

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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Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 33
PAGES 8001-8250**

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

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

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| 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 |

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| | 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 |

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| | 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 Forseeability 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 |

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| 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 |

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| 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 |

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| 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 |

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| 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 Cir. 1991) (applying Missouri law); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d
 2 633, 653-54 (Md. 1992); *Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d
 3 442, 446 (Mo. App. 1988); *see also Jeep Corp. v. Murray*, 101 Nev. 640, 650-51,
 4 708 P.2d 297, 304 (1985), superseded by statute on other grounds as stated in
 5 *Countrywide*, 192 P.3d at 243 n. 39 (punitive damages not recoverable where
 6 defendant did not consciously and deliberately disregard known safety
 7 measures). “Constructive knowledge,” “substantial knowledge” or “should have
 8 known” is not enough to meet the “actual knowledge” requirement. *Owens-*
 9 *Illinois*, 601 A.2d at 653; *U.S. Gypsum Co.*, 750 S.W.2d at 446 (mere
 10 suggestions from which the defendant might deduce the existence of a
 11 dangerous defect are not enough); *see also Hoch v. Allied-Signal, Inc.*, 29 Cal.
 12 Rptr. 2d 615, (Ct. App. 1994) (manufacturer of allegedly defective seatbelt not
 13 liable for punitive damages absent evidence clearly showing that manufacturer
 14 was aware seatbelt buckle would unlatch in actual automobile accident).

15 The plaintiff must further show that, armed with this actual knowledge,
 16 the defendant consciously or deliberately disregarded the foreseeable harm
 17 resulting from the defect. *Owens-Illinois*, 601 A.2d at 653; *see also* NRS
 18 42.001(1) (conscious disregard requires “a willful and deliberate failure to act to
 19 avoid [the probable harmful] consequences”).

20 **4. Punitive Damages Are Not Recoverable if Reasonable**
 21 **People Could Disagree About the Design of a Product**

22 Punitive damages are recoverable in a product liability case only if the
 23 jury could find by clear and convincing evidence that the defendant had no
 24 arguably legitimate reason for designing the product or manufacturing it the
 25 way that it did. If reasonable people could disagree about whether the product
 26 or the manufacturing process was defective, the plaintiff may not recover
 27 punitive damages. *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir.
 28 1995) (vacating punitive damage award because “there was a genuine dispute

1 in the scientific community as to” the reasonableness of the challenged design);
2 *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages
3 inappropriate where “reasonable disagreement” exists over risks and utilities of
4 product).

5 **5. *The Availability of a Better Material or Design***
6 ***Does Not Warrant Imposing Punitive Damages***

7 The mere availability a better material or design does not warrant the
8 imposition of punitive damages. See *Loitz v. Remington Arms*, 563 N.E.2d 397,
9 407 (Ill. 1990) (fact that a better steel was available to make a gun that
10 exploded did not establish requisite state of mind for punitive damages). Even
11 where the defendant believed another material or design would be superior, this
12 does not support punitive damages because it “does not mean that the type
13 actually used by [the defendant] was inadequate.” See *id.*

14 **6. *Mere Considerations of Cost in Designing or***
15 ***Manufacturing a Product Do Not***
16 ***Support Punitive Damages***

17 Even where the defendant weighed financial concerns in deciding
18 whether to incorporate additional safety features into a product, this alone does
19 not support punitive damages. *Montgomery v. Mitsubishi Motors Corp.*, 2006
20 U.S. Dist. LEXIS 21039, *6 (E.D. Pa. 2006) (applying Pennsylvania law); *Stiles*
21 *v. Chloride, Inc.*, 668 F. Supp. 505, 506 (W.D.N.C. 1987) (applying North
22 Carolina law); *Phillips v. Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005). If
23 punitive damages could be assessed on this theory alone,

24 [it] would mean that no manufacturer of a product
25 having the slightest danger could dare research the safety
26 aspect of its product as it would become immediately
27 exposed to punitive damages the day it determined that
28 some factor, no matter what the cost, improved the potential
safety of the product unless it chose to pull all its then
existing products off the shelf, absorb that loss, and go on
trying to compete with the cheaper products available from
other manufacturers.

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1 *Stiles*, 668 F.Supp. at 506.

2 **7. *Even Knowledge of Prior Incidents Would Not***
3 ***Establish the Required Culpable State of Mind***

4 Knowledge of prior, similar incidents relating to the product does not,
5 without more, demonstrate the culpable state of mind required for punitive
6 damages. *Loitz*, 563 N.E.2d at 404; *see also Berczyk v. Emerson Tool Co.*, 291 F.
7 Supp. 2d 1004, 1014-15 (D. Minn. 2003). “[V]irtually all manufacturers of
8 mass-produced goods that are inherently dangerous . . . [including] tires . . . will
9 be the targets of many complaints and lawsuits every year.” *Loitz*, 563 N.E.2d
10 at 404 (quoting Owen, Problems in Assessing Punitive Damages, 49 U. Chi. L.
11 Rev. at 31). In *Loitz*, for example, the shotgun manufacturer’s knowledge of
12 prior barrel explosions involving the same shotgun did not, without more,
13 establish the type of “outrageous misconduct” that would support a punitive
14 damages award. 563 N.E.2d at 404.

15 **C. Evidence of Conscious Disregard for**
Punitive Damages Must be Clear and Convincing

16 **1. *Clear and Convincing Proof is a High Bar***

17 The “clear and convincing evidence” standard “must produce ‘satisfactory’
18 proof that is so strong and cogent as to satisfy the mind and conscience of a
19 common man, and so to convince him that he would venture to act upon that
20 conviction in matters of the highest concern and importance to his own
21 interest.” *Ricks v. Dabney*, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008). It
22 “requires a finding of high probability.” *Shade Foods, Inc. v. Innovative Prods.*
23 *Sales & Marketing, Inc.*, 93 Cal. Rptr. 2d 364, 394 (2000). The evidence must be
24 “so clear as to leave no substantial doubt” and “sufficiently strong to command
25 the unhesitating assent of every reasonable mind.” *Id.* at 394 (quoting *In re*
26 *Angelia P.*, 171 Cal. Rptr. 637 (1981)).
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2. *Punitive Damages are Quasi-Criminal and Implicate the Concerns of Criminal Due Process*

Punitive damages are qualitatively different from compensatory damages, going to punishment rather than compensation. They are thus quasi-criminal penalties. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (stating that punitive damages “serve the same purposes as criminal penalties”); *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 150 (S.C. 2010) (“[P]unitive damages are quasi-criminal in nature.”); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995) (“In contrast to compensatory damages, exemplary damages rest on justifications similar to those for criminal punishment.”). And, because punitive damages impose punishment akin to criminal sanctions, there are “heightened due process considerations surrounding punitive damages awards” under the Fourteenth Amendment. *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009); *see Campbell*, 538 U.S. at 417 (basing the Court’s decision on the fact that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding[, which] increases our concerns over the imprecise manner in which punitive damages systems are administered”); *George Grubbs*, 900 S.W.2d at 339 (“Because exemplary damages resemble criminal punishment, they require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.”); *Austin*, 691 S.E.2d at 150 (“Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”).

Thus, the showing of malice based on conscious disregard is an issue of constitutional dimension. *See generally, e.g., Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U. S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v.*

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1 *Haslip*, 499 U.S. 1 (1991); KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE 2D
2 § 3.03 (2000). Allowing the jury to impose punitive damages based on a mere
3 inference or presumption would run afoul of both Nevada’s *clear and convincing*
4 evidentiary requirement and the Constitution’s guarantee of due process.

5 **D. Punitive Damages are Usually Inappropriate in**
6 **Cases Involving an Allegation of Product Defect**

7 While the legislature allowed for punitive damages in products liability
8 cases, the reason was explained in the 1989 legislative session by Allen Earl,
9 later a district judge:

10 Punitive damages in products liability cases are relatively
11 rare. . . . This is the one area where you would not normally
12 expect conduct so outrageous as to justify punitive damages
13 to be used. But when it occurs, on those rare cases where it
14 occurs, it is the kind of thing that you truly want And
15 the kinds of cases in which you have punitive damages
16 awarded, are those in which the manufacturers or
17 distributors have covered up facts, concealed documents,
destroyed evidence or intimidated witnesses. . . . In
addition, you want punitive damages, as in the case in which
a corporation knows that a product is defective and yet they
make a cost accounting decision—it is more effective, cost-
wise, to manufacture it and sustain the burden of getting
sued, then it is to change the product. Again, I remind you,
this is very rare.

18 Minutes of Senate Jud. Com. May 18, 1989 at 14 (editing notation by LCB
19 omitted). Judge Earl is obviously referring to the Ford Pinto case, where a
20 manufacturer purported intentionally chose to maintain an unsafe design on
21 the rationale that it would be cheaper to pay injury claims than to prevent the
22 injuries.

23 In cases similar to this, punitive damages have not even been an issue.
24 The recent *Ford v. Trejo* case, for example, involved a defective roof design on a
25 Ford Excursion—a design that was never physically tested and that did not
26 meet Ford’s internal criteria for roof strength for smaller vehicles. 133 Nev.,
27 Adv. Op. 68, 402 P.3d 649, 652 (2017). But that did not give rise punitive-
28 damages liability.

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1 **E. The Cases where Punitive Damages have Been Sustained**
2 **Involve Conscious, Despicable Conduct**

3 A survey of the cases where the Nevada Supreme Court has upheld
4 punitive-damages liability illustrates how far this case falls below that
5 threshold.

6 **1. *Intentional Torts***

7 Several cases upholding punitive-damage awards involve intentional torts
8 such as fraud and conversion.

9 *Dynamic Transit v. Trans Pac. Ventures* involved a shipping company
10 that, to the company that contracted for its services to pay its bills, converted a
11 customer’s luxury sports car and refused to return it, instead transporting it to
12 the shipping company’s storage facility halfway across the country. 128 Nev.
13 755, 758, 291 P.3d 114, 116 (2012).

14 Similarly, in an unpublished decision, the Supreme Court upheld a
15 punitive-damage award against a purchaser of a motor home who converted the
16 buyer’s bank account and forged lien documents, subjecting the buyer to
17 significant financial hardship. *Amaral v. Shull*, 127 Nev. 1114, 373 P.3d 890
18 (2011).

19 *Grosjean v. Imperial Palace, Inc.* involved agents of the Gaming Control
20 Board who violently arrested a patron who supposedly resembled a suspect and
21 then refused to let him go long after they had been told they had the wrong
22 person. 125 Nev. 349, 356, 212 P.3d 1068, 1073–74 (2009) (reversing the award
23 on other grounds and remanding for a new trial).

24 *Bongiovi v. Sullivan* involved a plastic surgeon who slandered a colleague
25 with the intention of hurting the colleague’s business and gaining customers.
26 122 Nev. 556, 581–82, 138 P.3d 433, 451 (2006).

27 *Evans v. Dean Witter Reynolds, Inc.* involved a lawyer who fraudulently
28 siphoned his dying aunt’s assets into his personal accounts and manipulated
29 the form of her assets to deprive the aunt’s other heirs of an inheritance. 116

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1 Nev. 598, 612, 5 P.3d 1043, 1052 (2000).

2 *Frantz v. Johnson* involved a former employee who took proprietary
3 information to a competitor and violated a court order to stop stealing
4 customers. 116 Nev. 455, 469–71 & n.9, 999 P.2d 351, 360–61 & n.9 (2000).

5 *Dillard Dept. Stores, Inc. v. Beckwith* involved a department store that
6 demoted and then constructively terminated an “exemplary” employee for the
7 express reason that she had taken time off for an injury covered by worker’s
8 compensation. 115 Nev. 372, 375, 989 P.2d 882, 884 (1999).

9 *Smith’s Food & Drug Centers, Inc. v. Bellegarde* involved a grocery store
10 who grabbed a customer’s purse, sprayed her with pepper spray, and
11 handcuffed her for half an hour as part of a false charge of shoplifting. 114 Nev.
12 602, 607–08, 958 P.2d 1208, 1212 (1998), *overruled on other grounds*
13 *by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243
14 (2008).

15 **2. Insurance Bad Faith**

16 Several cases upholding punitive-damages awards arise in the quasi-
17 fiduciary context of insurers who act in bad faith vis-à-vis their insureds.

18 *Albert H. Wohlers & Co. v. Bartgis* involved an insurer that
19 misrepresented the scope of coverage, inducing her to pay for a policy that all
20 but excluded coverage for her hospitalization. 114 Nev. 1249, 1261, 969 P.2d
21 949, 958 (1998).

22 *Powers v. United Services Auto. Ass’n* involved an insurer who not only
23 wrongfully accused its insured of intentionally sinking his boat for insurance
24 fraud, but also referred the insured for criminal charges and would not relent
25 even when the insured was acquitted of those charges. 114 Nev. 690, 704, 962
26 P.2d 596, 604–05 (1998).

27 *Guar. Nat. Ins. Co. v. Potter* involved an insurer’s refusal to pay for an
28 independent medical examination that the insurer itself had required. 112 Nev.

1 199, 208, 912 P.2d 267, 273 (1996).

2 **3. Fiduciary Duties**

3 In *Clark v. Lubritz*, the court upheld an award of punitive damages for a
4 doctor whose partners for years had been secretly cheating him out of the
5 partnership’s profits in violation of the partners’ fiduciary duties. 113 Nev.
6 1089, 1098–99, 944 P.2d 861, 866–67 (1997).

7 **4. Other Known Problems**

8 Other cases have to do with extreme tortious conduct based on actual
9 knowledge of the dangers that that conduct posed. “Should have known” is not
10 enough.

11 In an unpublished decision, the Supreme Court allowed punitive damages
12 against a company that entrusted a known alcoholic with its trucks, despite
13 never performing a background check or even determining whether he was
14 licensed. *ETT, Inc. v. Delegado*, 126 Nev. 709, 367 P.3d 767 (2010). That
15 circumstances predictably led to a drunk-driving accident that killed the
16 plaintiffs’ decedent.

17 *Prestige of Beverly Hills, Inc. v. Weber* involved a landowner whose
18 property was damaged by a neighboring business’s refusal to keep its trees from
19 invading the property. 128 Nev. 927, 381 P.3d 652 (2012). The business knew
20 about the problem, and the hazards (including the collapse of a barrier wall
21 surrounding a pool) that the trees created to the landowner’s family. *Id.* The
22 business also defied a court order to remove the trees.

23 By contrast, in an unpublished decision, the Supreme Court found no
24 evidence to submit a punitive-damages claim against an oil company to the
25 jury. *Kinder Morgan Energy Partners, L.P. v. Claytor*, 60131, 2014 WL
26 7187204, at *4 (Nev. Dec. 16, 2014). The company “knew that benzene was a
27 dangerous carcinogen” and “did not monitor the atmospheric benzene content”
28 in Las Vegas even though it had a benzene management plan for handling raw

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1 benzene in other locations. *Id.* It was thus liable in negligence. *Id.* The
2 company did not, however, know that exposure to gasoline as opposed to raw
3 benzene posed a risk of cancer, so punitive damages on that basis were
4 inappropriate. *Id.*

5 **5. *The Contrast between Countrywide and Winchell***

6 As discussed, the Supreme Court drew an instructive contrast in the
7 respective outcomes of *Countrywide* and *Winchell*. *Countrywide* involved
8 obvious, repeated red flags that it was foreclosing on the wrong property; if it
9 lacked actual knowledge, it was only because of willful ignorance. *Countrywide*,
10 at 255. In *Winchell*, by contrast, the signs that the unit was not abandoned was
11 not so clear as to permit a finding of willful ignorance. *See Winchell*, at 953.

12 **6. *Wyeth***

13 It has been eight years since the Nevada Supreme Court has published an
14 opinion upholding punitive damages in a product-defect case. That case
15 involved a drug manufacturer who not only failed to warn doctors and patients
16 of a potential link to cancer, but actively tried to hide any potential harmful
17 consequences of its products.” *Wyeth v. Rowatt*, 126 Nev. 446, 473–74, 244 P.3d
18 765, 783–84 (2010). It represented that in a “human study,” the cancer rates
19 were not abnormal, when in fact it had conducted no such study. *Id.* In
20 addition, the manufacturer manipulated studies and sponsored articles
21 minimizing the risk as part of a concerted “policy to dismiss scientific studies
22 that showed any link between breast cancer and hormone therapy drugs and to
23 distract the public and medical professionals from the information as well.” *Id.*
24 Finally, the manufacturer kept secret a European study that confirmed the
25 unusually high risk of cancer for patients like the plaintiff. *Id.*

26 **F. MCI Had No Notice of a Defect**

27 Existence is not notice. Plaintiffs rely on the mere existence of an article
28 to argue that MCI had constructive notice of a dangerous condition, but

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1 plaintiffs offer no evidence that the article was ever given to or possessed by the
2 defendant. Manufacturers have no duty to be aware of every article, published
3 anywhere in the world. Accordingly, a plaintiff cannot prove constructive
4 knowledge simply by showing the mere existence of an article.

5 **II.**

6 **MCI IS NOT VICARIOUSLY LIABLE**

7 Nevada restricts the imposition of vicarious liability in the context of
8 punitive damages against a corporation. No employer is liable in punitive
9 damages for an employee’s act unless

10 (a) The employer had advance knowledge that the
11 employee was unfit for the purposes of employment and
12 employed the employee with a conscious disregard of the
rights or safety of others;

13 (b) The employer expressly authorized or ratified the
14 wrongful act of the employee for which the damages are
awarded; or

15 (c) The employer is personally guilty of oppression,
fraud or malice, express or implied.

16 NRS 42.007(1). A corporate employer such as MCI is not liable unless those
17 elements “are met by an officer, director or managing agent of the corporation
18 who was expressly authorized to direct or ratify the employee’s conduct on
19 behalf of the corporation.” *Id.*

20 There is no evidence here that anyone who received “notice” of plaintiffs’
21 claimed defects was a managing agent for MCI, or that any managing agent
22 consciously ratified the decision to not to address any claimed defects.

23 **1. *A Managing Agent Must Establish,
24 Not Just Implement, Company Policy***

25 To be a managing agent so as to make an employer liable for punitive
26 damages, the employee must have had such control as to establish policy for the
27 company. *Nittinger v. Holman*, 119 Nev. 192, 197, 69 P.3d 688, 691 (2003). The
28 employee’s position must be managerial and “important.” *Klolstad v. Am.*

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1 *Dental Ass’n*, 527 U.S. 526 (1999). The employee’s authority has to be “fairly
 2 considered executive in character.” *Dobelle v. Nat’l R.R. Passenger Corp.*, 628 F.
 3 Supp. 1518 (S.D.N.Y. 1986) (applying N.J. law). A managing agent “must be of
 4 sufficient stature and authority to have some control over a certain area of [the]
 5 business with some power to set policy for the company.” *Nittinger*, 119 Nev. at
 6 197, 69 P.3d at 691 (citations omitted). Such a person must in fact “exercise[]
 7 substantial discretionary authority over significant aspects of a corporation’s
 8 business.” *Id.*

9 The mere existence of discretion in carrying out established policy is not
 10 enough. Punitive damages do not apply to someone outside the management
 11 level that ordinarily determines corporate policy merely because the person is
 12 left with total discretion to determine what is done and how it is done. There
 13 are times when a lower-level manager may have the ability to *make* policy,
 14 depending on “the nature of what the agent is authorized to do.” Where a
 15 manager of a hotel’s dance hall, for example, is given *carte blanche* regarding
 16 the use of force, he is effectively determining policy, at least for that limited
 17 location, about the critical question of whether to cause injury to patrons.
 18 *Cerminara v. Cal. Hotel & Casino*, 104 Nev. 372, 378, 760 P.2d 108, 111 (1988).
 19 *But see Pier 66 v. Poulos*, 542 So. 2d 377, 381 (Fla. Ct. App. 1989) (hotel
 20 manager was not considered a managerial agent). Similarly, an acting store
 21 manager, who is not instructed on whether to arrest shoplifters, is left free to
 22 determine policy on the delicate issue of detaining customers. *Smith’s Food &*
 23 *Drug Centers v. Bellegarde*, 114 Nev. 602, 611, 958 P.2d 1208, 1214 (1998). But
 24 not all employees’ choices rise to the level of establishing policy. While most
 25 employees’ tasks involve some level of decisionmaking, few rise to the level of
 26 establishing policy. Every driver for a delivery service, for example, must
 27 decide when to yield to other traffic, and a framer constructing a building must
 28 choose how many nails to use on a particular joint. These determinations are

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1 operational decisions for which an employer need not have a corporate policy.

2 The hallmark of a managing agent is the authority to deviate from
3 established policy or to exercise discretion or independent judgment in
4 establishing company policy. In *Nittinger v. Holman*, a casino’s security officers
5 punched, kicked and beat the plaintiffs with nightsticks, used racial slurs, and
6 assaulted the female plaintiff while the shift supervisor looked on. The
7 Supreme Court concluded that the supervisor, although able to bind his
8 employer casino for compensatory damages, was not a managerial agent for
9 punitive damages. 119 Nev. at 198, 69 P.3d at 692. *Nittinger* dictates the same
10 result in this case. The focus in *Nittinger* was on whether the alleged
11 managerial agent had sufficient control over the relevant part of the business to
12 set policy for the company. *See id.* at 196–97, 69 P.3d at 691. The supervisor in
13 *Nittinger* had discretion just to implement company policy regarding security
14 procedures. *See id.* at 198, 69 P.3d at 692.

15 This is confirmed in the legislative history, which contemplated that “the
16 person who is at the top position of the corporation has to know about
17 something for punitive damages to be assessed.” (Leg. Hist. 51 (statement of
18 Senator Mark A. James).) Senator James offered the example of “ratifying the
19 wrongful conduct of a subordinate, intentionally *putting into place a policy* that
20 would be a wrong to people who come into the hotel.” (*Id.* (emphasis added).)

21 **2. No One Who Allegedly Received Notice**
22 **of a Defect was a Managing Agent**

23 Plaintiffs have not put on any evidence that a managing agent of MCI
24 was alerted to the allegedly dangerous conditions that plaintiffs say call for a
25 redesign of the J4500 coach. Plaintiffs rely heavily on conversation between
26 Mark Barron, the inventor of the S-1 Gard; and Pablo Fierros, an executive
27 with Universal Coach Parts, an affiliate of—but legally separate from—MCI.
28 That conversation is not, as a matter of law, sufficient to put MCI on notice that

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1 the absence of an S-1 Gard renders MCI motor coaches dangerously defective.
 2 Mr. Barron did not testify that he relayed any such warning to Mr. Fierros.
 3 And more important, Mr. Fierros is a managing agent of his company, not MCI.
 4 Plaintiffs put on no evidence in their case-in-chief that Universal Coach Parts is
 5 a mere alter ego of MCI such that this Court could disregard the corporate form
 6 and make Mr. Fierros a managing agent of a different company. *See Viega*
 7 *GmbH v. Eighth Judicial Dist. Court*, 130 Nev., Adv. Op. 40, 328 P.3d 1152,
 8 1157 (2014).

9 **3. To Ratify Wrongful Conduct, the Employer Must**
 10 **Consciously Adopt it as the Company's Policy**

11 To establish a claim of punitive damages based on corporate ratification
 12 under NRS 42.007(1)(b), a plaintiff must show that the corporation
 13 “demonstrated an intent to adopt or approve oppressive, fraudulent, or
 14 malicious behavior by an employee in the performance of his job duties.”
 15 *College Hosp. Inc. v. Superior Ct.*, 882 P.2d 894, 907 (Cal. 1994).
 16 Ratification requires full and actual knowledge of the conduct and its
 17 outrageous nature. *Id.* at 908; RESTATEMENT (SECOND) OF TORTS § 909 cmt. b
 18 (1979) (ratification must be done “with full knowledge of the act and the way in
 19 which it was done”); *see also* See RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. e
 20 (2006).² And the corporation must affirm the act in its entirety. RESTATEMENT
 21 (THIRD) OF AGENCY § 4.01(d) (2006) (no ratification unless “the ratification
 22 encompasses the act in its entirety”). Although ratification can manifest itself
 23 through conduct, that conduct must be unequivocal: an employer’s conduct that

24 _____
 25 ² Although NRS 42.007 in some ways sets an even *higher* bar for employer
 26 liability, both the statute and the Restatement “complicity” approach are
 27 “conservative” in that they “abandon[] the use of traditional respondeat
 28 superior principles.” *Countrywide*, 124 Nev. at 747 n.64, 192 P.3d at 257 n.64
 (citing 2 J. KIRCHER & C. WISEMAN, PUNITIVE DAMAGES: LAW & PRACTICE § 24:1,
 at 2–5 (2000)).

1 might be taken for reasons other than ratification, such as failure to terminate
2 or reprimand an employee, is not ratification. RESTATEMENT (THIRD) OF
3 AGENCY § 4.01 cmt. d (2006); *Jaquez v. Herbert*, 447 F. Supp. 2d 858, 878 (N.D.
4 Ohio 2006); *Turner v. Werner Enters., Inc.*, 442 F. Supp. 2d 384, 387 (E.D. Ky.
5 2006) (commenting that no cases have found failure to discipline an employee-
6 driver who has been in an accident constitutes ratification by an employer such
7 that punitive damages would be available).

8 In the corporate context, it is not enough that a managing agent is
9 somehow connected to the injury. The officer, director, or managing agent must
10 be “expressly authorized to direct or ratify the employee’s conduct on behalf of
11 the corporation.” NRS 42.007(1). So, for example, a chief finance officer or
12 controller may have authority to set company policy in some areas but would
13 *not* necessarily be a managing agent capable of ratifying a maintenance
14 worker’s personal-injury torts, which involves policy (operations, facilities)
15 outside the manager’s sphere of authority.

16 **4. *There is No Evidence of Ratification***

17 Plaintiffs presented no evidence that *anyone* on MCI’s design team knew
18 that the J4500 was built to endanger cyclists. Even if they had, there is no
19 evidence that MCI’s managing agents knowingly ratified any decision to build a
20 dangerous product. To the contrary, Mr. Hoogestraat and Mr. Couch testified
21 that they tried to build a safe, reliable product and expressed surprise at the
22 defect claims plaintiffs are raising in this case.

23 **CONCLUSION**

24 The bare existence of a defective product is not evidence of blameworthy
25 conduct warranting punitive damages. *Failing* to anticipate the consequences
26 of inaction is not enough. *Failing* to understand the full consequences of
27 inaction is not enough. Ignoring *possible* consequences is not enough. Plaintiffs
28 at trial have not fulfilled their promise to produce evidence that MCI either

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1 intended to injure Dr. Khiabani or knowingly, willfully, and deliberately
2 ignored the probable consequences to his rights and safety. Without the
3 necessary despicable conduct—consciously disregarding the known risk that
4 aspects of its design would cause mortal danger to nearby cyclists—this Court
5 should grant judgment as a matter of law on plaintiffs’ claim for punitive
6 damages.

7 Dated this 12th day of March, 2018.

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I hereby certify that on the 12th day of March, 2018, a true and correct copy of the foregoing brief was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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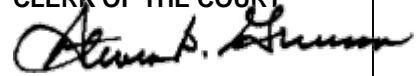
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12 **EIGHTH JUDICIAL DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 KEON KHIABANI and ARIA KHIABANI, minors,
15 by and through their Guardian, MARIE-CLAUDE
16 RIGAUD; SIAMAK BARIN, as Executor of the
17 Estate of Kayvan Khiabani, M.D. (Decedent), the
18 Estate of Kayvan Khiabani, M.D. (Decedent);
19 SIAMAK BARIN, as Executor of the Estate of
20 Katayoun Barin, DDS (Decedent); and the Estate of
21 Katayoun Barin, DDS (Decedent);

22 Plaintiffs,

23 vs.

24 MOTOR COACH INDUSTRIES, INC., a Delaware
25 corporation; MICHELANGELO LEASING INC.
26 d/b/a RYAN'S EXPRESS, an Arizona corporation;
27 EDWARD HUBBARD, a Nevada resident; BELL
28 SPORTS, INC. d/b/a GIRO SPORT DESIGN, a
Delaware corporation; SEVENPLUS BICYCLES,
INC. d/b/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

PLAINTIFFS' TRIAL BRIEF
REGARDING ADMISSIBILITY OF
TAXATION ISSUES AND GROSS
VERSUS NET LOST INCOME

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1 This Trial Brief is based upon the pleadings and papers on file in this action, the Points
2 and Authorities set forth herein, and argument to be made by counsel at the time of the hearing.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Defendant Motor Coach Industries Inc., (“MCI”) contends that the jury should hear
5 evidence of whether Plaintiffs’ economic damages expert calculated decedent Kayvan Khiabani
6 M.D.’s lost income on a gross versus net (after taxes) basis. Plaintiffs anticipate that MCI will
7 take this argument further and also request that the jury be instructed that the measure of lost
8 probable support in this case should be calculated based upon Dr. Khiabani’s net income as
9 opposed to his gross income. MCI does not cite to a single case as support for these assertions,
10 and instead asks this Court to rely upon a lone legal treatise regarding personal injury damages,
11 which in fact undermines MCI’s position and expressly acknowledges that “in personal injury
12 cases, courts usually adopt the gross earnings as the true measure of the injured person’s
13 earning capacity.” See MCI’s Reply in Support of Defendant’s Motion in Limine No. 17 to
14 Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes at 6, n.
15 1. Further damning to MCI’s position is that Stan Smith, its designated expert in the field of
16 economics, authored “ECONOMIC/HEDONIC DAMAGES: The Practice Book for Plaintiff
17 and Defense Attorneys,” in which Dr. Smith similarly notes, “In most states, juries are not
18 instructed on income tax effects.” Michael L. Brookshire, PhD, Stan V. Smith, PhD;
19 ECONOMIC/HEDONIC DAMAGES: The Practice Book for Plaintiff and Defense Attorneys,
20 236 (1990).

21 Consistent with the majority rule, the Nevada Supreme Court has long held that a jury
22 should generally not be instructed as to issues of taxation because such a directive would only
23 invite complications and confusion, which substantially outweigh any potential probative value.
24 See *Otis Elevator Co. v. Reid*, 101 Nev. 515, 522 (1985)(concluding that, “tax exemption
25 instructions are appropriate only as curative devices designed to eliminate any prejudice
26 resulting from the jury’s exposure to tax-related issues at trial”). While Nevada law is silent as
27 to the admissibility of evidence of prospective tax consequences with respect to a wrongful
28 death action in particular, that silence is telling because case law from other jurisdictions makes

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1 clear that in the absence of a legislative directive regarding the admissibility of tax
2 consequences, such evidence should be precluded. *See McKee v. Colt Electronics, Inc.*, 849
3 F.2d 46, 48-49 (internal citations omitted)(2nd Cir. 1988).

4 **A. INTRODUCING EVIDENCE OF GROSS VERSUS NET INCOME WOULD**
5 **LEAD TO IMPROPER JURY SPECULATION REGARDING THE TAX**
6 **CONSEQUENCES ASSOCIATED WITH ANY VERDICT.**

7 Consistent with NRS 41.085, the Jury will be asked to award both Aria and Keon each
8 pecuniary damages for their grief or sorrow, loss of probable support, companionship, society,
9 comfort and consortium, in addition to damages for their father’s pain, suffering and
10 disfigurement. Thus, the loss of probable support is merely one component of the total damages
11 awarded in this case. As a result, any evidence relating to the proposition that certain portions
12 of those damages would or would not be subject to taxation, or that Dr. Khiabani’s lost income
13 would or would not have been subject to taxation, would lead to rank speculation, unreasonably
14 confuse the issues in this case and be unduly prejudicial.

15 It is well-settled law that a verdict may not be based on speculation. *Gramanz v. T-*
16 *Shirts & Souvenirs*, 111 Nev. 478, 485894 P.2d 342, 347 (1995) (citing *Advent Systems Ltd. v.*
17 *Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). In order to attempt to account for potential
18 tax liabilities within its verdict, the Jury here would be forced to improperly speculate about
19 issues that are typically not within a lay person’s ken of expertise, such as ever changing tax
20 laws, prospective tax brackets in a given year, and available write offs or deductions, all of
21 which are fluid and subject to vast variance among individuals and the given tax year.

22 In *Otis Elevator*, the Nevada Supreme Court considered whether it was error for the trial
23 court to refuse to instruct the jury that personal injury awards are exempt from income tax. 101
24 Nev. at 521. The court considered the defendant’s concern that a jury may inflate its verdict in
25 the ignorance of state laws potentially exempting such awards from income tax. *Id.* at 522. The
26 Court concluded the trial judge was correct in refusing any such instruction, particularly
27 because the jury had not heard any evidence regarding taxation. *Id.* Especially relevant in this
28 case, the Court noted that the risk that the verdict may be inflated was substantially outweighed

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1 by the risk of the complications and confusion that would likely ensue as a result of any
2 instructions regarding taxation. *Id.*

3 Other jurisdictions similarly state that taxation as a general proposition is inadmissible,
4 including Nevada’s sister jurisdiction, California. *See Henninger v. S. Pac. Co.*, 250 Cal. App.
5 2d 872, 59 Cal. Rptr. 76 (1967); *Hinzman v. Palmanteer*, 501 P.2d 1228, 1232 (Wash. 1972)(a
6 wrongful death action in which the court expressly acknowledged “The majority of the courts
7 considering items to be deducted from the decedent’s gross income and fixing damages for
8 destruction of his earning capacity have held that income tax on these probable future earnings
9 should not be taken into consideration”)).

10 The courts considering this issue have reached their decisions on a variety of grounds.
11 Courts so ruling have considered income tax liability or savings as (1) a matter not pertinent to
12 the damage issue as it is a matter between the plaintiff and the taxing authority and of no legal
13 concern to the defendant; (2) that the amount of income tax which might become due on one’s
14 prospective earnings in future years is too conjectural to be considered in fixing damages; and
15 (3) that to introduce an income tax matter into a lawsuit for damages would be unduly
16 complicating and confusing. *Hinzman*, 501 P.2d at 1232 (Wash. 1972) (citing *Henninger*, 250
17 Cal. App. 2d 872, 59 Cal. Rptr. 76; *Hall v. Chicago & N.W. Ry.*, 5 Ill. 2d 135, 125 N.E.2d 77
18 (1955)).

19 Likewise, referring the jury in this case to the issue of taxes only invites speculation and
20 assumption. Thus, any minimal probative value of such evidence is substantially outweighed
21 by the risk of unfair prejudice to Plaintiffs and complete confusion of the relevant issues in this
22 case.

23 **B. NEVADA LAW DOES NOT SUPPORT THE CALCULATION OF LOST**
24 **INCOME BASED ON NET VERSUS GROSS INCOME OR THE ADMISSION**
25 **OF EVIDENCE REGARDING TAXATION OF PERSONAL INJURY**
26 **DAMAGES**

27 Defendant MCI has repeatedly argued in this case that Nevada’s Wrongful Death
28 statute, NRS 41.085, is exhaustive and delineates the full scope of Plaintiff’s recoverable
damages. NRS 41.085 is notably devoid of any mention of taxation but does specify that any

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1 amounts recovered by the heirs for grief, sorrow, loss of probable support, companionship,
 2 society and consortium, “are not liable for any debt of the decedent.” *See* NRS 41.085(4).¹
 3 Nevertheless, despite the lack of any statutory authority or relevant Nevada case law, MCI asks
 4 this Court to depart from the majority rule and instead, read into the statute a non-existent
 5 requirement that the Jury consider Dr. Khiabani’s potential tax liabilities in determining the
 6 amount of lost probable support to be awarded in this case. In short, MCI asks this Court to
 7 invite the jury to adjust its verdict based upon pure speculation, which would result in undue
 8 prejudice to Plaintiffs and constitute reversible error.

9 In *McKee*, a wrongful death action much like this one, the Second Circuit squarely
 10 addressed the admissibility of tax related issues and concluded that evidence of the decedent’s
 11 prospective income tax liability was properly excluded. 849 F.2d at 48-49. In *McKee*, the
 12 decedent was killed in a plane crash and survived by his wife and 4 children, who were ages 22,
 13 21, 18 and 14 at the time of their father’s death. *Id.* at 47. His heirs brought a wrongful death
 14 action, in relevant part alleging generators on the plane had been defectively designed,
 15 manufactured and installed. *Id.* The decedent’s wife had passed by the time the case went to
 16 trial, but just as in this case, her video deposition was played for the jury. *Id.*

17 The evidence presented in *McKee* demonstrated that like Dr. Khiabani, the decedent
 18 there, was an athletic, vigorous man who was dedicated to his children’s education given that he
 19 had sent them to private school, and was committed to financing their graduate education based
 20 upon discussions with the kids regarding their educations and careers. *Id.* Both sides presented
 21 expert testimony with respect to the decedent’s lost earnings, personal expenses and the value of
 22 his household services. *Id.* At the conclusion of trial, the jury awarded \$1,763,700 for the loss
 23 of financial support and additional sums for loss of care, guidance, training and education as
 24 well as household services. *Id.*

25 On appeal, the defendants argued it was error for the trial court judge to exclude
 26 evidence of the decedent’s prospective income tax liability and to refuse to instruct the jury to

27
 28 ¹ Thus, even assuming Dr. Khiabani himself owed taxes at the time of his passing, any amounts awarded to his heirs for these damages would not be subject to such tax debt.

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1 reduce its award to account for such potential liabilities. *Id.* at 48-49. The Second Circuit
 2 rejected that argument and instead, affirmed the trial court’s exclusion of evidence of a
 3 decedent’s prospective income tax liability as well as the refusal to instruct the jury to reduce
 4 any award to account for income tax liability. *Id.* at 49. In rendering that decision, the Second
 5 Circuit noted with approval its prior holdings that, “‘where the question is one of federal law or
 6 the applicable state law is silent,’ the jury should not be allowed to consider the effect of taxes
 7 on earnings.’” *Id.* at 48 (internal citations omitted).² The *McKee* court went on to note that
 8 speculation as to the taxation of a decedent’s income “would not only complicate the jury’s
 9 already difficult task, but would also distort the jury’s basic factfinding objective.” *Id.* at 49.

10 To allow MCI to present evidence as to prospective income taxes that may or may not
 11 have to be paid on Dr. Khiabani’s projected future income would likewise distort the jury’s
 12 factfinding objective in this case. Moreover, any reduction of the award to account for
 13 hypothetical income taxes, would unfairly prejudice Plaintiffs who will then face tax
 14 consequences for sums awarded for lost income or support. Thus, the court would then be
 15 tasked with instructing the jury that it must also consider increasing its award to account for
 16 such tax implications. This result is likewise improper and consistent with both *Otis Elevator*
 17 and the overwhelming majority of jurisdictions considering these issues, this Court should
 18 entirely avoid such complication and confusion by precluding all evidence of taxation and
 19 refusing to give any instruction on such issues.

20 ///
 21 ///
 22 ///

24 ² It is of note that the Ninth Circuit Court of Appeals has held that under the Federal Tort
 25 Claims Act, income taxes should be deducted from an award for lost compensation, but only
 26 because a contrary result would effectively punish the federal government who would have to
 27 pay the award and also not receive the income taxes, thereby amounting to a double penalty
 28 where the Federal Government is the defendant. *Shaw v. U.S.*, 741 F.2d 1202, 1206 (1984).
 However, even in FTCA cases where income taxes are deducted from the award, the court must
 then increase the award to account for income tax that would have to be paid on the earnings of
 the total award because to hold otherwise would unjustly penalize the plaintiff. *Id.*

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III.

CONCLUSION

Based on the foregoing facts, law, Plaintiffs respectfully request that this Honorable Court order that Defendant not be permitted to introduce any evidence of taxation and that the jury not be instructed on any issues related to potential tax consequences.

Dated this 12th day of March, 2018.

CHRISTIANSEN LAW OFFICES

By 
PETER S. CHRISTIANSEN, ESQ.
KENDELEE L. WORKS, ESQ.

and

KEMP, JONES & COULTHARD, LLP

By  - FOR -
WILL KEMP, ESQ.
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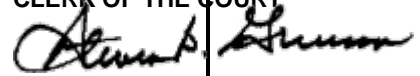
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTIANSEN LAW OFFICES, and that on this 9th day of March, 2018 I caused the foregoing document entitled *PLAINTIFFS' TRIAL BRIEF REGARDING ADMISSIBILITY OF TAXATION ISSUES AND GROSS VERSUS NET LOST INCOME*, to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.



An Employee of Christiansen Law Offices

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1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

7 KEON KHIABANI and ARIA)
8 KHIABANI, minors by and)
9 through their natural mother,)
10 KATAYOUN BARIN; KATAYOUN)
11 BARIN, individually; KATAYOUN)
12 BARIN as Executrix of the)
13 Estate of Kayvan Khiabani,)
14 M.D. (Decedent) and the Estate)
15 of Kayvan Khiabani, M.D.)
16 (Decedent),)

17 Plaintiffs,)

18 vs.)

19 MOTOR COACH INDUSTRIES, INC.,)
20 a Delaware corporation;)
21 MICHELANGELO LEASING, INC.)
22 d/b/a RYAN'S EXPRESS, an)
23 Arizona corporation; EDWARD)
24 HUBBARD, a Nevada resident,)
25 et al.,)

Defendants.)

21 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

22 BEFORE THE HONORABLE ADRIANA ESCOBAR
23 DEPARTMENT XIV

24 DATED TUESDAY, MARCH 13, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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I N D E X

Witness: Direct: Cross: Redirect: Recross:

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| ROBERT RUCOBA | 28 | 102 | 114 |
| | 94 | | |

E X H I B I T S

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| Number | Admitted |
| (no exhibits admitted) | |

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1 LAS VEGAS, NEVADA, TUESDAY, MARCH 13, 2018;

2 12:59 P.M.

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

4 * * * * *

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

8 Please be seated. Come to order.

9 THE COURT: Okay. I know that it's the
10 plaintiffs' opportunity to cross-examine
11 defendants' witness, but I think we should discuss
12 the motion to view the bus -- or the coach.

13 Excuse me.

14 THE COURT RECORDER: Do you want to go
15 on, Your Honor? We're not on.

16 THE COURT: Let's go on the record.

17 THE COURT RECORDER: Okay.

18 THE COURT: All right. This actually
19 came in during my calendar, so I wasn't able to
20 address it until recently. That's what I've been
21 doing. I received a brief by Motor Coach
22 Industries. It's a bench brief in support of jury
23 view of the interior of the motor coach. It cites
24 many cases, but I've truly focused on the Nevada
25 cases.

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1 MR. CHRISTIANSEN: Judge, did you
2 receive -- the plaintiff filed a brief as well on
3 that issue?

4 THE COURT: No, I did not.

5 MR. CHRISTIANSEN: May I approach? I
6 have an extra copy for you.

7 THE COURT: Yes.

8 MR. BARGER: Do you want to take a
9 moment to read that?

10 THE COURT: Yes. Thank you. I would
11 have looked at this before had I seen it.

12 I'll be right back.

13 THE MARSHAL: Court is now in recess.

14 (Whereupon, a recess was taken.)

15 THE COURT: All right. So I've read
16 both trial briefs concerning the jury bus view,
17 first defense -- the defendants', as I received
18 that after my calendar, and just recently the
19 plaintiffs'. I've read the case -- the pertinent
20 cases -- the Nevada cases. Do you wish to argue
21 or should I let you know what my thoughts are?

22 MR. HENRIOD: Well, in light of time
23 constraints, it's probably most constructive if
24 you were to let us know what your inclination is,
25 and then perhaps we can address what might be

1 questions or misimpressions.

2 THE COURT: Right.

3 Mr. Kemp?

4 MR. KEMP: Judge, I think we gave the
5 argument yesterday.

6 THE COURT: Okay.

7 MR. HENRIOD: And I don't think we've
8 given our argument, because I don't think it's us
9 that -- I don't think we're asking to do anything;
10 rather, I think that they're trying to constrict
11 more than us trying to expand.

12 So if I need to argue, I will. I'm just
13 saying I think it would be more productive if you
14 were to tell us which way you're leaning.

15 THE COURT: Yes, it is getting pretty
16 late. Okay.

17 Okay. So I've reviewed these cases, the
18 Nevada cases. And here are my thoughts on this
19 view. I've taken some notes.

20 All right. There is no dispute -- I
21 wrote this down so it's quicker. Okay? There's
22 no dispute that out-of-court experiments are
23 misconduct because a jury bases its decision on
24 facts not in evidence. And experiments are not
25 allowed under Bowman and I believe it's Krause.

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1 Second, inviting jurors to sit in any of
2 the seats would be allowing, in my view, or
3 encouraging, from reviewing these cases, them to
4 make conclusions based on their own perceptions
5 rather than the evidence present -- that's been
6 presented.

7 Further, any probative value of sitting
8 in any of the seats is lessened by the existence
9 of Mr. Cohen's drawings which were created for the
10 purpose of enabling the jury to visualize the
11 visibility from particular seats.

12 Finally, the risk of unfair prejudice
13 from speculation of what a witness could see at
14 the time of the incident, especially considering
15 how different the conditions are, and they cannot
16 be recreated, would only be probative -- the
17 probative value of allowing the jury to sit in the
18 seats, in my view, is substantially outweighed by
19 the risk of unfair prejudice.

20 So the jurors will not sit in any of the
21 seats or measure anything or anything else.

22 Considering all of the above, the jury
23 will be allowed a view of the interior of the
24 coach without sitting in any seat, measuring
25 anything. Seeing the exterior and the interior

1 are both helpful for the jury to more fully
2 appreciate the evidence received in trial under --
3 is it Eichelberg? -- Eichelberger, and the view is
4 not evidence.

5 So the goal is not to re-create the
6 accident. Again, the conditions are different
7 than the day of the accident. We would have to
8 craft some sort of instruction for them to
9 understand. I have some ideas. I've put them in
10 different places. One would be -- and this would
11 depend on what counsel would want.

12 Number one, the view of the bus, you
13 know -- or the tour inside is not evidence. It is
14 allowed so that the jury can more fully appreciate
15 the evidence received in trial. They are not
16 viewing it as a depiction of what occurred on that
17 date, what the conditions on that day were, and so
18 forth.

19 There would be no questions, no speaking
20 by the attorneys -- or to the attorneys -- or
21 anyone but the marshal, who is not going to be
22 answering any questions. No touching of anything.

23 And I also had you might want to note
24 that -- I don't even know if this is the actual
25 bus, but if it is, that the bus is not necessarily

1 in the same condition as it was and that touring
2 the bus is not evidence. And if it's another bus,
3 that this is a different bus.

4 MR. BARGER: It's the same bus.

5 THE COURT: Okay. Well, that the bus is
6 not in the same condition as it was that day.
7 That's up to you to -- but no sitting down, no
8 touching, no asking questions. I don't think
9 that's appropriate.

10 MR. KEMP: Judge, are you going to allow
11 them to actually go in the bus?

12 THE COURT: Yes.

13 MR. KEMP: And if they go in the bus,
14 are they going to be told before they go in that
15 they can't sit down?

16 THE COURT: That's why I want to have a
17 list from both of you so that I can give them that
18 specific direction of what the limits of the Court
19 are.

20 And I'm explaining to you why -- you
21 know, I've just given you the -- the cases that
22 you gave to me and why I think it's okay to do but
23 with the restrictions that I'm placing.

24 MR. KEMP: Yeah, I was just going to
25 say, if you get two or three people in there --

1 THE COURT: We're going one at a time.

2 MR. KEMP: One at a time?

3 THE COURT: One at a time.

4 MR. KEMP: Yeah, as long as they're told
5 they can't sit down.

6 THE COURT: No, if they're -- we only
7 have a handful.

8 MR. KEMP: Right.

9 THE COURT: Well, more than a handful,
10 but, I mean, we don't have that many, and I don't
11 want any -- I don't even want anyone to be able to
12 look at each other and make any suggestions.

13 I just want one person at a time. They
14 can walk the bus. They're not to sit anywhere.
15 And these are some of the recommendations that I
16 think should be in my direction to them before --
17 I'm sorry about the witness, but you gave me these
18 things at the last minute. And this is very
19 important, so this is the way it is.

20 MR. KEMP: Will they also be told that
21 they should not be doing view experiments, line of
22 sight --

23 THE COURT: They will be told that, yes.

24 MR. HENRIOD: I don't know what that
25 means.

1 THE COURT: What experiment -- what do
2 you mean by that?

3 MR. KEMP: Trying to figure out a view.
4 You know, just when they walk on the bus, even if
5 they don't sit down, what if they angle to try
6 to -- you know, what if they try to put their head
7 where the driver they think would be? Even if
8 they don't sit down, they could be doing a view
9 experiment.

10 MR. HENRIOD: All right. And here's
11 where I need us to back up just a little bit and
12 put this on the record, but not cynically to just
13 put it on the record, but because I think Your
14 Honor ought to consider it.

15 The case -- and these are Nevada
16 cases -- of Krause v. Little, I think is pretty
17 much right on point. It's actually the only civil
18 case that's been cited. And, there, we're talking
19 about the jury -- and we're not even asking for
20 them to reenact -- but, there, what was found to
21 be appropriate was the jury actually climbing up a
22 ladder to see if the expert's theory was correct,
23 to test the veracity of that theory.

24 Here, we have a case where, frankly, an
25 alternative universe, I think, is being presented

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1 to the jury based on this picture that is a
2 snapshot in a millisecond of time to say "here's
3 what the view would have been based on where the
4 bus and the bike might have been at the exact
5 moment that they want to point to." But a big
6 issue in this case is when the bike would have
7 been seen otherwise.

8 If we were doing an experiment, we would
9 be driving this thing down the road with a
10 bicycle. No one is talking about recreating the
11 incident or doing some type of experiment. But
12 just as they are allowed to pick up the S-1 Gard,
13 as opposed to just being able to see it, and not
14 even think about how it might work, here, they're
15 going on the bus to see whether or not there is
16 veracity to their underlying theory. And that's
17 whether or not the ordinary person with ordinary
18 knowledge in the community would look at this and
19 say, "Is this a view that is unreasonably
20 dangerous?"

21 I don't think there is anything
22 inappropriate about them looking at this the way
23 they have any other evidence and to wonder whether
24 or not examining it supports -- after examining
25 it, they are able to find that the expert that

1 gives them this picture recreation just from a
2 brief snapshot in time, whether or not the
3 opinion -- the conclusion that there is a limited
4 view that is unreasonably dangerous holds water.

5 It's really not like -- it's not unlike
6 any of the other evidence. And I think Krause
7 v. Little is right on point. I don't think the
8 law is that contrary to common sense.

9 MR. KEMP: Your Honor, I think the real
10 problem here is that there's all these variables.
11 And when we had Mr. Cohen up on the stand, he was
12 able to put the computer simulation on the
13 driver's eyes, on Mr. Plantz's eyes, and on
14 everyone else and show what the actual view would
15 be.

16 And, as you recall, we gave a lot of
17 latitude to the defense. They played with the
18 bike, they moved it back and forth, they moved it
19 up and down. And they showed the view in that
20 area. They did that for at least 20 different
21 shots. Okay? So there is evidence on this
22 viewpoint.

23 What they didn't do -- and what they
24 apparently want to try to make up for -- is they
25 didn't have their own expert like Mr. Cohen. They

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1 used our expert. There was nothing that precluded
2 them from presenting this type of evidence. In
3 fact, they even made a 3-D model. We heard about
4 that yesterday.

5 So what they want to do is they want the
6 jurors to go on the bus and somehow try to do some
7 sort of line-of-sight study of their own, some
8 sort of view that, first of all, as we know,
9 there's a big variable here. Where you put the
10 seat on the bus is a big variable. Okay?

11 I mean, if the exact same person, if the
12 seat's here, if a 5-foot person and a 6 1/2-foot
13 person, the exact same person sits in that seat in
14 just the exact way, they're going to have a
15 completely different viewpoint.

16 THE COURT: Well, that's why they're not
17 going to sit in the seat.

18 MR. KEMP: Right. But now what they're
19 asking for -- I think -- I don't know. I'm not
20 really sure what they're asking for. I mean, I've
21 already said we don't have any problem with them
22 seeing the outside of the bus. I probably don't
23 have any problem with opening the door and letting
24 them look in the bus so they can see the spacial
25 arrangements of the seats. I don't have a problem

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1 with that.

2 But I do have a problem if either
3 they're going to sit down in the seat and try to
4 position their head to get some kind of line of
5 sight. That's what I think should be forbidden
6 here. And the problem is the same problem we had
7 in the Russell case, which I -- as the Court has
8 just read, that's the one where the guy drove back
9 and forth between Carson City and Reno to see how
10 long it would take.

11 And the Court said, "Hey, look, there's
12 a lot of variables here. You know? How much
13 traffic is there? What are the weather
14 conditions?"

15 But they said since there's all these
16 variables that could affect your driving time
17 experiment -- which is what the guy was doing in
18 this case -- they're not going to allow it in.

19 There are a lot more variables in our
20 case than there are just driving back and forth
21 between Carson City and Reno. I've already
22 pointed out the seat placement, the height of the
23 juror. I mean, really, if they had wanted -- if
24 it truly is, as defense says, a, quote, big issue
25 in the case, unquote, why didn't they present it

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1 the right way? Why didn't they hire someone to do
2 a modeling line of sight? And I think the real
3 reason is because they don't want to show what the
4 line of sight is depicted as.

5 But, in any event, that was the way to
6 present it, because if you present the evidence
7 that way, we have some sort of record. You know,
8 when we go up on appeal, if we do, at least
9 there's something the appellate court can take a
10 look at like Mr. Cohen said. We printed out his
11 pictures. We printed out all his views. They
12 printed out the ones they liked. You know, that's
13 a record that can be analyzed and examined.

14 You know, what these jurors are going to
15 do -- what are we going to do, put 3-D headsets on
16 them to see what they're seeing and not seeing?
17 It's not appropriate, Your Honor. With these type
18 of variables, I think we really got to -- you
19 know, going around the bus, I have no problem.
20 Opening the door and letting them see it, I have
21 no problem. Even having them walk in and out of
22 the bus, I have no problem. I do have a problem
23 when they start trying to re-create a view --
24 line-of-sight studies.

25 MR. ROBERTS: Your Honor, may I add

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1 something to the factual argument, not to the
2 legal argument. I don't want to double-team on
3 that.

4 But the things that Mr. Kemp says, we
5 don't know. In other words, what was the seat
6 height? We don't know. No one measured the seat
7 height on the day of the incident. It was months
8 later when his expert inspected the bus. No one
9 has any idea what the seat height is, and their
10 expert assumed a seat height. They want to lock
11 the jury into that assumption. We don't know --

12 THE COURT: Mr. Roberts, I'm still not
13 going to allow them to sit down in the seats.
14 Because of that -- because I have -- I have the
15 ability to allow this, but I don't feel
16 comfortable with them sitting in the seat.

17 I just think that a view is correct. I
18 think that's reasonable. There's been a lot of
19 evidence about different -- you know, the post,
20 the window, everything. They should be able to
21 see that through their own eyes. And I think it's
22 going to help them. I mean, both the exterior and
23 the interior would help the jury to more fully
24 appreciate the evidence received under
25 Eichelberger.

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1 But the view is not evidence. Okay? So
2 we have to be very careful because I must follow
3 the law.

4 MR. HENRIOD: Understood. And I respect
5 how earnest the Court has been in this, and I
6 really don't mean to disrespect that at all.

7 THE COURT: No, no.

8 MR. HENRIOD: I do need to just
9 address -- in case it comes up later -- I don't
10 want to let it go now -- this idea that the issue
11 comes down to a battle of the experts.

12 This is not the exclusive province of
13 experts. I think that this case is a lot like
14 *Rish v. Simao*, where the district court had
15 precluded the jury from considering whether or not
16 the forces of the impact in a traffic case at a
17 common sense level likely would have led to the
18 alleged injuries.

19 And the district court said, "Well, no,
20 you can't consider those things because that would
21 be the jury hypothesizing about the forces at
22 issue and then doing their own analysis. And they
23 should have an expert do that. And, therefore, it
24 can't be talked about at all."

25 And the supreme court said, "No, that is

1 an improper interpretation of Hallmark. This is
2 not the exclusive province of experts." And so
3 you don't waive your right to ask the jury to
4 assess these things at a commonsense level and
5 with their experience that they're instructed to
6 bring into the courtroom simply because you don't
7 have an expert when you don't need one.

8 And I'll leave it at that. I understand
9 the Court has made its determination.

10 THE COURT: No, understood. That's why
11 I'm allowing them to enter the bus and to view it.
12 I think you would prefer them to sit down and --
13 in the seats?

14 MR. HENRIOD: Yes. I mean, I don't have
15 a problem -- as a matter of fact, I think they
16 ought to be able to view from the vantage point of
17 the person who had the view, just to see whether
18 or not this vehicle in general is something they,
19 with their ordinary knowledge, would consider
20 unreasonably dangerous, unusually dangerous,
21 because of a restricted view.

22 Everything else is to the variables.
23 Well, we don't know which way the driver's head
24 was pointed at the time. We don't know which way
25 he was leaning. There's a lot we don't know. And

1 that goes to dispute the experts' conclusions as
2 well. All of that goes to weight, however.

3 Thank you.

4 MR. BARGER: We do have a suggestion.

5 THE COURT: Again, I just want to
6 reiterate.

7 The reason for not allowing that is
8 that -- that's why I wrote it down, because I
9 wanted to stay on track -- is that I do think
10 that, especially considering how different the
11 conditions are and that they can't be recreated,
12 the probative value of allowing the jurors to sit
13 in any seats is substantially outweighed by the
14 risk of undue prejudice. So that's why I'm not
15 going to allow that.

16 MR. BARGER: On timing, Mr. Kemp and I
17 have discussed this, I think. The bus was
18 scheduled to be here at 3:00, but I don't think
19 it's -- we could send somebody down about that
20 time and tell them they're just going to have to
21 wait until Mr. Kemp gets through with his cross.

22 THE COURT: Well, here's the thing:
23 They're only going to let us -- just so you know,
24 my understanding is that it might be better for
25 the bus to not pull into the loading zone at

1 3:00 because they may have other vendors that are
2 coming. So we might coordinate with the bus to
3 pull into the loading zone at a time when this
4 cross is over. Do you understand what I'm saying?

5 And I also want to review with the
6 parties a list of my instructions to the jury
7 before they view the bus.

8 MR. BARGER: So maybe close to the time
9 the bus is supposed to arrive, maybe Mr. Roberts
10 could be excused, and he could go down and make
11 sure it doesn't pull in yet until we get word from
12 the Court.

13 THE COURT: Yes.

14 And then, Marshal Ragsdale, you may let
15 them know that the bus will be coming -- what time
16 do they close the loading dock?

17 THE MARSHAL: No, we're not using the
18 actual loading dock; we're using the inmate sally
19 port where they bring the buses in. So it's two
20 different ports.

21 THE COURT: Because the loading dock
22 closes at a certain time.

23 THE MARSHAL: They should be fine at
24 3:00.

25 THE COURT: Well, it may be later than

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1 3:00.

2 THE MARSHAL: Yes, the later, the
3 better.

4 THE COURT: Just let them know.

5 THE MARSHAL: Okay.

6 MR. KEMP: Your Honor, I had one minor
7 update, and it's a positive update.

8 We got an email from The Venetian last
9 night, and they said they will have a check for
10 Mr. Lennon by 4 o'clock today.

11 THE COURT: Oh, I'm so happy to hear
12 that.

13 MR. KEMP: And I don't know even how
14 they get their checks, Your Honor. So I don't
15 know if that means he's got to run over there by
16 5:00, or, you know --

17 MR. CHRISTIANSEN: I think he said he
18 was supposed to go to the concierge.

19 THE COURT: Well, the concierge is open
20 24 hours, right, at The Venetian?

21 MR. CHRISTIANSEN: Let me find it, Your
22 Honor.

23 THE COURT: Maybe he can go to a VIP
24 concierge.

25 MR. KEMP: Let me just read you what the

1 email says. "We will have a check ready for his
2 pickup after 4:00 p.m. tomorrow at The Venetian
3 team member concierge." I don't know what that
4 means. Well, they give us a team member number
5 too. It's 19743.

6 Do you want to see this email, Your
7 Honor?

8 THE COURT: No, I --

9 MR. KEMP: It was copied to Mr. Russell.

10 THE COURT: Pardon me?

11 MR. KEMP: It was copied to Mr. Russell.

12 THE COURT: Okay. Very good.

13 Hello, Mr. Russell.

14 MR. RUSSELL: And, also, I know you
15 asked Mr. Pepperman at the end of the day
16 yesterday about the written agreement. I just got
17 an email from counsel for The Venetian that
18 general counsel is signing off on the agreement we
19 stipulated yesterday.

20 MR. KEMP: But that does not resolve the
21 two-week issue because --

22 MR. RUSSELL: No, no, it doesn't.

23 THE COURT: When you have an agreement,
24 it's best to finalize it.

25 MR. KEMP: I just want to make sure that

1 we're not waiving anything.

2 THE COURT: No, I understand that.

3 MR. KEMP: For the record, it says,
4 quote, we will have a check ready for his pickup
5 tomorrow after 4:00 p.m. at The Venetian team
6 member concierge," whatever that means.

7 THE COURT: I don't know how late that's
8 open.

9 MR. KEMP: I have no idea, Your Honor.

10 THE COURT: But I know for certain that
11 the VIP concierge is open 24 hours. So if they
12 need to walk it from one to the other --

13 MR. KEMP: I kind of think they're
14 different concierges myself.

15 THE COURT: Yes, but, you know --
16 probably.

17 All right. So what is your pleasure? I
18 think we should bring the witness in -- or -- I'm
19 sorry -- you're here -- but follow through with
20 the cross-examination. Then we should take a few
21 minutes to agree on the list -- or the
22 instructions that I'm going to give the jury.

23 Okay? Or would you prefer to do that
24 now?

25 MR. BARGER: Whatever is best for the

1 Court would be fine.

2 MR. ROBERTS: Is Mr. Kemp about to do
3 cross? Maybe you can ask him his preference, and
4 we'll defer to him.

5 THE COURT: I'm sorry?

6 MR. ROBERTS: Mr. Kemp is getting ready
7 to do cross, and we'll defer to his preference.

8 MR. TERRY: Mr. Christiansen and I will
9 work on it -- see if we can come to an agreement.

10 MR. HENRIOD: If you want something more
11 elaborate, we can do it later.

12 THE COURT: Would you like to join them?

13 MR. HENRIOD: Sure.

14 MR. KEMP: Can we have two minutes?

15 THE COURT: Okay.

16 (Discussion off the record.)

17 THE COURT: Are we ready for the jury?

18 MR. CHRISTIANSEN: I believe so, Your
19 Honor.

20 (Whereupon, a recess was taken.)

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

23 THE MARSHAL: All rise.

24 Your Honor, all the jurors are present.

25 Please be seated. Come to order.

1 THE COURT: Welcome back, ladies and
2 gentlemen. Please take roll call.

3 THE CLERK: Yes, Your Honor.

4 Byron Lennon.

5 JUROR NO. 1: Here.

6 THE CLERK: John Toston.

7 JUROR NO. 2: Here.

8 THE CLERK: Michelle Peligro.

9 JUROR NO. 3: Here.

10 THE CLERK: Raphael Javier.

11 JUROR NO. 4: Here.

12 THE CLERK: Dylan Domingo.

13 JUROR NO. 5: Here.

14 THE CLERK: Aberash Getaneh.

15 JUROR NO. 6: Here.

16 THE CLERK: Jaymi Johnson.

17 JUROR NO. 7: Here.

18 THE CLERK: Constance Brown.

19 JUROR NO. 8: Here.

20 THE CLERK: Enrique Tuquero.

21 JUROR NO. 9: Here.

22 THE CLERK: Raquel Romero.

23 JUROR NO. 10: Here.

24 THE CLERK: Pamela Phillips-Chong.

25 JUROR NO. 11: Here.

1 THE CLERK: Gregg Stephens.

2 JUROR NO. 12: Here.

3 THE CLERK: Glenn Krieger.

4 JUROR NO. 13: Here.

5 THE CLERK: Emilie Mosqueda.

6 JUROR NO. 14: Here.

7 THE COURT: Do the parties stipulate to
8 the presence of the jury?

9 MR. BARGER: Yes, Your Honor.

10 MR. CHRISTIANSEN: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. KEMP: Your Honor, we have an
13 equipment malfunction.

14 THE COURT: So just to discuss where we
15 are in the trial chronology, so plaintiffs are now
16 going to begin cross-examination of this witness,
17 Mr. Rucoba. Thank you.

18 MR. KEMP: Good afternoon, ladies and
19 gentlemen. Okay. Let's see if we can get Mr.
20 Rucoba out of here.

21 CROSS-EXAMINATION OF ROBERT RUCOBA

22 BY MR. KEMP:

23 Q. Mr. Rucoba, first of all, are people
24 back in San Antonio watching you live?

25 A. They are.

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1 Q. They are watching you live, people in
2 your office?

3 A. No.

4 Q. Have you been watching this live?

5 A. No, I have not.

6 Q. Now, you recall yesterday when you told
7 us that the bike lane was 4 feet wide?

8 A. Approximately, correct.

9 Q. That's not true, is it?

10 A. Approximately, it is true.

11 Q. Would you take a look at -- in fact, let
12 me hand it to you.

13 Take a look at the diagram and tell me
14 how long it indicates -- how wide it indicates the
15 bike lane is there.

16 A. Based on that diagram, it says 4 foot,
17 6 inches.

18 Q. So it's 4 1/2 feet wide or it's 4 feet
19 wide?

20 A. My measurements say approximately
21 4 feet.

22 Q. So you're disputing that it's 4 1/2
23 feet?

24 A. Well, I can just tell you what my
25 measurements say. My measurements say it was

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1 approximately 4 feet.

2 Q. Do you think maybe you made a mistake
3 there?

4 A. I don't think so.

5 Q. All right. Now, do you recall doing a
6 calculation yesterday on perception-reaction time?

7 A. Yes.

8 Q. And when you were doing that
9 calculation, you were comparing frames 4 and 9; is
10 that correct?

11 A. Yes, we did talk about frames 4 and 9,
12 correct.

13 MR. KEMP: Let's have frame 4, please.
14 And let's have frame 9, please.

15 MR. GODFREY: Would you like them side
16 by side?

17 MR. KEMP: Side by side, if you can.
18 Okay.

19 BY MR. KEMP:

20 Q. And, basically, what you told us is
21 there's a tenth of a second between each frame?

22 A. That is correct.

23 Q. And you told us that there was 6/10 of a
24 second between these two frames.

25 Do you recall that?

1 A. Yes, I do.

2 Q. Okay. Let me see if I can figure out
3 how you got that. 4 to 5 is 1/10 of a second?

4 A. Well, this is 5/10 of a second. Excuse
5 me.

6 Q. Oh, so you were wrong yesterday when you
7 said it was 6/10?

8 A. No. I think we were talking about in
9 the turn is the 6/10. And that's where we were
10 talking frame 9 to frame 15.

11 Q. Well, I have your exact testimony here,
12 where you said, quote, so if you're looking at
13 perception and reaction time, and the 6/10 of a
14 second it took to get to the point of impact.

15 That's what you said yesterday?

16 A. Yes. That's exactly what I'm saying
17 now.

18 Q. So you recognize that you made a mistake
19 yesterday when you said 6/10 of a second?

20 A. No, no. It's still 6/10 of a second.
21 Into the turn, you get to the point where you
22 have --

23 Q. 4 to 5 is 1/10.

24 A. Okay.

25 Q. 5 to 6 is 2/10.

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1 A. Correct.

2 Q. 6 to 7 is 3/10.

3 A. That's correct.

4 Q. 7 to 8 is 4/10.

5 A. Correct.

6 Q. And 8 to 9 is 5/10?

7 A. That's correct.

8 Q. Not 6/10?

9 A. But this isn't the point of impact.

10 Q. Yesterday you told us that it was 6/10
11 of a second.

12 A. To get to the point of impact, which is
13 frame 15.

14 Q. Isn't it true you just made a mistake
15 yesterday?

16 A. No. What we don't have up here is frame
17 15, which is the point of impact.

18 So if you go from frame 9 to frame 15,
19 that's 6/10 of a second. That's the 6/10 that
20 we've been referring to.

21 Q. So frame 9 to 15 is the 6/10?

22 A. Yes. Now you've got it right.

23 Q. Now, yesterday you told us about
24 something called perception-reaction time;
25 correct?

1 A. Yes, I did.

2 Q. And you told us that studies -- well,
3 you said, quote, standard perception-reaction time
4 can range from anywhere between a second to 2 1/2
5 seconds; right?

6 A. No. What I said was that for accident
7 reconstructionists, typical accident
8 reconstructionist perception-reaction time is
9 anywhere from about a second and a half to 2 1/2
10 seconds.

11 Q. And you also told us that the American
12 Association of State Highway Transportation
13 Officials estimated it to be around 2 1/2 seconds?

14 A. That's exactly what I said.

15 Q. So you told us that it was 2 1/2
16 seconds?

17 A. Well, what I said was that accident
18 reconstructionists typically use a range. It can
19 be anywhere from about a second and a half to
20 2 1/2 seconds.

21 Q. Now, isn't it true that there's lots of
22 perception-reaction time studies out there?

23 A. Yes, that's true.

24 Q. And the ones you're using have young
25 people, old people, complicated maneuvers, simple

1 maneuvers. That's the general ones you're using;
2 right?

3 A. No, not exactly. Yes, you're right on
4 the range of types of people. When they establish
5 this kind of a range, a second and a half to 2 1/2
6 seconds, it typically applies to what is more
7 considered to be a simple sort of a scenario. In
8 other words, the light turns from yellow to red,
9 or the --

10 Q. Well, the simple scenario is that --

11 A. -- or something where the light turns
12 green. So those would be considered simple
13 scenarios, and that's where the second and a half
14 to 2 1/2 seconds applies.

15 If you go to a little bit more what are
16 considered complex-type scenarios, now the
17 perception-reaction times can expand and become
18 larger intervals.

19 Q. What we have here is a simple reaction
20 time; they're turning the wheel left. This is
21 simple. This is about as simple as it gets;
22 right?

23 A. Well, what we did is we took the --

24 Q. The answer can be "yes, it is" or "no,
25 it isn't," sir.

1 A. Well, what we did is --

2 Q. I said "correct." Is it correct that
3 this is a simple perception-reaction time?

4 A. The way that we --

5 Q. Am I correct?

6 A. -- is that we're using the more
7 simplistic perception-reaction times, correct.

8 Q. And the movement we have in this case,
9 steering to the left, is a simple reaction; right?

10 A. The scenario that I chose for my
11 analysis yesterday, that is correct.

12 Q. Okay. So a complex reaction would be,
13 for example, taking your foot off the gas and
14 hitting the brake?

15 A. No.

16 Q. That would be -- that would not be more
17 common?

18 A. That would also be considered simple.

19 Q. Okay.

20 A. Complex has to do with variables such as
21 is there traffic around? Are there other objects
22 that need to be assessed with regard to the
23 scenario that is in front of the driver?

24 That's what makes something go from
25 simple to a more complex scenario.

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1 Q. Well, would I be correct that there are
2 actually studies that say, in a simple reaction
3 time, like steering the wheel, the average driver
4 takes about .36 seconds? Would I be right?

5 A. If we're just talking about the steering
6 part of it, you would be right.

7 Q. So -- and that's what we're talking
8 about in this case. We're talking about the
9 steering part of it; right?

10 A. No. What we're talking about is the
11 perception-reaction part.

12 Q. Okay. Well, you would agree with me
13 that other groups other than the ones that you've
14 alluded to, like the automobile association, have
15 published data that are different than the 1.5 to
16 2 seconds you're using?

17 A. Not when you consider that we're talking
18 about perception and reaction.

19 MR. KEMP: Can I have my next one,
20 please, Shane.

21 BY MR. KEMP:

22 Q. You see this chart, Doctor?

23 A. Yes, I do.

24 Q. And what does it say the average value
25 of the reaction time is in this particular

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1 population?

2 Looks like .4 seconds to me, but I don't
3 want to put words in your mouth.

4 A. Sure. It does appear that the average
5 reaction time is .4 seconds based on that graph.

6 Q. .4 seconds, not 1.5 and not 2.5, .4?

7 A. Again, yes, that is the reaction time,
8 but we're talking about perception combined with
9 reaction.

10 Q. Okay. Well, we'll get to that.

11 Next one, please, Shane. I think we had
12 one before that, didn't we?

13 Okay. Doctor, this is age-dependent to
14 a certain degree; correct?

15 A. Yes, it is.

16 Q. So, like, older people have slower
17 perception-reaction time in general than younger
18 people?

19 A. That's true.

20 Q. And, in this case, we have a 50-year-old
21 bus driver?

22 A. That is true.

23 Q. And so, according to this data from the
24 American Automobile Association, the reaction time
25 would be .48 seconds; right?

1 A. Yes, talking about reaction time.

2 Q. And that's less than the 1.5 or 2 that
3 you've given us?

4 A. Yes. 1.5 is going to be greater than
5 .48.

6 Q. Now, would I be correct that there are
7 scientists who have done pretty sophisticated
8 studies on what the reaction time is for a
9 steering moment?

10 A. Sure.

11 Q. You haven't done that?

12 A. No. I rely upon those studies, but
13 sure.

14 MR. KEMP: Okay. Let's have the next
15 one, Shane.

16 BY MR. KEMP:

17 Q. And can you take a look at what the
18 average value is for the driver reaction time for
19 steering?

20 A. Looks like the average value is .362.

21 Q. Okay. And that's not the lowest one;
22 that's just the average. Right?

23 A. That is correct.

24 Q. What is the lowest one?

25 A. .348?

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1 Q. Could you look at the minimum value.

2 A. .262.

3 Q. So the lowest one is .26?

4 A. Yes, the reaction time is .262 is the
5 minimum.

6 Q. Okay. And you're familiar with this
7 study?

8 A. I'm familiar with studies like that,
9 sure. Reaction time is something that I use in
10 accident reconstruction.

11 Q. And I don't want to trick you or
12 anything, so let me hand you a copy of it. This
13 is Dr. Guzman's study; correct?

14 A. Yes, that's the author of the paper.

15 Q. And what Dr. Guzman did is he set up a
16 driving simulator and he tested drivers to see
17 what their perception-reaction time? That's what
18 he did; right?

19 A. No.

20 Q. That's not what he did?

21 A. No, that's not what's being measured.

22 Q. Okay. So when he says the results of
23 his examination of 100 drivers to a comparison of
24 their reaction time on the steering wheels, he's
25 not telling us what the reaction time is?

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1 A. He's definitely telling us what reaction
2 time is; he's not telling you what
3 perception-reaction time is, which is what we
4 discussed yesterday.

5 Q. Well -- is it Dr. Rucoba? I'm sorry.

6 A. No, it's Mr. Rucoba.

7 Q. Okay. Mr. Rucoba, if you take a look at
8 page 21, he sets up a simulator there; right? Top
9 left.

10 A. Yes, that's right.

11 Q. And he gives these hundred drivers a
12 signal; right?

13 A. Right.

14 Q. And then he sees how long it takes for
15 them to perceive the signal and react; correct?

16 A. No.

17 Q. No? So what is causing them to react?

18 A. They're merely reacting and he's
19 recording the reaction time.

20 Q. After they see the signal?

21 A. But he's not recording the perception
22 part of it. He's only recording the reaction
23 time.

24 MR. KEMP: Can I have the chart again,
25 Shane.

1 BY MR. KEMP:

2 Q. You see that the simple steering wheel
3 is different than the more complex maneuver?

4 A. Yes, I do see that.

5 Q. Now, a couple seconds ago, you got done
6 telling me that the steering wheel and brake pedal
7 was not a complex maneuver, in your view. Do some
8 people consider that a complex maneuver?

9 A. Again, it depends on the situation. It
10 depends on the variables that are associated with
11 the scenario. Some steering situations can be
12 simple; some braking situations can be simple.
13 Some steering situations can be complex; some
14 braking situations can be complex.

15 Q. And what we have here is a simple
16 steering situation; correct?

17 A. Well, I see four columns --

18 Q. No, no, no, no. I mean, in this
19 particular case, what we have is a simple
20 steering-to-the-left situation?

21 A. Correct.

22 Q. Okay. And so we would apply the .362 as
23 the average value; correct?

24 A. No.

25 Q. No? Okay. We would apply the .26

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1 because the driver is 50? Is that what you're
2 telling me?

3 A. No.

4 Q. You really don't know what the
5 perception-reaction time of this particular driver
6 for the steering moment is, do you?

7 A. The best that we can do is apply a
8 range, like I was talking about yesterday. So a
9 range would be anywhere from a perception-reaction
10 time of about a second and a half to a
11 perception-reaction time of about 2 1/2 seconds.

12 Q. So the answer to my question is, "Yes,
13 Mr. Kemp, I don't know what the
14 perception-reaction time of this specific driver
15 is." Is that correct?

16 A. Specific, no. The best you can do is
17 apply a range.

18 Q. You're giving us an estimate?

19 A. No, it's a scientifically based range.

20 Q. And, in this case, the range is .362 up,
21 right, in Professor Guzman's case?

22 A. Well, if you see across the timeline,
23 you see that this is merely the reaction time. It
24 does not include the perception part. So all
25 you're looking at is one small portion of the

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1 total perception-reaction.

2 Q. Doctor, why don't you look at the
3 sentence right under this chart, please, the part
4 that it says, quote, the predominating interval,
5 which included the average time of reaction on the
6 steering wheel, was from .3 to .4.

7 A. I'm sorry. What page are you on?

8 Q. Right under the chart.

9 A. Okay.

10 Q. You with me?

11 A. Yes, I am.

12 Q. And they are reacting to a stimulus in
13 this study; right?

14 A. Yes, that is correct.

15 Q. So they are perceiving a stimulus and
16 reacting to it; right?

17 A. Right.

18 Q. And they say that the average value is
19 .36; correct?

20 A. And all that he's recording is the
21 reaction phase; he's not recording the perception
22 part of that.

23 Q. Have you seen this before today?

24 A. No, but I've seen similar studies like
25 that.

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1 Q. Okay. All right.

2 Now, why don't we use Professor Guzman's
3 .36 and go through the exercise that you did for
4 the jury.

5 So if you use the .36, does that yield a
6 different result?

7 And I think your conclusion was that the
8 bus or the driver would be 16 or 20 feet in front?
9 Is that right, first of all? That was your
10 conclusion?

11 A. That was one of the conclusions that I
12 had yesterday, yes, sir.

13 Q. Okay. And it's not really a conclusion;
14 it's kind of a guesstimate?

15 A. No, there was a calculation. So it's a
16 conclusion based on science.

17 Q. It's a calculation using your scientific
18 guesstimate of the bus driver's reaction time?

19 A. No, it's based on physical evidence and
20 it's based on science.

21 Q. I thought you just told me you didn't
22 know what the driver's reaction time was in this
23 case.

24 A. No, like I said before, the best that we
25 can do is estimate a range of the likely

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1 perception-reaction time interval for the driver.

2 Q. And if we used .36 instead of the 1.5,
3 what is the difference?

4 A. Well, the difference in time.

5 Q. The difference in the 16 feet to 20 feet
6 that you've estimated?

7 A. I would need to have one more piece of
8 information from you in order to be able to answer
9 your question.

10 Q. And what is that?

11 A. You need to tell me what the perception
12 time phase is.

13 Q. I just told you -- let's assume the
14 perception-reaction time is .36. Let's just
15 assume that.

16 A. So you're going to say the analysis is
17 now that it has a complete perception-reaction
18 time of .36 seconds?

19 Q. That's what I just said, .36. Let's
20 assume that.

21 A. Okay. We're going to ignore where it
22 says "reaction time" on --

23 Q. No, we're going to use what Dr. Guzman's
24 true data is, not what you're trying to say it is.
25 Let's just assume it's .36 for purposes of this

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1 exercise.

2 A. Okay. Dr. Guzman's data says .36 for
3 the reaction time.

4 Q. Can we assume that the
5 perception-reaction time is .36?

6 A. We can assume whatever you want. It's
7 your --

8 Q. I want you to assume it's .36. What's
9 the difference?

10 A. So we're going to use a total
11 perception-reaction time of .36 seconds. Is that
12 what you're asking?

13 Q. Doctor, I know you don't like the
14 question, but I've asked it to you three times.
15 Let me try one more time.

16 A. Okay. Will you assume that the
17 perception-reaction time is .36 and tell me the
18 difference.

19 A. Okay.

20 A. Okay.

21 Q. And?

22 A. And the answer is that the bicycle would
23 be approximately 7 feet in front of the bus when
24 the bus driver would begin to perceive and react
25 to the presence of the bike turning left in front

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1 of him.

2 Q. How is it you take a 1.5-second
3 perception-reaction time and you get 16 to 20,
4 and then when we lower it to .36, you get half
5 that? How does that work?

6 A. Well, we started with 1 second in the 16
7 to 20, so you're now reducing it from the
8 18 feet --

9 Q. No, actually, the 16 to 20 was your 1.5
10 seconds. Would you like me to read your
11 transcript?

12 A. No. My 16 to 20 was the 1-second time
13 interval.

14 Q. Would you like to look at page 237/8 and
15 see what you said yesterday?

16 THE COURT: Mr. Kemp, will you please
17 speak a little bit louder?

18 MR. KEMP: Sure.

19 THE WITNESS: Yes. Okay. So at the top
20 of the page, the question is from Mr. Barger, "Can
21 you give us the numbers if the perception-reaction
22 time of the bus driver was 1 second?"

23 And my answer was, "The bike would be
24 approximately 16 to 20 feet in front of the bus."

25 That's just like what I just said.

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1 BY MR. KEMP:

2 Q. Let's lay it out a little bit here.

3 What was your answer for 2 seconds? Do
4 you have one there?

5 A. I did not do a calculation for 2
6 seconds.

7 Q. 2 1/2?

8 A. I did not do a calculation for 2 1/2
9 seconds.

10 Q. You just did one for 1 1/2?

11 A. And I did a second one for 1 second.

12 Q. And what we're trying to do here is
13 we're trying to create an argument as to the
14 location of the bus and bike at the time of the
15 passing moment. That's what we're trying to do
16 here with this perception-reaction?

17 A. I don't know what you mean by "create an
18 argument," but what we're trying to do is
19 establish, using laws of physics, where the bike
20 would be and where the bus would be at the time
21 that the bus -- or excuse me -- at the time that
22 the bike would begin to make its left turn.

23 Q. And the reason you want to do that using
24 laws of physics is you don't want to use the
25 eyewitness testimony; is that right?

1 A. No, no, that's not right.

2 Like any -- in any other accident
3 reconstruction, what you have to do is use laws of
4 physics. And you also have to take into account
5 the witness information, but you've got to be able
6 to measure the accuracy of the witness information
7 against the physical evidence that you have to
8 work with.

9 Q. Well, let's try to do that. Okay?

10 Do you remember in opening statement
11 when MCI and Mr. Terry said that they were going
12 to prove to the jury that the bike was in the
13 right turn lane? Did you read that?

14 A. Yes, I did see that.

15 Q. That's not true; right?

16 A. We don't know where the bike came from.
17 I do not know where the bike came from.

18 Q. You know from the witness statements
19 that this isn't true; right?

20 A. Well, we've got witness statements that
21 indicate that it's in the bike lane. We have
22 information that came from another witness who
23 indicated it's in the right turn lane.

24 Q. Well, why don't we see what the
25 witnesses really said. Okay?

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1 MR. KEMP: Can I have my first, Shane.

2 (Recording played.)

3 "QUESTION: Did you ever see the
4 bicyclist leave the bicycle lane?

5 "ANSWER: No."

6 MR. KEMP: Stop.

7 BY MR. KEMP:

8 Q. This is the very first witness,
9 Mr. Sacarias. So he has the bike in the bike
10 lane, not the right turn lane; correct?

11 A. That is correct.

12 MR. KEMP: Let's have the next one,
13 Shane.

14 (Recording played.)

15 "QUESTION: Did you ever see the
16 bicyclist out of the bike lane?

17 "ANSWER: No."

18 BY MR. KEMP:

19 Q. So this is Mrs. Kolch, who also has the
20 bike in the bike lane, not the right turn lane;
21 right?

22 A. Correct.

23 MR. KEMP: Can I have my next one,
24 Shane.

25 (Recording played.)

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1 "QUESTION: So to the best of your
2 recollection, when you looked across and saw
3 the bike, you remember it was in the bike
4 lane?

5 "ANSWER: Yes.

6 "QUESTION: And the bus was in the travel
7 lane?

8 "ANSWER: Yes.

9 "QUESTION: Your impression was they were
10 both where they were supposed to be; right?

11 "ANSWER: Yes.

12 "QUESTION: Did the bicyclist appear to
13 be right in the middle of the bike lane?

14 "ANSWER: Yes."

15 BY MR. KEMP:

16 Q. This is Mr. Roberts on
17 cross-examination, and she still has him in the
18 bike lane; right?

19 A. Correct.

20 MR. KEMP: Can I have my next, Shane.

21 MR. GODFREY: I think that was all.

22 MR. KEMP: Ms. Bradley?

23 (Recording played.)

24 "QUESTION: So the bike was in the bike
25 lane all the way from 50 to the 25 to the 0?

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1 "ANSWER: Yes, that's correct.

2 "QUESTION: And the bus was in the right
3 through lane all the way from the 50 to the
4 25 to the 0?

5 "ANSWER: Yes."

6 BY MR. KEMP:

7 Q. So we have one, two, three witnesses
8 that all say that the bike was in the bike lane,
9 not in the right turn lane; is that right?

10 A. Correct.

11 Q. In addition, that's what Mr. Pears said
12 too; right?

13 A. Correct.

14 Q. So now we have four witnesses that say
15 the bike was in the bike lane; right?

16 A. That's correct.

17 Q. And you're telling the jury that it's
18 still your theory, still MCI's theory of the case,
19 that the bike was really in the right turn lane?

20 A. Again, I've said before I don't know
21 where the bike came from. I can't argue or
22 dispute the witnesses that say the bike was in the
23 bike lane. I can't -- I can't rule that out with
24 my physical evidence.

25 Q. So you've worked on this case for six or

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1 eight months, spent hundreds of hours on it, and
2 you can't tell us whether the bike was in this
3 lane or that lane?

4 A. Correct. We do not know the trajectory
5 or the path of the bike.

6 Q. But we do know that we have four
7 witnesses at least saying one thing; correct?

8 A. We do. That's correct.

9 Q. And the only person that indicates that
10 the bike is in this lane is Mr. Plantz; right?

11 A. That is correct.

12 Q. And he would have the worst view --
13 well, strike that.

14 He would have a worse view than
15 Mr. Sacarias?

16 A. I don't know. It's kind of hard to say.

17 Q. He's obstructed by the whole bench of
18 the bus that's offset in front of him?

19 A. It's kind of hard to say. I don't know
20 the answer to that. I've not studied that aspect
21 of it.

22 Q. He'd have a worse view than Mrs. Kolch?

23 A. Again, I don't know. All I know is his
24 testimony.

25 Q. He'd have a worse view than

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1 Mrs. Bradley?

2 A. I do not know.

3 Q. Well, certainly, you can say he'd have a
4 worse view than Mr. Pears who was looking out the
5 window right by the bike lane?

6 A. Well, Mr. Pears is looking right out the
7 window and the bike is in the bike lane, so I
8 think he would have a pretty good view.

9 Q. So why is it you can't tell me that MCI
10 is wrong when they say in the opening statement --
11 in fact, let's have it. I don't want you to --

12 MR. KEMP: Can I have the opening
13 statement, please.

14 "We submit to you that the evidence will
15 be that" -- okay? -- "the doctor made a turn to
16 the bus and he did it from that location."

17 Next, Shane.

18 "We believe that he was in an area he
19 couldn't be seen. We do not believe he was in an
20 area of the bike lane."

21 And then they put up Mr. Plantz's bus
22 placement; right?

23 BY MR. KEMP:

24 Q. Are you familiar with that, Doctor?

25 A. No, I'm not.

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1 Q. Well, that's wrong; right?

2 A. Well, like I said before, I have no
3 physical evidence that tells me if the bike was in
4 the bike lane, bike was in the right lane. I
5 don't have any physical evidence that gets me to
6 the point of impact for the bike.

7 Q. Okay.

8 MR. KEMP: Can I have my next one,
9 Shane.

10 BY MR. KEMP:

11 Q. So we have a preponderance of the
12 evidence standard here; right?

13 A. Sure.

14 Q. And we're trying to figure out what's
15 true and what's probably not true; right?

16 A. Correct.

17 Q. And wouldn't you agree with me --

18 MR. BARGER: Your Honor, can we
19 approach, please?

20 THE COURT: Yes.

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

23 MR. KEMP: Shane, let's go back.

24 BY MR. KEMP:

25 Q. Mr. Rucoba, we have four different

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1 eyewitnesses that put the bike in the bike lane.
2 Would you agree with me that it's more likely than
3 not that the bike was in the bike lane when the
4 bus started passing?

5 A. If I had physical evidence, I'd be able
6 to answer that question, but I don't have enough
7 physical evidence to tell me where the bike was
8 when it led up to the point of impact.

9 Q. So even though -- even though we have
10 four eyewitnesses with a better view, you're not
11 willing to concede that the bike was in the bike
12 lane when the bus passed him?

13 A. Again, I can't say they're wrong because
14 I have no physical evidence that I can compare it
15 to.

16 Q. I'm just asking if you're willing to
17 concede that.

18 You won't concede that?

19 A. I can't. I have no physical evidence to
20 compare one witness's information versus the other
21 witnesses' information.

22 Q. Now, you also said yesterday, I think,
23 that the bike turned in to the bus. Do you recall
24 that statement?

25 A. Yes, sir.

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1 Q. Okay. And that's not what the
2 eyewitnesses said happened either, is it?

3 A. No, that's pretty consistent with
4 several of the witnesses.

5 Q. Okay. Let's see what the gardener said.
6 (Recording played.)

7 "QUESTION: Did the bicyclist ever turn
8 in to the bus?

9 "ANSWER: No.

10 "QUESTION: You're sure?

11 "ANSWER: Yes."

12 BY MR. KEMP:

13 Q. So your position is not consistent with
14 the gardener's testimony; right?

15 A. No, my reconstruction is definitely not
16 consistent with Mr. Sacarias's view of events
17 because he has the bus moving out of the bus lane
18 of travel and into the bike lane and hitting the
19 bike, and we know that that doesn't agree with the
20 physical evidence.

21 Q. My question -- listen to it or you're
22 going to be here longer than you should otherwise
23 be.

24 You said that you think the bike turned
25 in to the bus; right?

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1 A. The physical evidence supports that the
2 bike turned in to the side of the bus.

3 Q. And the gardener, who is 10 feet away,
4 said he's sure that didn't happen?

5 A. That is his testimony.

6 Q. Let's see what Mrs. Kolch said.

7 (Recording played.)

8 "QUESTION: Did you ever see the
9 bicyclist swerve?

10 "ANSWER: No.

11 "QUESTION: Did you ever see the
12 bicyclist turn?

13 "ANSWER: No."

14 BY MR. KEMP:

15 Q. And that's inconsistent with your theory
16 of the case; correct?

17 A. It's inconsistent with the physical
18 evidence, correct.

19 Q. Okay. And let's see what Ms. Bradley
20 said.

21 (Recording played.)

22 "QUESTION: Okay. So you didn't see it
23 turn and you didn't see it swerve?

24 "ANSWER: No.

25 "QUESTION: Okay. What did you see?

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1 "ANSWER: I saw him kind of, like, wobble
2 or -- wobble into the bus."

3 MR. KEMP: Can I have the next one,
4 Shane.

5 (Recording played.)

6 "QUESTION: All right. So when you saw
7 him wobble, did you see him wobble to the
8 right and then to the left, or what did you
9 see?

10 "ANSWER: I only -- what caught my
11 attention was the last -- or I don't know if
12 it was the last or first movement, but he
13 wobbled to the left into the bus.

14 "QUESTION: Okay. And when he wobbled,
15 was it at the time the bus was passing him or
16 ahead of him?

17 "ANSWER: They were even.

18 "QUESTION: So they were even at the time
19 that he wobbled -- that you saw him wobble?

20 "ANSWER: Yes."

21 MR. KEMP: Okay. So let's stop.

22 BY MR. KEMP:

23 Q. Will you accept this as true, that the
24 bike wobbled when he was even with the bus?

25 A. Well, I think we've seen Ms. Bradley has

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1 both "wobbled" and "swerved" being used
2 interchangeably, but what she was consistent about
3 was that the bike turned left into the bus.

4 Q. What she said was there was a wobble
5 when the bus started passing it at the entrance of
6 the intersection. That's what she said; right?

7 A. Not quite. What she said was --

8 Q. Stop. Let's play it again. Let's see
9 what she really said.

10 Can I have that one more time, Shane,
11 25/10 through 23.

12 (Recording played.)

13 "QUESTION: Okay. So you didn't see a
14 turn and you didn't see a swerve?

15 "ANSWER: No.

16 "QUESTION: Okay. What did you see?

17 "ANSWER: I saw him kind of, like, wobble
18 or -- wobble into the bus."

19 BY MR. KEMP:

20 Q. Wobble; right?

21 A. No, that's not right.

22 Q. You didn't see the question and answer
23 part of that where she said she didn't see it
24 turn, didn't see a swerve; she saw a wobble?

25 A. I've read her testimony and her trial

1 testimony. She does not say that this bike is
2 going left to right.

3 Q. She says it's --

4 A. She's been very consistent that the bike
5 goes to the left, exactly right --

6 Q. Right here --

7 A. -- and she's also consistent where --

8 Q. Right here --

9 A. -- she says --

10 Q. Right here where the bus is passing the
11 bicycle, that's where the wobble starts; right?

12 A. Again, like I said before, she
13 interchangeably uses "wobble" and "swerve," but
14 she's always been consistent in that the bike
15 turns to the left.

16 Q. Now, let's see if we can establish a
17 point. You do not have an opinion, as we sit here
18 today, as to what caused the wobble; correct?

19 A. Correct. I do not.

20 Q. So all you're telling the jury is that
21 the bike wound up in the right turn lane, but you
22 don't know why it either wobbled or went out of
23 control? You don't have any reason -- any idea?

24 A. Well, I know that the bike was turned
25 and that Dr. Khiabani turned to the left and into

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1 the side of the bus.

2 Q. So your testimony now is that
3 Dr. Khiabani intentionally turned in to the side
4 of the bus?

5 A. No, I do not believe that Dr. Khiabani
6 intended to run into the side of the bus.

7 Q. And you've seen no evidence, no evidence
8 whatsoever, that there was some sort of human
9 error that caused this bike to wobble; correct?

10 A. Again, I did not evaluate the wobble
11 because I have no physical evidence that I can use
12 to evaluate it.

13 Q. Let me ask my question again. You have
14 seen no evidence whatsoever that this wobble was
15 caused by human error; is that correct?

16 MR. BARGER: Judge, can we approach the
17 bench?

18 THE COURT: Yes.

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

21 BY MR. KEMP:

22 Q. Okay, Mr. Rucoba. And I want to focus
23 you specifically on the wobble. Okay?
24 Specifically on the wobble.

25 Isn't it true you have no evidence

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1 whatsoever of human error with regards to being a
2 cause for the wobble?

3 A. True.

4 Q. No evidence?

5 A. True.

6 Q. Okay. Now, you have eliminated other
7 potential causes of the wobble; correct?

8 A. I did not evaluate the wobble at all. I
9 was pretty clear about that in my deposition.

10 Q. Well, I thought in your deposition you
11 told me you looked at the bike and there was
12 nothing mechanically wrong with it?

13 A. That's true when assessing the cause of
14 the crash.

15 Q. But with regards to the cause of the
16 wobble, would you agree with me that you found
17 nothing mechanically wrong with the bike that
18 could theoretically cause the wobble?

19 A. And, again, as I said in my deposition,
20 I did not assess what was the cause of the bike
21 wobbling. What I looked at and analyzed was what
22 was the cause of the crash.

23 Q. Focus on my question.

24 You found no mechanical problems with
25 the bike; yes?

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1 A. That is correct.

2 Q. And so there were no mechanical problems
3 that you know of that could have caused the
4 wobble; correct?

5 A. Again, I found nothing mechanically
6 wrong with the bike.

7 Q. Now, let's look at the roadway. You
8 found nothing -- there was no roadway error;
9 correct?

10 A. I found nothing wrong with the roadway
11 that would have caused or contributed to the
12 crash.

13 Q. So there was nothing wrong with the
14 roadway that could have caused the wobble either;
15 right?

16 A. And, again, I've not assessed the bike
17 wobbling in this case; all I've done is looked at
18 what was the cause of the crash.

19 Q. You want to look at the point of impact,
20 not the point where the wobble occurred. Is that
21 what you're telling the jury?

22 A. Well, if I had physical evidence that I
23 could use to evaluate where the wobbling -- if it
24 even did occur, where that took place on the
25 roadway, then I would be able to use science and

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1 calculations and be able to do the kinds of things
2 that accident reconstructionists do. But what we
3 have is a point of impact. And I can use that
4 piece of physical evidence and science and
5 calculations and work my reconstruction up because
6 I have physical evidence to evaluate.

7 Q. Okay. But the direct answer to my
8 question is, no, there is no road impairment that
9 you know of that could explain the wobble.

10 THE COURT RECORDER: Court's indulgence?

11 THE COURT: Can you hear him?

12 MR. KEMP: Sorry, Your Honor. It was
13 still off because we were --

14 BY MR. KEMP:

15 Q. So the direct answer to my question is,
16 no, there's no evidence that you know of with
17 regards to road impairment that could explain the
18 wobble?

19 A. Sorry. I can't answer the question any
20 other way than I've already answered it.

21 Q. And the answer is no road impairment
22 that you've observed; correct?

23 A. The answer is, in my analysis, I was not
24 able to determine whether the bike did or did not
25 wobble because I have no physical evidence that I

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1 can compare. So I really have no opinion about
2 whether the bike did or didn't wobble or whether
3 the road could have made it wobble because I don't
4 know where all of that took place. I have no
5 physical evidence.

6 Q. Okay. And you have no physical evidence
7 that the doctor was incapacitated, dehydrated, or
8 anything; right?

9 A. I do not have any such physical
10 evidence.

11 Q. And, in fact, they tested for his
12 electrolytes; right?

13 A. That is correct.

14 Q. So when we eliminate mechanical
15 problems, we eliminate the first point that we
16 started with, we eliminate roadway conditions, all
17 we have left is air blast; right? That's the only
18 possible cause we have left for the wobble; right?

19 A. Again, I did not assess whether or not
20 this bike wobbled prior to the collision because I
21 have no physical evidence.

22 Q. Assuming Mrs. Bradley is correct that
23 there was a wobble at this point, would you agree
24 with me that the only explanation left that hasn't
25 been excluded is the air blast?

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1 A. No, I would not agree with that.

2 Q. Okay. Is there some other explanation
3 other than the ones I've mentioned?

4 A. Yes. It goes back to what I said
5 yesterday. And that is --

6 Q. Tell me what the explanation for the
7 wobble is that you think exists?

8 A. Well, it goes back to what I said
9 yesterday. And that is I'm looking at the cause
10 of the crash. And I concluded that the cause of
11 the crash was that Dr. Khiabani turned left into
12 the side of the bus.

13 Q. You just got done telling me that you
14 have no evidence that he intentionally did it;
15 right? You got done telling me that?

16 A. Yeah, I do not believe that Dr. Khiabani
17 intended to run into the side of the bus.

18 Q. Okay. Now, back to the wobble. We've
19 excluded mechanical. We've excluded roadway
20 conditions. We've excluded physical impairment.
21 The only thing that's left is air blast; right?

22 A. I don't know how to say this again --

23 Q. I'm not asking you to agree to air
24 blast; I'm saying that's the only cause left that
25 we still have to evaluate. Right?

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1 A. Again, I don't know how to say this in
2 any other way than I really have no opinion about
3 this wobbling of the bike or whether it did or
4 didn't occur because I have no physical evidence
5 that I can use to evaluate whether it did or
6 didn't occur.

7 Q. So if an air blast caused the bike to
8 wobble and ultimately impact the bus, that would
9 be the cause of the accident; right?

10 MR. BARGER: Your Honor, this is the --
11 objection. Repetitious.

12 MR. KEMP: Your Honor --

13 MR. BARGER: It's the same question he's
14 answered --

15 THE COURT: Overruled.

16 THE WITNESS: Again, I have not assessed
17 whether this bike was wobbling or not wobbling
18 prior to the collision because I have no physical
19 evidence that I can use.

20 BY MR. KEMP:

21 Q. But the only explanation left that you
22 haven't excluded for wobble is the air blast;
23 correct?

24 A. Again, if we're going to go back to
25 talking about the wobble and whether or not the

1 displacement of air can cause this bike to wobble,
2 there are others that will be here and there are
3 others that have done testing to be able to answer
4 that question.

5 As the reconstructionist, I cannot
6 answer that question because I don't have enough
7 physical evidence.

8 Q. Well, you're familiar with
9 Dr. Breidenthal's opinion; correct?

10 A. Yes, I am.

11 MR. KEMP: Can I have the summary of
12 opinion, please.

13 BY MR. KEMP:

14 Q. And he says that, assuming the bike and
15 the bus are within 3 feet of each other, there's a
16 10-pound push force. That's what he says; right?

17 A. Yes, that's what he says.

18 Q. And he says there's an even greater pull
19 force; right?

20 Right?

21 A. Yes, that's what he says.

22 Q. And you can't exclude -- if
23 Dr. Breidenthal is right, you cannot exclude the
24 aerodynamics as a cause of this accident?

25 A. I'm not an aerodynamics engineer.

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1 That's not been my role in this particular matter.
2 There are others that are going to be addressing
3 the theories of Dr. Breidenthal. That's not my
4 role in the accident reconstruction.

5 Q. Okay. Let's not try and duck the
6 question.

7 If Dr. Breidenthal is right, will you
8 agree with me that that could be a potential cause
9 of the accident?

10 MR. BARGER: Your Honor, with all due
11 respect, he's answered the question. He's not an
12 expert on it. He said -- we can approach if you
13 want me to. He said other people address that,
14 not him. He's asked it twice, and he's already
15 told him that's not his area.

16 MR. KEMP: Your Honor, I'm just trying
17 to --

18 (A discussion was held at the bench,
19 not reported.)

20 BY MR. KEMP:

21 Q. Now, Mr. Rucoba, would you take a look
22 at your deposition, please. And I'll give you a
23 page in one second.

24 Would you take a look at page 86, line
25 5, please.

1 THE COURT: Mr. Kemp, we can't hear you.

2 MR. KEMP: I'm sorry, Your Honor. Is
3 that better?

4 THE COURT: A little bit. Not
5 completely.

6 BY MR. KEMP:

7 Q. Isn't it true that when you were
8 deposed, Mr. Rucoba, the question was asked --
9 question -- and I'm starting on 85, line 23.

10 "QUESTION: Assuming for the sake of
11 argument that Dr. Breidenthal is right that
12 there was a 10-pound side force -- let's just
13 assume that; that somehow or the other I
14 convince you that he is absolutely right.
15 Would that cause you to reevaluate your
16 opinion with regards to whether or not air
17 blast could be a contributing factor to this
18 accident?"

19 And your answer was, "I'd have to
20 evaluate the issue. And I think it would be done
21 with science and testing in order to be able to
22 address that. So I've got no opinion on it now."

23 Right?

24 A. I'm sorry. You're at page 86?

25 Q. 86. Did I read that right?

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1 A. Yes, that's correct. That was my
2 answer.

3 Q. And you said one more time underneath
4 that, that if Dr. Breidenthal was right, you'd
5 have to reevaluate that as a potential cause of
6 the accident; correct?

7 A. Well, this was my answer.

8 Well, first off, this was the question,
9 "Assuming scientifically that Dr. Breidenthal was
10 right, you would reevaluate your opinion as to
11 whether or not air blasts were a contributing
12 factor to the accident; correct?"

13 And my answer was, "Well, there's two
14 issues there. And, again, with regard to the
15 issue of whether or not there is such a thing as
16 an air blast, it's clear that we've already
17 discussed that, my opinion with regard to that
18 based on the granite testing. But now, having
19 said that with regard to if there was a 10-pound
20 lateral force and what that would do, it would
21 have to be reevaluated, of course."

22 Q. So you would agree with me that if
23 Dr. Breidenthal is correct, that the side force,
24 the 10-pound side force, is a potential cause of
25 the accident. You would agree; right?

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1 A. Yes, it would have to be -- the theory
2 would have to be evaluated and compared to
3 scientific testing, and then I would take that
4 into consideration, of course.

5 Q. And, as we sit here today, you haven't
6 done that; correct?

7 A. As we sit here today, others have. And
8 that is not in the scope of accident
9 reconstruction.

10 Q. Okay. Well, let's not ask what others
11 have done or not. I asked whether you have done
12 that.

13 A. Of course I have not because that is not
14 in the scope of accident reconstruction.

15 Q. And you don't know how much force would
16 be required to make the bike wobble? You don't
17 know that; right?

18 A. That is not something that I've studied
19 in this matter; that's something that's being
20 addressed by others.

21 Q. So you don't know whether it's 1 pound,
22 2 pounds, 5 pounds, 10 pounds? You don't have any
23 idea?

24 A. There are others that will be coming in
25 and could answer that question. That was not part

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1 of accident reconstruction.

2 Q. Okay. I'm happy you think there's
3 others that are going to come in and say that.
4 I'm just asking whether you -- you have any idea
5 whether 1 pound, 2 pounds, 3 pounds, 5 pounds,
6 10 pounds is sufficient to make the bike wobble.

7 A. Again, I didn't address that and it's
8 not part of accident reconstruction.

9 Q. So the answer to my question is you
10 don't know?

11 A. The answer is I don't know because I did
12 not analyze that part because it's not accident
13 reconstruction.

14 Q. Okay. Now, you don't have a bachelor's
15 degree in aerodynamics; correct?

16 A. I do not.

17 Q. You don't have a master's degree in
18 that?

19 A. I do not.

20 Q. Don't have a doctorate?

21 A. I do not.

22 Q. And Dr. Breidenthal has all of those
23 things; right?

24 A. I believe that's correct.

25 Q. And Dr. Breidenthal is telling us that

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1 there's a 10-pound side force; right?

2 A. Yes, that is his opinion.

3 Q. That's the push, and there's more pull.

4 That's his opinion?

5 A. That is his opinion, yes, sir.

6 Q. Now, I think you said that others are
7 going to tell us that there is no side force. Is
8 that what you just said?

9 A. No, that's not what I said.

10 Q. What did you say?

11 A. The aerodynamic issues that are being
12 discussed in this particular matter are going to
13 be addressed by other engineers that are coming in
14 after me. They've done the science. They've
15 evaluated the particular theories that have been
16 put forth by Mr. Breidenthal -- or
17 Dr. Breidenthal. That's what I'm referring to.

18 Q. You are aware that two bus drivers have
19 testified that the J4500 produces a side force.
20 You are aware of that; right?

21 A. Yes. I saw some such testimony, yes,
22 sir.

23 Q. Well, why don't we look at
24 Mrs. Witherell's testimony and tell me if that's
25 what you're referring to.

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1 (Recording played.)

2 "QUESTION: And back to the air blast.
3 You have personally stood next to a J4500 at
4 about 25 miles per hour, a foot away;
5 correct?

6 "ANSWER: Yes, sir.

7 "QUESTION: Tell the jury what you felt.

8 "ANSWER: It's -- you feel the air as
9 it's coming by you, and it's a little
10 unsteady feeling that you feel.

11 "QUESTION: While you're standing there,
12 it made you feel unsteady?

13 "ANSWER: But it just -- it's -- I wasn't
14 stumbling. It just gave you the feeling of
15 being unsteady.

16 "QUESTION: Let's stick with 25 miles per
17 hour.

18 "ANSWER: Okay. It's just you can feel a
19 motion.

20 "QUESTION: A motion from the air?

21 "ANSWER: Yes, sir.

22 "QUESTION: Is that what you're saying?
23 Okay. All right. Is the same true at
24 2 feet?

25 "ANSWER: Yes, sir. Not as bad probably.

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1 "QUESTION: Okay. And when you get out
2 to 5 and 6 feet like you talked about with
3 Mr. Roberts, it goes away; right?

4 "ANSWER: Yes, sir."

5 BY MR. KEMP:

6 Q. Okay. Is that the first bus driver you
7 remember saying that?

8 A. Yes.

9 Q. And in addition Mr. Sherlock also said
10 that; correct?

11 A. I recall some such testimony very
12 similar to that.

13 MR. KEMP: Let's see what Mr. Sherlock
14 said.

15 (Recording played.)

16 "ANSWER: And as it does that, it has
17 momentum. And when it tries to go around the
18 corners, that momentum carries it wide. So
19 the air on the side doesn't go around like in
20 a well-designed vehicle; it shoots out to the
21 sides. And that creates a pressure wave
22 where that jet of air is coming off, and that
23 would push a bicyclist away. This is well
24 studied. There's a Kato paper that you'll
25 probably see that goes into this in detail.

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1 "So it pushes the rider away,
2 and then it sucks them in. Because right
3 behind that pressure wave is an area that's a
4 partial vacuum. And that's what led to these
5 problems I was talking about with air
6 quality, all these other things."

7 BY MR. KEMP:

8 Q. So we have two bus drivers and an
9 aerodynamic engineer, all three saying that
10 there's a push when the bus passes the bike;
11 correct?

12 A. Yes, I believe that's what they just
13 said.

14 Q. And you haven't evaluated the cause of
15 the wobble despite that evidence; is that right?

16 A. Again, the aerodynamic issues in this
17 case are being addressed by other engineers.
18 That's not falling under the area of accident
19 reconstruction.

20 Q. You have not addressed the cause of the
21 wobble, the air blast; right?

22 MR. BARGER: Objection. Repetitious.

23 MR. KEMP: Your Honor, he hasn't
24 answered the question.

25 MR. BARGER: He just said -- he's

1 answered it five times.

2 THE COURT: Overruled.

3 THE WITNESS: Again, I've not addressed
4 the areas of whether or not this bike has wobbled
5 because I have no physical evidence. And I've not
6 addressed the areas that involve the aerodynamic
7 aspects of the bus because that's not falling
8 under the area of accident reconstruction.

9 BY MR. KEMP:

10 Q. Well, you do know that there are a lot
11 of other vehicles out there that are more
12 aerodynamically efficient than this bus? You do
13 know that; right?

14 A. I'm sure there's a wide range of
15 vehicles out there that have aerodynamic features
16 that are similar or different than an MCI bus.

17 Q. I didn't say "similar or different"; I
18 said "better." You know there's a lot of vehicles
19 out there with better aerodynamics than this bus;
20 correct?

21 A. I'm sure there are other vehicles out
22 there which have lower coefficients of drag out
23 there than an MCI bus.

24 MR. KEMP: Can I have my first one,
25 Shane.

1 BY MR. KEMP:

2 Q. FedEx has better aerodynamic features;
3 right?

4 A. I have no idea. I have not tested a
5 Federal Express truck for aerodynamic qualities.

6 MR. KEMP: Can I have my next one,
7 Shane.

8 BY MR. KEMP:

9 Q. We have UPS with better aerodynamic
10 features; right?

11 A. Same answer. Again, I've done no
12 testing to measure the aerodynamic features of a
13 UPS truck.

14 Q. Okay.

15 Can I have my next one, Shane.

16 Will you take a look at the rounded
17 radii at the corner of this garbage truck; yes?

18 A. Yes, I see that.

19 Q. And that's what Dr. Breidenthal is
20 saying that MCI should have done; right?

21 A. I believe that he's talking about
22 putting some sort of a radii on the corners, if I
23 recall his testimony.

24 Q. A .125 radii just like this garbage
25 truck; right?

1 A. I don't know what the radii of that
2 garbage truck is. I don't really recall what
3 Dr. Breidenthal's radius criteria is. I've not
4 evaluated that aspect of this crash.

5 Q. Would you agree with me that buses
6 should be at least as aerodynamically efficient as
7 garbage trucks?

8 MR. BARGER: Your Honor, objection.
9 We're going out of his area of reconstruction
10 testimony at this time. Foundation.

11 THE COURT: Sustained.

12 BY MR. KEMP:

13 Q. Now, we discussed the Russian video;
14 right?

15 A. Yes, we did.

16 Q. On direct?

17 MR. KEMP: Okay. Let's have that again,
18 Shane.

19 (Video played.)

20 BY MR. KEMP:

21 Q. You've seen the video; right?

22 A. Yes. I studied the video.

23 Q. Something caused that bike to wobble;
24 right?

25 A. Yes. It's the -- the truck is hitting

1 the handlebar on the bike.

2 Q. Well, actually, it's the air blast from
3 the vehicle; right, Doctor -- or Mr. Rucoba? I'm
4 sorry.

5 A. No. When you study the video, you see
6 that the right handlebar is hit by a fender of the
7 truck. That's what make the bike go unstable.

8 Q. You don't think there's an air blast
9 coming off this truck passing the bicyclist?

10 A. No. I can tell you that the reason that
11 this bike is wobbling like you're describing,
12 based on my analysis of the video, it's clear that
13 the right handlebar is hit by the fender of the
14 truck as it goes by.

15 Q. You don't think that's what happened in
16 this case, do you? Before the crosswalk, that
17 part of the bus hit the bike?

18 A. Before the crosswalk?

19 Q. Right.

20 A. No. I have no evidence that the bus and
21 the bike came into contact prior to the crosswalk.

22 Q. And you do know that Mrs. Bradley
23 testified that the wobble started before the
24 crosswalk; right?

25 A. I believe that is her testimony,

1 correct.

2 Q. And you do know that Ms. Bradley said
3 that the wobbling she saw was substantially
4 similar to what we have in this video?

5 A. No. As I understand her testimony --
6 and you keep going like this with your hand -- but
7 that's really not what she said. What she has --

8 Q. Well, let's see what --

9 A. -- consistently said --

10 Q. Let's see what --

11 A. -- is that the bike goes --

12 Q. Stop, Doctor --

13 A. -- to the left.

14 Q. Let's see what she actually said rather
15 than what you think she said.

16 MR. KEMP: Can I have my first one.

17 "QUESTION: And can you tell the jury why
18 you think the video is similar?

19 "ANSWER: It's similar because it looks
20 very similar to the movement that I saw when
21 he wobbled to the left into the bus.

22 "QUESTION: Okay. And the video you saw
23 was taken from the back?

24 "ANSWER: Yes.

25 "QUESTION: Just like where you were?

1 "ANSWER: Yes.

2 "QUESTION: In the video, you saw the
3 bike wobble the same way you saw it?

4 "ANSWER: Yes.

5 "QUESTION: Okay. Can you tell the jury
6 why you think that's similar to what you saw?

7 "ANSWER: So, as the truck is passing the
8 biker, the initial wobble when it wobbles in
9 towards the truck is what I recall seeing.

10 "QUESTION: You saw the same thing with
11 the doctor wobbling into the bus?

12 "ANSWER: Correct."

13 BY MR. KEMP:

14 Q. So what Ms. Bradley actually said is
15 that it was the same wobble in the video that she
16 observed; correct?

17 A. I think that what she just said was that
18 it wobbled to the left into the bus.

19 Q. In the same manner that the Russian
20 truck video wobbled; correct?

21 A. Yes, that part is true. That is what
22 she said.

23 Q. So you would agree that if a bike is
24 wobbling like that, something has to be causing it
25 to wobble; right?

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1 A. Yes. Just like I said in the Russian
2 bike video, what's actually causing the bike to go
3 unstable or to go back and forth is because the
4 right front handlebar -- the right-hand
5 handlebar -- excuse me -- got hit by the fender of
6 the truck. When you do the video analysis, you
7 can see that.

8 Q. And that didn't happen in this case, did
9 it?

10 A. Well, ultimately, the left handlebar --

11 Q. Prior to the crosswalk, that didn't
12 happen in this case, did it?

13 A. If we're going back to prior to the
14 crosswalk, like I said before, there is no contact
15 between the bike and the bus prior to the
16 crosswalk.

17 Q. So contact was not a cause of a wobble
18 before the crosswalk; right?

19 A. Again, I've done no assessment of the
20 wobbling because I have no physical evidence that
21 I can work with. All I can do is look at the
22 physical evidence and the point of impact between
23 the two vehicles.

24 Q. There was no evidence whatsoever of
25 contact between the bike and the bus before the

1 crosswalk; is that correct?

2 A. That is correct.

3 Q. Okay. So since we don't have any
4 evidence of contact before the crosswalk,
5 something had to be causing that bike to wobble
6 before the crosswalk; correct?

7 A. Well, it depends again on what testimony
8 you choose to look at. We have witnesses who say
9 it wobbled; we have witnesses who say it did not
10 wobble.

11 I can only look at the testimony and
12 compare it to the physical evidence. But in this
13 particular case with regard to wobbling of a bike,
14 I have no physical evidence that I can use to make
15 a comparison.

16 Q. Okay. You own a car with a blind-spot
17 detector, don't you?

18 A. I do.

19 Q. That's a Kia?

20 A. Yes, that's right.

21 Q. In fact, you own two of them?

22 A. I do.

23 Q. And when you bought one, you bought one
24 for your wife?

25 A. I did.

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1 Q. And then the other one you bought for
2 the daughter?

3 A. I did.

4 Q. And to get that blind-spot detector, you
5 had to pay more; right?

6 A. I did.

7 Q. Okay. So the Kia from Korea has a
8 blind-spot detection system; right?

9 A. It does.

10 Q. And it is from Korea; right?

11 A. It is.

12 Q. And you've seen the testimony of at
13 least three different bus drivers that this bus
14 should have a proximity sensor; correct?

15 A. I've read some testimony. Proximity
16 sensors and those issues are not something that
17 I've studied in this particular case because it
18 doesn't fall under the area of accident
19 reconstruction.

20 Q. Okay. But you will agree with me that
21 at least three different bus drivers have
22 testified that there should be a proximity sensor
23 on this bus; right?

24 A. I don't know how many people have talked
25 about whether there should be proximity sensors on

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1 this bus. I've not studied that aspect of this
2 crash.

3 Q. Okay.

4 MR. KEMP: Why don't I have
5 Ms. Witherell's, please.

6 MR. BARGER: Your Honor, objection.
7 Foundation. That's just going to show the same
8 testimony --

9 THE COURT: I'd like to hear it.

10 MR. BARGER: Okay.

11 (A discussion was held at the bench,
12 not reported.)

13 MR. KEMP: Shane, let's hear from
14 Mrs. Witherell -- or I guess -- who's first?
15 Ms. Witherell?

16 (Recording played.)

17 "QUESTION: Now, do you know what a
18 proximity sensor is?

19 "ANSWER: Yes, sir.

20 "QUESTION: And do you know what a side
21 proximity sensor is?

22 "ANSWER: It would detect -- notify you
23 of anything that would be on your side.

24 "QUESTION: Do you think proximity
25 sensors are a good idea?

1 "ANSWER: In my personal opinion, yeah.

2 "QUESTION: And why is that?

3 "ANSWER: It's because the right side of
4 the bus is -- you know, like I said, you've
5 got more blind spots on your right side than
6 the left side of the bus.

7 "QUESTION: Okay.

8 "ANSWER: And anything is better as long
9 as -- you know, anything that increases the
10 safety is better for everybody."

11 MR. KEMP: Can I have the next one from
12 Mr. Hubbard.

13 (Recording played.)

14 "QUESTION: Mr. Hubbard, in your
15 experience, would a proximity sensor or a
16 camera on a bus be a good idea?

17 "ANSWER: Yes."

18 MR. KEMP: And my last one, please.

19 (Recording played.)

20 "QUESTION: Did other buses have
21 proximity sensors?

22 "ANSWER: Yeah, certainly did. BCI did.

23 "QUESTION: When did that come out?

24 "ANSWER: '07.

25 "QUESTION: 2007?

1 "ANSWER: 2007, correct."

2 BY MR. KEMP:

3 Q. Okay. Mr. Rucoba, given that you bought
4 the Kia from Korea twice with proximity sensors,
5 and -- if you had to buy the same car tomorrow,
6 you'd still get the proximity sensors, right?

7 A. Sure.

8 Q. Okay. So given that the Kia from Korea
9 that you bought twice has proximity sensors, and
10 given that the three different bus drivers said
11 that they think proximity sensors would be a good
12 idea, wouldn't you agree with me that proximity
13 sensors would be a good idea on this bus?

14 A. That's a question that is best asked of
15 the person that analyzed proximity sensors in this
16 matter.

17 Q. So when it comes to protecting the
18 Rucoba family, a proximity sensor is a good idea;
19 but when it comes to whether MCI should protect
20 the general public with a proximity sensor, you
21 can't answer the question. Is that what you're
22 telling me?

23 A. I'm telling you that there's more that
24 goes into being able to answer that question.
25 There are others that have studied the proximity

1 sensors and that issue with regard to this crash.

2 Q. Well, let's go back to reaction time.

3 You do know something about that; right?

4 A. I do.

5 Q. And you are familiar with the testimony
6 that if Mr. Hubbard had, .1 or .12 seconds earlier
7 noticed, he could have got the bus over farther?

8 A. .1 or .2 seconds?

9 Q. .1 or .12.

10 A. Okay.

11 Q. Have you seen that testimony?

12 A. Yes.

13 Q. Okay.

14 And just to make sure we're talking
15 about the same thing, can I have that testimony,
16 please.

17 (Recording played.)

18 "QUESTION: That's probably in the
19 neighborhood of .10 to .12 seconds?

20 "ANSWER: Oh, sure. Yeah.

21 "QUESTION: Okay. And with regards to a
22 left proximity sensor -- excuse me, Your
23 Honor -- would that give warning -- it's
24 Friday, ladies and gentlemen -- would that
25 give .10, .12 seconds' warning, additional

1 warning, to the bus driver?

2 "ANSWER: It seems likely."

3 BY MR. KEMP:

4 Q. That would have made all the difference
5 in this case; right?

6 A. No, it would not.

7 Q. Another .1 or .12 warning in addition to
8 what he already had wouldn't have made a
9 difference in this case?

10 A. No, it would not.

11 Q. Okay. All right. Let's see if I can
12 sum up.

13 So the perception-reaction time you've
14 used is different than what we showed with Dr. --
15 I guess it was Guzman; right?

16 A. Was that the paper you were referring
17 to?

18 Q. Yes, the Polish paper.

19 A. Yes, because when we were looking it up
20 on that chart were reaction times. And what I'm
21 talking about is the time period called perception
22 plus reaction. All you're looking at in the paper
23 that was shown on the overhead screen is just one
24 portion of what the total perception-reaction time
25 is for drivers.

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1 And that's why the chart says "reaction
2 time only." It doesn't tell you
3 perception-reaction time, which is what we've been
4 talking about.

5 Q. Mr. Rucoba, I don't want to get back
6 into the paper, but what they did is they flashed
7 a light and they measured how long it took for
8 people, after the light was flashed, to react;
9 right?

10 A. That is correct.

11 Q. Okay. And whether you want to call them
12 perceiving that light flashing or not, that's what
13 they did; right?

14 A. And that's why they called it reaction
15 time in the chart.

16 Q. All right. So you don't have a cause
17 for the wobble; right?

18 A. Again, I don't know how to say this any
19 other way, but whether or not the bike wobbled or
20 didn't wobble, we have witnesses who said it did;
21 there are witnesses who said it didn't. All I can
22 do is look at is there any physical evidence that
23 I can use to evaluate whether or not this bike
24 actually did wobble?

25 I don't have enough physical evidence to

1 be able to understand or answer the question, was
2 this witness correct or is that witness correct?

3 Q. So Ms. Bradley, who's directly behind
4 the bus -- directly behind the bus and has the
5 best view of where the bike lane is, said it
6 wobbled; right?

7 MR. BARGER: Excuse me. Objection.
8 Repetitious, Your Honor.

9 MR. KEMP: Your Honor, he started
10 arguing with me.

11 MR. BARGER: He's not arguing with him;
12 he's answered the question seven times.

13 THE COURT: Sustained.

14 BY MR. KEMP:

15 Q. And with regards to proximity sensors,
16 you can't say whether they should have been put on
17 the bus; is that right?

18 A. That's not an area that I studied in
19 this particular crash.

20 Q. Whether you've studied it or not, you
21 are not giving an opinion one way or the other
22 whether a proximity sensor should have been put on
23 this bus?

24 A. Correct.

25 Q. The only thing you can tell us is that

1 you, Mr. Rucoba, use proximity sensors; is that
2 right?

3 A. Sure.

4 MR. KEMP: Thank you.

5 MR. BARGER: Are you through? Did you
6 pass him?

7 MR. KEMP: Yeah.

8 MR. CHRISTIANSEN: Judge, can we
9 approach?

10 (A discussion was held at the bench,
11 not reported.)

12 CROSS-EXAMINATION OF ROBERT RUCOBA

13 BY MR. CHRISTIANSEN:

14 Q. Mr. Rucoba, my name is Pete
15 Christiansen. I represent the estate of Katy
16 Barin and her oldest son, Aria Barin. I have some
17 follow-up questions for you.

18 This isn't the first bus case you've
19 testified in; correct?

20 A. Correct.

21 Q. You live in Texas?

22 A. I do.

23 Q. Defense counsel lives in Texas?

24 A. He does.

25 Q. You've worked on behalf of bus companies

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1 in the past?

2 A. I have.

3 Q. Your testimony is a known quantity to
4 them?

5 A. Yes. With regard to accident
6 reconstruction investigation, yes.

7 Q. It is such a known quantity that you
8 showed up with the ability to control your own
9 PowerPoint presentation; correct?

10 A. Yes. That's correct.

11 Q. So you had your questions and answers
12 rehearsed to an extent that you didn't even need
13 to listen to the question to know what your next
14 answer was going to be because you had it in line;
15 fair?

16 I'm over here, Mr. Rucoba. I'm over
17 here talking to you.

18 A. Well, I knew where the areas were going
19 to go because I prepared the PowerPoint.

20 Q. Right. So you knew both the questions
21 and the answers before you stood up and told the
22 jury the story you told yesterday?

23 A. Sure.

24 Q. Okay. And that was different than when
25 you testified at your deposition, right, the

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1 deposition with Mr. Kemp and myself, we had you on
2 videotape and we're asking you questions?

3 A. Well, sure, because I never know what
4 you're going to ask me, of course.

5 Q. Right. And because your testimony is a
6 known quantity because you've worked for bus
7 companies in the past, you were able to prepare
8 the show we saw yesterday, correct, where you
9 stood over here and talked to the people and said
10 "you people, you this, you that"? Remember that
11 whole thing you did yesterday?

12 A. Sure. I've made presentations like this
13 before, of course.

14 Q. Most of the time when I see people
15 testify, they sit in that chair, they look at the
16 lawyer that asks them questions, and they answer
17 the lawyer. That's not what you did yesterday.

18 MR. BARGER: Your Honor, he's just
19 being -- arguing with him. It's improper.

20 THE COURT: Sustained.

21 BY MR. CHRISTIANSEN:

22 Q. Let's just see if we can agree on some
23 things.

24 Shane, on the overhead. I think it
25 might be the next one in line, 566, maybe.

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1 At the moment in your frames that you
2 start, that's frame 4; correct?

3 A. That is correct.

4 Q. Scientifically speaking, that is the
5 first moment in time that you're able to capture
6 the front of that bus on the Red Rock video;
7 correct?

8 A. That is correct.

9 Q. Okay. Before that moment in time -- and
10 it's pretty close to where the bus is here on the
11 map without being crazy precise; fair?

12 A. It's fairly close, correct.

13 Q. Before that moment in time, you cannot
14 tell the ladies and gentlemen of the jury at all
15 what this bus was doing; correct?

16 A. That's not correct.

17 Q. You know it was in the lane it was in?

18 A. I do. That's correct.

19 Q. You don't know if it was moving
20 laterally one way or another?

21 A. No, we do know that.

22 Q. But you don't have video of it. You
23 reading minds now?

24 A. No. It's called equations of motion.
25 It's called laws of physics.

1 Q. So this is how this works, Mr. Rucoba.
2 I ask yes-or-no questions on cross-examination,
3 and you're entitled to give me just that,
4 yes-or-no answers.

5 MR. BARGER: Excuse me. Objection to
6 that. That's not the law --

7 MR. CHRISTIANSEN: It is the law.

8 MR. BARGER: -- and he knows it.

9 He's entitled to answer his questions.

10 THE COURT: Excuse me. I'd like you to
11 approach.

12 (A discussion was held at the bench,
13 not reported.)

14 BY MR. CHRISTIANSEN:

15 Q. All right, Mr. Rucoba. So I'm going to
16 ask you questions that call for a yes-or-no
17 answer, and you have to give me a yes-or-no
18 answer. Okay?

19 A. What if I can't answer it completely --

20 Q. That's the law in Nevada, sir. That's
21 what the judge just told us. So can you do that?

22 A. Okay.

23 Q. Can you do that?

24 A. Sure.

25 Q. Okay. The first moment the Red Rock

1 video captures the bus is in your little show that
2 you had for the jury, Slide 4 of Exhibit 566;
3 correct?

4 A. That is correct.

5 Q. And can we agree by Slide 9 -- just look
6 at forward 5 -- by Slide 9 in your little
7 presentation you had ready for the jury yesterday,
8 you say for the first moment you can see the coach
9 turning left at Slide 9; correct?

10 A. Correct.

11 Q. And that constitutes, as you were doing
12 the math for Mr. Kemp, .5 tenths of a second, so 5
13 of 1 is half; right? Half a second? Half a
14 second goes by between 4 and 9; correct?

15 A. Correct.

16 Q. And by -- I put it a little too far.
17 By 9, you can see on the video that the
18 coach is moving to the left; correct?

19 A. Correct.

20 Q. And at 4, you've got all the witnesses
21 Mr. Kemp pointed out to you saying the bike is
22 parallel with the bus, correct, just to the west
23 of the bus?

24 A. There are some witnesses that say that,
25 yes.

1 Q. Okay. And by 9, the bus has moved --
2 taken evasive actions? In a half a second, it has
3 moved, correct, laterally?

4 A. It is starting to turn, correct.

5 Q. And Mr. Pears -- I'm sorry --
6 Mr. Hubbard, you read his testimony; correct?

7 A. I did.

8 Q. From the trial when he told these people
9 on the jury that, out of the corner of his eye at
10 the intersection, he sees a bicyclist. You saw
11 that?

12 A. That is correct.

13 Q. And you saw that he said immediately he
14 dodged to the left; correct?

15 A. That is correct.

16 Q. And so if you just take Mr. Hubbard at
17 his word, he started to move the bus within a half
18 a second; correct? .4 to .9, that's a half a
19 second; right? Yes or no?

20 A. He gives no time interval.

21 Q. I'm using yours, man. .4 to .9, that's
22 half a second; right?

23 A. That is a half a second, correct.

24 Q. And then he keeps doing it for another
25 6/10 of a second to Slide 15 --

1 Shane, go forward.

2 -- to where the area of initial contact
3 takes place; correct?

4 A. That is correct.

5 Q. And the chart Mr. Kemp showed you had
6 reaction time at .36; right?

7 A. That is correct. That's what the chart
8 showed.

9 Q. And you want to tell the ladies and
10 gentlemen of the jury that if you got both your
11 hands on the wheel and you see out of the corner
12 of your eye, like Mr. Hubbard did, something near
13 your bus, that it takes you one, one thousand;
14 two, one thousand and a half, to move the bus?
15 That's your testimony?

16 A. No, that's not quite right.

17 Q. You moved it in half a second according
18 to your little show; right? The bus moved
19 laterally in one half of one second; correct? Yes
20 or no?

21 A. On the video, that's correct. It's a
22 half a second.

23 MR. CHRISTIANSEN: Nothing else.

24 MR. BARGER: May it please the Court?

25 THE COURT: Certainly.

1 REDIRECT EXAMINATION OF ROBERT ROCUBA

2 BY MR. BARGER:

3 Q. "Your little show," what does that mean?

4 A. I'm not sure.

5 Q. I'm not either. You've got videotapes,
6 computer analysis, photographs. Is that a little
7 show?

8 A. No, sir.

9 Q. Let me ask you a question. Somebody is
10 saying you have a planned script; is that true?

11 A. No, that's not true.

12 Q. Is it common, what lawyers do is discuss
13 with the witnesses what their area of expertise is
14 and what they're going to cover?

15 A. Yes.

16 Q. Do you think these lawyers over here
17 talked to their experts before they put them on
18 the stand?

19 MR. KEMP: Objection. Your Honor.

20 MR. BARGER: Maybe that's speculation.

21 BY MR. BARGER:

22 Q. Has it been your experience that lawyers
23 always meet with the witnesses --

24 MR. KEMP: Same objection, Your Honor.

25 THE COURT: Overruled.

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1 BY MR. BARGER:

2 Q. It's been your experience that the
3 lawyers meet with witnesses so they put them on
4 the stand?

5 A. Yes.

6 Q. Did I tell you what to say?

7 A. No, sir.

8 Q. Of course not. I don't know what the
9 implication is, but the fact is that presentation
10 is from the evidence collected in the case, isn't
11 it?

12 A. That is correct.

13 Q. And it's not a little show, is it?

14 A. No, it's not.

15 Q. What was the purpose of that
16 presentation?

17 A. The purpose is to show the amount of
18 analysis and science that went into the
19 reconstruction of the crash.

20 Q. And we'll hear from witnesses on
21 testing, won't we?

22 A. Yes, we're going to hear from several
23 witnesses about testing.

24 Q. You came here as what, sir? An accident
25 reconstruction expert?

1 A. Yes, that is correct.

2 Q. You're not an aerodynamics expert and
3 don't claim to be, are you?

4 A. I am not.

5 Q. You're obviously not an expert in
6 proximity sensors, are you?

7 A. I am not.

8 Q. Is it your understanding there will be
9 other experts in this case who will testify about
10 this case, about what they did, not what you
11 thought they did?

12 A. Yes, that is correct.

13 Q. All right. Now, let's go back and talk
14 a little bit about a couple of things.

15 I want to go back and bring you back to
16 your area of expertise. Okay?

17 A. All right.

18 Q. In fact, before I do that, you just
19 answered a question that -- explain why .1 to .12
20 would not have made any difference with
21 perception-reaction time. Would you explain what
22 you -- you were only allowed to say yes or no.

23 Now, explain what the answer really is.

24 A. Well, the answer is, is that the bus is
25 moving past the bike at a rate of about 17 feet

1 every second. So what that means in .1 second is
2 that the bus would move past the bike 1.7 feet,
3 but the bus is much longer than that. And if
4 Dr. Khiabani's bike follows the same path that it
5 would follow in that last tenth of a second, it
6 would merely hit another spot on the side of the
7 bus.

8 So the outcome or the crash itself would
9 not change, and that's why I answered the way I
10 did.

11 Q. I want to go back to where Mr. Kemp
12 first started on perception-reaction time. And,
13 by the way, is that two words: Perception?
14 Reaction?

15 A. Yes, it is.

16 Q. Is reaction one word?

17 A. Yes, reaction is one word.

18 Q. Can you ever look at an accident and
19 only look at reaction?

20 A. No.

21 Q. And why not?

22 A. Because if you're looking at what
23 drivers are doing under given scenarios, you have
24 to add in the perception phase, the phase where
25 they're recognizing what's going on, not just

1 focus on the smaller reaction phase. So in order
2 to correctly look at what drivers do under crash
3 sequence, you have to look at the total
4 perception-reaction time.

5 MR. BARGER: Your Honor, may I ask that
6 the chart -- I don't have that chart that shows
7 .362 -- be placed on the board? Can I ask
8 permission for that? Would that be permissible?
9 I don't have that chart.

10 MR. KEMP: I thought I gave you a copy.

11 MR. BARGER: Well, we can do that.

12 MR. KEMP: Here.

13 MR. BARGER: If he can put it on the
14 board, that's fine, if he doesn't mind.

15 MR. KEMP: Which one do you want?

16 MR. BARGER: The one that shows the
17 chart of reaction times of .362.

18 MR. KEMP: There you go.

19 BY MR. BARGER:

20 Q. Now, you had that article in front of
21 you and there was some questions asked. What does
22 it say as Table 2? What does it say?

23 A. Across the top, it says, "Table 2 is
24 selected descriptive statistics of the driver
25 reaction time at Tests A, B, C, and D.

1 Q. Is that half the equation?

2 A. Yes. That's only one-half of the
3 equation.

4 Q. And going back to perception. Why is
5 perception important?

6 A. Because that has to be factored in
7 because it's the phase where a driver is trying to
8 figure out what it is that's happening in front of
9 them.

10 And what's important about including
11 that is that, all the while during that time
12 period, the vehicle is still moving down the road.
13 It still has some velocity. So you have to know
14 that total time duration so that you can
15 understand how far the vehicle went down the road
16 during the perception-reaction phase.

17 Q. Is it -- so this chart about .362
18 deletes perception, doesn't it?

19 A. It does.

20 MR. BARGER: Fine. We can take that
21 off. Thank you.

22 BY MR. BARGER:

23 Q. Now, when you did your
24 perception-reaction time -- and we'll talk about
25 this in a minute -- you used what with respect to

1 the driver?

2 A. Well, what I said earlier yesterday was
3 that perception-reaction times can vary anywhere
4 from a second and a half to 2 1/2 seconds in time.

5 So I said, well, let's just look at the
6 shorter time interval, the 1 1/2 second, and let's
7 just not address the 2 1/2-second interval first.
8 And so my first calculation was where is the
9 bicycle and the bus when you use the 1 1/2-second
10 perception-reaction time?

11 Q. Have you read the testimony, the
12 deposition or trial testimony, of Mr. Caldwell who
13 came and testified?

14 A. I did.

15 Q. Did you use what perception-reaction
16 time -- did you see what perception-reaction time
17 he normally uses?

18 A. I think he uses a very similar
19 perception-reaction time, as I recall. And I
20 think there may have also been a
21 perception-reaction time of 1.25 seconds in there
22 as well.

23 Q. Okay. And you actually, in your
24 analysis, went down as fast as 1 -- 1 point
25 seconds; right?

1 A. Right. In the second part of my
2 analysis, I said, well, let's sort of ignore the
3 1.5 seconds, which is on the low end of the
4 quick -- the quick perception-reaction time, and
5 let's go down even lower, and let's go down to
6 1-second perception-reaction time, and also looked
7 at that location of the bike and the front of the
8 bus when you use 1 second.

9 Q. And what was that distance that you
10 found?

11 A. When I used 1 second, my calculations
12 indicated that the bicycle would be 16 to 20 feet
13 in front of the bus when it would begin its turn.

14 Q. Okay. Now, would it make any
15 engineering sense whatsoever to use a .362
16 perception-reaction time?

17 A. No, it would not.

18 Q. Now, I want to go back and I want to
19 talk for a moment about what Erika Bradley said.
20 And I apologize. I don't have the videotape that
21 shows what was said, but I have the trial
22 testimony.

23 And I want to -- I know Mr. Kemp played
24 some of it, but I want to show you what Erika
25 Bradley said in her trial testimony if I can use

1 the ELMO.

2 MR. BARGER: Brian, can you help me,
3 please.

4 THE MARSHAL: Press the button.

5 MR. BARGER: Thank you. I'm afraid to
6 press buttons. Thank you, sir.

7 BY MR. BARGER:

8 Q. I don't have that video clip, but I have
9 actually what she said. And I'm going to read it
10 if we can. It starts at page 49. The question --
11 these are the questions I asked her.

12 MR. KEMP: Your Honor, can we approach?

13 THE COURT: Yes.

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

16 BY MR. BARGER:

17 Q. Do you recall the testimony that
18 Mr. Kemp played to you; right?

19 A. Yes, I do.

20 Q. Okay. Do you recall exactly word for
21 word the testimony of what Erika Bradley said
22 about the turn?

23 A. Not exactly word for word.

24 Q. Would it be helpful for you to see her
25 exact testimony to help recall what she said to

1 the jury?

2 A. Yes.

3 Q. Okay. Let me show you page 49. The
4 question --

5 MR. KEMP: Judge, can we approach?

6 THE COURT: Yes.

7 (A discussion was held at the bench,
8 not reported.)

9 BY MR. BARGER:

10 Q. Let me show you pages 49 and 50 and 51
11 and 52. And I want you to read that. And then I
12 want to ask you some questions about what she
13 really said.

14 A. Okay.

15 Q. Okay. So what I want to ask you, you've
16 now read what she said at the trial; right?

17 A. Yes, I have read that.

18 Q. And you had read that before, had you
19 not?

20 A. I had.

21 Q. All right. So when Mr. Kemp asked you,
22 she said there was a wobble, what else did she
23 say?

24 A. She said it was a swerve.

25 Q. Did she ever say it turned to the right?

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1 A. No, she never did.

2 Q. And what did she say? And the jury will
3 get to hear this, I promise you, in closing
4 argument again.

5 But what else did she say with respect
6 to what she thought the bicyclist was doing when
7 she first saw it? What did she say?

8 A. She thought that the bicyclist was
9 turning left either in front of or into the side
10 of the bus.

11 Q. Did she ever indicate whether or not she
12 was an aerodynamic expert with respect to wobbles?

13 A. No, she did not.

14 Q. Okay. Now, you know, there's a lot of
15 eyewitnesses that the jury has heard with respect
16 to who saw what where, and Mr. Kemp asked you back
17 about Mr. Sacarias; right?

18 A. Yes, he did.

19 Q. What did Mr. Sacarias testify happened
20 that he saw standing 15 feet away?

21 A. What he said he saw was that the bus
22 moved to the right and into the bike lane and hit
23 Dr. Khiabani.

24 Q. And do both you and Mr. Caldwell both
25 agree that did not happen and could not have

1 happened?

2 A. Yes, we both agreed that that did not
3 happen based on the physical evidence.

4 Q. As an accident reconstructionist, do you
5 take into account what witnesses say, obviously?

6 A. Oh, yes. You have to every time.

7 And then you measure that against the physical
8 evidence.

9 Q. And when you measure things against what
10 the physical evidence are, is that how you reach
11 your opinions, not based upon what four different
12 witnesses say happened?

13 A. That is correct.

14 Q. All right. And, in this case, for
15 instance, it's absolutely impossible for this bus
16 to have turned into the bike lane, isn't it?

17 A. Yes, that does not agree with the
18 physical evidence.

19 Q. So that perception of the accident by an
20 eyewitness would be incorrect, wouldn't it?

21 A. Yes, that is correct.

22 Q. All right. Now, let me ask you just one
23 final question because you've been on the stand
24 now for 2 1/2 hours and we've got some other work
25 to do.

1 The fact is, you're here for one reason,
2 and what's that one reason?

3 A. Accident reconstruction.

4 Q. And did you utilize the physical
5 evidence?

6 A. Yes, I did.

7 Q. All right. And the conclusions that you
8 gave yesterday -- I want to ask you the last
9 question.

10 From a reasonable engineering
11 probability, what is your opinion as to the cause
12 of the collision?

13 A. Dr. Khiabani turned his bike left while
14 he was in front of the bus and then ran into the
15 side of the bus.

16 MR. BARGER: Thank you.

17 RE-CROSS-EXAMINATION OF ROBERT ROCUBA

18 BY MR. KEMP:

19 Q. I'm going to try to be loud. Okay?

20 Mrs. Bradley said when she used the
21 words "swerve" and "wobble," it was the same thing
22 to her; correct?

23 A. Yes, she did use them interchangeably.

24 Q. And counsel just asked you what
25 Mrs. Bradley said at her deposition about her

1 first impression. Do you recall that question?

2 A. Yes. I think he was talking about trial
3 testimony.

4 Q. Okay. Well, that was actually
5 impeachment that he was doing of her testimony
6 using her deposition; correct?

7 Correct?

8 A. Yes, she was reading her deposition.

9 Q. Okay. And so she later on said in that
10 deposition that her first impression was wrong;
11 right?

12 A. I don't recall that portion of the
13 deposition.

14 Q. You don't recall her saying later on in
15 the deposition that her first impression was
16 wrong?

17 A. No. Can you show me that --

18 Q. Different -- different. Is that fair?

19 A. Again, if you show me that text, I don't
20 remember that line of comments by her about being
21 different or wrong.

22 Q. Actually, she gave a potential cause for
23 the wobble in her deposition, did she not?

24 A. She said it was possible.

25 Q. Possible that it was a?

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1 A. Oh, that it was an air blast.

2 Q. So Mrs. Bradley actually said it was
3 possible that the bike was being wobbled by an air
4 blast, not that -- not that there was some sort of
5 turn left; correct?

6 A. No, that's not quite correct.

7 Q. Okay. Let's try to get you out of here.

8 You said something to the effect of that
9 the bike would move 1.7 feet -- or excuse me --
10 the bus would move 1.7 feet in .10 seconds. Is
11 that what you said?

12 A. We were talking about a tenth of a
13 second, correct.

14 Q. And you said 1.7 feet?

15 A. Correct.

16 Q. Is that just the forward motion?

17 A. That's the motion of the bus past the
18 bike. They're both moving, but I was talking
19 about the relative motion of the two.

20 Q. Okay. And the bike is turning to the
21 left; right?

22 A. That is correct.

23 Q. So in addition to 1.7 feet of forward
24 motion, in .10 seconds, there'd also be movement
25 to the left; right?

1 A. Yes, there would be.

2 Q. And can you quantify that in terms of an
3 inch or 2 inches or 3 inches?

4 A. Sure. It would be a couple of inches.

5 Q. So in 1.7 feet, which would be .1
6 seconds, the bike would move a couple inches to
7 the left; is that right?

8 A. Yes, that's true, and also down the road
9 in that same time interval.

10 Q. So as we continue .10 seconds, .10
11 seconds, .10 seconds, it would move a couple
12 inches each one of the .10 seconds?

13 A. Relative to each other every tenth of a
14 second, that's correct.

15 Q. And when we say "a couple inches," are
16 we talking 2 inches? 3 inches? 4 inches? Can you
17 estimate?

18 A. Well, each interval would be the same
19 assuming they both have the same velocity. So if
20 you move sideways a couple of inches in a tenth of
21 a second, each tenth of a second, you could move a
22 couple more inches.

23 Q. And I don't want to split hairs here,
24 but I will.

25 Is it 2 inches, 2.5 inches, or 3 inches

1 that you think the bus would move to the left in a
2 tenth of a second?

3 A. It would be approximately 2 inches.

4 Q. 2 inches. Okay.

5 So if the accident could be avoided --
6 and let me rephrase that. That's a real bad
7 question.

8 You understand that Dr. Khiabani got his
9 head run over by the rear tires?

10 A. Yes, that is my understanding.

11 Q. All right. So if the bus had started
12 moving to the left .1 seconds earlier, it would
13 have moved the bus to the left by 2 inches; right?

14 A. Approximately.

15 Q. And another .1 seconds is another
16 2 inches; right?

17 A. Approximately, sure.

18 Q. So if you had .2 seconds of additional
19 warning in addition to whatever the driver had,
20 you would agree with me that the bus would have
21 moved at least 4 inches to the left?

22 A. Approximately.

23 Q. Okay. And that would have -- under the
24 defense theory of the case, that would have kept
25 the rear tires from running over Dr. Khiabani;

1 correct?

2 A. Not necessarily.

3 Q. Well, you have read Dr. Carhart's report
4 where he claims that the sidewall pinched the top
5 of his head?

6 A. Yes, that is my understanding.

7 Q. And assuming that to be the case, if you
8 move over 4 inches, that doesn't happen; right?

9 A. That's not necessarily true.

10 Q. You think the sidewall still pinches the
11 head if he -- if you move the bus over 4 inches?

12 A. I can't tell you if the outcome would
13 have been different.

14 Q. All you can tell me is the bus would be
15 over 2 inches for every tenth of a second. That's
16 all you can tell me?

17 A. Correct.

18 Q. And when you say the bus would be over,
19 the sidewall would be over 2 inches; right?

20 A. Correct.

21 MR. KEMP: Thank you.

22 MR. BARGER: Last question.

23 FURTHER REDIRECT EXAMINATION

24 BY MR. BARGER:

25 Q. You and Mr. Caldwell agree that this

1 accident and the impact occurred 6 feet into the
2 right-hand travel lane of the bus; right?

3 A. That is correct.

4 MR. BARGER: Thank you. That's all I
5 have.

6 MR. KEMP: Nothing further, Your Honor.

7 THE COURT: Are there any questions from
8 the jury, Marshal?

9 (A discussion was held at the bench,
10 not reported.)

11 THE COURT: It's hard to see you. I
12 have some questions from the jury.

13 THE WITNESS: Okay.

14 THE COURT: And if you're able to answer
15 them, please do.

16 THE WITNESS: Okay.

17 THE COURT: First, how do you measure
18 perception time?

19 THE WITNESS: It's something that is
20 done usually under testing. Usually you have
21 experiments that are done on drivers. And
22 somebody will have some sort of a timing device,
23 and then they will have some sort of an event that
24 might happen.

25 Say, for instance, there might be a

1 cardboard cutout of a car that comes shooting out
2 of a side between two parked cars. And these are
3 under controlled experiments. These aren't things
4 that are done on a public road.

5 But somebody has literally, like, a
6 stopwatch. And they know at what time the object
7 is going to come out, and it's all timed. And
8 then they start the stopwatch. And then they can
9 look at it in terms of how long does it take the
10 driver to recognize, perceive, and then react to
11 that thing that has been juttred out in front of
12 them.

13 So that's one of many types of
14 experiments that scientists do to measure
15 perception and to measure the reaction time. And
16 then you combine them together to give you the
17 total perception-reaction time.

18 THE COURT: "How do you separate the
19 perception time from the reaction time in a
20 simulation?"

21 THE WITNESS: It can be difficult, but
22 you can look at those same experiments, and you
23 can look at, say -- for instance, if you know that
24 it took the driver this long to do something --
25 either apply the brake or to turn the steering

1 wheel -- somebody can stop the stopwatch and then
2 start the stopwatch again to where the actual
3 steering begins and where the actual braking
4 begins.

5 So now scientists are able to break up
6 the perception part and the reaction part so that
7 now we have these precise intervals. And then
8 people like myself, who do accident
9 reconstruction, can take both the perception and
10 reaction parts together to apply them to a given
11 crash.

12 THE COURT: Third question.

13 "Is it possible the perception time
14 begins before someone is conscious of their
15 response?"

16 THE WITNESS: I think we have -- sort of
17 by reflexes we might have. That might be
18 something like that that would play a role in
19 that. But in general, for driving situations, you
20 have drivers that are going to perceive and react
21 quicker than some other ones. So that part of the
22 reflexes or the responses of drivers -- say, new
23 drivers might have a longer period of time because
24 they're just new, whereas, drivers that have been
25 on the road for a while might have that

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1 perception-reaction time that's a little quicker,
2 the 1 1/2-second time. Older people tend to have
3 longer perception-reaction time because they're
4 old and their reflexes are old. Young people can
5 have shorter perception-reaction time down into
6 that 1 1/2-second range because they have younger
7 reflexes. They're quicker just because they're
8 younger.

9 THE COURT: All right. This is from a
10 different juror. The first question.

11 "From the point of impact" -- excuse me.
12 "From the point of the impact marking, can you
13 explain how the mark goes from the bottom and
14 slightly going up?" And then that's question
15 mark. "From a 30-degree angle?"

16 THE WITNESS: Yes. Yes, I can do that.
17 So what we know is happening is that the
18 bus is going faster than the bike. So we know
19 that the first point of contact is going to be
20 near the leading edge of the scuff. The reason
21 that it's getting angled up or that it goes up is
22 that, as the bike is interacting with the bus and
23 as it starts to get more and more engaged with the
24 bus, the bike itself starts to get more vertical.
25 Whereas, it started out 30 degrees, it now engages

1 and it now starts to get more vertical as the bike
2 slams against the side of the bus. That is why
3 the mark itself kind of hooks in an upward
4 fashion.

5 THE COURT: Second question.

6 "Do you believe the left handlebar/hood
7 somehow got caught on the wheel well?"

8 THE WITNESS: No. No, I do not. The
9 physical evidence indicates that the brake hood
10 hit just behind the wheel well. It's that -- that
11 scuff mark that we see is just behind the wheel
12 well, and that's from the brake hood.

13 THE COURT: Okay. Do counsel have any
14 follow-up questions?

15 MR. BARGER: No, I do not, Your Honor.

16 MR. KEMP: No, Your Honor.

17 THE COURT: Any other questions from the
18 jury?

19 Mr. Rucoba, you're excused. Thank you.

20 Counsel, can you please approach.

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

23 THE COURT: We're going to take a five-
24 to ten-minute break. I don't want you to wander
25 off because we're going to be falling to very

1 quickly after that. And I'm going to read you
2 this admonition.

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

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

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

24 You are not to form or express any
25 opinion on any subject connected with this trial

1 until the case is finally submitted to you.

2 THE MARSHAL: All rise.

3 (The following proceedings were held
4 outside the presence of the jury.)

5 THE COURT: All right. We're still on
6 the record.

7 And I understand that you met. I'm
8 going to address just a couple of things. I mean,
9 we could go much longer, but I don't believe it's
10 necessary.

11 But with respect to one of the comments,
12 just generally by the defense, specifically by
13 Mr. Henriod, with respect to Krauss, I'm not sure
14 that that's right on point because it discusses
15 experiments that are allowed with admitted
16 exhibits. And I don't believe the bus is going to
17 be an exhibit that's admitted. But, anyway, I
18 just wanted to point that out.

19 MR. HENRIOD: Very well.

20 THE COURT: And then also, Mr. Kemp,
21 with respect to the variables that will affect the
22 visibility from any seat, they can't be addressed
23 on examination of witness and in closing argument.
24 And this will also be addressed in the Court's
25 instructions, that the jury is not seeing or

1 viewing the bus to decide what the witnesses could
2 see.

3 I have a proposed --

4 MR. KEMP: Judge, they drafted that and
5 just handed it to us.

6 THE COURT: I'm going to hand you what I
7 asked them to draw up and see if we can coordinate
8 this. This is mine. This is the Court's. Okay.
9 All right.

10 Just to read it into the record, what I
11 would like to read to the jury is, "The view of
12 the coach is not evidence. Rather, the purpose of
13 allowing the jury to view the coach is solely to
14 help you to better appreciate the evidence that is
15 received in court. Thus, the jury will be allowed
16 to examine the coach's exterior and interior, but
17 you will not be allowed to sit in any of the
18 chairs or touch any part of the interior of the
19 bus.

20 "Further, only one juror will be allowed
21 inside the coach at a time. As you know from the
22 admonishment I have read you repeatedly over the
23 past few weeks, you're not permitted to discuss
24 anything amongst yourselves until you retire to
25 deliberate.

1 "So there will be no speaking allowed
2 during your view of the coach. If you have any
3 questions, they must be directed to Marshal
4 Ragsdale, but he will only be able to repeat these
5 instructions and will not be able to answer any
6 questions about the case or the coach itself. You
7 may take your notebooks if you like.

8 "Once all jurors have had an opportunity
9 to view the interior of the coach, Marshal
10 Ragsdale will escort you back to the courtroom.
11 Once again, you're not to speak to anyone or
12 attempt any experiments during this process."

13 MR. BARGER: We're fine with that.

14 THE COURT: Would that work?

15 MR. KEMP: Your Honor, I would suggest
16 adding six words after "process," "such as
17 line-of-sight experiments," because that's what
18 we're concerned with.

19 MR. HENRIOD: I mean, here's the
20 practical problem of that, is coming in and
21 saying, "Well, I saw somebody hunch over and look
22 out the direction of the windshield; therefore, we
23 get a mistrial."

24 THE COURT: I'm not going to add that.
25 That's why I addressed your comments about the

1 Krauss case and Mr. Kemp's comments about that
2 issue. So I am going to read this.

3 MR. KEMP: Judge, I think this opens
4 wide open to them doing a line-of-sight analysis
5 as soon as they get in the bus. I think that's
6 exactly what they're all going to do. So I think
7 there's got to be some reference that they can't
8 be doing line-of-sight experiments.

9 MR. HENRIOD: Does that mean they can't
10 look in the direction of the windshield and think
11 about line of sight? I really don't know what
12 that means.

13 MR. KEMP: I'm willing to say "such as
14 line-of-sight experiments." I'm willing to live
15 with that.

16 MR. HENRIOD: Experiments?

17 MR. BARGER: Just say "experiments." I
18 mean, line of sight, Your Honor, I'm standing
19 here, with all due respect, I'm looking at the
20 Court. I mean, that's not an experiment. So I
21 just think you use the word "experiment."

22 THE COURT: I think I did.

23 MR. KEMP: Judge, now they're saying to
24 the Court that they think -- it's just the last
25 sentence.

1 THE COURT: Okay. Thank you. All
2 right. Go on, Mr. Kemp.

3 MR. KEMP: All I'm suggesting, and
4 Mr. Barger initially agreed, "Once again, you are
5 not to speak to anyone or attempt any experiments
6 during this process, such as line-of-sight
7 experiments." That's all I'm asking for. And I
8 think that is the primary area of concern here,
9 that they will do line-of-sight experiments.

10 MR. BARGER: And I didn't -- I said
11 that's fine here, but then I looked at Mr. Henriod
12 and we discussed it. So maybe I shouldn't have
13 said that out loud.

14 MR. HENRIOD: I mean, the problem is
15 line of sight, I don't know what that means. I
16 don't expect them to know what that means. And I
17 don't want to create a tar pit for us coming back
18 as to what somebody might or might not have been
19 thinking based on some expression they may or may
20 not have made. It's enough direction to say there
21 shouldn't be experiments.

22 MR. KEMP: I don't think so, Your Honor.
23 I mean, I'm not married to that term "line of
24 sight." "Such as visibility experiments."

25 THE COURT: I had another line that I

1 wrote earlier when I was going through this. Let
2 me see if I can find it.

3 This isn't set in stone. This was
4 something I was writing quickly back in my
5 chambers to see what you could put together, but
6 something along these lines. And I'm not great
7 with this either, but it's just a suggestion to
8 see if we can work together.

9 Something along the lines as, in this
10 regard, that they are not viewing it as a
11 depiction of what the witnesses saw that day.

12 By the way, it's just a suggestion.

13 MR. HENRIOD: I think if we put in
14 "necessarily," "necessarily saw that day." I
15 mean, anybody in the bus saw that same interior.

16 THE COURT: Right.

17 MR. KEMP: Judge, when we were arguing
18 this, you specifically said that you weren't going
19 to let them do, quote, no view experiments,
20 et cetera, unquote. All I'm asking is that the
21 jury be told they can't do view experiments
22 because that is the big concern here.

23 THE COURT: All right. View
24 experiments. I'm really trying to work with you
25 here. I want to understand how -- how that --

1 MR. KEMP: Judge, we've been talking
2 about right-side blind spots for four weeks. I
3 think the natural inclination of a juror, as soon
4 as they're inside that bus, is going to be to get
5 as close as they can to the seat and try to do
6 their own right-side blind spot experiment.
7 That's their natural inclination. And that's why
8 we objected to them coming into the bus. Okay.

9 I mean, they can certainly view from the
10 outside of the bus where the front passengers are
11 sitting, each one of them. They can view where
12 the driver's seat is. But as soon as they get in
13 and on that bus, they're going to try to do
14 line-of-sight experiments.

15 I mean, they've got to. We've been
16 talking about right-side blind spot for four weeks
17 and they're not going to start looking for that
18 when they get on the bus?

19 MR. BARGER: Judge, we're okay with
20 "view experiments."

21 THE COURT: With what?

22 MR. BARGER: With "view experiments."
23 That's fine.

24 THE COURT: You're sure?

25 MR. BARGER: Yes, Your Honor. That's

1 fine.

2 THE COURT: So "Once again, you are not
3 to speak to anyone or attempt any experiments,
4 including" --

5 MR. HENRIOD: "Any view experiments."

6 MR. KEMP: They can't be fussing around
7 with the rear tires, you know.

8 MR. HENRIOD: I agree.

9 MR. KEMP: So "experiments, including
10 view experiments."

11 MR. CHRISTIANSEN: Experiments including
12 view experiments.

13 THE COURT: All right. So in the last
14 line, it's going to read, "Once again, you are not
15 to speak to anyone or attempt any experiments,
16 including" -- no -- yes -- "including view
17 experiments" --

18 MR. CHRISTIANSEN: During this process.

19 THE COURT: -- "during this process."

20 MR. HENRIOD: That will work.

21 THE COURT: Will that work for everyone?

22 MR. BARGER: That's fine.

23 MR. CHRISTIANSEN: It does.

24 THE COURT: Jerry, you need these
25 instructions. I'm sorry I had you take the time

1 to do that.

2 MR. BARGER: Yours is a lot better than
3 theirs, to be honest. Can we take five, the
4 lawyers?

5 THE COURT: Yes, we need to. I need to.

6 THE MARSHAL: Is everyone going down?

7 THE COURT: Does everyone who needs to
8 have a copy of these instructions? Do you need a
9 copy?

10 MR. BARGER: I have a request. Don't
11 need to be on the record.

12 Our next witness, our expert,
13 Mr. Krauss -- Dr. Krauss -- can he leave? Because
14 he's not -- he can't go look at it. He's not
15 going to get on the stand today.

16 MR. KEMP: Sure.

17 THE COURT: Yes. Yes. Yes. Okay. All
18 right.

19 MR. HENRIOD: Your Honor, let me ask you
20 about jury instructions and verdict forms. I just
21 received plaintiffs' draft verdict form and
22 special instructions. So if you want us to meet
23 and confer before we give them to you, I don't
24 think we can meet the 5:00-this-evening deadline.

25 THE COURT: No, I know. But you have

1 them --

2 MR. HENRIOD: We have them. We can
3 submit them. And as long as Your Honor
4 understands that there hasn't necessarily been a
5 good-faith meet-and-confer.

6 THE COURT: No, I understand.

7 MR. HENRIOD: I thought we were going to
8 submit them, and then we were going to try to --

9 THE COURT: Right. That way I can at
10 least review them.

11 MR. HENRIOD: That's fine. And,
12 actually, Eric and I have been trying for a couple
13 days to reduce that.

14 THE COURT: Do you want a copy?

15 MR. TERRY: Yes.

16 THE COURT: When we come back, I don't
17 need to admonish them. I'm going to have the
18 marshal sworn in. I'm going to make the
19 instructions an exhibit.

20 I'm going to have the marshal sworn in,
21 and then we're going to walk down quietly. We're
22 not going to speak to anyone. And you can direct
23 us where the bus is, and we'll take one person at
24 a time.

25 THE MARSHAL: Okay.

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1 THE COURT: And I'll make sure --

2 THE MARSHAL: Am I reading this to them
3 or are you reading this to them?

4 THE COURT: I'm reading this to them.

5 What do the parties think about -- it's
6 not included now in my writing. It's part of the
7 paragraph where it says "including view
8 experiments."

9 MR. CHRISTIANSEN: I see that, Your
10 Honor.

11 THE COURT: Do you think it would be a
12 good idea for them to have this?

13 MR. TERRY: I don't think it's
14 necessary, Your Honor.

15 THE COURT: I just want to make sure
16 that they don't mess up.

17 MR. CHRISTIANSEN: I agree.

18 THE COURT: I don't want a mistrial
19 because they forgot this.

20 MR. CHRISTIANSEN: I think you telling
21 them sternly before we all go down would work,
22 Your Honor.

23 THE MARSHAL: Are they coming back in?
24 Because they have their pads here.

25 THE COURT: They have to come in because

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1 we have to swear you in and then we're going to
2 go. Let's take a five-minute break.

3 (Whereupon, a recess was taken.)

4 (Discussion off the record.)

5 THE COURT: What I said was this has now
6 become this. So for the record, the including --
7 the language that was incorporated in the Court's
8 instructions to the jury is now not handwritten.
9 It's all part of it. And I think they should have
10 it because I'm afraid they might forget and I
11 don't want a problem.

12 MR. HENRIOD: It's not a big deal. I
13 don't object.

14 MR. TERRY: No objection, Your Honor.

15 MR. KEMP: No objection, Your Honor.

16 THE MARSHAL: You want me to put them in
17 their seats now?

18 (Discussion off the record.)

19 THE MARSHAL: They're ready to go
20 whenever you are, Judge.

21 MR. KEMP: Do we need more copies?

22 THE COURT: We're going to give -- also,
23 what is the quickest way to get there? Should we
24 take the back elevator or is there going to be --

25 THE MARSHAL: Who's all going?

1 THE COURT: I'm sorry?

2 THE MARSHAL: How many people is going?
3 I think it will only take 15, 16 people maybe.

4 MR. CHRISTIANSEN: Mr. Marshal, we're
5 just going to the south entrance and wait for you
6 there.

7 MR. BARGER: I was under the impression
8 that we would go down before the jury got there
9 and stand so we were out of the way. Is that okay
10 with you?

11 THE COURT: That's fine. I was
12 wondering if you were in the same location.

13 MR. CHRISTIANSEN: I'm fine with the
14 marshal taking the jury down the back elevators
15 and we'll go in the front elevators.

16 THE COURT: I plan on attending too, and
17 I think you need to go.

18 You want to bring them, please, Jerry.

19 THE MARSHAL: All rise.

20 (The following proceedings were held
21 in the presence of the jury.)

22 THE MARSHAL: All the jurors are
23 present, Your Honor.

24 THE COURT: Okay. Thank you.

25 THE MARSHAL: Please be seated. Come to

1 order.

2 THE COURT: Do the parties stipulate to
3 the presence of the jury?

4 MR. CHRISTIANSEN: Yes, Your Honor.

5 MR. BARGER: Yes, Your Honor.

6 THE COURT: Ladies and gentlemen, I'm
7 going to read these instructions to you, and you
8 each have a copy. They're completely typewritten.
9 We are now going to go view the bus, okay, the
10 coach. Excuse me. The coach. So I'm going to
11 read this to you. And then, let's see, we're
12 going to swear in Marshal Ragsdale, and you will
13 follow him and we will meet you there.

14 This is really important that you follow
15 these directions, okay, closely.

16 "The view of the coach is not evidence.
17 Rather, the purpose of allowing the jury to view
18 the coach is solely to help you to better
19 appreciate the evidence that is received in court.
20 Thus the jury will be allowed to examine the
21 coach's exterior and interior, but you will not be
22 allowed to sit in any of the chairs or to touch
23 any of the interior of the bus.

24 "Further, only one juror will be allowed
25 inside the coach at a time. As you know from the

1 admonishment I have read you repeatedly over the
2 past few weeks, you are not permitted to discuss
3 anything amongst yourselves until you retire to
4 deliberate, or with anyone else.

5 "So there will be no speaking allowed
6 during your view of the coach. If you have any
7 questions, they must be directed to Marshal
8 Ragsdale, but he will only be able to repeat these
9 instructions and will not be able to answer any
10 questions about the case or the coach itself. You
11 may take your notebooks with you if you like.

12 "Once all the jurors have had an
13 opportunity to view the interior of the coach,
14 Marshal Ragsdale will escort you back to the
15 courtroom.

16 "Once again, you are not to speak to
17 anyone or attempt any experiments, including view
18 experiments, during this process."

19 Do you all understand that? Okay. Very
20 good.

21 Will you please swear Marshal Ragsdale
22 in.

23 THE COURT CLERK: You do solemnly swear
24 that you will well and truly perform the duties of
25 the conductor of the premises in this case, that

1 you will not allow anyone to speak to the jury
2 concerning this case, nor do so yourself, except
3 to point out physical objects upon the premises as
4 directed by the Court, so help you God."

5 THE MARSHAL: I do.

6 THE COURT CLERK: Thank you.

7 THE COURT: Please lead the jury to the
8 coach.

9 THE MARSHAL: All rise. You guys, bring
10 your pads and your belongings with me. I'm going
11 to leave the courtroom open. Bring your pads.
12 Everybody bring your pads.

13 (Whereupon, a recess was taken.)

14 THE MARSHAL: All rise.

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

17 THE MARSHAL: All the jurors are
18 present, Your Honor.

19 THE COURT: Okay. Parties stipulate to
20 the presence of the jury?

21 MR. CHRISTIANSEN: Yes, Your Honor.

22 MR. ROBERTS: Yes, Your Honor.

23 THE COURT: Ladies and gentlemen, I've
24 asked you back so I can admonish you for this
25 evening. We're going to start tomorrow at 9:30.

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

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

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

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

25 Have a great evening. See you tomorrow

1 at 9:30.

2 THE MARSHAL: All rise.

3 (The following proceedings were held
4 outside the presence of the jury.)

5 THE COURT: Anything else for this
6 evening?

7 MR. ROBERTS: One point, Your Honor. As
8 I informed you, the guy has the paycheck waiting.
9 I don't know if anyone has told him.

10 THE COURT: Did you tell Mr. Lennon
11 where he can pick up his paycheck?

12 THE MARSHAL: No. He did inform me that
13 it was all taken care of.

14 THE COURT: Okay. Very good. Thank
15 you. Have a great evening.

16 MR. PEPPERMAN: Judge, I have one other
17 thing. I don't know if it was addressed before I
18 got here, but the proposed jury instructions, I
19 have copies with me now.

20 Mr. Henriod and I met -- or spoke
21 earlier today. And we went through the stock
22 instructions and agreed on the general
23 instructions. We had some -- a few disputes
24 relating to the contents of some of the
25 instructions.

1 So based on my understanding of our
2 conversation, and Mr. Henriod has not had a chance
3 to confirm it yet, I put all the instructions
4 together that we've agreed should be given. I've
5 highlighted the points in the instructions where
6 we have our disputes. And I summarize them in a
7 table. I can give these to the Court now -- I
8 know you wanted them today by 5:00 -- with the
9 caveat that Mr. Henriod may go through and I may
10 have misunderstood an agreement, so there might be
11 minor changes to that extent.

12 THE COURT: That's fine.

13 MR. PEPPERMAN: There may be some
14 supplementation. We'll continue to work together
15 as well.

16 THE COURT: That's not a problem.
17 Whatever it is, that's fine. This way, I can
18 start studying them. Better now.

19 MR. ROBERTS: That sounds good. We'd
20 like you to have them now.

21 THE COURT: Thank you.

22 MR. PEPPERMAN: And I also have
23 plaintiffs' proposed special jury instructions
24 again, with the caveat we'll continue working
25 together. There may be some additions or

1 supplements and then a plaintiffs' proposed
2 verdict form. Same caveat, that we'll continue to
3 work together and there might be changes.

4 MR. HENRIOD: I'm doing an email blast
5 to the world and the Court with ours.

6 THE COURT: Perfect. Thank you. I hope
7 you all have a great evening.

8 MR. BARGER: Thank you, Your Honor.

9 MR. ROBERTS: Thanks so much, Your
10 Honor.

11 (Thereupon, the proceedings
12 concluded at 5:26 p.m.)

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

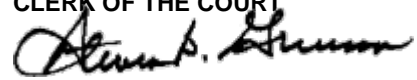

/S/ Kimberly A. Farkas, RPR

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1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

7 KEON KHIABANI and ARIA)
8 KHIABANI, minors by and)
9 through their natural mother,)
10 KATAYOUN BARIN; KATAYOUN)
11 BARIN, individually; KATAYOUN)
12 BARIN as Executrix of the)
13 Estate of Kayvan Khiabani,)
14 M.D. (Decedent) and the Estate)
15 of Kayvan Khiabani, M.D.)
16 (Decedent),)

Plaintiffs,)

vs.)

17 MOTOR COACH INDUSTRIES, INC.,)
18 a Delaware corporation;)
19 MICHELANGELO LEASING, INC.)
20 d/b/a RYAN'S EXPRESS, an)
21 Arizona corporation; EDWARD)
22 HUBBARD, a Nevada resident, et)
23 al.,)

Defendants.)

24 **REPORTER'S TRANSCRIPTION OF PROCEEDINGS**

25 BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV

DATED WEDNESDAY, MARCH 14, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

TRANSCRIBED BY: KRISTY L. CLARK, NV CCR No. 708

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3 Kayvan Khiabani, M.D.:

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I N D E X

| Witness: | Direct: | Cross: | Redirect: | Recross: |
|--------------------|---------|--------|-----------|----------|
| Captain Dale Horba | 76 | 102 | 119, 126 | 122, 128 |
| Kevan Granat | 134 | 223 | | |

E X H I B I T S

| Number: | Marked: | Admitted: | Joint: |
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| 75 | | 79 | |
| 574-001 | | 150 | |
| 478 | | 183 | |
| 573-001 | | 220 | |

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1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 14, 2018;

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P R O C E E D I N G S

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THE MARSHAL: All rise. Department 14 is now
in session with the Honorable Adriana Escobar
presiding.

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11

THE COURT: Good morning. I apologize for
being tardy.

12

13

THE MARSHAL: Please be seated. Come to
order.

14

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17

THE COURT: All right. Good morning.

MR. ROBERTS: Good morning, Your Honor.

We have a couple of issues to cover with
regard to the next witness.

18

19

20

It's Dr. David Krauss.

THE COURT RECORDER: Excuse me. Are we ready
to go on the record?

21

22

23

24

25

THE COURT: Yes.

THE COURT RECORDER: Your Honor, we are on.

THE COURT: Okay. Thank you.

Go ahead, Mr. Roberts.

MR. ROBERTS: Okay. Fantastic. Lee Roberts,

1 Darrell Barger, and Mike Terry for defendant MCI. Our
2 first witness this morning will be Dr. David Krauss,
3 our human factors expert.

4 THE COURT: Yes.

5 MR. ROBERTS: There is an objection from the
6 plaintiff to a couple things that I wanted to go over
7 with Mr. Krauss on his direct.

8 The first is an opinion which he described
9 both in his report --

10 MR. KEMP: Your Honor, should we have
11 Mr. Krauss step out while we talk about his testimony?

12 THE COURT: Yes.

13 MR. KEMP: Okay.

14 THE COURT: Thank you.

15 MR. ROBERTS: So the first issue, Your Honor,
16 on Mr. Krauss -- and he has left the courtroom, for the
17 record.

18 The first issue was addressed in his report
19 and in his deposition. And it reflects -- and it's
20 related to his opinion on warnings. The plaintiffs, as
21 you know, claim that there should have been a warning
22 of the air blast. In summary, his opinion is that,
23 based on the experts for the plaintiffs, the danger is
24 within 3 feet of the bus. So while their expert offers
25 no suggestion of what the appropriate warning would be,

1 he surmised that the -- the most logical warning would
2 be to stay more than 3 feet away, pedestrians and
3 bicyclists; in this case, a bicyclist.

4 So his opinion is there's already a Nevada
5 law that requires bus drivers and all drivers to stay
6 3 feet away from a bicyclist. So, therefore, the most
7 appropriate warning that would be given would be
8 redundant and unnecessary and not even as effective
9 because laws with criminal penalties are known to be
10 much more effective than manufacturers' warnings.

11 Therefore, any warning by MCI would be
12 redundant, unnecessary, and less effective than the law
13 already in place. And they have objected to -- to that
14 testimony.

15 MR. KEMP: Judge, first of all, as
16 Mr. Roberts --

17 THE COURT: You need to speak louder. I'm
18 sorry.

19 MR. KEMP: First of all, as Mr. Roberts
20 accurately said, our expert did not give an opinion
21 that the warning should be that they should stay 3 feet
22 away. That was not the testimony by our expert.

23 Our expert merely said that they should give
24 some kind of warning of the air blast, not that it
25 should be 1 foot away, not that it should be 3 feet

1 away, not that it should be 5 feet away, just a warning
2 of the air blast. Mr. Roberts has constructed this
3 3-foot thing solely out of thin air so he can try to
4 violate the Court's motion in limine.

5 He wants to get this expert to testify that
6 that bus driver was negligent because either he didn't
7 know or didn't comply with Nevada law that he says has
8 criminal penalties requiring 3 feet clearance. So,
9 clearly, what they're trying to do is violate motion in
10 limine No. 1 on contributory negligence. And this
11 expert's report is replete with those kind of
12 statements.

13 "The training's bad. The driver should have
14 seen this. The driver should have done that." I mean,
15 this -- we were going to ask for a sidebar because we
16 were very concerned about this entire area. If you
17 take a look at his expert report and you throw out the
18 driver negligence, there's basically nothing left -- a
19 little bit on proximity sensors, but nothing more than
20 that left.

21 So this is the expert that I am most
22 concerned about them violating the motion in limine.
23 And you've got to remember, Mr. Roberts already
24 violated the motion in limine once in this trial and we
25 had to have the curative instruction that the jury's

1 not to consider the negligence of the driver and that
2 does not absolve the defendant of liability.

3 I think we're going to be asking for another
4 curative instruction, probably stronger when we get
5 into this; but, in any event, there should be no
6 testimony whatsoever about Nevada law. There should be
7 no testimony whatsoever that Nevada law requires 3 feet
8 of clearance. There should be no testimony whatsoever
9 that a warning about 3 feet is or is not adequate
10 because there was no testimony from plaintiffs about a
11 warning concerning 3 feet.

12 If he wants to say, oh, I don't think an air
13 blast warning is necessary for whatever reason, I'm
14 fine with that. Okay? But that's not what they want
15 to do, and that's not what he did in his deposition.

16 His deposition was a total total "point the
17 finger at the driver" event, as was his expert report.
18 So, Your Honor, we would vigorously object to this as
19 being a direct violation of motion in limine 1.

20 MR. ROBERTS: Your Honor, Dr. Krauss's report
21 was authored in October of 2017, long before any
22 motions in limine were issued. And the -- the motion
23 in limine prevents us from arguing that Mr. Hubbard was
24 negligent for violating Nevada law. We're not talking
25 about the portion of Nevada law that would require him

1 to change lanes, which he apparently violated, although
2 there is an interpretation of the statute that he
3 didn't have to change lanes because the bicycle was not
4 occupying his lane but a bicycle lane, and, therefore,
5 he was already in the next lane.

6 But, nevertheless, we aren't getting into
7 that alleged violation. What Dr. Krauss wants to talk
8 about is his view that the warning, based on his review
9 of the evidence, that would be most appropriate is to
10 stay more than 3 feet away from bicyclists based on
11 their experts that say, within 3 feet of the vehicle,
12 the air blast would have a certain force exerted on a
13 bicyclist.

14 And then he's going to say not only is there
15 already a Nevada law requiring a 3 feet of distance,
16 but Mr. Hubbard says he was maintaining a 3-feet
17 distance. We're not violating -- we're not claiming
18 the driver was negligent. In fact, he's going to point
19 out that Mr. Hubbard testified, as he read his
20 deposition, that he was attempting to maintain a 3-foot
21 distance, a 3- to 4-foot distance.

22 So Mr. Hubbard is complying with the law.
23 There is a law. And the most appropriate warning is
24 therefore unnecessary and redundant. We are not
25 violating any motion in limine.

1 And I don't believe the Court actually found
2 I violated a motion in limine when I was questioning
3 Mrs. Witherell and asked her, "If the driver was paying
4 attention, would you be able to see a bicyclist in
5 front of the bus?" I believe that was the scenario.

6 And I would point out, and the Court noted,
7 that Mr. Christiansen used the exact same line of
8 questioning regarding inattention, if a driver was
9 paying attention, later in the trial. So to the extent
10 there was any harm in my using that analogy about a
11 different driver in a different situation,
12 Mr. Christiansen used the same language, therefore
13 making any comment I made harmless on that point.

14 MR. KEMP: Judge, how can saying that there's
15 a Nevada law that the driver in this case violated,
16 that's negligence per se? How can that be anything
17 that pointing the finger at the driver and claiming
18 that he's negligent? It can't be, Your Honor. And,
19 again, there was no testimony from the plaintiffs
20 presented at this trial that there should be a warning
21 to stay away from 3 feet.

22 If you remember, when I presented Dr. Cunitz,
23 I didn't even ask him what type of warning to give. I
24 asked him should they give a warning, and he said yes.
25 Counsel inquired of it a little deeper, saying you

1 didn't design one and you have no model warning.
2 Counsel asked him that question. But Dr. Cunitz, on
3 either direct or cross -- and he's our warnings
4 expert -- never said that the warning should be stay
5 3 feet away.

6 That is something that Mr. Roberts is making
7 up out of thin air because he wants to attach it to
8 this Nevada law so he can suggest to the jury that the
9 bus driver somehow violated or may have violated Nevada
10 law. And that is totally improper because that's
11 pointing the finger at the driver, and that's a direct
12 violation of motion in limine No. 1, contributory.

13 And he says, "Oh, Judge, we didn't know that
14 motion in limine No. 1 would be granted at the time we
15 did the expert reports." The Young's Machine case that
16 says contributory negligence is not a defense came out,
17 I believe, in 1988. So that's not new law. If there
18 had been a change of law in the last six months, I
19 could see Mr. Roberts saying, "Oh, gee, Judge, we
20 didn't know it wouldn't be allowed in this trial to
21 point the finger at the driver." But they knew what
22 Young's Machine was.

23 In fact, I attached briefing where
24 Mr. Roberts argued this exact same point in front of
25 Judge Williams. And one of the cases discussed there

1 was Young's Machine. So he knew coming into this
2 trial, or at least he should have known, that he wasn't
3 going to be able to point the finger and argue
4 contributory negligence as a defense because the law in
5 Nevada is crystal clear.

6 Contributory negligence is not a defense in a
7 products case. They can't argue that to the jury.
8 They can't offer evidence to the jury. Certainly they
9 can't say, oh, gee there's a Nevada law saying stay
10 3 feet away, so, ladies and gentlemen of the jury,
11 maybe you should consider whether or not the driver
12 violated in this case.

13 For all those reasons, Your Honor, this
14 area -- and I'm kind of surprised they even called this
15 expert in the first place. You know? This expert is
16 nothing more than an attempt to violate the motion in
17 limine.

18 MR. ROBERTS: Your Honor, Mr. Kemp is still
19 setting up a straw man. We are not claiming and have
20 never claimed and have not offered any evidence that
21 Mr. Hubbard ever violated Nevada law requiring a 3-foot
22 distance between the bus and the cyclist. If you
23 recall, the bus -- the bike lane is 4-foot-6 wide. The
24 middle of the bike lane is where Ms. -- the bicyclist
25 put -- Ms. Kolch -- Samantha Kolch, she puts him in the

1 middle of the bike lane.

2 If you recall, our expert Mr. Rucoba had a
3 reconstruction, and he had -- as they entered the
4 intersection, he had the bus all the way over to the
5 left side of its lane. And there's way more than
6 3 feet. The evidence is that the collision took
7 place -- and it's undisputed; their expert agrees --
8 somewhere between 5 and 6 feet outside the bicycle lane
9 is where this collision took place.

10 So no one has claimed that Mr. Hubbard moved
11 into the bicycle lane or somehow broke that law
12 requiring 3 feet separation. The evidence is that
13 Mr. Hubbard was moving away from the bicyclist as the
14 bicyclist was coming toward him and collided with him
15 5 feet outside the bicycle lane. There is no evidence
16 that he violated the law, so how could we be attempting
17 to offer evidence that he did?

18 MR. KEMP: No evidence --

19 MR. ROBERTS: We're saying that the most
20 appropriate warning here -- which I didn't make up;
21 this was my expert's opinion -- that, based on his
22 review of their experts, the most appropriate warning
23 to give would be maintain 3 feet, and there's already a
24 law.

25 MR. KEMP: No evidence that he was within

1 2 1/2 or 3 feet other than Mrs. Bradley's testimony
2 that we played yesterday, other than Mrs. Kolch's
3 testimony that we played yesterday? That's the
4 evidence of how close he was when the wobble started,
5 which, as you know, is the plaintiffs' theory as to how
6 the accident started in this case.

7 They can't turn around and say, "Oh, it's
8 6 feet away," and ignore the fact that there was a
9 potential violation by the driver at the time the
10 wobble started. And that's what they want to suggest
11 to the jury, Your Honor.

12 And I'm happy that he has admitted on the
13 record that the true measurement of the bike lane is
14 4 feet, 6 inches, because his expert told us yesterday
15 it was 4 feet. And I asked him about it. And, you
16 know, I was very frustrated that -- that there would be
17 such a wrong fact set forth for the jury, completely
18 wrong. So I'm happy that he's admitted it.

19 But the issue in this case is really whether
20 contributory negligence is a defense or it isn't a
21 defense. And we know it's not a defense. So what
22 they're suggesting to the Court is they can have an
23 expert testify that there was no need for a 3-foot
24 warning because the law said 3 feet when the plaintiffs
25 have not argued at any point for a 3-foot warning.

1 Dr. Cunitz just said they should give a
2 warning. And we've argued during the case to the jury
3 that it should be a warning about the air blast danger.
4 That's what I argued to the jury. Okay? Your Honor,
5 that's what we've argued consistently throughout the
6 case.

7 So Mr. Roberts is just trying to come up with
8 some way to argue that we are doing something
9 different, arguing a 3-foot warning, in order to get
10 this Nevada law in. And, again, the sole reason he
11 wants this Nevada law in is so the jury thinks that,
12 when Mrs. Bradley said he's within 2 1/2 feet and that
13 caused the wobble and Mrs. Kolch says he's within 2 1/2
14 to 3 feet, that he's violated Nevada law. That's the
15 only reason they want this in, Your Honor.

16 MR. ROBERTS: Your Honor, on the issue of
17 Ms. Bradley of 2 to 3 feet, that's not inconsistent
18 with our position that it was more than 3 feet. One of
19 the very opinions that Mr. Krauss is going to give is
20 that eyewitnesses' estimates of distance are
21 notoriously unreliable and you have to rely on the
22 physical evidence.

23 And the fact that she says he was in the bike
24 lane, just like Ms. Kolch, and if the bus was where it
25 was supposed to be in the bus lane and the bike was in

1 the bike lane, they had to be more than 3 feet apart.
2 And the fact that she just gives an off-the-cuff
3 estimate of 2 to 3 feet, we're not arguing there's any
4 violation; we're claiming that's inaccurate and that he
5 wasn't within 2 feet.

6 MR. KEMP: You know, Your Honor, first of
7 all, an expert should not be allowed to evaluate the
8 testimony of a witness, much less two eyewitnesses that
9 said it was 2 1/2 to 3 feet. He didn't offer that
10 opinion in his report that Mrs. Bradley's testimony was
11 inaccurate, that Ms. Kolch's testimony was inaccurate.

12 And to call Mrs. Bradley's testimony an
13 off-the-cuff statement, that is totally ridiculous,
14 Your Honor. She was grilled on that for 20 to 25 pages
15 at her deposition, and then at trial she was grilled on
16 it. I mean, we've got at least five different clips
17 from her saying 2 1/2 to 3 feet. Kolch, they never
18 even questioned her testimony on that point.

19 So we have -- once again, we have a situation
20 where the defendant doesn't like the real facts of the
21 case. You know, they don't like Mr. Plantz -- or they
22 like Mr. Plantz's testimony that they know is wrong,
23 that the bike is over by the sidewalk. They don't like
24 Bradley and Kolch's testimony that's it's 2 1/2 to
25 3 feet. So rather than address the actual facts of the

1 case, now they want to call expert witnesses to say the
2 witnesses are wrong?

3 You can't do that, Your Honor. You can't
4 have experts evaluate the credibility of witnesses on
5 the stand. And they made that exact same objection
6 yesterday, if you recall, when I asked Mr. Rucoba,
7 well, there's four witnesses this way and one that,
8 they stood up and they ran up to the bench and they
9 said, "Judge, Mr. Kemp is trying to get his expert to
10 evaluate the testimony of the witnesses. That is
11 forbidden."

12 Okay. Well, if it's forbidden for me, Your
13 Honor, it's forbidden for Mr. Krauss to say, "Oh, these
14 witnesses are all wrong." Forbidden.

15 MR. ROBERTS: Mr. Krauss is not evaluating
16 the credibility of witnesses. He's not implying
17 anyone's lying. He's talking about the field of human
18 factors. And one of the things that they have derived
19 from scientific study is that people are not good at
20 estimating distances and time durations in -- when
21 eyewitnessing accidents. And, therefore, you should
22 rely more on the physical evidence than eyewitness
23 testimony of distances. That's the -- that's a human
24 factors opinion that comes in all the time.

25 MR. KEMP: Your Honor, I don't know which

1 issue we want to address first, the Nevada law
2 violation or the expert credibility one, but now
3 there's two issues here. This is going to be a tough
4 witness, Your Honor.

5 MR. CHRISTIANSEN: There's more too, Judge,
6 because he's got additional opinions he didn't possess
7 at his depo.

8 THE COURT: Right. First, I know I've seen
9 it somewhere in my readings, but please tell me that
10 it's NRS or ...

11 MR. ROBERTS: The -- on the --

12 THE COURT: The 3 feet.

13 MR. ROBERTS: Yes.

14 MR. CHRISTIANSEN: And, Your Honor, while the
15 Court is considering this, you may just want to
16 understand this was his answer, Mr. Krauss's answer, in
17 his deposition. It's not that he got it from our
18 expert; he says the laws, the rules, the training
19 already establish the quote/unquote corrective behavior
20 that would be prescribed by the warning. That's at
21 page 30 of his deposition. So he doesn't say, "I got
22 this from plaintiffs' experts"; he says, "I got it from
23 the law."

24 MR. KEMP: Judge, I think the clincher is
25 Mr. Hubbard testified he didn't know about the law at

1 the time of his deposition. That question was not
2 asked at trial. At the time of his deposition, he said
3 he didn't know about this 3 feet law.

4 So, really, what they're -- what they're
5 doing is they're trying to show negligent training is
6 really where this -- where this is going to go to. And
7 that's what his report is addressed to, the negligent
8 training.

9 MR. ROBERTS: So, first of all, the law, Your
10 Honor, NRS 484B.270 effective in 2011.

11 And then I think Mr. Kemp is confusing a
12 statement made by Dr. Krauss with regard to knowing
13 Nevada law and what warnings are required versus
14 knowing the law on bicyclists and vehicles maintaining
15 a distance from bicyclists.

16 And that was addressed several times in his
17 deposition, the first time on page 20, where he says:

18 "ANSWER: Well, so -- and, again, I'm not
19 an aerodynamics guy, but it is my
20 understanding -- and I don't think I need to be
21 an expert to say this -- that the more
22 clearance you have between a bus and a cyclist,
23 the less the hazard is, that quote/unquote
24 hazard. So to the extent, again based on your
25 expert, who effectively said at 3 feet the

1 hazard is mitigated, providing a warning saying
2 'stay 3 feet away,' when that's what
3 Mr. Hubbard is doing, it's what he understood
4 to be the law, it's what the law was, that's
5 not going to change anything, that warning."

6 And he addresses the 3-foot law several times
7 in his deposition and offered this opinion both in his
8 deposition and in his report.

9 MR. KEMP: Your Honor, I did not mean to
10 say -- if I did, I misspoke. I did not mean to say
11 Mr. Krauss didn't address the 3 feet law. What I said
12 was that Mr. Hubbard, when we took his deposition, said
13 he didn't know about the 3-foot law. He said he found
14 out about it earlier that week when he was prepping for
15 the deposition.

16 So what they want to argue to the jury is
17 that they should be able to get into this 3-foot
18 statute to show that a warning wouldn't have been any
19 good to Mr. Hubbard because he already knew about the
20 3-foot statute, when, in fact, he did not know about
21 the 3-foot statute.

22 That -- it just doesn't make any sense, Your
23 Honor. And it's all directly targeted towards driver
24 negligence. That's what they're doing. That's why --
25 that -- excuse me.

1 MR. CHRISTIANSEN: Sorry.

2 MR. KEMP: That's why Mr. Barger had the
3 expert accident reconstructionist play the video
4 yesterday showing the long gaps between where cars were
5 coming, so they could get up and argue to the jury at a
6 later point, "Well, jeez, there's no other
7 distractions, the lane was wide open. He should have
8 moved over. The driver was negligent."

9 That was the whole reason for that exercise,
10 Your Honor. And I didn't object because I couldn't
11 think of an appropriate ground. But that was the
12 reason.

13 What they're doing is they're trying to set
14 up a driver negligence defense even though that's been
15 prohibited by the Court. And to be as blatant as to
16 suggest that they could have the expert say, "Oh,
17 there's a Nevada law requiring 3 feet of clearance, and
18 that doesn't -- that means there's no warning," and try
19 to sneak it in that way, I mean, that is really
20 blatant, Your Honor, and that's just inappropriate.

21 MR. ROBERTS: Could I have the ELMO? Is it
22 on?

23 MR. BARGER: I was going to say something
24 while he's doing that. I respect Mr. Kemp reading my
25 mind, but that's not the reason I'm playing the video,

1 because there's other obvious reason.

2 MR. CHRISTIANSEN: Judge, just to support
3 Mr. Kemp's --

4 THE COURT: Just a moment.

5 Go ahead, Mr. Christiansen.

6 MR. CHRISTIANSEN: Just to support what
7 Mr. Kemp is telling you about the intention of
8 Dr. Krauss, throughout Dr. Krauss's report -- I mean,
9 it's seven or eight times -- he opines that Mr. Hubbard
10 was aware of and saw Dr. Khiabani the entire time. In
11 his deposition -- and we know that's not true; right?
12 Judge, we know Mr. Hubbard has hit the stand. He said,
13 "I saw him on Charleston. I saw him when I turned.
14 And then from the cutout -- the municipal cutout -- I
15 didn't see him again until the intersection."

16 However, Krauss says, "I don't believe that.
17 That's not true." He says it in his report several
18 times. And then when asked in his deposition, Mr. Kemp
19 says to him, "Well, he doesn't say what he doesn't
20 recall seeing; he says, quote, right, he didn't see
21 him." And that's -- "him" is Mr. Hubbard.

22 And here's his answer. It's illustrative of
23 what they intend to do today.

24 "ANSWER: I understand that. I deal with
25 this in a lot of my cases; right?"

1 Which is what Mr. Roberts told you he was
2 going to say.

3 "So I've done an objective analysis of the
4 visibility out of the front of the bus. We know the
5 bike would have been visible during virtually that
6 entire time. And we also know he didn't impact him
7 during that time. So there's a very good chance that
8 he did see Dr. Khiabani; he just doesn't recall it.
9 And I would expect him to -- I wouldn't expect him to."

10 So now he is calling Mr. Hubbard, you know,
11 incredible. That's vouching. He can't do that. It's,
12 like, evidence 101. You cannot say what somebody said
13 under oath is not true because you've divined some fake
14 scientific principle to disprove it.

15 THE COURT: Mr. Roberts, one second, please.

16 Go on.

17 MR. ROBERTS: So Mr. Kemp doesn't always feel
18 constrained by the facts; he just made up the fact that
19 the witness said he became aware of the law just prior
20 to his deposition. Here's his report, which was
21 issued --

22 MR. KEMP: No, not Dr. Krauss; I'm talking
23 about Mr. Hubbard.

24 MR. ROBERTS: Ah.

25 MR. KEMP: Not Dr. Krauss; Mr. Hubbard

1 testified he didn't know about the law and his
2 attorneys told it to him a couple of days before.

3 And, you know, what's really ironic, Your
4 Honor, is, at that point in time, MCI and Michelangelo
5 were getting an expert to say that he didn't even
6 violate Nevada law. At that point in time, they wanted
7 to defend the driver because they were holding hands in
8 the case, and so they were going to have an expert say,
9 like Mr. Roberts just said, that, oh, well, that law
10 doesn't apply to right lanes next to bike lanes; that
11 only applies to right lanes next to right lanes.

12 So it's -- so they were taking the
13 position -- and, frankly, to be candid with the Court,
14 I think they were totally wrong -- but they were taking
15 the position that there was no Nevada law violation in
16 this case. And now they want to suggest to the jury
17 that, oh, this Nevada law was so crystal clear, the one
18 they said didn't even apply to right turn lanes and
19 bike lanes. They want to suggest to the jury that this
20 law is so crystal clear that, since Mr. Hubbard didn't
21 heed the law that he didn't know about, he wouldn't
22 have heeded an air blast warning, despite the fact he
23 testified in his deposition he would and he testifies
24 on the witness stand that he heeds instructions.

25 And we didn't -- we didn't delve into this,

1 Your Honor, because we knew we were getting into a
2 dangerous area. We asked one simple question, "Would
3 you heed appropriate instructions?" And that was it.
4 We left it at that with Mr. Hubbard.

5 MR. ROBERTS: Although Mr. Hubbard did say he
6 was informed of the law by his counsel, he also said
7 that he tried to maintain 3 to 4 feet of distance
8 between bicyclists. And that's what he said he tried
9 to do, that's what would be appropriate to avoid the
10 air blast based on Mr. Krauss's opinion on the
11 appropriate warning. And he was already doing it, and
12 the law already required it.

13 The idea that they weren't violating the law
14 dealt with moving over to the left-hand travel lane and
15 whether or not, if there is a separate lane for a
16 bicyclist, whether that applies because the bicyclist
17 is already in its own lane, you're in your own lane.
18 No one ever claimed that he didn't have to maintain 3
19 to 4 feet. And nobody from our side has ever claimed
20 he violated a 3-foot clearance law. They're conflating
21 that with the law saying you have to move over to the
22 left-hand lane if it's available.

23 And yes, the investigating officer on this
24 case, who was deposed and who authored this report for
25 Metro, also felt that there was no law requiring him to

1 move to the left-hand lane because there was a bicycle
2 lane and Dr. Khiabani was in it. So it's not some idea
3 that we cooked up with Michelangelo; it's the opinion
4 of the investigating officer.

5 Now, that's not admissible, but that's not an
6 issue in this case. Nobody is claiming Hubbard was
7 negligent for failing to move over to the left-hand
8 lane in this case.

9 MR. KEMP: Well, I agree with him, Your
10 Honor. Hubbard's negligence should not be an issue in
11 the case.

12 THE COURT: I'm sorry?

13 MR. KEMP: Hubbard's negligence should not be
14 an issue in the case. You've already granted a motion
15 in limine on this.

16 THE COURT: Mr. Hubbard's negligence cannot
17 be an issue --

18 MR. KEMP: It cannot be an issue.

19 THE COURT: -- because of Nevada law.

20 MR. KEMP: Right.

21 MR. ROBERTS: Yes.

22 MR. KEMP: And so this attempt to, you know,
23 nip at the corners of this or get in the middle of this
24 is what really -- really what they're doing, Your
25 Honor. I think it's totally inappropriate.

1 THE COURT: Is there anything else?

2 MR. CHRISTIANSEN: Yes, Judge.

3 This morning Mr. Roberts, I think at 7:45,
4 sent me a PowerPoint slide of what he intends to use
5 with Mr. Krauss. Included in that slide is a Bendix
6 pamphlet for the side sensor proximity sensor.

7 Mr. Krauss had no opinions about proximity sensors in
8 his deposition, no opinions in his report.

9 And he's asked at page 69, "Okay. Let's
10 stick with the right front proximity sensor. So what
11 you've told me is you don't know whether it extends the
12 range 10, 15, 20 feet? You don't know?"

13 There's an objection.

14 He then says, "I don't know. I would -- I
15 would defer to others on that. I don't know how
16 they're designed."

17 So it's inappropriate for a guy who doesn't
18 have proximity sensor opinions to now say, "Well, I do
19 have proximity sensor opinions, and they wouldn't have
20 worked anyways."

21 MR. ROBERTS: Your Honor, I would draw your
22 attention to the expert's report at page 7, where
23 there's a section on proximity sensors and
24 perception-reaction time.

25 The second paragraph in his report,

1 plaintiffs' expert Mr. Cohen included a figure
2 schematically depicting how such a sensor would work.
3 In that figure, he shows a sensor alerting a driver
4 such as Mr. Hubbard to the presence of a cyclist ahead
5 of the bus.

6 That's the very -- one of the very exhibits
7 that I'm proposing to use. That's been admitted into
8 evidence. And the Court and the jury have seen it.
9 And he gives opinions on this and that it would not
10 have added any additional information to what was
11 already clearly visible to Mr. Hubbard with his eyes.
12 And, therefore, the proximity sensor would not have
13 avoided this accident in his opinion.

14 This is something he gave in his
15 deposition -- I mean -- excuse me -- in his report.
16 And in his deposition, he admitted that he wasn't an
17 expert on the technical aspects of proximity sensors,
18 but he can comment that, based on the sight lines that
19 he observed and his knowledge of human factors, that a
20 proximity sensor that did the things that plaintiffs'
21 expert say could be done would not have been effective
22 in avoiding the collision.

23 MR. CHRISTIANSEN: Judge, here's his answer.
24 When asked about a proximity sensor and range, "I don't
25 know. I would defer to others on that. I don't know

1 how they're designed."

2 How does he say "I don't know anything about
3 them" in his deposition and then show up with a canned
4 opinion that he's going to get up and offer to the
5 jury? I mean, that's trial by ambush. You can't do
6 that.

7 THE COURT: His report was authored?

8 MR. CHRISTIANSEN: Before the deposition.

9 I'm sorry, Your Honor. Before the
10 deposition. His report was offered on October the
11 16th; the deposition was conducted on 11/9, so about
12 three weeks later.

13 THE COURT: Three weeks before the depo?

14 MR. CHRISTIANSEN: Yes, ma'am.

15 MR. ROBERTS: So I'm going to quote some of
16 his deposition at page 66, Your Honor.

17 The question is, "Okay. Using my car, for
18 example, which is a Mercedes, when I have something on
19 the side, there's a red light that comes on in the
20 mirror. And when I have sufficient clearance front and
21 back, the red light goes away. Have you seen those
22 types of proximity sensors?

23 "ANSWER: I have.

24 "QUESTION: Do you think those would be
25 impractical and not useful for warning of a

1 hazard?

2 "THE WITNESS: I'll throw it back at you
3 and ask you if that happens all the time or
4 when you're intending to change lanes.

5 "QUESTION: It happens all the time. It
6 happened to me when I was driving in three or
7 four times today. It was very handy.

8 "ANSWER: So these tend to be effective
9 when you're looking to change lanes; right? So
10 if sometimes I'm aware of some cars, they turn
11 on -- when you turn on, they activate when you
12 use a signal. I'm not aware of the pantheon of
13 the types of sensors, but if you're not
14 intending to change lanes, you're not looking
15 at that information; right?

16 "So let's just say here that
17 Mr. Hubbard, who we know is intending to go
18 straight, let's pretend we have this sensor you
19 just described in your car. There would be no
20 reason, number one, to be looking at that.

21 "Number two, it's a blind-spot
22 detector. It's showing you something that is
23 going to interfere with your vehicle that is
24 out to your side already. Here Mr. Hubbard
25 wasn't actually next to Dr. Khiabani until,

1 again, a fraction of a second prior to
2 Dr. Khiabani's impact with the bus.

3 "So I just don't see -- that's why
4 I'm talking about sensors here, not because I'm
5 a sensor expert, but because when you talk
6 about the time involved, there simply isn't any
7 practical sensor that would give you sufficient
8 warning such that you could respond in a
9 different way than what Mr. Hubbard already
10 attempted to do."

11 So you can -- you can see, he describes these
12 opinions he wants to give today both in his report and
13 then he elaborates on them several times in his
14 deposition. He can take what their experts say
15 available proximity sensors can do and then describe to
16 the jury why that would not have been effective in
17 avoiding this collision because that's within his field
18 of expertise as a human factors expert.

19 MR. CHRISTIANSEN: Judge, he can't. He can't
20 say Mr. Hubbard is wrong. That's what he wants to do.
21 He wants to say Mr. Hubbard had ample visibility. I
22 mean, he writes that in his report, "An audible alert
23 to a cyclist who was located" --

24 THE COURT: Where in his report?

25 MR. CHRISTIANSEN: At page 7, Your Honor,

1 bottom paragraph. "An audible alert" -- it's on the
2 screen -- "to a cyclist who is located where he's
3 supposed to be, particularly when Mr. Hubbard testified
4 he was aware of Dr. Khiabani's presence anyway, is
5 redundant, unnecessary, and ineffective."

6 So he -- he's supplanting a lie for the sworn
7 testimony. Dr. -- Mr. Hubbard didn't say he was aware
8 of Dr. Khiabani; that's Krauss's fabrication to reach a
9 conclusion to defend MCI. He can't do that. It's
10 vouching.

11 And he does it in his depo. I read to you in
12 his depo where he says "I see this all the time.
13 Here's what happens, people are wrong. Mr. Hubbard did
14 see him. I don't believe him." And then he says, "It
15 wouldn't surprise me that he doesn't remember it."

16 So, I mean, how does that not lead to rank
17 speculation in the jury's deliberations? He can't say
18 Hubbard is wrong. He cannot do it.

19 MR. ROBERTS: Your Honor, I could probably
20 count at least six times that different witnesses have
21 already testified using the board that, based on
22 perception-reaction time and the speed of the cyclist
23 and the speed of the bus, that 1 second, 2 seconds,
24 3 seconds before the collision, the cyclist was in
25 front of the bus. That evidence has been offered over

1 and over and over again, that cyclist was within
2 Mr. Hubbard's field of vision.

3 So this is not something that Dr. Krauss is
4 making up; it's based on the physical evidence and the
5 testimony that's already been given to the jury that
6 where the cyclist was, he would not have been in a
7 blind spot for Mr. Hubbard.

8 And then with regard to Mr. Hubbard's
9 saying -- he did say he was aware that he had passed
10 him, he knew he was there. And then he does say, "I
11 didn't see him again until he was coming right at me."
12 I will agree that that's what his testimony was, Your
13 Honor.

14 But the Court will also know that the
15 accident reconstructionists all agree that the bus was
16 already angled into its left-hand turn as it entered
17 the intersection and continued that left-hand turn.
18 And even using superhuman perception-reaction time of
19 1, using the 1.25 that was initially offered and then
20 withdrawn by Mr. Sherman [sic], but using the --
21 Dr. Krauss actually wrote the book on
22 perception-reaction time and is going to opine the
23 range is 1 1/2 to 2 1/2. So we know, based on
24 perception-reaction time and what Dr. Krauss will say,
25 is that Mr. Hubbard had started his left-hand turn at

1 least a second, more likely more, before he entered the
2 intersection. Therefore, that could not have been the
3 first time he saw him because he had already reacted
4 over a second earlier to seeing him.

5 More likely than not, he saw the cyclist
6 because he reacted to the cyclist. And this is
7 something that, in the field of human factors, they see
8 all the time, where people say "I didn't see him until
9 the last minute," but the physical evidence shows they
10 reacted to their presence before that would have been
11 physically possible.

12 And -- and that's the type of opinion that a
13 human factors expert can offer. And it's not
14 impeaching credibility; it's just explaining away
15 apparent inconsistencies in the testimony. And I think
16 if the Court has listened to every witness, there's
17 some aspect of every single witness that we know is
18 impossible based on the physical evidence.

19 Ms. Kolch, who was a very credible witness, I
20 thought, on the motorcyclist, in her deposition, she
21 initially said that she thought the bus and the cyclist
22 were stopped at a red light at the intersection before
23 they moved across.

24 And Zack --

25 THE COURT: Her fiance?

1 MR. ROBERTS: Yes, Kieft, her fiance, thought
2 the same thing. But we know from the Red Rock video
3 that's physically impossible.

4 So you can point out to someone, "Look at
5 this video. You were mistaken, weren't you?"

6 "Yes."

7 This is no different, pointing out ways that,
8 based on the science of perception-reaction time and
9 the physical evidence of when the bus began its turn
10 away from the cyclist, that he must have perceived him
11 earlier.

12 MR. KEMP: Judge, Mr. Hubbard -- there was no
13 inconsistency in what Mr. Hubbard said. He clearly
14 said -- and this was -- this question was asked at
15 least 15 times in deposition. He clearly said he
16 didn't see the bicyclist for the last 400 feet. No
17 inconsistency about that. Didn't say maybe it was 398,
18 395. No inconsistency.

19 So what he just told you is they want Krauss
20 to say that, quote, it was more likely than not that he
21 saw him, unquote, before. So he wants to have an
22 expert witness get up and tell the jury that this
23 testimony must be wrong because he's a human factors
24 expert.

25 I don't care if he's Sigmund Freud, Your

1 Honor, the greatest psychologist of all time. He can't
2 sit here and tell the jury that this witness testimony
3 is wrong because he really saw him when he said he
4 didn't see them. That's just wrong, Your Honor. That
5 is a direct attack on testimony by a witness.

6 You know, he's telling the jury, "Don't
7 believe that witness on the key point that he didn't
8 see him for 400 feet." You can't do that.

9 And then the second thing he said is that
10 they want to regurgitate the perception-reaction time
11 opinion that we heard yesterday. They don't get two
12 experts on every subject. Okay? They presented their
13 perception-reaction time expert yesterday. I -- I
14 thought they were going to do it with Mr. Krauss. I
15 really did because he wrote a chapter in a book on it.

16 But they instead chose to do it with
17 Mr. Rucoba. And if you recall, we spent a long time
18 yesterday with Mr. Rucoba, who -- you know, frankly, he
19 couldn't measure the bike lane. And I think that's
20 going to be a telling fact when we argue the
21 perception-reaction time testimony he gave at closing.

22 But, in any event, they chose to do the
23 perception-reaction time through Mr. Rucoba. Okay?
24 That was their perception-reaction time. And if you
25 remember, Mr. Barger started at 2 seconds, went to a

1 half second, then said, "Oh, well, very liberal 1
2 seconds."

3 I cross-examined him on it; they redirected
4 him on it. We must have spent at least an hour
5 yesterday on perception-reaction time. The jury even
6 had a question or two on perception-reaction time. So
7 to suggest that they can have two experts on the exact
8 same subject, that's another problem.

9 And, you know, from what I hear from
10 Mr. Roberts, I think this expert should be totally
11 excluded. He can't testify about contributory
12 negligence. He can't say Hubbard was lying because,
13 really, he did see the bike. He can't testify about
14 perception-reaction time; it would be duplicative.

15 I mean, what's left? He can't testify about
16 the Nevada law on 3 feet. You know, there's nothing
17 left of this expert report, Your Honor. And then --
18 now they got him ginned up to say, "Oh, gee, the
19 proximity sensor wouldn't have worked," when he told us
20 at the deposition that he didn't know anything about
21 proximity sensors. He was going to defer to others.
22 Okay?

23 So during the deposition when I have the
24 opportunity to explore his opinion, he says, "So what
25 you've told me is you don't know whether it extends --

1 the radius extends 10 feet? 15 feet? 20 feet? You
2 don't know?"

3 "ANSWER: I don't know. I would defer to
4 others on that. I don't know how they're
5 designed."

6 And now they want to get this guy, who -- you
7 know, I don't know what they've done between the time
8 of the deposition and now. I assume they've made him
9 read a bunch of proximity sensor literature and have
10 him talk to these others that he would defer to so he
11 doesn't sound like a complete moron on proximity
12 sensors, but at the time of the deposition --

13 THE COURT: Mr. Kemp.

14 MR. KEMP: Okay.

15 THE COURT: Argue.

16 MR. KEMP: Okay. Uninformed on proximity
17 sensors. Let me rephrase that, Your Honor.

18 So -- but at the time of the deposition, when
19 I had the opportunity to explore the basis of his
20 opinion, he said he didn't know and that he wasn't
21 offering an opinion on that area. "I would defer to
22 others." Said he didn't know how they were designed.
23 So to allow him to get up now and be the proximity
24 sensor expert after that would be totally
25 inappropriate -- totally inappropriate, Your Honor.

1 MR. ROBERTS: Your Honor, his opinion is
2 right up on the screen. He doesn't know how they're
3 designed, he's not an expert on what they do, but if
4 one like their expert -- one like their expert
5 hypothesizes, this is the one that they admitted into
6 trial, this is Figure 5 that he's talking about,
7 alerting Mr. Hubbard to the presence of a cyclist ahead
8 of the bus properly positioned in the bike lane, it
9 doesn't provide any notice -- any additional warning of
10 impending hazard.

11 He's given this opinion. And the fact that
12 he's not an expert on the technical aspects of
13 proximity sensors doesn't get him -- doesn't prevent
14 him from opining on the human factors area of whether
15 the plaintiffs' proposed proximity sensors would have
16 provided any additional information or warning.

17 And they're the ones who introduced the side
18 detector literature at his deposition and marked it as
19 an exhibit to his deposition. And now they don't want
20 to -- they don't want to use it.

21 MR. KEMP: Judge, it's not --

22 MR. ROBERTS: And we just want to apply his
23 human factors opinions stated in his report to the ones
24 that they say should have been on the bus. And that's
25 perfectly appropriate.

1 With regard to impeachment, he keeps saying
2 we're going to call Mr. Hubbard a liar. Obviously,
3 we're not doing that. And he's trying to use hyperbole
4 for effect here.

5 The standard instruction that's been given
6 since 1985 is innocent misrecollection is not uncommon.
7 It's right in our standard instructions. And it's what
8 human factors people do and opine on.

9 They had an expert, Loftus, L-o-f-t-u-s,
10 who's also a doctor, and he opined on the Rashomon
11 effect: contradictory interpretations of the same
12 event by different people. And his opinion was you
13 cannot believe eyewitness testimony always; you have to
14 look at the physical evidence.

15 Now, they didn't offer that in trial, but
16 they prepared a report and they produced it.
17 Obviously, when Mr. Kemp produced it, he knew this was
18 a proper subject of opinion at trial for an expert.

19 MR. KEMP: Well, that's kind of funny, Your
20 Honor, because Mr. Roberts laughed at me and said,
21 "You'll never get that in. That will never come in."
22 And we withdrew that expert. And he wasn't even
23 deposed. He laughed at me and said, "You can't produce
24 an expert that says the witnesses are wrong."

25 So -- and then I withdrew him and he wasn't

1 even deposed. And now he wants to argue that this is a
2 fair game, that he can have an expert say, more likely
3 than not, Mr. Hubbard actually saw him when Mr. Hubbard
4 testified directly to the contrary.

5 MR. ROBERTS: If Mr. Hubbard didn't see him,
6 how did he begin a left-hand turn, Your Honor? It's
7 physical evidence.

8 THE COURT: One at a time.

9 MR. KEMP: For 400 feet, he didn't see him.
10 That was the clear testimony. He said it over and over
11 and over again. And then he said he saw him out of the
12 corner of his eye at the last minute. That's the full
13 testimony, Your Honor.

14 And with regards to the statement that this
15 guy Krauss didn't know the, quote, technical details,
16 unquote, of proximity sensors.

17 "QUESTION: You don't know what the range
18 is, whether it extends 10 feet, 15 feet,
19 20 feet?"

20 These aren't technical details, Your Honor;
21 these are basics.

22 "ANSWER: I don't know. I would defer to
23 others on that. I don't know how they're
24 designed."

25 So I have an expert. When I depose him, this

1 is my one chance to depose him before trial to explore
2 the basis of his opinions, and he says he's not going
3 to testify on it. "I would defer to others on it."

4 Now -- now, they don't have another. So now
5 they're making him into a proximity sensor expert, or
6 trying to. It would be -- it would be obvious error to
7 allow an expert who has said that he doesn't know about
8 proximity sensors and that other people are going to
9 have to testify on it, and he's going to defer to them,
10 to now become the proximity sensor expert because
11 they've -- they've somehow educated him in the interim.

12 That would be -- that would -- that is
13 ambush, Your Honor. That is blatant ambush. And that
14 is worse than what the Nevada Supreme Court has
15 reversed on many occasions. The Nevada Supreme Court,
16 they look at the expert report, and they say, "Oh, this
17 area is not covered and you let him get into it. That
18 was wrong. We're going to reverse." Okay? That's --
19 that's what the Nevada Supreme Court opinions.

20 I have never seen a Nevada Supreme Court
21 opinion where we depose the expert and he says he
22 doesn't know about something and that he's going to
23 defer to other people on it, and then they try to bring
24 him in as an expert. That's even worse than not
25 covering it, Your Honor, because, at the time you're

1 trying to explore it -- and like Mr. Roberts said, I
2 tried to explore it. I brought in the Eaton
3 literature. I tried to explore it with this guy, and
4 he says "I don't know. Defer to others. Don't know
5 how they're designed."

6 You know, doesn't know basic facts about
7 proximity sensors. Doesn't know the range, 10 feet,
8 15 feet, 20 feet. "I don't know." And now he's going
9 to come before this jury being the super proximity
10 sensor expert. That's totally trial by ambush, Your
11 Honor.

12 MR. ROBERTS: Thank you.

13 And, Your Honor, just to say it again,
14 Mr. Kemp keeps saying his part again. I think maybe
15 we're becoming redundant at this point.

16 But he says, "I don't know the technical
17 aspects of proximity sensors. I don't know if Cohen's
18 diagram, which has been admitted into evidence, is
19 technically correct at where the proximity sensor would
20 detect a bicyclist. But if he's correct, and if this
21 is what the proximity sensor would show, it doesn't add
22 any useful information to the driver and would not have
23 prevented the accident."

24 So he doesn't have to know whether Cohen is
25 technically correct that this is the radar range of the

1 proximity sensor and that the proximity sensor would
2 have detected the bicyclist in this position. But he
3 can say, based on the sight lines of the bus and the
4 visibility of the bus, which I've examined, that the
5 bicyclist would have also been visible to the driver in
6 this position, so this proximity sensor, which has been
7 offered into evidence, adds no useful information and
8 would not have prevented the accident.

9 That's his opinion, not that this is correct,
10 not that, oh, this is wrong, it wouldn't have gone that
11 far out to the side. That's -- that's not his area of
12 expertise. He can opine on what the proximity sensors
13 offered by the plaintiffs, who've testified this is
14 what a proximity sensor available would have done.

15 MR. KEMP: Your Honor, actually, the
16 proximity sensor expert was Mr. Sherwood [sic]. And
17 Sherwood testified -- I got a clip tagged for another
18 reason -- but Sherwood testified that a front proximity
19 sensor would go 350 to 400 feet in front. That's what
20 Sherwood testified to -- Sherlock. Excuse me.

21 This is just a drawing by the computer
22 animator depicting how a proximity sensor in general
23 works. It is not intended to illustrate the Sherlock
24 opinion or to be some sort of limitation of the range
25 of the proximity sensor. Sherlock's already testified

1 to that. So when he repeatedly says that Mr. Krauss is
2 going to rebut this drawing, that's not the opinion
3 that was given in the case.

4 And, second of all, he said that --
5 Mr. Krauss said, "I didn't -- I don't know the
6 technical details. I don't know if Cohen's correct."
7 That's not what he said in the deposition, Your Honor.
8 It's page 59, line 7.

9 "QUESTION: So you think, even though his
10 sworn testimony" -- referring to Hubbard --
11 "repeatedly is that he didn't see him -- that
12 he really didn't see him and he just doesn't
13 recall?

14 "ANSWER: I'm saying I don't know."

15 Okay. So, first of all, he says he doesn't
16 know if he doesn't recall. And now they want him to
17 say, "Well, he didn't recall. Because I'm a human
18 factors expert, so he didn't recall." So first he
19 says, "I'm saying I don't know. I'm saying whether he
20 did or didn't, nothing adverse happened until
21 Dr. Khiabani entered his lane. Whether he saw him or
22 not, I don't know. His recollection is he didn't, but
23 we just don't know."

24 Three times, he says he doesn't know. And
25 now they want to bring this exact same guy on to say

1 that Hubbard is wrong, that he really did know. And
2 so, jury, you should disregard his testimony.

3 And on the proximity sensor issue, he didn't
4 say he didn't know about technical details or he didn't
5 know about the range. He said he didn't know, period,
6 and that he was going to defer to someone else.

7 So how can we get blindsided by an expert who
8 said it's not his area and he's going to defer to
9 another expert? That's just not appropriate, Your
10 Honor. There's -- there's no possible reason or basis
11 for that testimony to come in.

12 THE COURT: Is there anything else?

13 MR. ROBERTS: It's all in his report, Your
14 Honor. And -- and if they got him to say that he
15 doubted an opinion that's offered, that's
16 cross-examination; it's not exclusion. Cross --
17 witnesses get cross-examined all the time on
18 inconsistencies between their deposition and their
19 report.

20 And we actually have his report and -- and we
21 can probably find a copy of the deposition too if the
22 Court would like to review it.

23 THE COURT: I would like to review the
24 pertinent parts.

25 MR. ROBERTS: May I approach, Your Honor?

1 THE COURT: Yes.

2 MR. ROBERTS: This is his deposition.

3 THE COURT: I know that everyone is extremely
4 busy, but, truly, a trial brief on this would have been
5 very helpful.

6 MR. CHRISTIANSEN: I'm sorry, Your Honor. We
7 got --

8 THE COURT: I understand.

9 MR. CHRISTIANSEN: We got the proposed
10 exhibits of what they were going to use with him at
11 7:45 this morning, so I was caught off guard as well.

12 MR. ROBERTS: But they've known about these
13 opinions since October.

14 MR. CHRISTIANSEN: The opinions he didn't
15 have, yeah, I knew about all of those.

16 THE COURT: I realize I've started a bit
17 late, but I'm going to just review.

18 MR. CHRISTIANSEN: Sure. I understand. It's
19 important. Thank you, Your Honor.

20 MR. KEMP: Can we enunciate that -- at least
21 list the issues we have listed -- we've argued about a
22 number of things.

23 THE COURT: Right.

24 MR. KEMP: We've argued about whether they
25 should have a cumulative proximity perception-reaction

1 time testimony. We've argued about whether --

2 THE COURT: Slowly.

3 MR. KEMP: Whether -- whether they can have
4 two proximity -- or excuse me -- perception-reaction
5 time experts back to back.

6 We've argued whether or not he can give
7 proximity sensor testimony when he says he doesn't
8 know.

9 We've argued about whether or not he can say
10 you didn't need a warning because Nevada law was
11 violated. And kind of a subset of that is that the
12 3-foot -- the 3-foot warning, which was never offered.

13 And then we argued about whether he could
14 say, well, Hubbard didn't actually see what he
15 testified to.

16 Those are the four things we argued about.

17 MR. ROBERTS: Your Honor, we don't agree with
18 the characterization of the issues, but we agree those
19 are the issues.

20 And with -- I don't believe I addressed their
21 argument that this is cumulative to have him talk about
22 perception-reaction time.

23 Accident reconstructionists use
24 perception-reaction time in their job. Human factors
25 experts, in order to give their opinions, have to use a

1 perception-reaction time in their job. So the fact
2 that they're both talking about perception-reaction
3 time in order to reach different ultimate conclusions
4 doesn't make it cumulative.

5 Thank you, Your Honor.

6 MR. KEMP: Well, it's not different
7 conclusions, Your Honor. They're using
8 perception-reaction time as a technique to try to put
9 the bike way in front of the bus when it passes so they
10 can, number one, argue to the jury that, hey, what all
11 these other witnesses, Bradley and Kolch, saw, that
12 really didn't happen.

13 So it's the exact same thing. They're going
14 to try to use perception-reaction time with him to put
15 the bike up front in order to argue that it's visible.
16 That's exactly what they did yesterday with Mr. Rucoba.

17 Now, I was kind -- like I said to the Court
18 already, I was surprised they jumped into this with
19 Rucoba because I thought they'd bring it up with this
20 guy. But the fact -- they can't do it twice, Your
21 Honor. Otherwise, I could have my experts come back
22 and do things twice.

23 MR. ROBERTS: I'll make one offer, Your
24 Honor, to -- to help the Court perhaps and -- so
25 there's so much here.

1 THE COURT: Yes.

2 MR. ROBERTS: Is that -- that I could provide
3 for in camera inspection an outline of my questions and
4 my anticipated answers that I have planned for today so
5 the Court can focus on -- on what I actually plan to
6 do.

7 And then if the Court would like to mark that
8 as a Court's exhibit after Mr. Krauss takes the stand,
9 then I'm fine with that. Obviously, I don't want to
10 provide the outline at this point to plaintiffs'
11 counsel.

12 MR. KEMP: When --

13 MR. ROBERTS: After he takes the stand.

14 MR. KEMP: Oh, after.

15 I don't know how that helps me, Your Honor.
16 I mean, he can't communicate to the Court and not do it
17 in my presence. What he's doing is giving his notes.
18 He just can't do that.

19 THE COURT: I think we should take a break.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: Yeah, 20 minutes at least.

22 MR. CHRISTIANSEN: Sure. Come back at
23 11:00-ish?

24 THE COURT: I'm just going to inform them
25 that I'm not going to attend the all-judges meeting,

1 and send my proxy. But I just want to make sure I take
2 care of that and I review this thoroughly.

3 MR. CHRISTIANSEN: Thank you, Judge. It's
4 important.

5 THE MARSHAL: Court is in recess 20 minutes.

6 THE COURT: Or more.

7 THE MARSHAL: Or more, 20, 30.

8 (Whereupon a lunch recess was taken.)

9 THE MARSHAL: All rise. Court is back from
10 recess.

11 THE COURT: Good afternoon.

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

14 MR. CHRISTIANSEN: Afternoon, Your Honor.

15 THE COURT RECORDER: Go on the record, Your
16 Honor?

17 THE COURT: Yes, please.

18 All right. I have thoroughly reviewed the
19 motions, objections, conversations that we had a while
20 ago concerning Dr. Krauss's testimony. And I have --
21 I'm going to go into -- okay.

22 With respect to NRS 484B.270 and 211 -- wait.
23 484B.270. Okay. So here's my analysis: This is a
24 strict liability case. And, as stated in the motion in
25 limine, driver negligence is foreseeable and therefore

1 is irrelevant in a strict liability case. Here,
2 mention of law that the driver, Mr. Hubbard, was
3 required to follow it necessarily raises, in this
4 Court's view, the question in the jury's mind as to
5 whether he was negligent.

6 Thus, number one, mentioning the law at all
7 is highly prejudicial.

8 Two, with respect to probative value, when
9 Mr. Hubbard has said is -- he is not aware of the law,
10 then the expert's conclusion would be wrong because it
11 is based upon the assumption that the driver knows the
12 law and that he is not -- the case -- that is not the
13 case here.

14 Three, these issues -- concerning all the
15 above issues, the probative value is substantially
16 outweighed by the risk of unfair prejudice. Dr. Krauss
17 cannot mention the existence of the statute or any
18 conclusion based upon the statute; however, Dr. Krauss
19 can give opinion or discuss 3 feet is a safe distance
20 based upon his review of plaintiffs' experts.

21 Now --

22 MR. ROBERTS: Your Honor, for -- on a point
23 of clarification, can he testify that -- can he say
24 that Mr. Hubbard said that he was attempting to
25 maintain a 3- or 4-foot separation and, therefore, any

1 warning to maintain at least 3 feet would be redundant
2 of what he was already attempting to do?

3 THE COURT: No, I think that opens the door
4 to what -- what I just enunciated, Mr. Roberts. And --

5 MR. ROBERTS: Well, I believe eliminating the
6 law and what Mr. Hubbard said he was trying to do
7 eliminates his opinion on warning and leaves us with no
8 warnings opinion, Your Honor.

9 THE COURT: There's more with Mr. -- with
10 Dr. Krauss. So -- so --

11 MR. ROBERTS: Okay.

12 THE COURT: Let's see. Perhaps in a later --
13 I think I -- I -- if I'm not mistaken, I think I
14 discuss that afterwards.

15 Okay. So -- so Dr. Krauss can give opinions
16 or discuss 3 feet as a safe distance based upon his
17 review of the plaintiffs' experts.

18 Number two, discussing the accuracy of
19 eyewitness testimony as a human factors expert, one,
20 correct -- it's correct that the expert witnesses
21 cannot opine as to the credibility of a fact witness.
22 I think that's something that's very -- we all know
23 about -- we've known about since law school, I believe.

24 Number two, Dr. Krauss thus cannot
25 specifically testify that he believes or concludes that

1 a witness is testifying inaccurately as to what they
2 perceived.

3 It is different for him to testify that,
4 based upon his experience, witnesses sometimes
5 misremember or perceive differently. They testified to
6 what they think they saw, as long as he not -- does not
7 discuss specific witnesses or testimony but just gives
8 the general area of -- it's like when a domestic
9 violence witness comes in and explains a circle of DV
10 and that sort of thing, just generally how this works.

11 For instance, I -- I wrote down an example
12 when I was thinking about this in my office. For
13 instance, when a witness testifies that memory is
14 flawed or tainted after time or through other events,
15 this type of testimony -- this type of testimony would
16 be admissible because it goes to the human factor and
17 to memory. And we all know that this occurs in
18 witnesses.

19 Because it is within the scope of their
20 experience and it does not infringe on the province of
21 the jury, that -- the type of testimony I have
22 discussed with you would be all right, but no
23 discussion of any witnesses in this case.

24 And I have a note. I think that that would
25 also be outside the scope of Dr. Krauss's expertise,

1 this part. If there are any questions, even without
2 mention of a witness's name, concerning particular
3 testimony and whether it complies with expert -- within
4 the expert's understanding or conclusions of the
5 accident, it is not allowed, as that is the accident
6 reconstructionist's testimony.

7 And he did testify very specifically to each
8 witness yesterday thoroughly. I remember because I
9 took copious notes and I was also reading it. And I
10 also reviewed Mr. Rucoba's testimony from yesterday
11 just to be sure that I was correct on this. Okay?

12 Three, proximity sensor opinion by
13 Dr. Krauss. Okay. Plaintiffs object that Dr. Krauss
14 has no personal knowledge concerning proximity sensors.

15 One, as long as Dr. Krauss's testimony is
16 limited to what he discusses on page 7 and 8 of his
17 report -- namely, the opinion based on Mr. Cohen's
18 depictions -- that's fine.

19 Concerning the objection that Dr. Krauss is
20 testifying after he said that he did not know about
21 proximity sensors, it appears as -- it appears to this
22 Court that there's a distinction between the technical
23 aspects of how they work, that it had more to do with
24 that. And -- and I -- I don't believe it's necessary
25 for him to know the technical aspects of how they work.

1 That wasn't the gist of the testimony that -- that I
2 saw in his report or -- I also looked through his
3 deposition. And this only applies to proximity -- the
4 sensors, beginning on page 7 and the top of page 8.
5 Okay?

6 Number four, it applies to -- in other words,
7 it applies to that.

8 Number four, cumulative testimony concerning
9 perception/reaction time. Mr. Rucoba used 1 1/2 to
10 2 1/2 range. I reviewed his testimony. With respect
11 to Dr. Krauss and Mr. Rucoba, in the transcript on
12 pages -- Mr. Rucoba's transcript on pages 219 to 237 --
13 which was the direct by Mr. Barger -- Mr. Rucoba
14 thoroughly went into perception-reaction time. Okay?

15 He was asked if it was 1 second to 2 1/2. I
16 believe the answer was no. 1 1/2 seconds to 2 1/2
17 seconds, I believe the answer was yes.

18 On page 29 of Tuesday's testimony for
19 Mr. Rucoba, which begins by cross-examination by
20 Mr. Kemp, that -- that's when the difference in the
21 timing came in. If -- if Mr. Rucoba's testimony is the
22 same as Dr. Krauss's, then under, you know, a 403
23 analysis, there's a, you know, possibility that, you
24 know, it can risk undue delay.

25 I -- I know that it would be foundation, but

1 if Mr. Krauss is going to testify about certain things,
2 I don't -- I don't believe -- unless -- I have a
3 question for you, actually.

4 Mr. -- Dr. -- excuse me -- Dr. Krauss's
5 opinions No. 3 -- 3. The way -- he concludes, "The way
6 in which Dr. Khiabani impacted the bus did not afford
7 Mr. Hubbard, or any other typical driver in
8 Mr. Hubbard's position, sufficient time to respond and
9 carry out any sort of effective maneuver to avoid the
10 accident."

11 Is that something that Mr. Rucoba testified
12 to?

13 MR. CHRISTIANSEN: Yes.

14 MR. ROBERTS: I'm going to let Mr. Barger
15 answer since he put on Mr. Rucoba and is more familiar
16 with the details.

17 THE COURT: I mean, I reviewed depositions as
18 thoroughly as I could in the amount of time that I had,
19 but I just want to make sure.

20 MR. BARGER: If the Court is asking --

21 THE COURT: He has four -- five opinions in
22 his last page before he signs.

23 No. 3, "The way in which Dr. Khiabani
24 impacted the bus did not afford Mr. Hubbard, or any
25 other typical driver in Mr. Hubbard's position,

1 sufficient time to respond and carry out any sort of
2 effective maneuver to avoid the accident.

3 MR. BARGER: Mr. Rucoba did not say that.

4 THE COURT: He did not?

5 MR. KEMP: No, Your Honor. That was the
6 whole point of the entire examination where they had 2
7 to 1.5 to 1. And they said, "Well, let's use a liberal
8 1." And then they said, "Is that enough time? How far
9 would the bus move?"

10 That was the entire point of the examination,
11 that exact statement right there. So maybe he didn't
12 say it exactly word for word, but he said that, in
13 his -- his view, the perception-reaction time would be
14 1 and that that wouldn't be sufficient time to react.

15 And they went on and on about -- they even
16 showed a picture of the bus turning, and they compared
17 frames 5 with 9, and then frame whatever with another
18 frame. And they calculated 10 seconds per frame. And
19 they said, "Is this enough time? Is that enough time?"

20 So it's -- it's the same thing, Your Honor.

21 MR. BARGER: That wasn't the whole -- that
22 was not the purpose. The purpose was to show that the
23 bicyclist is out in front of the bus. That was the
24 whole purpose of that. He -- he never testified --

25 THE COURT: I'm going to allow --

1 MR. BARGER: Okay. Thank you.

2 THE COURT: -- this, but I'm not going to
3 allow it excessively, because I do think that there is
4 an argument for it to be cumulative, but I don't think
5 the analysis warrants his not testifying.

6 But going over and over and over is not going
7 to happen. You know what I mean?

8 MR. BARGER: I understand.

9 MR. ROBERTS: So, Your Honor, would you like
10 me to limit his explanation? One thing the jury's
11 never heard is perception-reaction time is broken down
12 into four stages and -- and what those four stages are,
13 and then addressing the braking versus the steering and
14 how that -- I mean, that's part -- he has a chapter in
15 a book on that. And I don't believe we've ever gone
16 through it in that type of detail with any witness.

17 MR. KEMP: Well, we didn't go into it in that
18 type of detail because yesterday's witness told us
19 there were only two stages, perception and reaction.

20 Now they want to offer this witness to -- to
21 expand upon that, change that. And then braking versus
22 steering, why didn't we do all that yesterday? We had
23 a chart that showed the difference between braking
24 times and steering-only times. That was the -- the
25 chart from the Warsaw University that was on the screen

1 the whole time, Your Honor.

2 So this is repetitive. This is cumulative.
3 You know, how can you say that it's not?

4 MR. BARGER: Your Honor, I cannot understand
5 how he can cross-examine -- Mr. Kemp can cross-examine
6 a witness. All I did was --

7 THE COURT: I don't want any more argument
8 from either party.

9 MR. BARGER: Okay.

10 THE COURT: I'm really -- I'm a very patient
11 person, but I'm getting tired. I'm sorry.

12 MR. BARGER: I understand.

13 THE COURT: Because -- I know I was a few
14 minutes late, but this is -- I think we're way past
15 that now. And I really need to move this trial along.

16 MR. BARGER: I understand.

17 THE COURT: Okay?

18 And I understand this is very important.
19 Don't -- don't misread what I'm saying to you. But we
20 need to move on. Okay?

21 So I don't want -- well, actually, I have a
22 note here that says that if Mr. Krauss is going to --
23 so, first of all, with respect to proximity sensors, as
24 long as his testimony is limited to what he discusses
25 on page 7 and 8 of his report -- namely, the opinion

1 based on Mr. Cohen's depiction -- that's fine.

2 Then I have over here that if -- if I allow
3 him to testify as to No. 3 -- that I've already read
4 twice -- and No. 4, even if the bus had been equipped
5 with a proximity sensor -- excuse me -- proximity
6 sensor, it would have not afforded Mr. Hubbard
7 sufficient time to avoid that.

8 I -- I -- I have a note here which concerns
9 me, but I don't want, you know, to spend a lot of time
10 on foundation, which I know is necessary for each
11 witness, but I'd like that stipulated to, because then
12 we're just getting into -- it's getting too long, to be
13 honest with you.

14 And so it looks to me like Mr. Rucoba used
15 the perception-reaction time to reconstruct working
16 backwards and that Dr. Krauss is using it to decide on
17 how much warning was needed to avoid an accident -- I
18 don't know that would be called -- working forward.

19 Okay?

20 But there can be absolutely no backdoor,
21 straightforward, any type of suggestion -- because it
22 doesn't look like that, in what I've read from him on
23 these issues I'm allowing him to -- to testify to, that
24 Mr. Hubbard was negligent. It's a very fine line.

25 Okay? I was back there thinking, how are they going to

1 do it? But, you know, that's -- that's absolutely
2 necessary. Okay?

3 So to the extent that it's not -- and we're
4 all going to be very civilized and very -- I understand
5 you each have to represent your clients, but I -- I am
6 going to be monitoring you, obviously, and making sure
7 that we don't cross any lines here and we don't get
8 unnecessarily repetitive. Okay?

9 I'm probably not being clear enough. I can't
10 give you each questions to ask him and not ask him.
11 That's too far, but -- Mr. Roberts, you have a
12 question? I'm not --

13 MR. ROBERTS: I -- I do have a question, Your
14 Honor.

15 THE COURT: I'm not being fair.

16 MR. ROBERTS: And just, again, clarification,
17 the Court's excluded two of the more significant
18 aspects of why he rendered his warnings opinion. Would
19 he be allowed to just say "I don't believe a warning in
20 this case would be either necessary or effective" and
21 not give the bases for his opinions?

22 And then I'm concerned that he gives his
23 general opinions on his -- on -- on the subjects the
24 Court's allowing, but if they then cross-examine him,
25 "Well, your opinion is inconsistent with this witness,

1 isn't it? What's your explanation for that?"

2 I mean -- and if he says, "Well, but that --
3 that witness's opinion doesn't comport with the
4 physical evidence," is he allowed to say it if they
5 elicit it on cross?

6 THE COURT: No, if the plaintiffs open the
7 door on cross-examination to certain things, then the
8 witness can testify to it.

9 MR. ROBERTS: Okay.

10 THE COURT: They're very skilled lawyers,
11 just as you are. So that's a different issue. But
12 these are the ground rules here. Okay?

13 MR. ROBERTS: Okay.

14 THE COURT: You have another question?

15 MR. ROBERTS: No, no, no. I just need to be
16 able to -- Mr. Krauss is not in the courtroom. I need
17 to be able to explain the rulings to him so that he
18 doesn't violate -- what's that?

19 Well, he's testifying on a case in California
20 tomorrow -- tomorrow, so he has to make a plane
21 tonight.

22 THE COURT: Mr. Krauss -- Dr. Krauss?

23 MR. ROBERTS: Dr. Krauss, yes.

24 THE COURT: Okay.

25 MR. ROBERTS: In San Jose.

1 THE COURT: So, No. 4, "Even if the bus had
2 been equipped with proximity sensors, it would not have
3 afforded Mr. Hubbard sufficient time to avoid
4 Dr. Khiabani."

5 That's not something that was testified to by
6 Mr. Rucoba, correct, or was it? Those are my two
7 questions.

8 MR. BARGER: No, he didn't deal with
9 proximity sensors.

10 THE COURT: I reviewed Mr. Rucoba's
11 testimony. I didn't see anything, but it might be
12 there.

13 MR. BARGER: In fact, he said he wasn't an
14 expert on it, it wasn't part of his job, other people
15 would come.

16 THE COURT: Mr. Christiansen?

17 MR. CHRISTIANSEN: Your Honor, I wanted to
18 hear -- your question was, did Mr. Rucoba say --

19 THE COURT: Yes, my question was --

20 MR. CHRISTIANSEN: Yes, ma'am.

21 THE COURT: This is one of the opinions that
22 Mr. -- that Dr. Krauss gives.

23 MR. CHRISTIANSEN: That's right.

24 THE COURT: Even if -- No. 4, "Even if the
25 bus had been equipped with a proximity sensor, it would

1 not have afforded Mr. Hubbard sufficient time to avoid
2 Dr. Khiabani." And I -- I am very concerned about any
3 type of comparative or contributory negligence. But I
4 don't believe that that suggests that. I think that
5 this is -- has more to do with a defense to the product
6 defect issue of the proximity sensors not being there.

7 I mean, they -- the defense has to have a way
8 to -- to defend their case. And I -- I don't believe
9 that that would -- being very, very cautious, and
10 almost overly cautious, I don't believe that that would
11 lead to -- to anything.

12 You could take, if you were very concerned,
13 Mr. Hubbard's name out of it, but I don't think it's
14 necessary in this case.

15 MR. KEMP: Judge, I don't see where there's a
16 foundation for that. I mean, if he's going to say that
17 the proximity sensors wouldn't work 400 feet, 350 feet
18 300 feet, 200, 250 -- whatever the number is, in his
19 deposition, he said he doesn't know. He does not know.

20 So he cannot give an objective answer to
21 that; all he can say is -- well, I don't know what he's
22 going to say. All he can really say is that "I don't
23 think the driver would have been alerted or the driver
24 would have reacted." It wouldn't -- I mean, it gets
25 right into contrib, so I think that is a really

1 dangerous area to go into.

2 THE COURT: It's very dangerous. And, you
3 know, I -- I don't know how much -- it's hard because I
4 am in a different position than you are, but I don't
5 know how much that would enhance a case given the fact
6 that it's so dangerous, but that -- you know, that's
7 not -- that's not my call, you know.

8 I just will absolutely refuse to have, you
9 know, anything that starts blending into contributory
10 or comparative negligence. It's really a very fine
11 line.

12 MR. BARGER: Can I ask real quick?

13 THE COURT: By the way, I have your
14 deposition and your ...

15 MR. BARGER: We're just making sure we
16 understand so it doesn't make, you know, an improper
17 question. But, Your Honor, he -- he -- he probably
18 needs to spend a couple of minutes with us.

19 THE COURT: I think that's fair. I think
20 that's reasonable because he doesn't know what I've
21 just discussed with you.

22 MR. ROBERTS: Your Honor, I'm assuming you --
23 you said he could talk in general about witness
24 perceptions and inconsistencies.

25 THE COURT: Yes, yes, just like other experts

1 talk about --

2 MR. ROBERTS: But to -- I want to read this
3 to clarify that it's excluded.

4 "QUESTION: In your work, do you often
5 encounter testimony that you know to be
6 inconsistent with the objective facts of the
7 case?

8 "I do."

9 "Does the field of human factors provide
10 an explanation as to why that might be?

11 "ANSWER: Before this impact occurred,
12 Dr. Khiabani would not have constituted
13 something in Mr. Hubbard's environment that
14 required him to encode a memory. So what
15 happens is, as we go through life, our brains
16 perceive the things that are most pertinent to
17 the tasks we are performing and filter out the
18 rest.

19 "Similarly, we only make memories of
20 an even smaller subset of those things. When
21 an event like this happens, Mr. Hubbard would
22 not have been making all of these memories of
23 Dr. Khiabani, but, after the accident, our
24 brains try to fill in those blanks. I do it,
25 you do it, everyone does this. It is not lying

1 or deception but rather us trying our best to
2 figure out what must have happened rather than
3 direct memory of what did happen."

4 I -- I know that it includes a specific
5 witness, which would appear to exclude it, but it's --
6 in the context of the case, he's explaining a general
7 principle.

8 So I just feel like I need to ask and have
9 you explicitly exclude that because that's a really key
10 part of what he's offering to the jury as a tool to
11 help them interpret the testimony in the case.

12 MR. CHRISTIANSEN: I mean, Judge, that's
13 exactly what you said he can't do. He can't say
14 what -- there's a -- "Here, let me tell you my reason
15 of my magical, fantastical, and dreamt-up theory of why
16 Mr. Hubbard remembered -- misremembers things."

17 THE COURT: Right.

18 MR. CHRISTIANSEN: Can't do that.

19 THE COURT: Unless that could be discussed in
20 a very general term, not specifically talking about
21 this impact or this case or this driver, it -- if
22 that's a principle in the human factor issue, I think
23 it's reasonable. But it would have to be without
24 Mr. Hubbard and specifically discussing this case,
25 because I think that expert witness -- we know that

1 expert witnesses cannot -- cannot discuss accuracy of
2 eyewitness testimony, and that's what we have here.

3 Okay? Specifically.

4 MR. ROBERTS: Okay.

5 THE COURT: So the general concept that
6 you've just read is fine, but it can't be related to
7 something that Mr. Hubbard testified to because that's
8 an expert then testifying to what an eyewitness in this
9 case -- do you see -- I think I've explained myself.

10 MR. ROBERTS: I understand, Your Honor.

11 THE COURT: Okay. But if you -- if you can
12 direct that question to him in general terms or he can
13 answer it without talking about Mr. Hubbard's
14 perception that he's already testified to and -- and
15 how it relates specifically to that, then it would be
16 fine.

17 MR. ROBERTS: Okay.

18 THE COURT: Because if that's part of the
19 human factor analysis, accuracy of eyewitnesses, and he
20 is a human factors expert in general, I think that
21 would be fine.

22 MR. ROBERTS: Okay. Very good. Could I have
23 about five minutes to go confer with Dr. Krauss?

24 THE COURT: Yes, of course.

25 MR. ROBERTS: Thank you, Your Honor.

1 THE COURT: Let's go off the record.

2 (Discussion was held off the record.)

3 THE COURT: Let's go on the record for just a
4 moment.

5 One of the things I forgot to add to my
6 second point with respect to discussing accuracy of
7 eyewitnesses as a human factor expert and how that
8 cannot occur is because, in addition to everything else
9 I discussed, you cannot interfere -- it cannot infringe
10 on the province of the jury. Okay? That's -- that's
11 very important. I forgot to add that.

12 Okay. Were you able to chat with him long
13 enough for him to understand?

14 MR. ROBERTS: I was able to chat with him.
15 And, frankly, I think -- I think he understands, but
16 I'm a little nervous. You know, we went through his
17 testimony Sunday and then Monday and then last night.
18 And I'm afraid some of these answers may be somewhat
19 ingrained. And I just think some -- I'm concerned that
20 I may inadvertently run afoul of the Court's order.

21 So he can come back next Monday or Tuesday.
22 He has to leave tonight to go to this trial tomorrow.
23 And I think it would be our preference to reschedule
24 him for next Wednesday or Tuesday. And then we'll put
25 on the captain from the fire department, one of the

1 first responders, who's waiting now in the witness
2 room. Mr. Barger's prepared to proceed with
3 Mr. Granat. And then we can just move Krauss to next
4 week, just to make sure that we can carefully craft --

5 THE COURT: Mr. Granat is the first
6 responder?

7 MR. ROBERTS: Dale Horba, Captain Dale Horba
8 is the first responder. And Mr. -- Dr -- Mr. Granat is
9 one of our witnesses with regard to the aerodynamics.

10 THE COURT: Okay. I'm sorry that you -- I
11 think you're being safe. I think that's a good call.

12 MR. ROBERTS: I think it's a good idea.

13 THE COURT: I'm sorry you had to do that.

14 All right. Shall we bring the jury in? Are
15 we ready?

16 MR. ROBERTS: Yes, we're ready.

17 THE COURT: Okay. Do you know where Jerry
18 is?

19 MR. CHRISTIANSEN: Judge, can I have 90
20 seconds with Mr. Roberts?

21 THE COURT: We are off the record.

22 (Discussion was held off the record.)

23 THE COURT: Should we go on the record?

24 MS. WORKS: Yes.

25 THE COURT: Certainly.

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

3 THE COURT: All right. Let's go back on the
4 record. I just wanted to remind everyone, all counsel,
5 that, with objections, our -- object and then we go
6 sidebar. Okay? Thank you.

7 THE MARSHAL: Are we ready, Your Honor?

8 THE COURT: We're ready. We're all ready;
9 right?

10 MR. CHRISTIANSEN: Your Honor, just for
11 counsel scheduling, what time do you think we will
12 start tomorrow? I don't know how big your calendar is.
13 I don't need to know this second.

14 THE COURT: I would like to know too. I will
15 let you know in a few.

16 THE MARSHAL: All rise.

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

19 THE MARSHAL: Your Honor, all the jurors are
20 present.

21 THE COURT: Okay. Thank you.

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

24 THE COURT: Please call the roll.

25 THE CLERK: Yes, Your Honor.

1 Byron Lennon.
2 JUROR NO. 1: Here.
3 THE CLERK: John Toston.
4 JUROR NO. 2: Here.
5 THE CLERK: Michelle Peligro.
6 JUROR NO. 3: Here.
7 THE CLERK: Raphael Javier.
8 JUROR NO. 4: Here.
9 THE CLERK: Dylan Domingo.
10 JUROR NO. 5: Here.
11 THE CLERK: Aberash Getaneh.
12 JUROR NO. 6: Here.
13 THE CLERK: Jaymi Johnson.
14 JUROR NO. 7: Here.
15 THE CLERK: Constance Brown.
16 JUROR NO. 8: Here.
17 THE CLERK: Enrique Tuquero.
18 JUROR NO. 9: Here.
19 THE CLERK: Raquel Romero.
20 JUROR NO. 10: Here.
21 THE CLERK: Pamela Phillips-Chong.
22 JUROR NO. 11: Here.
23 THE CLERK: Gregg Stephens.
24 JUROR NO. 12: Here.
25 THE CLERK: Glenn Krieger.

1 JUROR NO. 13: Here.

2 THE CLERK: Emilie Mosqueda.

3 JUROR NO. 14: Here.

4 Thank you.

5 THE COURT: Do the parties stipulate to the
6 presence of the jury?

7 MR. KEMP: Yes, Your Honor.

8 MR. ROBERTS: Yes, Your Honor.

9 THE COURT: Good afternoon, ladies and
10 gentlemen.

11 Mr. Roberts, you may proceed.

12 MR. ROBERTS: Thank you, Your Honor.

13 The defense would call Captain Dale Horba.
14 H-o-r-b-a, of the Clark County Fire Department.

15 THE MARSHAL: Watch your step there, sir.
16 Remain standing, raising your right hand and facing the
17 clerk.

18 THE CLERK: You do solemnly swear the
19 testimony you're about to give in this action shall be
20 the truth, the whole truth, and nothing but the truth,
21 so help you God?

22 THE WITNESS: Yes, ma'am.

23 THE CLERK: Thank you. Please be seated.
24 And please state and spell your name.

25 THE WITNESS: Dale Horba. D-a-l-e,

1 H-o-r-b-a.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. ROBERTS:

5 Q. Good afternoon, Captain Horba.

6 A. Good afternoon.

7 Q. Good to see you again.

8 Could you tell the jury how you're currently
9 employed.

10 A. I'm a captain with the Clark County Fire
11 Department. I'm a paramedic. I've been with the
12 department for 12 years.

13 Before that, I was with the Cleveland Fire
14 Department in Ohio for almost six years. And then I've
15 been a medic for almost nine years, pretty much as old
16 as my daughter, so it coincides.

17 And I've been a captain now for a year as of
18 last week. And -- and that's where I'm at right now.

19 Q. Very good. And -- and were you a first
20 responder who responded to the scene of a bus-bicycle
21 accident involving Dr. Kayvan Khiabani?

22 A. Yes.

23 Q. And were you the chief medic on that team
24 that responded from the Clark County Fire Department?

25 A. I responded with Engine 28. And I was the

1 only medic on that unit, so yes.

2 Q. Very good. And back on April 18th of 2017,
3 you were a captain at that point also; correct?

4 A. Yes.

5 Q. Could you tell the jury a little about your
6 education and training that you received in order to
7 become a certified paramedic with the fire department.

8 A. With -- when I started with -- in the EMS
9 field, I started as a -- to get my basic, which was
10 Cleveland. And that's just basic life support.

11 And then when I got out here in 2006, I had
12 to become an intermediate, which is now called
13 advanced. And it's a little bit more involved, like
14 IVs and certain things like that. You can do
15 medications and stuff like that, certain ones.

16 And then when I went to medic school, it was
17 eight months of classroom and then two to three months
18 of getting precepted and some hospital and emergency
19 room time like that.

20 And -- and then, since then, it's been -- I
21 average between 1000 to 1200 calls a year. And, with
22 the fire department, 90 percent of our calls are
23 medical in nature. So it's definitely what we -- we do
24 way more of that than we do firefighting. So ...

25 Q. Following responding to this incident, did

1 you prepare a report as part of your job duties?

2 A. Yes, a medical report.

3 Q. Okay.

4 MR. ROBERTS: Permission to approach the
5 witness, Your Honor?

6 THE COURT: Yes.

7 BY MR. ROBERTS:

8 Q. Captain Horba, I'm going to show you what's
9 been previously marked as Exhibit 75. Could you flip
10 through that four-page exhibit and let me know if that
11 appears to be a true and accurate copy of the fire
12 department report.

13 A. (Reviewing document.)

14 That's affirmative. This is my electronic
15 patient care report, is what we call it. So we do it
16 on the computer. I usually don't see it in this form
17 until if we get -- if there's a subpoena or something,
18 then it gets printed out and I get to see it in this
19 form. But, usually, we see it as drop-down boxes on
20 our computer screen. That's about it.

21 Q. Okay. But this appears to be your electronic
22 data that you entered into the computer?

23 A. Yes.

24 Q. Okay.

25 MR. ROBERTS: Your Honor, I'd move to admit

1 Exhibit 75.

2 MS. WORKS: No objection, Your Honor.

3 THE COURT: Okay. Exhibit 75 is admitted.

4 (Whereupon, Defendant's Exhibit 75 was
5 admitted into evidence.)

6 MR. ROBERTS: Brian, can we display

7 Exhibit 75, page 2, for the jury.

8 BY MR. ROBERTS:

9 Q. Okay. Let's focus on the little chart with
10 times on it in the upper right-hand corner.

11 Can you blow that up for me, Brian. Perfect.

12 Okay. Could you explain what these times are
13 for -- for the jury, beginning with "call received."

14 A. Okay. The call received is where someone on
15 scene has deemed this an emergency, dialed 911. That
16 goes to our dispatch center. So that 10:35:38 is --
17 dispatch is now, "Hello, this is 911. What's your
18 emergency?"

19 As they're talking, they don't get all the
20 information and then send us. As soon as they get the
21 location, there's a button that's pressed and they send
22 the closest unit, which was Engine 28 at the time.

23 And then dispatch, that's our 10:35:54. So
24 the tones at our station start to go off letting us
25 know where we're going. They get repeated twice.

1 And en route is when we go into the actual
2 engine and I hit en route button. So we may not
3 physically be moving at that point. It's not, like,
4 connected to the movement, but it's -- there's at least
5 one of us in there that has hit "en route" and we're
6 assembling and getting ready to leave.

7 Q. So, to clarify, looking at these numbers, is
8 it fair to say that someone was in the engine getting
9 ready to leave in less than two minutes from the
10 station's receipt of the 911 call?

11 A. Yeah. And that's our goal is to -- on
12 dispatch, to get out of the barn within two minutes.
13 So we definitely -- I'm the one that touched the button
14 on this one.

15 Q. Very good. "On scene."

16 A. So "on scene" is -- as we pull up, there's a
17 couple roundabouts on that street, which -- it slows us
18 down a little bit, especially in the big engine. And
19 as soon as we see the accident, we might have been slow
20 rolling, like, kind of just coming up to the scene, but
21 it's me hitting the red on-scene button. And that
22 documents that time, 10:39:56.

23 Q. What is the entry for "patient contact"?

24 A. So "patient contact" is we stop. The
25 patient's right over to the left, and it's pretty