

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

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

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

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

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

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

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

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

1 What is the duration of time of the force in this
2 particular test?

3 A. Looks to be about -- is that 10 seconds
4 maybe?

5 Q. 10 seconds. And do you recall, when we took
6 your deposition, we discussed the differences in
7 duration of exposure a stationary bike would have to a
8 25-mile-an-hour bus and a bike moving 11 1/2 miles an
9 hour? Do you remember that?

10 A. I don't remember specifically.

11 Q. Well, let me find the page for you.

12 Why don't you look at page 35, line 4. Just
13 try to refresh your recollection here.

14 A. (Witness reviewing document.)

15 Okay.

16 Q. Okay. And what did you say?

17 A. What do you mean?

18 Q. It's a 2.2 multiplier if we have a moving
19 bike?

20 A. Oh, no. That would not be accurate, no. The
21 2.2 multiplier that you're talking about is a time
22 duration.

23 Q. That's what I just said. It's a 2.2
24 multiplier of the time duration.

25 A. For a moving -- no, the -- in this test, the

1 coach is long past the stationary bicycle.

2 Q. Listen to the question. Please read the
3 deposition.

4 If you have a moving bike as opposed to a
5 stationary bike, the duration of time the moving bike
6 is exposed to the same force that a stationary bike
7 will be increases; right? The concept of relative
8 speed, that's what we're talking about in the
9 deposition.

10 A. Right. If the bus and the bike are going the
11 same speed, it would be a constant force.

12 Q. It would be -- it would be exposure
13 continuous; right?

14 A. It would be a constant force.

15 Q. We don't have that here. We have either
16 11.5, 13.5, whatever you want to use. We used 11.5 in
17 the depo. If you compare 11.5 to a 25-mile-an-hour
18 bus, that would result in a 2.2 multiplication factor
19 times the time; right?

20 A. Times that entire duration? No, you'd take
21 the first couple of peaks and multiply that, not the
22 entire duration.

23 Q. Okay. All right. So this -- so you would
24 multiply -- in your view, you would multiply this 4
25 seconds? this 4 seconds? what? This is 10 seconds;

1 yes?

2 A. Yes. The first couple of peaks are going to
3 be the actual measurement along the front of the bus.
4 After the red line drops there, then the bus has
5 already passed. So the rest of that is -- is
6 oscillation of the test picture.

7 Q. Okay. And so how long is this?

8 A. I don't know. Looks to be about 4 seconds.

9 Q. Okay. So when we apply the 2.2, we get to 10
10 seconds, say?

11 A. That would be 8.8, but that's the -- that's
12 the actual length of the bus.

13 Q. Okay. 9 seconds is the time a bike going
14 11.5 miles an hour, pursuant to your testing, would
15 continue to see the exposure; correct?

16 A. No. No, the bus is long past, the 9 seconds.
17 This is the bus passing at 4 seconds.

18 Q. Okay. Let's try one more time.

19 Dr. Breidenthal gave us an opinion that if a
20 bike was moving at 13.5 miles an hour and a bus was
21 moving at 25 miles an hour, the exposure time -- the
22 duration of exposure -- let's leave the force out of
23 it -- the duration of exposure would be 25 seconds.

24 Do you remember his opinion?

25 A. 25 seconds, no, I don't.

1 Q. .25 seconds. I'm sorry.

2 A. Yes, .25.

3 Q. Do you agree with that or disagree?

4 A. I agree that that's about the right
5 magnitude, a quarter of a second.

6 Q. So you agree with the time of exposure; you
7 just disagree with the amount of exposure with
8 Dr. Breidenthal; is that right?

9 A. I'm not sure I follow you. The time --

10 Q. You agree that the duration of exposure is
11 about .25 seconds, but you think there's less force.

12 A. Absolutely.

13 Q. Is that fair?

14 A. Yes.

15 Q. Okay. Based on this testing?

16 A. Correct.

17 Q. Okay. Now, the rocket test we saw yesterday,
18 what was the point of that?

19 A. Well, the testing with the fans and the
20 rocket were both --

21 Q. Let's -- let's start with the rocket, and
22 we'll go to the fan. I promise.

23 A. Sure.

24 Q. Let's start with the rocket.

25 A. The model rocket was applied to the back of a

1 rider to show, if you apply a force to a rider, what is
2 the effect on the rider. So that's purely a means of
3 looking at what kind of effect does a 5-pound force
4 have on an actual human cyclist?

5 Q. And you had Dr. Breidenthal's opinion before
6 he did this testing?

7 A. About?

8 Q. You had Dr. Breidenthal's opinion where he
9 estimated the force was 10 pounds?

10 A. Right.

11 Q. And instead of using a 10-pound rocket, you
12 used a what pound?

13 A. The peak force was 5 pounds.

14 Q. So you used a 5-pound rocket. Why didn't you
15 use the 10-pound rocket that Dr. Breidenthal --

16 A. Oh, my testing showed that the forces were
17 not as high as 10 pounds. They were on the order of
18 1 pound, so a 5-pound rocket would be greater than --

19 Q. And when you say "my testing," you're talking
20 about this wind testing that -- where the wind is going
21 back and forth and all the results are variable that
22 we've already talked about? That's the testing you're
23 talking about?

24 A. It shows that the coach pass-by force is
25 similar to ambient conditions.

1 Q. Now, you've already agreed that there's a
2 push and a pull; right?

3 A. There's an oscillation, absolutely.

4 Q. Okay. So how did this rocket work? It
5 pushed this way and then it flipped around and went
6 that way?

7 A. It pushed and then it released.

8 Q. So you just tested push?

9 A. Correct.

10 Q. Didn't test pull?

11 A. It's a one-direction rocket. That's right.

12 Q. Okay. And the same thing for the fan test?

13 A. Correct.

14 Q. You just tested one direction?

15 A. Correct.

16 Q. Okay. You could have set up a fan for push
17 and then another one for a pull and driven through both
18 of them, but you didn't do that?

19 A. You could do that. That would be a very
20 interesting experiment.

21 Q. An interesting experiment that you didn't do?

22 A. I'm not aware of anybody that did that.
23 That's right.

24 Q. And you didn't do that because you thought
25 that might make the bike wobble; right?

1 A. Absolutely not. If you look at the fan
2 tests, there's no wobble.

3 Q. The fan test blowing one way, there's no
4 wobble?

5 A. Sure. And I guarantee --

6 Q. You've already agreed there's a push-pull
7 here.

8 A. If you do the same test with two fans, you'd
9 get the same result.

10 Q. How do you know that if you haven't even done
11 the test? You just said it would be an interesting
12 test to do you haven't done.

13 A. The force is 1 1/2 pounds. It's not enough
14 to displace the rider.

15 Q. All right. Now, yesterday, Mr. Terry showed
16 you Alternative 1 in the 1993 wind tunnel testing. Do
17 you recall that?

18 A. Proposal 1?

19 Q. Yes.

20 A. Yes.

21 Q. And he asked you if that was comparable to
22 the J4500.

23 A. Some of the features of it, sure.

24 Q. Okay. And that was not an opinion you gave
25 in your expert report; right? When you did your expert

1 report, you did not give that opinion?

2 A. In my deposition, I did.

3 Q. In the expert report, you did not give that
4 opinion.

5 A. I don't think I explicitly discussed the wind
6 tunnel tests in my report.

7 Q. So then you and Mr. Terry looked at a picture
8 of the 1/6 model of the CJ3 and you compared it to
9 something else in the wind tunnel tests. Do you recall
10 that? You looked at the picture of the model CJ3?

11 A. Right.

12 Q. And is it your position that you can look at
13 pictures of buses and models and say what the drag
14 coefficient is?

15 A. No. If you want to --

16 Q. Can't do that? Can't do that? That's
17 impossible?

18 A. If you want to know that, you'd have to run a
19 test.

20 Q. And if you told a mechanical engineer or an
21 aerodynamics engineer or even any engineer that you
22 could look at pictures and determine what drag
23 coefficients are, they'd start laughing, wouldn't they?

24 A. I doubt that, but perhaps.

25 Q. Okay. So if you can't -- and you don't know

1 the drag coefficient of the J4500?

2 A. I did not measure it. That's right.

3 Q. You didn't test it?

4 A. Didn't measure the drag coefficient. That's
5 right.

6 Q. So you thought about doing a wind tunnel
7 test, but you didn't do it?

8 A. No, the wind tunnel doesn't support a moving
9 vehicle. So you couldn't do a 25-mile-per-hour test in
10 a wind tunnel.

11 Q. Okay. You could have built a 1/6 model like
12 they did in 1993 of the J4500 and tested it? You could
13 have done that; right?

14 A. Yeah, that's not a J4500.

15 Q. No, you could have built a 1/6 model. Like
16 they built the 1/6 model of the six buses in 1993, you
17 could have built one of the J4500 and tested it; right?

18 A. I wouldn't want to do that, no. I did the
19 testing with an actual vehicle and an actual cyclist.

20 Q. And you wouldn't want to do that, because, in
21 a wind tunnel, we don't have this problem of the wind
22 changing directions or the wind changing force because,
23 in a wind tunnel test, it's controlled conditions;
24 right?

25 A. Right. But you don't have the option of

1 creating relative speed between the bicycle and the
2 bus. That's really the problem with a wind tunnel
3 test. You can't move one with respect to the other.

4 Q. Well, the way they do that is they increase
5 the wind speed; right?

6 A. That's -- that's the absolute wind speed.
7 That doesn't change the relative speed. You can't move
8 the bike at 13 miles an hour and have the wind speed at
9 25 miles per hour.

10 Q. Okay. Back to the pictures. You can't tell
11 the radii -- I think I mispronounced it yet again. You
12 cannot tell the radii of a bus by looking at a picture
13 of it?

14 A. I think that's accurate, sure. You could
15 estimate, but I don't think you could tell from a
16 picture. I would take measurements.

17 Q. Okay. And you didn't take measurements of
18 the CJ3?

19 A. I did not.

20 Q. And you guys had the D series up there on the
21 screen. You didn't measure the radii of the D series?

22 A. No, I only measured the J4500.

23 Q. Okay. So you don't really know how the J4500
24 compares to either the CJ3 or the D series; right?

25 A. Certainly just know from visual comparison.

1 Q. And Alternative 1 that you said yesterday you
2 thought looked like the J4500, you don't know what the
3 radii is -- radii is for Alternative 1; right?

4 A. I don't know what the radius is, but the --
5 the features that are incorporated in Proposal 1 are
6 similar to some of the features that are on the J4500.

7 Q. So you think you can eyeball these pictures
8 and say that this bus is similar to that bus? That's
9 what you -- that's what your position is?

10 A. I think it has similar features, yes. You
11 can look at the photos and see the curvature of the
12 roof.

13 Q. All right.

14 Shane, let's have the next photo, please.

15 Here's six different buses -- or six buses.
16 Okay? Which one do you think has a -- let's start with
17 this one, top left. Is that same or similar radii to a
18 J4500?

19 A. Which one are you pointing to?

20 Q. Top left.

21 A. I don't know. This is probably not the right
22 angle to evaluate that from. I would take
23 measurements.

24 Q. Okay. So you can't tell from this picture
25 what the radii is; right?

1 A. No. I would not rely on just looking at a
2 photo as opposed to measuring.

3 Q. And can you tell from this picture if this
4 bus has better aerodynamic efficiency than that bus?

5 A. No. I would do measurements, and I would do
6 a wind tunnel test to evaluate the coefficient of drag
7 if that's what your question is.

8 Q. In Bus No. 1, can you tell if this bus has a
9 better aerodynamic efficiency than Bus No. 3?

10 A. No. I would defer to the testing that was
11 done.

12 Q. Okay. So when Mr. Terry was going through
13 the script with you, you had answers. But, today, you
14 have to do some testing. Is that what you're saying?

15 A. I would say you should do the testing. And
16 if you look at the feature, then you can incorporate
17 certain features, sure.

18 Q. Okay. And these features on -- let's take
19 this bus first, 3. Do you think that's better or worse
20 than a J4500?

21 A. I don't know. I think you -- you'd have to
22 run the tests to evaluate that.

23 Q. So looking at this picture, you can't say
24 that 3 is better or worse than a J4500?

25 A. These pictures alone? No, I wouldn't rely on

1 that. I would say you should --

2 Q. But when you looked at Alternative 1 with
3 Mr. Terry yesterday, you just popped up that it was --
4 it was similar to a J4500. That's what you said
5 yesterday.

6 A. I didn't say it was similar; I said it
7 incorporated features that are in the J4500.

8 Q. Do you think exhibit -- or Picture 3 is
9 similar to a J4500?

10 A. I don't know. You'd have to look at more
11 angles of that.

12 Q. Do you think 6 is similar to a J4500?

13 A. I don't know. You'd have to look at more
14 angles.

15 Q. Do you think that 2 or 5 is similar to a
16 J4500?

17 A. Same answer.

18 Q. And do you think that 4 is similar to a
19 J4500?

20 A. Same answer.

21 Since these tests were run on those proposals
22 and the CJ3, and none them were the same as a CJ3 -- or
23 as a J4500, I would say that they all have differences.
24 If you wanted to know the actual dimensions, you'd have
25 to measure those models.

1 Q. So, in your opinion, the J4500 is better or
2 worse than these six buses?

3 A. I haven't tried to evaluate that. You
4 should --

5 Q. And you can't say one way or the other?

6 A. You'd have to run a test -- if you wanted to
7 know the actual drag coefficient, you'd have to run a
8 test.

9 Q. All right.

10 Shane, could I have the next picture to show
11 the witness what these three buses are.

12 That's the J4500, Mr. Granat.

13 A. No, that's -- that's a --

14 Q. This is the J4500 laser image from Mr. Cohen.
15 It's a J4500.

16 A. That's actually not a laser image, no.
17 That's his graphical representation of the bus.

18 Q. So you just got done telling the jury, when
19 you looked at this exact same picture -- we put some
20 shades on it -- that you couldn't tell whether this was
21 better or worse than a J4500.

22 A. I --

23 Q. You just got done telling the jury that you
24 couldn't tell if this picture was better or worse than
25 a CJ3.

1 A. I would definitely run the tests. If you
2 want to know what's better or worse, you should run the
3 tests.

4 Q. And you didn't do that?

5 A. Absolutely not.

6 Q. You didn't do it when you told the jury that
7 the J4500 and the Alternative 1 had the same features?
8 You didn't run the test, did you?

9 A. I said that they had similar features.

10 Q. Well, let's talk about similar features.
11 This is the CJ3; right?

12 A. I don't know.

13 Q. MCI CJ3.

14 A. Okay.

15 Q. Okay. Look at the pillar here with the
16 molding; right?

17 A. Okay.

18 Q. Same pillar with the molding that we have
19 with the J4500; right?

20 A. I would compare an actual picture of the bus
21 rather than those -- the graphics on the right.

22 Q. This is the only picture we have of the CJ3
23 in this case.

24 A. No, I'm talking about the J4500 there.

25 That's Mr. Cohen's graphic of the bus.

1 Q. So you think Mr. Cohen's graphic is somehow
2 wrong or inappropriate? This is an admitted exhibit.

3 A. That's fine, but I think if you want to
4 actually do that comparison, you got to look at real
5 measurements of the coach.

6 Q. And the reason you don't like that picture is
7 because, basically, the bus at the right is identical
8 to the CJ3 --

9 A. It is not.

10 Q. -- correct?

11 A. No.

12 Q. Oh, it's not?

13 You think the shape of the front of the bus
14 is different between the left picture and the right
15 picture?

16 A. Well, given the perspective that you have on
17 the right picture, you can't tell what curvature the
18 roof has. That's why you need to look at it from
19 another perspective.

20 Q. These were the same pictures. I just got
21 done showing you -- I just got done showing you in the
22 series of six, these are the exact same pictures. And,
23 before, you couldn't tell me anything. And now you're
24 telling me you can give an opinion?

25 A. No, I'm telling you you need to look at more

1 than just these pictures. That's the same opinion.

2 Q. What you need to look at is a drag
3 coefficient from a wind tunnel test; right?

4 A. For?

5 Q. For the J4500. You need that in order to
6 give an informed opinion, don't you?

7 A. No. No, not in this matter.

8 Q. No. No.

9 A. No, my testing is based on pass-by forces
10 created by a bus going past a bicycle. I did not try
11 to evaluate the drag coefficient.

12 Q. Okay. Well, let's talk about drag
13 coefficient a little bit.

14 Can I have my next chart since we're on the
15 subject.

16 So here's the CJ3. So you know that that's a
17 .6; right?

18 A. Based on that wind tunnel test, that's right.

19 Q. And you told me yesterday, I believe -- and
20 also at your deposition -- that you didn't know one way
21 or the other whether the J4500 was a .6, .7? You just
22 don't know?

23 A. I said both times that I don't know the
24 specific number, but I can say that it's -- it's more
25 rounded than a CJ3. It has features that would make it

1 a lower drag than a CJ3.

2 Q. You told me at the deposition that you didn't
3 know one way or the other what the drag coefficient was
4 and it could be a .6. Do you recall that?

5 A. I told you it could be .6, .7, but I think
6 it's probably less than that. It's probably less than
7 the CJ3.

8 Q. Are you speculating? Are you speculating
9 now?

10 A. No. It's based on looking at the wind tunnel
11 test.

12 Q. So you told me at the -- the wind tunnel --
13 there is no wind tunnel test for the J4500.

14 A. Right. And I'm telling you that it's less
15 than the CJ3.

16 Q. So yesterday and at the deposition, you told
17 me it could be .6 and .7, and now you want to back that
18 down?

19 A. I'll be glad to point out the deposition
20 testimony. I told you that it could be some number. I
21 don't know the specific number, but I told you it would
22 be likely less than that value.

23 Q. Okay. So let's see if we can agree.
24 CJ3 is .6; right?

25 A. Sure, based on that testing.

1 Q. And the Prevost from the same testing is .44?

2 A. I will take your word for it.

3 Q. All right. And the Bugatti, you saw

4 Dr. Breidenthal's testimony, is .38?

5 A. I don't know where that number comes from,
6 but I will accept it.

7 Q. You saw -- you saw his testimony?

8 A. Right, that's a sports car.

9 Q. It is a sports car. And so the alternative
10 front that MCI developed in 1993 has a .34 in the wind
11 tunnel testing; right?

12 A. I'm not sure, but I will accept your numbers
13 on that.

14 Q. And this is the number for the Mercedes Setra
15 from Mr. Lamothe's testimony at the trial, .33.

16 A. I didn't see that testimony, but I will
17 accept your word for it.

18 Q. So the best one is the Mercedes Setra coach;
19 right?

20 A. I don't know where that number came from, but
21 I will accept your number, sure.

22 Q. All right. And so if we were trying get the
23 most aerodynamically efficient bus, we would use the
24 Mercedes; correct? We wouldn't use the CJ3?

25 A. For things like fuel economy and that type of

1 efficiency, absolutely.

2 Q. Okay. And, yesterday, you told Mr. Terry
3 that one of the reasons we can't have the window
4 molding flush with the glass is they've got to change
5 the windows. Do you remember that testimony?

6 A. That's my understanding of why the glass is
7 the way it is.

8 Q. Okay.

9 Can I have my next in order, please.

10 This is a Setra 5,000 -- 500. Excuse me.

11 You see the window here. You see the

12 A-pillar?

13 A. I see it.

14 Q. You see how it's flush?

15 A. I do.

16 Q. And in a J4500, the window molding is not
17 flush; correct?

18 A. Right. There's a small piece of trim that
19 goes around the perimeter of the windshield.

20 Q. So you don't think that Mercedes can't change
21 these windows, do you?

22 A. I don't know. I don't know the
23 serviceability. I would suspect you can change the
24 window.

25 Q. Okay. And you've seen the -- the big suction

1 cups they put on -- you have one on each hand, they put
2 it on the window, and they pull the window off? Have
3 you seen that done?

4 A. I don't think you're pulling that off with
5 one person.

6 Q. Okay.

7 A. I mean --

8 Q. I -- I didn't suggest it was one person.

9 They have service centers for these buses, don't they?

10 A. Right.

11 Q. But you can take that window on and off
12 pretty easy; right?

13 A. I don't know.

14 Q. You don't know one way or the other?

15 A. No, I don't know how you would take that
16 window off.

17 Q. So when you told the jury that MCI couldn't
18 use this type of design because they had to be able to
19 take the window off, you don't even know how you take
20 the window off of this type of design?

21 A. Right. That's not what I said; I just said
22 that there's a seal around it so it can be removable.

23 Q. Okay. And, lastly, we -- we talked for a
24 long time about your testing; right? As we sit here
25 today -- as we sit here today, you studied the case for

1 eight months; right? Six months?

2 A. Maybe so.

3 Q. Okay. And, as we sit here today, other than
4 an air blast, you have no alternative cause for the
5 bike wobble?

6 A. I did not evaluate the cause.

7 Q. But you have no alternative cause for the
8 wobble?

9 A. I was not charged with -- with evaluating the
10 cause of the crash except for the aerodynamic design of
11 the J4500. And I concluded that it's certainly not the
12 cause of a wobble.

13 Q. Why don't you look at your deposition
14 page 72, line 7, page 72, lines 21, and refresh your
15 recollection as to what you told me at the deposition.

16 A. Sure.

17 I said, "I have not tried to determine the
18 cause of the crash. All I can tell you is that an air
19 disturbance from the J4500 is not going to generate
20 forces that would have caused the crash."

21 Q. 72/21, please.

22 A. Well, 21 is just -- it just says "I think
23 we're saying the same thing."

24 Q. And the question is, "Well, if you have not
25 tried to evaluate that, it stands to reason you do not

1 have an alternative cause; right?"

2 A. I was not charged with trying to find the
3 cause of the crash, only -- I only evaluated the
4 aerodynamic properties and concluded that that was not
5 the cause.

6 Q. You do not have an alternative cause; yes?

7 A. I didn't investigate an alternative cause.

8 Q. As we sit here today, you do not have any
9 alternative cause for a wobble?

10 A. I did not try to evaluate the cause.

11 Q. And so that means you don't have an
12 alternative cause; right?

13 A. If I didn't try to evaluate it, I can't come
14 up with an alternative one. That's -- that's more of a
15 reconstructionist type of an opinion.

16 Q. Thank you, Mr. Granat.

17 MR. CHRISTIANSEN: May we approach, Your
18 Honor?

19 THE COURT: Yes.

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

22

23 CROSS-EXAMINATION

24 BY MR. CHRISTIANSEN:

25 Q. Good afternoon Mr. Granat. Just a few

1 follow-up questions for you.

2 A. Good afternoon.

3 Q. I will try to keep them brief.

4 Mr. Granat, can we agree -- well, let's go
5 back a couple of days. As an expert, you are afforded
6 the ability to sit and watch other experts testify.
7 That's allowable under the rules; correct?

8 A. I'm not familiar with the rules, but of
9 course I was here.

10 Q. You were here for Mr. Rucoba -- Mr. Rucoba?
11 I'm sorry. I keep getting that guy's name wrong.

12 A. No, I was not.

13 Q. You did not watch any of his testimony?

14 A. I did not.

15 Q. And can we agree that the truth -- an honest
16 answer is not dependent upon who poses the question?
17 In other words, if Mr. Terry asked you, "Is today
18 Thursday?" and you say yes, and then Mr. Kemp stands up
19 and says "Is today Thursday?" and you say no --

20 A. Right. For the exact same question, you
21 should get the same answer.

22 Q. You should get the same answer. So when
23 Mr. Rucoba told the ladies and gentlemen of the jury
24 that the outcome doesn't change depending upon when the
25 threat is noticed and then tells Mr. Kemp he can't make

1 that determination, that's a different answer to the
2 same question?

3 MR. TERRY: Objection. May we approach, Your
4 Honor?

5 THE COURT: Yes.

6 (A discussion was held at the bench,
7 not reported.)

8 BY MR. CHRISTIANSEN:

9 Q. I just wanted to go back to your testing.
10 You were engaged by Mr. Barger, I believe, the
11 gentleman over here?

12 A. By -- by the firm representing MCI, yes.

13 Q. Okay. And you understand the firm is
14 lawyers, advocates on behalf of MCI; correct?

15 A. They are representing MCI. That's right.

16 Q. And you were engaged by them -- and I'm just
17 looking at your report; I'm not doing anything
18 tricky -- to -- to study the theories advanced by
19 plaintiffs' experts. Is that a fair assessment?

20 A. That is.

21 Q. And that report, so the ladies and gentlemen
22 of the jury just timewise understand everything, was
23 authored October the 18th, 2017. Is that fair?

24 A. I will take your word for it. I don't
25 remember the date specifically.

1 MR. CHRISTIANSEN: Judge, may I approach just
2 so I can show the gentleman?

3 THE COURT: Yes.

4 THE WITNESS: Yes.

5 BY MR. CHRISTIANSEN:

6 Q. October the 18th?

7 A. Yes.

8 Q. And authored by yourself?

9 A. Correct.

10 Q. To study the theories advanced by plaintiffs'
11 experts; correct?

12 A. With a focus on aerodynamic properties of a
13 J4500 coach.

14 Q. Understood. And in doing that, you -- you
15 conducted the tests that we all got to see yesterday --
16 and I'm not going to spend a great deal of time talking
17 about -- correct?

18 A. Okay. Sure, yes.

19 Q. And what you discovered was the theory
20 advanced about an air displacement was an accurate
21 theory? Such a thing exists?

22 A. Well, sure. As we walk around this room, we
23 displace air. So every object displaces air.

24 Q. And what you also concluded was that the --
25 the physics of it was a push and then a pull by a

1 passing bus; fair?

2 A. Sure. There's a displacement of the air
3 toward the cyclist and then a release of that
4 displacement.

5 Q. So you concluded, at least initially, that
6 that theory advanced by the plaintiffs' expert was
7 correct, the theory? I'm not asking you the extent of
8 the theory.

9 A. Just simply the movement of the air?

10 Q. Yes, sir.

11 A. Right. That's -- that's understood from
12 basic aerodynamic principles.

13 Q. All right. So that part of the plaintiffs'
14 theory was correct, basic principles you said?

15 A. Just -- just the displacement of air?

16 Q. Yes, sir.

17 A. Yes.

18 Q. Then you further -- Mr. Kemp had the bike
19 yesterday. And he was asking about the lever effect.
20 And you agreed that the effect of the air pushing on --
21 or the effect of a 2 1/2-pound push on the back tire
22 would effectuate about a multiple of 4 on the
23 handlebar? That --

24 A. Well, I disagreed on the idea of a
25 2 1/2-pound force.

1 Q. Understood. But, I mean, I pulled your
2 transcript. You agreed to the multiple of 4 on the
3 handlebar?

4 A. I did estimate that. I think it's probably
5 lower than that in hindsight.

6 Q. Well, sir, come on, now. I mean, that's what
7 you said. You want me to put it up for you?

8 A. Yeah. I had a second to evaluate that. The
9 diameter of the tire is 26 inches.

10 Q. I don't want you to have to guess at what you
11 said.

12 Ms. Court Recorder, could I have the ELMO,
13 please.

14 This is just your transcript from yesterday.

15 "Can you answer yes or no with regards to, if
16 you have a 2 1/2-pound force like we've hypothecated,
17 what the leverage would be seen right here?"

18 This is your answer: "It's about 4-to-1
19 lever ratio, given geometry."

20 Correct? Did I read that -- did I read
21 that -- just the lever ratio. That's all I'm asking.
22 Is that what you said?

23 A. Right. That's what I said. Looking at the
24 bike, I think you should do some measurements and
25 calculations to find out, sure.

1 Q. Okay. And so not only is the initial physics
2 theorized by the plaintiff correct, but the lever
3 effect increasing the pressure from the tire to the
4 handlebars, you also agree with that in theory?

5 A. No.

6 Q. You told -- I just read your answer, sir.
7 You said it was a multiple of 4; correct?

8 A. Right. But I disagree very much with the
9 idea that the force is applied to the back of the tire.

10 Q. So let's just -- if it's a multiple of 4 and
11 the force is 10, it's 40, right, on the handlebar?

12 A. No. The force of 10 is from Dr. Breidenthal.

13 Q. What's 10 times 4?

14 A. That's 40. But the force that
15 Dr. Breidenthal talks about is the force on the body of
16 the rider; it's not the force on the tire.

17 Q. Sir, just listen to me. If the force on the
18 wheel -- the force on the tire is 10, the effect on the
19 handlebars, using your 4-to-1 lever -- 4-to-1 ratio, is
20 40; correct?

21 A. 10 times 4 is 40. That's right.

22 Q. All right. And that lever effect is
23 something you learned from Will Kemp; right? I mean,
24 you didn't know it in your report. It's not in your
25 report, is it?

1 A. No, I did not evaluate that in my report.

2 Q. It's not in any of your testing; correct?

3 A. No, that's not in my testing. That wouldn't
4 be something that I would have tested for.

5 Q. And -- 'cause you were tasked, as I
6 understand it, with a very limited role, aerodynamics;
7 correct?

8 A. Evaluating plaintiffs' theories of
9 aerodynamics at the time.

10 Q. And you drove that bus a hundred-plus times;
11 fair?

12 A. More so, yeah. About that.

13 Q. You had the ability to put whatever you
14 wanted on the bus. I saw you had a bunch of -- in your
15 pictures, you got a bunch of equipment on there.

16 A. Correct.

17 Q. You chose not to put a proximity sensor on
18 that bus; correct?

19 A. I measured it -- measured the proximity with
20 a laser sensor on the ground.

21 Q. No, no. You chose not to put a proximity
22 sensor on that bus; correct?

23 A. I did not put a proximity sensor on the bus.
24 That's right. That would be outside the scope of the
25 work I was doing.

1 Q. You chose not to evaluate the blind spot of
2 the bus; correct?

3 MR. TERRY: Objection, Your Honor. May we
4 approach?

5 THE COURT: Yes.

6 (A discussion was held at the bench,
7 not reported.)

8 BY MR. CHRISTIANSEN:

9 Q. Okay. So you chose -- we ended with you had
10 agreed you chose not to install and see -- use a
11 proximity sensor. And you agree?

12 A. Right. I was testing air displacement so I
13 wouldn't install a proximity sensor.

14 Q. Similarly, you did not inspect or evaluate
15 blind spots. Fair?

16 A. Right. For the purpose I was conducting the
17 test, I would not do that.

18 Q. Similarly, you did not install nor evaluate
19 an S-1 Gard and whether or not it would have pushed the
20 doctor's head out of the way. Fair?

21 A. That's fair, sure.

22 Q. You sort of kept your stuff narrowly tailored
23 as to aerodynamics; correct?

24 A. I think that's a fair statement, sure.

25 Q. And when you write reports, sir, you put in

1 your reports what it is you review. Is that accurate?

2 A. Right. I have a list of materials received
3 and reviewed.

4 Q. And you needed to do aerodynamics. As I
5 understand your testimony today. Fair?

6 A. I'm not sure what you mean.

7 Q. You were evaluating aerodynamics; is that
8 fair?

9 A. I was evaluating the aerodynamic properties,
10 sure.

11 Q. Help me understand what the deposition of
12 Aria Khiabani had to do with aerodynamics, because you
13 read that; right?

14 A. Those are -- those are all the materials I
15 received. Whether they're pertinent to my opinions or
16 not, those are everything that I've got.

17 Q. But you didn't, anywhere that I could find,
18 review the trial testimony that was preserved via video
19 of Katy Barin taken September the 22nd, 2017. Is that
20 accurate?

21 A. I don't recall seeing that, no.

22 Q. And so we're clear as to the timing of your
23 tests, October 7th and 8th were some of your tests?

24 A. Correct.

25 Q. Do you know and can you tell me where Katy

1 Barin was October 7th and 8th?

2 MR. TERRY: Objection, Your Honor.

3 THE COURT: Sustained.

4 BY MR. CHRISTIANSEN:

5 Q. When you did your tests, you and Mr. Carhart
6 both met down in this place outside of Phoenix?

7 A. It's actually his facility. He works for
8 Exponent, the company, and that's their facility.

9 Q. All right. And you used to work for Carr
10 Engineering?

11 A. I did.

12 Q. The same group that Mr. Rucoba works for?

13 A. I used to work with Mr. Rucoba some 20 years
14 ago.

15 Q. And all of you were retained by the lawyers
16 for MCI?

17 A. In -- you're talking --

18 Q. In this case. In this case.

19 A. -- Dr. Carhart? Yes, of course.

20 Q. And when you did your tests in early October,
21 you didn't invite any of the plaintiffs' experts; is
22 that fair?

23 A. I did that testing with Dr. Carhart.

24 Q. My question to you, sir, is you did not
25 invite any of my experts?

1 A. Right.

2 Q. There was nobody there to check your testing
3 besides you and the other gentleman working for MCI;
4 fair?

5 A. Right, as -- apart from the actual test
6 documentation that I've provided.

7 Q. You chose how to conduct the tests; correct?

8 A. That's right.

9 Q. You chose how to measure the tests?

10 A. That's right.

11 Q. You chose the charts to use?

12 A. That's right.

13 Q. The videos to take?

14 A. That's right.

15 Q. And when Mr. Carhart rode the bike and the
16 bus coming up behind him, he knew it was coming; right?

17 A. He did, right. He can hear the bus coming.

18 MR. CHRISTIANSEN: That concludes my cross,
19 Your Honor. Thank you.

20 Judge, I have one other area. Can we
21 approach with Mr. Terry?

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

24 THE COURT: I'm going to admonish you and
25 give you a 15-minute break.

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

8 You are not to conduct any research on your
9 own relating to this case, such as consulting
10 dictionaries, using the Internet, or using reference
11 materials.

12 You are not to conduct any investigation,
13 test any theory of the case, re-create any aspect of
14 the case, or in any other way investigate or learn
15 about the case on your own.

16 You are not to talk with others, text others,
17 tweet others, google issues, or conduct any other kind
18 of book or computer research with regard to any issue,
19 party, witness, or attorney involved in this case.

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

23 Take a 15-minute break.

24 THE MARSHAL: All rise.

25 (The following proceedings were held

1 outside the presence of the jury.)

2 THE COURT: I need to take a five-minute
3 break.

4 MR. KEMP: Your Honor, I just wanted the
5 record to reflect I gave Mr. Terry a better copy of
6 that weather data, because what we had on the screens
7 all --

8 THE COURT: Very fuzzy.

9 THE MARSHAL: Please be seated.

10 THE COURT: We are on a break.

11 THE MARSHAL: Oh, break. Step down, sir.

12 (Whereupon a short recess was taken.)

13 THE MARSHAL: Please remain seated. Come to
14 order.

15 THE COURT: Let's go back on the record.

16 Let's see. Before we went to break, you were
17 at the bench. There's a conversation about
18 cross-examination and direct and redirect.

19 So the reason why I am allowing
20 Mr. Christiansen -- thus far this has been the order --
21 to also cross-examine a witness is because you have
22 different clients. However, it cannot be cumulative
23 whatsoever. Okay?

24 Now, there's been a request by the defense to
25 also have a second attorney approach the redirect.

1 I've just done a little bit of research, and there's
2 not a lot about anything. But the only reason why I'm
3 allowing them to do it is because they have separate
4 clients. And I am not familiar with anything that
5 states -- in fact, my understanding is that the
6 attorney who conducts the direct is the same attorney
7 who conducts the redirect.

8 If anyone here has any information, or -- or
9 case law or statute or anything that is dissimilar to
10 that, I'm -- I welcome hearing about it.

11 MR. ROBERTS: Your Honor, the reason for my
12 request is, if you recall, we filed a bench brief -- a
13 trial brief in support of a level playing field.

14 THE COURT: Yes.

15 MR. ROBERTS: And we do not agree that
16 plaintiffs' counsel have different clients. From the
17 beginning of this case, they have indicated they
18 represent all of the plaintiffs. That's what the
19 complaint says, that's what the amended complaint says
20 that has the current parties, the wherefore clause.

21 It's not shorthand, as Mr. Kemp said. They
22 specifically list all of the plaintiffs and say they're
23 represented by both firms in the introductory paragraph
24 of the complaint. The pretrial order says that. The
25 motions have all said that. Mr. Christiansen, before

1 the venire in this case, introduced him and Mr. Kemp as
2 representing all of the plaintiffs.

3 It's a complete fiction that they represent
4 two different plaintiffs.

5 I understand the Court found that, if that's
6 what they say, their clients have a constitutional
7 right to separate representation and you were going to
8 allow them separate presentations; however, you said
9 you were going to not allow this to create an uneven
10 playing field or allow them to gain a strategic
11 advantage.

12 THE COURT: Correct.

13 MR. ROBERTS: And although it was limited to
14 opening and closing, the Court did say, because you're
15 allowing them two lawyers, if we wanted two lawyers for
16 opening or two lawyers for closing, you would allow
17 that.

18 It would be consistent with that ruling to
19 allow two lawyers to perform a redirect as long as it's
20 not cumulative and prevents them from gaining a
21 competitive advantage for this idea that they
22 manufactured separate clients for the purpose of a
23 strategic advantage, which I believe is what's happened
24 here.

25 But as far as being allowed, the Court has

1 discretion to direct the way the proceedings are -- go
2 forward. There aren't any rules about this. There are
3 customs, but you have discretion, as long as you don't
4 abuse it, to create an unfair situation. And rather
5 than creating an unfair situation, I believe if they're
6 allowed two lawyers and take two lawyers for any
7 witness, that should open the door to us having two
8 lawyers for that same witness as long as it's limited
9 to scope, duration, and noncumulative and isn't taking
10 advantage of the situation.

11 And we didn't ask to have two lawyers on
12 direct because at that time we didn't know that they
13 would try to take advantage of their separate
14 representation to double-team us on cross.

15 Thank you, Your Honor.

16 MR. KEMP: Your Honor, there's no rules on
17 it, but there's the constitutional right to
18 representation of counsel in the Sixth Amendment.
19 That's a constitutional right. And far from saying
20 that we've appeared for each plaintiff, the very first
21 time we walked into this courtroom, I made it crystal
22 clear on the record which plaintiffs I represented. I
23 put them both on the record. Mr. Christiansen did the
24 same thing. In the depositions we tried to do that.
25 For example, I have the Pears deposition here taken on

1 August 18th, 2007 -- or Plantz -- excuse me. I'm
2 looking at page 5, lines 21:

3 "MR. CHRISTIANSEN: Pete Christiansen on
4 behalf of Dr. Katy Barin, Aria Khiabani."

5 This was back in April.

6 Line 23:

7 "MR. PEPPERMAN: Eric Pepperman on behalf
8 of plaintiffs Keon Khiabani and the estate of
9 Kayvan Khiabani."

10 So, yes, we have separated, and, yes, we do
11 represent separate plaintiffs, and, yes, the rule in
12 this jurisdiction is that if you have two plaintiffs --
13 and in the Chanin case, I had the husband; Mr. Eglet
14 had the wife. That was the big hepatitis verdict for
15 505 million. We got full-bore cross-examination of
16 each particular witness. There was no limit
17 whatsoever, you know. I went an hour; he went an hour.
18 We did that during the entire trial because that was
19 our right to do.

20 We tried to be very judicious in this case,
21 and part of it is because, really, it's kind of going
22 fast and, you know, you can't prepare for every expert.
23 So there's a tactical reason.

24 But we have been pretty judicious, and I
25 think Mr. Christiansen has perhaps tried to ask couple

1 of additional questions for five or eight minutes. You
2 know, there's no reason to adopt a new rule in the
3 middle of trial. Here we are in week five of a trial,
4 and we're going to change the rules?

5 THE COURT: No. In fairness, Mr. Roberts
6 filed something several weeks ago -- I can't tell you
7 what date because I can't keep track of everything --
8 concerning playing --

9 MR. KEMP: He did, Your Honor, and we argued
10 it. We -- you heard the exact same argument today that
11 he made a couple of weeks ago. He said, "Oh, they have
12 been representing all the plaintiffs." And I made the
13 exact same response I'm making now, that when we came
14 in here the first time, we made separate appearances.

15 Your Honor, that should be the end of it.
16 That is the end of it in every case I've ever tried.
17 And it's not uncommon in a personal injury case to have
18 three, four, five lawyers because there's more than one
19 person hurt.

20 In fact, the ethical rules suggest that if
21 there's more than one plaintiff, that you have to have
22 more than one lawyer. That's in the ethical rules. So
23 to suggest that you have to have more than one lawyer
24 because of a conflict of interest or potential conflict
25 of interest, but that lawyer can't do his job and

1 defend his client, you know, in compliance with the
2 Sixth Amendment, I mean, it's just a ridiculous
3 request.

4 He represents the same client as Mr. Terry
5 and Mr. Barger does. You know, to turn this into a
6 free-for-all at week five, I just -- you know, there's
7 no doubt they represent the same client.

8 So, you know, if the Court wants to think
9 about it, fine. But coming in on a redirect, a
10 redirect examination, and claiming that there's some
11 reason that they need two attorneys all of a sudden?
12 You know, they've had 15, 20 minutes to confer with
13 each other. And they've done so. There's no reason
14 for them to have two attorneys, Your Honor.

15 THE COURT: All right. Mr. Roberts, I
16 understand what you're saying. But from -- frankly, as
17 usual, I ran back to do more research, and I don't find
18 anything that -- there's not a lot, period. But I
19 don't find anything -- I understand the plaintiffs and
20 how each have a right and a duty to represent their own
21 clients, but I don't find anything on having more than
22 one attorney question the same witness when they're
23 representing one -- the same client.

24 MR. ROBERTS: And, Your Honor, our whole
25 basis for this from the beginning -- and we cited this

1 in our trial brief, and Mr. Kemp can say that they've
2 always entered separate appearances, but we have shown
3 the Court that they haven't.

4 And even in this case, before this venire,
5 they introduced themselves as representing all -- each
6 one of them and both of them representing all of the
7 plaintiffs. And that's in our trial brief and it's
8 part of the record.

9 This is to balance out the fact that the
10 Court is granting them separate representation but in
11 recognition of the fact it's a fiction, and the only
12 time they introduce themselves as representing separate
13 clients is when they want to gain a strategic
14 advantage.

15 In the deposition Mr. Kemp has pointed out,
16 Mr. Pepperman and Mr. Christiansen both wanted to ask
17 questions and both did ask questions. If they
18 acknowledged the fact they'd entered an appearance at
19 that time, all representing the same parties, they
20 wouldn't have gotten two bites at the apple.

21 And this is what they're doing, and it's all
22 about a strategic advantage. And it isn't about
23 Mr. Terry's inability to ask the same questions I would
24 ask. It's about the strategic effect that having more
25 than one attorney ask questions, it changes the

1 attention of the jury. It revives the jury when you
2 have a new lawyer up. They pay more attention to what
3 the next new lawyer is doing.

4 It is a strategic advantage, and I don't
5 think they should get that strategic advantage
6 throughout the trial whenever they choose to use it
7 because they've created a fiction of separate
8 representation.

9 MR. KEMP: And at this very same deposition
10 he's talking about there were four defendants
11 represented, they each had their own attorney, and each
12 one of them took a whack at the witness. And that's
13 what happened during the entire discovery, Your Honor.
14 If they had separate clients, there wouldn't be an
15 argument here, but they have the same client.

16 And, Your Honor, before we -- we get going
17 again, I have a very serious matter to report to the
18 Court. It's quick, but it's serious.

19 They have a shadow jury here. They've had
20 eight people in the shadow jury monitor the case, which
21 is their right. I haven't objected to it.

22 THE COURT: What do you mean, a shadow jury?

23 MR. KEMP: They have people that they are
24 paying money to sit here and watch the case, and
25 they've tried to match each one of these people with

1 one of the jurors.

2 And so what they do -- well, I don't know
3 what they do at the end the day, but the reason you
4 have a shadow jury is so you can ask them questions
5 about what's going on and what's going on.

6 And I'm not arguing that's inappropriate,
7 Your Honor. I've used shadow juries before. But what
8 is inappropriate is we just observed one of their
9 shadow jurors talking to one of the actual jurors. And
10 whoever is running this shadow jury should have told
11 each one of those shadow jurors that that is absolutely
12 forbidden. That is grounds for a mistrial.

13 So either we got to get shadow jury out of
14 here or we got to bring in each one of them and ask --
15 each one of the shadow jurors and ask if they've had
16 any contact and what they've said to the regular
17 jurors.

18 I mean, it is just outrageous that whoever is
19 responsible for this shadow jury is allowing contact
20 between the regular jury and the shadow jury. That is
21 absolutely forbidden, Your Honor. They're paid by MCI.
22 They're agents of MCI. For them to say anything --
23 they should be subject to the same rules we are, that,
24 you know, can't speak to them. You can look at them;
25 you can wink at them. I don't know who's running this

1 shadow jury, but it's unbelievable that that happened.

2 MR. BARGER: I can address.

3 THE COURT: Before we go on, I'm not losing
4 sight of our first issue. Okay. And that's something
5 that we'll come back to.

6 MR. ROBERTS: Thank you, Your Honor.

7 THE COURT: But with respect to anyone from
8 either party or any of the parties that have someone
9 that's working with them, that has any contact with any
10 of the possible jurors or alternates, including my
11 department, except for Marshal Ragsdale --

12 MR. KEMP: Your Honor, we reported this to
13 the marshal, we were so concerned about it.

14 THE MARSHAL: I spoke with you, Your Honor.

15 THE COURT: Okay. I'd like to hear -- I'd
16 like to hear.

17 THE MARSHAL: Actually, a juror said she
18 spoke to the person.

19 MR. KEMP: Your Honor, she doesn't -- the
20 juror doesn't know that this is an MCI employee.

21 THE COURT: Well, they've been admonished
22 many, many times not to speak to anyone, at all,
23 including each other about --

24 THE MARSHAL: But she did say it was nothing
25 to do with the case. She just basically asked how was

1 her day as she was exiting the restroom.

2 THE COURT: I'm sorry. Come a little closer.
3 What did you say, Jerry?

4 THE MARSHAL: She asked the person in the
5 restroom -- she was in the restroom with the other
6 person and she asked how the other person's day was.

7 THE COURT: How's your day?

8 THE MARSHAL: That's basically all she asked
9 them, Your Honor.

10 MR. KEMP: Judge, this is why about a week --
11 maybe it was two weeks ago we -- we alerted the marshal
12 to the fact that there was a shadow jury.

13 THE COURT: This is the first I have heard of
14 it.

15 MR. KEMP: Maybe it's the first you heard of
16 it, but we made the marshal aware of it.

17 THE COURT: I haven't been made aware, Jerry.
18 I don't know if you should have probably let me know or
19 not.

20 MR. KEMP: You know, I would have thought
21 there was some precaution taken over here.

22 But, in any event, that's why we've been
23 encouraging the jury to go there because the shadow
24 jury goes out that way.

25 THE COURT: I see.

1 MR. BARGER: And, Judge, can I comment?

2 There is a shadow jury. I don't talk --
3 nobody -- they don't even know who has paid them and
4 who has had them be the shadow jury. It's very common,
5 and Mr. Kemp does it all the time, I'm sure.

6 The fact is they don't even know who it is.
7 We have an independent company that we do not talk to,
8 except later when they give a report. We have not -- I
9 don't even know who the shadow juror members are. I
10 know they're sitting in here. Nobody from MCI has ever
11 talked to a shadow member.

12 I'm sure they're instructed -- and I can
13 verify you those people are instructed to never talk to
14 anybody, period, about it.

15 So I just want to make the record clear of
16 what a shadow jury is is common. And I assure you,
17 they're not employees of MCI. They're from an
18 independent company who's done this and reports to us
19 their comments. And so from what I heard, it --

20 THE COURT: But -- but they're -- they're
21 agents.

22 MR. BARGER: I'm sorry?

23 THE COURT: There's an agent -- I mean,
24 they're here for the purposes of helping your team.

25 MR. BARGER: No, I understand.

1 THE COURT: There may not be anything
2 inappropriate with that. The only inappropriate issue
3 is any discussions.

4 Now, she said that the extent of the
5 conversation was --

6 THE MARSHAL: Yeah. She asked her how was
7 her day.

8 THE COURT: Who asked whom?

9 THE MARSHAL: It was the juror asked the
10 person in the restroom as she was exiting.

11 THE COURT: The juror asked the shadow juror.

12 THE MARSHAL: Yes.

13 THE COURT: Who we believe -- I don't even
14 know -- how was her day?

15 THE MARSHAL: Basically, as it was exiting.

16 THE COURT: What was the response?

17 THE MARSHAL: I don't recall the response.
18 But she -- I did speak with her, and she said she
19 didn't know what she was supposed to say or not to say
20 that she would not speak to the juror about the case.

21 THE COURT: You spoke to the shadow jurors?

22 THE MARSHAL: No. I spoke to the juror. I
23 did not speak to the shadow jurors.

24 MR. KEMP: The real juror.

25 THE COURT: All right.

1 MR. KEMP: Your Honor, I just ask that they
2 at least --

3 THE COURT: Well, you know, I think that
4 what's occurred is not -- is not --

5 MR. KEMP: I'm not making a motion for
6 mistrial. I'm not asking for sanctions.

7 THE COURT: -- because I think sometimes
8 people just automatically say, "Hi, how are you?" But
9 I do want to make sure that there's no contact at all.
10 And without discussing shadow juries, I will make sure
11 that I limit this jury's even saying good morning or
12 hello or anything to anyone and making sure that that's
13 emphasized. Okay?

14 And then, whomever is in charge of
15 indirectly/directly the shadow jurors needs to make
16 sure that -- I will try to keep this jury over here,
17 but I can't keep them there the entire time.

18 THE MARSHAL: Everyone else was in the back.
19 She just wasn't feeling well, so she used the restroom
20 up front.

21 MR. BARGER: Your Honor, I will -- I will
22 contact the company that runs the shadow jury. I
23 assure you these people are professional and they've
24 done this a lot. And I will remind them, whoever these
25 shadow jurors are, to discuss with them tonight don't

1 even -- if a juror even looks at them, just look the
2 other way.

3 THE COURT: That's what they're supposed to
4 do.

5 MR. KEMP: There's another problem. One of
6 the shadow jurors is a smoker, and one of -- a couple
7 of the regular jurors are smokers, and they go out
8 together and they smoke on the balcony. I haven't
9 observed them talking, Your Honor, but they're in close
10 physical proximity.

11 MR. BARGER: I will tell --

12 THE COURT: She's going to have to give -- he
13 or she will have to give up smoking.

14 MR. KEMP: It's a he.

15 THE COURT: Get them Nicorette. I'm serious.
16 I can't have them out there. It's very -- have you
17 gone out there? It's very small.

18 MR. BARGER: I have never been out there.

19 THE COURT: It's a very small space. And I
20 don't smoke, but I have people in Department 14 -- I
21 have one smoker. And when the smoker goes out there,
22 the other smokers, they chat. You know? It's a very
23 small space.

24 MR. BARGER: I will --

25 THE COURT: And it's natural for people to

1 chat.

2 MR. BARGER: I will tell --

3 MR. TERRY: Your Honor, as a former smoker,
4 may I inquire whether or not that smoking area is on
5 every level?

6 MR. KEMP: It is.

7 MR. TERRY: We'll get --

8 THE MARSHAL: Almost every level.

9 MR. BARGER: I will instruct.

10 THE COURT: To go to a different --

11 MR. BARGER: I will instruct the person
12 running the shadow jury to tell any shadow juror if
13 they smoke, they have to go down to a different level
14 and to never be on that level.

15 THE COURT: And will you please instruct --
16 because I don't want to -- to point out the smoker --
17 the smoker that they must stay on this level.

18 THE MARSHAL: Yes, I stay outside with them
19 every time they smoke.

20 THE COURT: Oh, you do?

21 THE MARSHAL: Yes.

22 THE COURT: All right. Anything else about
23 the shadow jury?

24 MR. KEMP: No, Your Honor.

25 THE COURT: I'm encountering new and

1 interesting situations on a -- but we're going hour by
2 hour now. Okay?

3 MR. BARGER: Judge, it's not the TV show
4 "Bull." Trust me.

5 THE COURT: I don't know what that is.

6 MR. BARGER: Did you ever see the TV show
7 "Bull"? Oh, it's about a jury consultant.

8 THE COURT: Oh, really? Okay.

9 All right. So do we have reasonable ground
10 rules here? And I will -- let me just tell you, shadow
11 jury, plaintiffs' -- plaintiffs' army of people, yours,
12 my -- my department, anyone that is doing that will be
13 sanctioned and -- and have significant problems. I
14 mean, it's a rule for everyone. Okay?

15 MR. BARGER: Yes.

16 THE COURT: Okay.

17 MR. BARGER: Thank you.

18 THE COURT: Very good.

19 All right. Now, I don't want to keep the
20 jury waiting. Back to the issue with respect to
21 having -- Mr. Roberts, I'm not at this time going to
22 grant that. I'll take a look at it this evening again
23 happily and -- and let you know tomorrow and -- and do
24 some more research. But I am concerned because it is
25 the only reason why I'm allowing that.

1 And, Mr. Christiansen, it cannot be
2 cumulative. So --

3 MR. CHRISTIANSEN: Judge, I have been pretty
4 brief. I don't think I have been longer than 12
5 minutes --

6 THE COURT: I know, but I just want to remind
7 you.

8 MR. CHRISTIANSEN: Understood.

9 THE COURT: Okay?
10 Where are we now? Let's bring the jury back
11 in.

12 THE MARSHAL: Ready?

13 THE COURT: You know -- how you doing?

14 THE WITNESS: Fine.

15 THE COURT: Okay.

16 THE MARSHAL: Ready, Your Honor?

17 THE COURT: Ready.

18 THE MARSHAL: All rise.

19 (The following proceedings were held in
20 the presence of the jury.)

21 THE MARSHAL: All the jurors are present,
22 Your Honor.

23 THE COURT: Thank you.

24 THE MARSHAL: Please be seated. Come to
25 order.

1 THE COURT: Do the parties stipulate to the
2 presence of the jury?

3 MR. KEMP: We do.

4 MR. TERRY: We do.

5 THE COURT: All right. Very good.
6 Please proceed.

7

8 REDIRECT EXAMINATION

9 BY MR. TERRY:

10 Q. Mr. Granat, I have just a few questions for
11 you. Mr. Christiansen asked whether or not you had
12 invited any of his experts to your testing.

13 A. Right.

14 Q. And the answer was no?

15 A. That's right.

16 Q. Were you invited to any testing conducted by
17 the plaintiffs' experts?

18 A. I was not.

19 Q. Were you invited to Dr. Breidenthal's testing
20 if there was any?

21 A. I was not. I was not aware of any testing.

22 Q. Were you invited to Dr. Stalnaker's testing
23 it there was any?

24 A. No.

25 Q. In connection with the information that you

1 had and what you did, did you choose what mission you
2 were given?

3 A. Well, I was asked to evaluate the air
4 disturbance -- or the air displacement around a J4500
5 coach. So, given that information, I chose how I -- I
6 did that. I chose and framed my test.

7 Q. So we -- or you were asked to conduct a
8 specific task or mission, and then you decided how to
9 accomplish that task or mission?

10 A. That's right.

11 Q. Were you the one that decided on the test
12 protocol that you would use?

13 A. Yes.

14 Q. Did you decide that wind tunnel testing was
15 not appropriate for what you were trying to do?

16 A. I did decide that.

17 Q. Did anyone instruct you, direct you, order
18 you not to do wind testing?

19 A. No, nobody did.

20 Q. Why did you not do wind testing?

21 A. The issue with wind tunnel testing is -- one
22 issue is scale. You can do scale models, but then, of
23 course, there's some significant issues with creating
24 an accurate scale model.

25 And then the other issue is the relative

1 displacement of the bus and the cyclist. You can't
2 create a wind tunnel model that's going 25 miles per
3 hour and a bicyclist that's going 30 to 45. So that's
4 why did the real testing with the actual bus and an
5 actual cyclist.

6 Q. Now, you were asked about whether or not you
7 could rule out or rule in other causes for the crash.
8 Do you remember those questions?

9 A. That's right, yes.

10 Q. And you were asked to read your deposition
11 where you were asked that same question by Mr. Kemp
12 when he took your deposition.

13 A. That's right.

14 Q. Do you still have your deposition there?

15 A. I do.

16 Q. Could you please go to page 71, where
17 Mr. Kemp had you read.

18 Are you there?

19 A. I am.

20 Q. The question at line 5 by Mr. Kemp was, "With
21 regards to the wobble or swerve, whatever you want to
22 call it, to the left, you don't have an alternative
23 cause to air blast that you could point me to; is that
24 correct?"

25 What was your answer?

1 A. The answer is, "Well, I'm not trying to
2 reconstruct the crash. I've not tried to re-create it.
3 What I can tell you is there is no air blast. Air
4 blast is not consistent with air displacement around
5 the coach. And I can tell you that air displacement
6 around the coach is not significant. So while I have
7 not tried to determine the precise cause, I can rule
8 out the cause of air displacement around the coach."

9 Q. Well, the next question was, "And you have no
10 other cause as we sit here today?"

11 A. Right.

12 Q. And what was your answer?

13 A. "I'm not reconstructing the crash. I'm not
14 trying to reconstruct that. That's not part of the
15 work that I've done in this case."

16 Q. "My question's real simple," he said. "Do
17 you have another cause or not?"

18 And what was your answer?

19 A. "I have not tried to determine the cause.
20 How could I have one if I've not tried to determine it?
21 All I can say that it's not the air displacement."

22 Q. And has that been your testimony here today?

23 A. That is.

24 Q. In connection with your review of photographs
25 of the other buses, the buses that were studied in the

1 1993 wind tunnel and the J4500 and the D coach, I'd
2 like to ask you some questions.

3 You were shown a picture of six bus or pieces
4 of six buses.

5 A. Right.

6 Q. This picture here, six buses?

7 MR. GODFREY: Madam Recorder, we've agreed to
8 display those from our side.

9 THE COURT: I'm sorry?

10 Thank you.

11 BY MR. TERRY:

12 Q. Okay. Is this the kind of picture that we
13 displayed yesterday for the jury when you were
14 comparing the MCI CJ3 with the J4500 or the MCI CJ3
15 with the D coach?

16 A. No, this is a an overhead view. It's with
17 apparently some masking on some of the views.

18 Q. Okay. And then you were shown the Fat Pencil
19 drawing.

20 A. Right.

21 Q. In terms of the Fat Pencil drawing, do you
22 know whether or not that is an accurate or -- depiction
23 of what the actual J4500 looks like?

24 A. Well, I have not had access to their model.
25 I can tell from the image that it's a -- it's a mesh of

1 some sort of a model. So it's -- I mean, you can see
2 some variability in that area above the A-pillar. That
3 just indicates that there's some modeling features
4 there that are -- are not likely identical to a real
5 vehicle.

6 But I have not had a chance to measure the
7 rest of this model to see if it's accurate.

8 Q. Okay. On the J4500 Fat Pencil that is
9 depicted on the model, Mr. Cohen's model --

10 A. Right.

11 Q. -- can you see the molding that holds the
12 windshield in?

13 A. I can see a piece of black line there that it
14 looks like it's meant to depict the molding.

15 MR. TERRY: May he approach?

16 BY MR. TERRY:

17 Q. Would you be so kind as to point out the
18 black molding on the Fat Pencil rendition of the 4500?

19 A. Sure. From what I can recognize in this
20 image, this would be the molding here --

21 Q. Okay. And where --

22 A. -- around the perimeter.

23 Q. When you go up to the top of the molding,
24 would you draw a line or point from the molding to the
25 corner of the bus.

1 A. You mean from the top of the molding here to
2 the -- I'm not sure which corner you're asking.

3 Q. To the right.

4 A. From this here down to here?

5 Q. No, the other way. Across the top.

6 A. I'm still not following you.

7 Q. All right. So you have the pointer there.
8 If you'd just run it down a little bit along the white.

9 A. Down this way?

10 Q. No, the other way.

11 A. This way?

12 Q. Okay. All right. Where is the grounding on
13 the front windshield of the J4500?

14 A. Well, we can't see in this model, certainly
15 not in this view. I can't really tell what's going on
16 there.

17 Q. Okay. Now, if you go to the one to the left,
18 the CJ3, can you find out where the molding is on that?

19 A. It appears to be in -- it appears to be in
20 this area right here.

21 Q. Okay. Can you tell whether or not that is in
22 the same place as the one on the 4500 relative to the
23 windshield?

24 A. It looks to be placed a little different. I
25 mean, I -- I would have to measure these to really tell

1 for sure.

2 Q. Would you describe putting a molding on the
3 windshield an aerodynamic sin?

4 A. I think the molding itself is a very small
5 feature. I'm not sure how that could be described as a
6 sin, but it's -- it's a small feature on the corner of
7 the bus there.

8 Q. Would you consider it the same sin on the CJ3
9 as on the 4500?

10 A. I don't know. I'd have to evaluate that
11 more. I mean, I can't really tell from the photographs
12 how these would compare.

13 Q. Thank you, sir. You may take your seat.
14 Thank you, sir.

15 You've indicated -- or Mr. Kemp pointed out
16 that you did not include an analysis of the 1993
17 testing in the written report you prepared in the
18 middle of October.

19 A. I think that's true, yes.

20 Q. Were you asked about that issue by Mr. Kemp?

21 A. During my deposition?

22 Q. Yes.

23 A. I believe so, yes.

24 Q. And did you respond to the questions that he
25 asked?

1 A. I did.

2 Q. Would you please go to your deposition at
3 page 25.

4 A. Okay.

5 Q. At line 21, Mr. Kemp asks you this question:
6 "Assuming for the sake of argument that the best result
7 achieved in the 1993 testing was a .29, you don't know
8 whether or not the J4500 model year 2008 was .58? .6?
9 .7? You don't know; right?"

10 What was your answer?

11 A. "I don't know specifically."

12 Q. And then on the next page, the question was,
13 "Well, you don't know generally either, do you?"

14 And what was your answer?

15 A. The answer was, "In reviewing the wind tunnel
16 testing, I would say that the shape of the coach was
17 closer to the lower drag numbers. And it appeared that
18 the higher drag number coach model was consistent with
19 that -- well, that design appeared to be more
20 consistent with an older model coach, a C or a D MCI
21 coach. But without somebody like Mr. Hoogestraat able
22 to identify specifically which shape was a C or a D or
23 a J coach, I really don't know specifically which one
24 is which."

25 Q. Which is the same thing you told the jury

1 yesterday?

2 A. Right.

3 Q. And when we looked at the picture, the
4 side-by-side photograph, this was your J4500 test
5 vehicle on the right?

6 A. Correct.

7 Q. And the MCI proposal on the left?

8 A. Proposal 1, yes.

9 Q. Okay. And you testified to the jury that
10 there were certain features in the proposal that were
11 consistent with or appeared in the J4500?

12 A. Certain features, yes.

13 Q. You were not -- or were not at the time an
14 employee of the MCI company?

15 A. I was not then and have not ever been.

16 Q. So you did not participate in the actual
17 engineering or design of the front for the J4500?

18 A. I did not.

19 Q. You were not a consultant to MCI in
20 connection with the design of the J4500 front?

21 A. Not when the J4500 was designed, no.

22 Q. Do you know how many engineers were in the
23 team that designed the J4500 or the E coach that came
24 before it?

25 A. I don't know.

1 Q. Do you know if it was more than one engineer?

2 A. It would most certainly be more than one
3 engineer.

4 Q. Based on your experience at Ford, would you
5 expect it would be more than one engineer?

6 A. Yes.

7 Q. Do you know which engineer actually
8 designed -- or which group of engineers actually
9 designed the J4500?

10 A. I don't know.

11 Q. So in terms of how they went about it, what
12 they used, what they relied on, what they consulted
13 with, what they considered, do you have any
14 information, personal knowledge, or have you been given
15 any information about that?

16 A. No, I don't have any information.

17 Q. So there's no mistake about it, then. Your
18 only basis for the conclusion that the J4500 as it
19 exists now, as it existed after 1993, shares certain
20 features with the MCI Proposal No. 1.

21 A. Right. Certain features, yes.

22 Q. And those are the rake to the top, the
23 rounding of the corners?

24 A. Yes.

25 Q. All right. Thank you, sir.

1 Now, I want to ask you questions about this
2 ambient wind condition that existed. I want to show
3 you the Kato article which has been marked as Exhibit
4 39 -- 139. And I'm going to ask you to look at Figure
5 No. 8.

6 Without going into a lot of detail, is every
7 dot on the line in Figure No. 8?

8 A. No. The Kato testing shows some scattering
9 of data around the fit lines.

10 Q. So that -- his test was conducted using
11 models?

12 A. Correct.

13 Q. 2 or 3, 4 inches in size?

14 A. I'd have to look at the report, but I think
15 1/10 or 1/6 scale model.

16 Q. And it was conducted inside?

17 A. Correct.

18 Q. And even conducting it with little pieces
19 inside, you still get a scattering of data?

20 A. Sure. That's the nature of scientific
21 testing.

22 Q. In connection with scientific testing, isn't
23 it usual and customary that you will get the scattering
24 of data?

25 A. Right. There's a whole related field of

1 curve-fitting, where you evaluate the scatter of the
2 data and fit trend lines to that scatter. So there's a
3 whole field dedicated to that.

4 Q. Now, you had some scattering of your data?

5 A. Right.

6 Q. Did you follow generally accepted scientific
7 principles to find the fit line, if you will, for your
8 scattered data?

9 A. Sure. I did.

10 Q. And is that the way science is conducted?

11 A. That is.

12 Q. Okay. Now, there was a lot of question about
13 ambient wind. Okay?

14 A. Right.

15 Q. Would you please explain for me, if you will,
16 what it is that this air displacement is. What are we
17 talking about when we talk about air displacement?

18 A. Sure. Well, when any object, whether it's
19 one of us walking in the room or a bus traveling down
20 the road or a bicyclist traveling down the road, any
21 object that's moving through the air has to displace
22 the air. The air doesn't go through us; it goes around
23 us.

24 So that air must be displaced. And any time
25 the air is displaced, it's obviously moving. It's got

1 to move around the sides of the coach, over the top of
2 the coach, underneath the coach, for the example of a
3 motor coach. For a bicycle, it's moving maybe through
4 the spokes, around the bicyclist. The air displacement
5 is just simply the movement of air.

6 Q. So what we are talking about, then, is a
7 specific movement of air that is created by the bus
8 going down the road?

9 A. That's the primary focus of the testing, is
10 looking at the displacement of air caused by the coach.

11 Q. And what the bus is doing is creating its own
12 wind?

13 A. It's displacing the air. It's creating
14 movement of the air around the coach. And that
15 movement of the air has a certain speed as it comes
16 around the coach.

17 Q. So what we're dealing with is a phenomenon
18 where the coach itself is creating its own wind and its
19 own direction of force or wind flow?

20 A. Sure. To some degree, that's true, yes.

21 Q. And now we're looking to see how much force
22 that would exert laterally on an individual within the
23 flow?

24 A. Correct.

25 Q. What relationship to that atmospheric event,

1 the air displacement, is ambient wind, like 6 miles an
2 hour from the west or 6 miles an hour from the left of
3 the bus?

4 A. Right. Well, the -- the testing was done
5 outside. So you have local conditions or ambient
6 conditions. You do have the air moving around just due
7 to the weather.

8 And the testing that I did is meant to
9 evaluate displacement of air around the coach. So when
10 I do the testing, I'm getting both -- since I'm testing
11 with a moving vehicle, and, in some cases, with a
12 moving bicycle, you have to have ambient conditions,
13 whether there's some wind or no wind.

14 What the data shows is, when the bus goes
15 past a bicycle, the -- the effect of the displacement
16 of air from the bus is very similar to the ambient
17 conditions; meaning, if you got on a bicycle and you
18 went outside and you rode -- and the wind outside was
19 5, 6, 7, 8, 9, 10, 11, 12 miles an hour -- then you'd
20 feel the same type of force as if this bus went by.

21 So the effect of the bus is a pound or less
22 of force at 25 miles an hour for the bus and 3 feet of
23 displacement or more. And that's similar to the effect
24 you get just riding in typical weather conditions.

25 Q. Now, Dr. Breidenthal has told us all that

1 this event, where the atmosphere or the wind created by
2 the bus impacts the bicycle, is about a quarter of a
3 second.

4 A. Correct.

5 Q. Does that sound about right to you?

6 A. It does. The initial peak of force that I
7 measure is -- is on the order of a quarter of a second.

8 Q. And so what we're talking about, then, is the
9 bus, by moving through the atmosphere, overcomes
10 whatever the ambient conditions are and creates its own
11 wind with its own direction?

12 A. Right.

13 Q. And that's what you're measuring?

14 A. That's what I'm measuring.

15 Q. All right. Now, in terms of how you measured
16 it, if you would go to Image 478.130, what you looked
17 at, what you measured, what you reported, is set up in
18 this graph. Okay?

19 A. Right.

20 Q. On the top graph, what you are measuring on
21 the blue line is the bus moving.

22 A. Correct.

23 Q. And then the red line indicates when the
24 force reaches the bike.

25 A. The red line indicates when the bus --

1 Q. When the bus reaches the bike?

2 A. Yes.

3 Q. And the green represents the force?

4 A. Correct.

5 Q. All right. Now, if there had been lateral
6 displacement of the bike by the ambient conditions
7 blowing the bike around, would that show up?

8 A. What you can see, a very slight waviness in
9 this particular test before and after the bus passes
10 by. So in this particular test, it's very slight.

11 Q. Okay. Can you, if you would, sir, be so kind
12 as to point to the jury what you're talking about in
13 terms of some lateral --

14 THE MARSHAL: Grab the mic, sir.

15 THE WITNESS: Yes.

16 Sure. The green line right here is the
17 lateral force, so we get just a slight variation on
18 that force. You can see it kind of separate from the
19 line, the axis line here. And then the bus passes, you
20 get a little pulse from the bus. And then you continue
21 to get a little bit of waviness from the green line
22 there.

23 So anything that you see in the green line
24 before and after the bus passes, that's due to local
25 wind and --

1 BY MR. TERRY:

2 Q. That's the ambient condition?

3 A. Yes.

4 Q. And that's all that the ambient condition
5 does in terms of lateral force?

6 A. Right, in this particular test. Other tests
7 will show more or less ambient displacement.

8 Q. But if you want to see what the ambient
9 conditions are actually doing to the bike, lateral
10 force of the test, you can look at the green line?

11 A. Yes.

12 Q. And it will tell you exactly what occurs?

13 A. Correct.

14 Q. And then the issue is whether or not the bus
15 creating its own atmosphere, its own wind, overcomes
16 that and creates a greater lateral force?

17 A. Correct.

18 Q. And that's what you measured?

19 A. Right. That's what I measured. That's on
20 the order of 1 pound or less at 25 miles an hour.

21 Q. Okay. I'm going to ask you to -- if you
22 would take your seat, sir.

23 I'm going to ask you to go back to the Kato
24 article. I'm going to ask you to take a look at
25 page 2, upper left paragraph.

1 Okay. In the bottom of that paragraph, there
2 is a sentence. "In this experiment" --

3 You see that?

4 A. I do.

5 Q. -- "only the component FY was measured
6 because it appeared that the bicycle was caused to
7 wobble by it. Aerodynamic coefficient CY of FY is
8 given as follows."

9 Okay. So is he measuring just one of the
10 forces?

11 A. He's just measuring the lateral force,
12 similar to what I did.

13 Q. So that's the push?

14 A. It would be the push or the pull.

15 Q. Well, does he measure the pull or does he
16 calculate the pull?

17 A. He measures the shape of the force; he
18 doesn't measure the actual magnitude.

19 Q. Does he calculate it?

20 A. He doesn't calculate it, no. He just -- he
21 just provides a graph that tells you what it would look
22 like.

23 Q. All right. Now, there was some criticism of
24 you actually using a weighted dummy or --

25 A. Right.

1 Q. -- or test device.

2 A. Anthropomorphic test device.

3 Q. Test device. And it is my understanding what
4 you did was you took the test device and you made it
5 roughly what Dr. Khiabani was in terms of height and
6 weight?

7 A. Right. Based on the information that I had,
8 that's right.

9 Q. And you put it on the bus -- the bike?

10 A. Correct.

11 Q. Why did you do that?

12 A. Well, I wanted to test the actual conditions,
13 the actual bus driving past the actual bicycle.

14 Q. Well, why did you have the -- the rider? Why
15 did you make a rider? Would the test not be valid
16 without the rider?

17 A. With no rider at all?

18 Q. Yes.

19 A. Right, it would be invalid without a rider.
20 The rider provides a surface for the -- for the air
21 displacement to act on. That's what causes some of the
22 force.

23 Q. So the forces that -- force you're actually
24 measuring, then, is the force on the rider?

25 A. It's on the rider and the bike together, but

1 it's on that entire -- on that entire surface of the
2 bike and the rider.

3 Q. And when Dr. Breidenthal made his
4 calculations, did he factor in the area of the rider?

5 A. My understanding is that he factored in the
6 area of the bike and rider. He used the frontal area
7 of a bike and rider that's published, I think, on the
8 internet.

9 Q. And the reason you do that is because you
10 want to measure the force that actually existed on
11 the -- Dr. Khiabani on the day this occurred as close
12 as you can?

13 A. Right, on the rider and the bicycle.

14 Q. Can you parse out the force so that you only
15 measure what's on the wheel or the tire?

16 A. No. The force -- the force that was
17 estimated by Dr. Breidenthal and the forces that I'm
18 measuring, they're acting on the entire body. You
19 can't pick one portion of that and say that that force
20 acts in only one spot.

21 Q. And so what you're measuring, then, is the
22 force that exists on this body as the bus passes by?

23 A. Right.

24 Q. And if the body was not there, would the
25 force you measured be smaller?

1 A. If the body was not there and it was just the
2 bicycle? Yes, it would be smaller.

3 Q. So in order to get what the force is that
4 Dr. Khiabani would have experienced, lateral force as
5 close as we can, you put something just like him on the
6 bike and drive the bus past him?

7 A. That's right.

8 Q. Does the gauge that you use measure that
9 force?

10 A. That's specifically what that instrument is
11 designed for, the strain gauge.

12 Q. Does it measure the force as it occurs -- or
13 as it strikes the test object?

14 A. Right. That is a very high-precision strain
15 gauge, so it has an extremely fast response time. So
16 it's -- for the purposes of this test, it's
17 instantaneous.

18 Q. Does it measure -- your instrument measure
19 whether the force is enough to move Dr. Khiabani?

20 A. Absolutely. If we know the mass of
21 Dr. Khiabani, then we can use Newton's laws to say
22 that, if the force is at this level, it will accelerate
23 a mass of this size a certain amount.

24 Q. And that formula is described as force
25 equals --

1 A. -- mass times acceleration.

2 Q. Is that one of Newton's laws?

3 A. That is.

4 Q. Does Newton's law apply to those who design
5 airplanes as well as those who design vehicles that
6 drive on the road?

7 A. Yes.

8 Q. Did you measure the acceleration as part of
9 your testing?

10 A. I did not measure the acceleration directly,
11 but you can calculate it as a result of my test.

12 Q. And did you do that or is it just available
13 in the numbers that you generated?

14 A. I did calculate it in my -- my calculations.
15 It's on the order of 0.005 Gs, I think.

16 Q. So calculating the force that Dr. Khiabani,
17 at his weight of 200 pounds, would have experienced
18 given his mass results in what percentage of
19 gravitational force?

20 A. 0.005 Gs, so very, very low acceleration.

21 Q. Okay. Consistent with the bound that you
22 described?

23 A. Right.

24 Q. In the cross-examination that you underwent,
25 Mr. Kemp read to you from Dr. Breidenthal.

1 Do you remember that?

2 A. He played a video section of Dr. Breidenthal.

3 Q. I apologize. He played the video.

4 A. Yes.

5 Q. I'm going to show you the transcript of that
6 presentation and ask you to read the answer that
7 Dr. Breidenthal gave.

8 Beginning with -- here, this is on page 232
9 of the statement of facts.

10 A. Right. Dr. Breidenthal said, "He had a dummy
11 mounted on a bicycle, and he points out in his report
12 that he made sure that the dummy had the same weight as
13 the victim in this tragic case. And the flaw in
14 that -- the flaw in that -- and it really is a big
15 mistake. The flaw is that he measured the forces on
16 this cyclist using a strain gauge, which is a small
17 electrical thing that measures strain or motion of the
18 cyclist's model. When you have a massive model,
19 because it takes a long time for something massive to
20 start moving and because these occur -- these forces
21 occur for such short times, there's no time for his
22 diagnostics to record the real fluctuating, rapidly
23 changing forces. So he reports forces that are very
24 weak forces, much weaker than Kato and much weaker than
25 my estimate."

1 Q. So what significance does this answer have to
2 you?

3 A. It's an interesting answer in that he
4 basically confirms one of my opinions, and that is if
5 you have a cyclist that weighs 191 pounds and a bicycle
6 that's under him that weighs the same as a Scott Solace
7 bicycle, then these forces are of such a low magnitude
8 that they -- they really will not move the cyclist.

9 To use his phrase, when you use a massive
10 model, because it takes a long time for something
11 massive to start moving and because these forces occur
12 for such a short time, there's no time for his
13 diagnostics to record the real fluctuating.

14 By the exact -- that's the end of his quote.
15 By the exact same token, there's no time for the
16 cyclist to really respond in any significant way. The
17 forces are very low. They're fluctuating rapidly.
18 Because the rider has mass, those forces don't have
19 enough time, they don't have enough force to actually
20 affect his riding significantly.

21 And that's exactly the conclusion I came to
22 from the subjective tests as well.

23 Q. Now, you were asked about the threshold of
24 force necessary to substantially impact a bike rider
25 moving at 12 miles an hour, weighing about 200 pounds.

1 Do you remember that?

2 A. Yes.

3 Q. I want to show you Dr. Breidenthal's summary
4 opinions that we have been using and ask you to take a
5 look at them.

6 Okay. You've seen those before?

7 A. Yes, I was shown these.

8 Q. Okay. Can you find in there where
9 Dr. Breidenthal says what force is necessary to
10 substantially impact a bike rider?

11 A. I'm not aware of him expressing opinions
12 about that.

13 Q. Is it in these -- is it in his opinions,
14 though?

15 A. It is not.

16 Q. Can you find in his opinion summary where he
17 says that 10-pound push force to a bike within 3 feet
18 is enough?

19 A. Is enough to affect the rider or --

20 Q. To substantially -- or to affect the rider
21 substantially.

22 A. He doesn't say that in his conclusions.

23 Q. So the expert witness retained by the
24 plaintiff does not identify what it takes to impact the
25 driver and does not say that what he has estimated is

1 enough?

2 A. He doesn't say what it takes to push a
3 bicyclist out of control.

4 Q. Does he say that what he calculate -- or what
5 he estimated is enough to do it?

6 A. He doesn't say that. He expresses what he
7 estimated.

8 Q. But he doesn't say that it's enough to affect
9 the bike rider, does he?

10 A. That's correct.

11 Q. Thank you, sir.

12 And you, Mr. Granat, on the basis of the
13 testing that you performed, the 150 or 110 tests were
14 where you actually drove the bus past the bike at
15 various speeds and various distances, concluded that
16 that was not enough to impact the rider?

17 A. Right. Certainly including the subjective
18 tests where I was a bicyclist.

19 Q. And then you and Dr. Carhart together
20 performed the test where you drove the bus past a
21 moving bike, and you concluded from your subjective
22 participation that was not enough?

23 A. Correct.

24 Q. And so you were able to conclude that the
25 forces you measured and determined were not enough to

1 affect the bike that Dr. Khiabani was driving?

2 A. Correct. The forces are -- are very, very
3 low.

4 Q. And that's the reason you were able to
5 eliminate that as a cause of the crash?

6 A. Right. These forces are not substantial
7 enough to cause a crash.

8 Q. Thank you.

9 MR. TERRY: That ends the redirect, Your
10 Honor.

11 MR. KEMP: Briefly, Your Honor.

12 THE COURT: Mr. Kemp, go on.

13

14 RE CROSS-EXAMINATION

15 BY MR. KEMP:

16 Q. Okay. Mr. Granat, I promised that I would
17 give you a better copy of the weather data.

18 Do you recall that?

19 A. Yes. This is a much better copy.

20 Q. And I have given you a better copy of the
21 weather data, and that confirms what I said, that it
22 was 9 miles an hour, 9 miles an hour, 9 miles an hour,
23 9 miles an hour.

24 Do you see where I have it highlighted?

25 A. Right. I see the 9 miles an hour, yes.

1 Q. So what I said was accurate; correct?

2 A. We'd have to go back and check what you said,
3 but what I see here is 9 miles an hour, 6, 8,
4 et cetera.

5 Q. Okay. I don't want to get into that because
6 Mr. Terry didn't. I just want to give you the chance
7 to look at the more legible copy.

8 A. Right. This is certainly much more legible.

9 Q. Okay. Mr. Terry just asked you a bunch of
10 questions about whether Dr. Breidenthal had an opinion
11 as to whether the force was sufficient to impact a
12 bicycle's ability -- a bicyclist's ability to control
13 the bike.

14 Do you recall those?

15 A. Yes.

16 Q. Isn't it true that plaintiffs have another
17 expert who has rendered an opinion in that area?

18 A. You do.

19 Q. And that's Dr. -- that's Alex LaRiviere;
20 right?

21 A. Correct. Based on my reading of his report,
22 yes.

23 Q. And he's the man -- I'll call him Alex
24 because that's kind of a mouthful. Alex is the
25 person -- you read his deposition?

1 A. I believe so.

2 Q. He's the one that was born in a
3 bicycle-making shop and started making bikes when he
4 was six; right?

5 A. He said something to that effect, yes.

6 Q. And Alex says that the force is sufficient to
7 cause the bike to wobble; correct?

8 A. I'd have to go back and review his
9 deposition, but he offered opinions like that, yes.

10 Q. Well, Alex took Dr. Breidenthal's force, and
11 then he applied it to the bike; correct?

12 MR. TERRY: Objection, Your Honor. May we
13 approach?

14 THE COURT: Yes.

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

17 BY MR. KEMP:

18 Q. Mr. Granat, your testimony was that
19 Dr. Breidenthal said that the force was not sufficient
20 to make a bicycle wobble. That's your testimony?

21 A. No. My -- my testimony was that the
22 conclusions that he offered doesn't say anything about
23 the sufficient force.

24 Q. Oh, those conclusions, not what his testimony
25 was. That's what you're saying?

1 A. That's what the question was, yes, what he --

2 Q. But his actual testimony here at trial was
3 the 10-pound was sufficient to cause a bicycle to
4 wobble; correct?

5 A. I didn't see all of his testimony. I'm not
6 sure if he said that or not.

7 Q. So you don't know one way or another whether
8 Dr. Breidenthal said that 10 pounds for .25 seconds
9 would be sufficient to cause a bicycle to wobble? You
10 don't know?

11 A. I would accept your statement on that.

12 Q. I'm just asking if you know.

13 A. I don't recall reading that in his testimony.

14 Q. Okay. Can I have the Fat Pencil model,
15 please.

16 This is the picture you were shown?

17 A. Right.

18 Q. And you weren't here when Mr. Cohen
19 testified, but he actually had a model where he moved
20 the bus around.

21 Can you show that, Shane, just to give the
22 witness an idea what I'm talking about.

23 So we could see the jury's -- jury's actually
24 seen the actual bus. Did you know that?

25 A. Yes.

1 Q. So they've seen the front of the bus, the
2 side of the bus, and they can see whether this is a
3 relatively flat bus or whether it's a round bus, as
4 you're maintaining; correct?

5 A. They can see -- based on this model?

6 Q. Yes.

7 A. Okay. I will --

8 Q. Have you seen enough of the model to verify
9 that what Mr. Cohen is showing is accurate?

10 A. I think you really need to turn on
11 perspective. That's clearly --

12 Q. Where do you want to see it? Just tell me
13 what perspective you want.

14 A. Turn on perspective. When you have a drawing
15 like this, note that the shape of the bus looks odd.
16 See how it looks like it gets taller in the back?
17 That's because you have perspective turned on in your
18 software.

19 Q. That's why you can turn the model around.

20 A. No, no, no. That's vantage point. Look.
21 Right there. Stay right there. When we see things in
22 the real world, the things that are further away look
23 smaller and smaller.

24 Turn that just a little bit of an angle and
25 you'll see that does not look smaller and smaller; it

1 looks taller and taller. This video or this --

2 Q. What view do you want to determine whether or
3 not this bus has a flat front? What do you need?

4 A. You have to turn on perspective.

5 Q. Have to turn around to --

6 A. No. You're thinking vantage point. You have
7 to turn on perspective. It's a standard drafting
8 practice. If you -- if you want to look at something
9 in the way that we really see it in the world, you have
10 to have perspective turned on.

11 Q. You have seen the actual bus?

12 A. I have.

13 Q. Well, actually, you've seen a serial number
14 that's close; right?

15 A. I have tested the actual model.

16 Q. Well, you haven't tested the actual bus that
17 was involved in this case; you've tested a serial
18 number that's close; correct?

19 A. It's the exact shape -- it's the actual
20 shape, yes.

21 Q. Okay. And the jury's seen the actual bus.

22 A. Right.

23 MR. KEMP: Okay. Can I have the Setra again,
24 please. The Setra. The Setra 500. The Setra 500 we
25 used earlier Shane.

1 MR. GODFREY: It's coming up.

2 BY MR. KEMP:

3 Q. Okay. Mr. Granat, you see the rounded
4 corners on the Setra?

5 A. I see the features of the Setra, sure.

6 Q. And you're not telling the jury that this .33
7 drag coefficient Setra is not aerodynamically superior
8 to a J4500, are you?

9 A. I think you'd have to run the test. I don't
10 know how this would compare.

11 Q. So you don't know?

12 A. No. You should run the test. If you really
13 want to understand the aerodynamic properties, you need
14 to run the test.

15 Q. Well, Setra ran the test, because we know
16 it's a .33. Mercedes ran the test; right?

17 A. I don't know where that testing came from.
18 It's not in the 1993 report.

19 Q. This is not a 1993 bus, is it?

20 A. Right. I don't know where you are getting
21 the .33.

22 Q. I'm getting it from Mr. Lamothe's testimony.
23 I told you that during --

24 A. Okay.

25 Q. Okay. All right. And these gentlemen over

1 here, MCI, they've never tested their bus. We don't
2 know what the drag coefficient is; right?

3 A. Right. I'm not aware of any testing.

4 MR. KEMP: Thank you.

5 MR. TERRY: I have nothing further, Your
6 Honor. May the witness be excused?

7 THE COURT: Are there any questions from the
8 jury?

9 THE MARSHAL: Any questions? No questions --
10 one question, Your Honor.

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

13 THE COURT: Mr. Granat, I have a -- several
14 questions from the jury. And I would like you to
15 answer them if you can. All right. First:

16 "Regarding the testing that you made when you
17 were on the bike at 13, 14 miles an hour, did you
18 experience any push-pull force?"

19 THE WITNESS: Nothing that I noticed.

20 THE COURT: Okay. Second:

21 "If you did, was there any calculations that
22 were made at that speed?"

23 THE WITNESS: Any calculations?

24 THE COURT: Well, I think the second part has
25 to do with if you experienced the push-pull.

1 THE WITNESS: Well, what I can answer is I
2 didn't experience anything; I didn't feel any push and
3 pull. Mostly I heard the sound of the bus and then the
4 bus passed the bicycle. However, for some of the human
5 riders, and the human riders themselves were
6 instrumented, and that was part of the testing that was
7 done by Dr. Carhart. So that question is a good
8 question. It's a good question for Dr. Carhart,
9 though. He has actual measurements of accelerations
10 that are applied.

11 THE COURT: Thank you.

12 THE WITNESS: I'm sorry.

13 THE COURT: Thank you. All right. All
14 right. Now, one:

15 "Not including this case, how many other
16 similar to this have you participated in as part of any
17 plaintiff's party and part of any defendant's party?"

18 THE WITNESS: Just generally my experience as
19 a witness, basically, I guess?

20 THE COURT: I think so.

21 THE WITNESS: I would say --

22 THE COURT: I think that's what that means.

23 THE WITNESS: Currently I do probably
24 30 percent of my work on current plaintiffs' cases.
25 These are people injured by vehicle crashes. And then

1 70 percent are defendant-type cases, based on my
2 experience in the auto industry.

3 THE COURT: Okay. Thank you very much.

4 Any --

5 MR. KEMP: Your Honor, one follow-up.

6 THE COURT: -- follow-up.

7

8 FURTHER RECROSS-EXAMINATION

9 BY MR. KEMP:

10 Q. Assuming that the juror by "similar to this
11 case" meant a case involving bus aerodynamics, is it
12 not true that this is the first case you've ever
13 testified in court with regards to bus aerodynamics?

14 A. I have never seen a bus aerodynamics case nor
15 any other aerodynamics case before like this.

16 Q. So you've never worked on any case before
17 this case that involved bus aerodynamics; correct?

18 A. I'm not aware of any case, whether I worked
19 on it or not.

20 Q. And when you read Dr. Breidenthal's
21 deposition, did you see the reference that he made to
22 the bus aerodynamic issue that he and Mr. Sherlock had
23 in Oregon?

24 A. Right. I -- I'm familiar with that.

25 Q. So you know other people have been involved

1 in the area of bus aerodynamics even though you
2 haven't?

3 A. That was not a lawsuit. And that was on a
4 Gillig Phantom bus. And that was an issue with having
5 dirt on the windows.

6 Q. Okay. Let's not confine it to lawsuits. You
7 have never been involved with any issue on bus
8 aerodynamics until this case; correct?

9 A. I think bus aerodynamics, that's fair. I
10 have done automotive aerodynamics, but not bus.

11 Q. Thank you.

12 MR. TERRY: Nothing, Your Honor.

13 THE COURT: Any other questions from the
14 jury?

15 THE MARSHAL: Any other questions?

16 No questions, Your Honor.

17 THE COURT: You are excused. Thank you.

18 THE MARSHAL: Watch your step, sir.

19 MR. TERRY: May the witness be released, Your
20 Honor?

21 THE COURT: Yes.

22 Okay. I'd like to see counsel at the bench,
23 please.

24 (A discussion was held at the bench,
25 not reported.)

1 THE COURT: Mr. Roberts, would you like to
2 call your next witness, please.

3 MR. ROBERTS: Yes. Thank you, Your Honor.

4 The defense calls Dr. Michael Baden.

5 THE MARSHAL: Doctor, watch your step, sir.
6 Face the clerk and watch your step. Raise your right
7 hand toward the clerk.

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

12 THE WITNESS: I do.

13 THE CLERK: Please be seated.

14 THE WITNESS: Thank you.

15 THE CLERK: Would you please state and spell
16 your first and last name for the record.

17 THE WITNESS: Michael Baden; M-i-c-h-a-e-l,
18 B-a-d-e-n.

19 THE COURT: Proceed.

20 MR. ROBERTS: Thank you, Your Honor.

21

22 DIRECT EXAMINATION

23 BY MR. ROBERTS:

24 Q. Good afternoon, Dr. Baden.

25 A. Good afternoon.

1 Q. You've been here since we started court today
2 about 1 o'clock?

3 A. Yes.

4 Q. Sorry to keep you waiting so long in the
5 witness room, Doctor.

6 A. I suspect other people have been here that
7 long also.

8 Q. So let's start out, Doctor, by telling the
9 jury what your profession is.

10 A. I'm a physician.

11 Do I talk loud enough?

12 Q. Yes. Here -- this is the microphone right
13 here.

14 A. Oh, okay.

15 Q. If you get down off the stand, you can take
16 that one with you, but that's your microphone.

17 Can everyone hear the doctor okay?

18 A. Thank you.

19 I'm a physician, medical examiner, forensic
20 pathologist.

21 Q. Okay. Let's start out again by telling the
22 jury a little bit something about your education and
23 training that you had to go through in order to have
24 that profession and then your work experience.

25 So first let's start with your education.

1 A. I received a bachelor of sciences degree from
2 the City College of New York, a medical degree from
3 New York University school of medicine.

4 I then trained at Bellevue Hospital Medical
5 Center in New York City, first in internal medicine,
6 and then in pathology.

7 I spent two years investigating heart and
8 lung disease as part of internal medicine training with
9 the two Nobel Prize winners who taught us at Bellevue.

10 I then went on to --

11 Q. So let me ask you, Doctor. Do all
12 pathologists typically go through training in internal
13 medicine and residencies in internal medicine?

14 A. No, no. I started out first in internal
15 medicine. After training there, went into pathology,
16 and was the chief pathologist at Bellevue residency
17 program.

18 While a resident doctor at Bellevue, began
19 working on a part-time basis for the New York City
20 Medical Examiner's Office, similar to the Coroner
21 Medical Examiner's Office in Las Vegas.

22 As part of that initial training, I -- I went
23 to scenes of death, usually in a hospital, on holidays,
24 weekends, evenings when I wasn't working at Bellevue.

25 When I finished my training at Bellevue

1 Hospital, I became a full-time forensic pathologist for
2 the City of New York.

3 Q. Let me stop you there. Let me ask for you to
4 describe to the jury, what is a forensic pathologist?

5 A. Yeah. There are 24 specialties in medicine:
6 internal medicine, pediatrics, OB-GYN, dermatology.
7 Pathology is one of the 24 specialties.

8 It's primarily concerned with finding out
9 what's wrong with patients. I do this by laboratory
10 tests and by microscopic examination of biopsies and by
11 doing autopsies. So it -- we don't usually -- the
12 pathologists don't usually deal with patients; they
13 give their information to the doctor, the surgeon, the
14 internist treating the patient to help and formulate
15 the diagnosis of what's wrong with the patient and what
16 treatment is appropriate.

17 Within pathology, there are subdivisions.
18 Anatomic pathology and clinical pathology are usually
19 the expertise in hospital doctor -- hospital
20 pathologists who deal with natural diseases. Anatomic
21 pathology are the pathologists who look at biopsies of
22 the lung or the skin and determine if it's cancer, not
23 cancer, breast biopsies, et cetera.

24 Clinical pathologists run the laboratory at
25 the hospitals -- do blood tests, urine tests, DNA

1 tests, bacteriology -- to see what the chemistry of the
2 body is. And that's usually what's appropriate for
3 natural diseases -- heart disease, cancer, and strokes,
4 et cetera.

5 The forensic pathologist goes on to study
6 unnatural diseases. Accident, homicide, suicide, drug
7 abuse -- drug abuse deaths are the additional expertise
8 of the forensic pathologists, who look into and have
9 training and expertise in investigating unnatural
10 conditions that cause death.

11 And, in that regard, I'm board-certified by
12 the American Board of Pathology, one of those 24
13 boards, that -- in anatomic pathology, clinical
14 pathology, and forensic pathology.

15 Q. What is a board certification, Doctor?

16 A. Board certifications developed largely after
17 World War II in all the different specialties to
18 provide information to a person who's seeking a doctor
19 as to the qualifications of that -- of the doctors who
20 hold themselves out as surgeons or internists or
21 dermatologists.

22 It's a means of testing the skills in those
23 areas, usually by written tests by clinical
24 examinations and determining whether -- and determining
25 whether the individual has had the proper training, has

1 gone to a recognized medical school, has had a proper
2 residency training, and has passed the various exams in
3 that specialty.

4 So that if a person has board certification
5 in surgery, that means that person has passed all these
6 criteria and has a proper ability to say he or she is a
7 surgeon as opposed to, in the old days, doctors did
8 everything with -- and did all different specialties.
9 Now we have -- especially after World War II, there
10 was -- this was a method of determining which doctors
11 are more proficient in which fields.

12 Q. Is every forensic pathologist
13 board-certified?

14 A. Well, to be properly called a -- a
15 forensic -- proper -- have the proper ability to say --
16 to establish oneself as a forensic pathologist, yes,
17 that person should have board certification in forensic
18 pathology.

19 Q. How many are there in the country?

20 A. There are less than 500 full-time forensic
21 pathologists in the United States out of about almost a
22 million doctors. It's not a very popular field.

23 Q. Thank you.

24 A. Doctors aren't taught in medical school to --
25 how to be cross-examined by lawyers.

1 Q. Thank you, Doctor.

2 Let's talk about professional appointments.
3 You mentioned that you're a medical examiner as well as
4 a forensic pathologist and physician.

5 A. Yes.

6 Q. What is a medical examiner?

7 A. A medical examiner is a governmental position
8 in which that individual has responsibility to look
9 into how people die unnaturally in the community. It
10 started out more as a coroner system. We inherited a
11 coroner system for -- in the colonial days in which a
12 person could run for the office, is elected, and,
13 without necessarily experience, would then determine
14 what a cause of death is.

15 In the beginning and early 1900s, it was
16 established that medical doctors were the best people
17 to -- to determine how somebody died. And so that
18 coroner system -- still, half the country is coroner
19 system -- still is an elected position. It's usually
20 anybody can run -- can run for it, whereas medical
21 examiner systems means that the physician -- a
22 physician has to be in charge. And that physician is
23 usually appointed by the mayor or a board in
24 government. That's a medical examiner.

25 Certain places, like Los Angeles and

1 Las Vegas, have what's called a coroner medical
2 examiner system, but essentially it functions like a
3 medical examiner system.

4 Q. Tell the jury about just a few of your most
5 significant professional appointments as a medical
6 examiner or some other significant professional
7 appointment that you've had.

8 A. Well, in New York City as a medical examiner,
9 I had various appointments to child abuse commissions
10 and drug abuse commissions, the kind of thing that
11 medical examiners in urban areas, even then, saw a lot
12 of.

13 On a state level, I've been and still am the
14 forensic pathologist to the -- the governor's appointed
15 commission that looks into all deaths and medical care
16 in the state's prison criminal justice system and in
17 mental hygiene systems, that all deaths in prisons,
18 jails, lockups, for example, must be independently
19 investigated by a board that consists of five people,
20 one of whom is a forensic pathologist, to make sure, A,
21 that the cause of death is properly arrived at, and, a
22 more important one medical examiner systems don't do is
23 to devise ways to -- to prevent such deaths in the
24 future, to -- to change systems in the jails or in the
25 mental health hospitals to make sure that persons who

1 can't really care for themselves have proper care and
2 representation on a federal level.

3 Q. Well, before you move to federal, have you
4 held any positions with the New York State Patrol?

5 A. New York State Police?

6 Q. Yes.

7 A. Oh, yes.

8 After completing -- after completing my
9 tenure at Bellevue Hospital and being -- working at the
10 chief medical examiner's office in New York City, I
11 became chief medical examiner in New York City, which
12 includes five boroughs of New York City.

13 Following that, I -- I became the chief
14 forensic pathologist for the New York State Police,
15 where -- which covers a large -- larger area of the
16 state.

17 And all those positions required doing
18 autopsies, reviewing other people's autopsies, exhuming
19 bodies where necessary where people have already been
20 buried, testifying in court, and doing a lot of
21 teaching to law enforcement agencies in general, but
22 also --

23 Q. How many autopsies would you say you've
24 performed personally over your career?

25 A. More than 20,000.

1 Q. More than 20,000. And have you supervised or
2 reviewed many more than that?

3 A. That's correct.

4 Q. How many years were you the chief medical
5 examiner for the New York State Police?

6 A. For 25 -- chief forensic pathologist, 25
7 years.

8 Q. Okay. You started to tell the jury about
9 governmental commissions or appointments that you've
10 had.

11 A. Yeah. And also on the state level, I did --
12 responded to other states when they needed -- wanted
13 assistance in investigating deaths.

14 And one was to -- to the district attorneys'
15 office in Jackson, Mississippi, to investigate the
16 death of Medgar Evers, who was a civil rights leader,
17 and whose death was reviewed 30 years after he died.

18 Q. Any other high-profile federal commissions
19 that you've been assigned to?

20 A. Well, on the federal level, I was the chief
21 forensic pathologist for the United States House of
22 Representatives Select Commission on Assassinations
23 that was set up to review the deaths of President John
24 F. Kennedy and Dr. Martin Luther King.

25 And, also, on a federal level --

1 Q. And you were the chief pathologist on both of
2 those commissions?

3 A. Yes. There were two separate commissions.
4 And that -- that required lots of different expertises,
5 one of which was a forensic pathology expertise as to
6 what the cause of death was and what aspects of the
7 cause of death might contribute to, you know, where the
8 gun was fired from, et cetera, et cetera.

9 I also was and still am a consultant to the
10 FBI, to the Veterans Administration when there are
11 deaths that are of a specific -- suspicious nature from
12 around the country, a drug enforcement agency. Part of
13 that reflects that there aren't too many forensic
14 pathologists around.

15 Q. Have you ever been on TV?

16 A. Yes. And I have been and I'm the forensic
17 science contributor to Fox News when issues come up
18 about how people die or what happens in the major
19 disasters. Or even in bacterial problems, I would be
20 the person that would comment on it.

21 Q. Have you written any books?

22 A. Yes. I have been author, coauthor, of some
23 80 medicolegal articles and four books, most related to
24 forensic pathology.

25 Q. Okay. You're here. You've been hired by

1 Motor Coach Industries in this case; correct?

2 A. Yes.

3 Q. And have you often been retained in other
4 civil litigation?

5 A. Yes. That is -- usually, when working for
6 the -- whether I work for the City of New York or the
7 State of New York, many non-- we would -- I would
8 always be involved with potential homicide cases. But
9 in addition to homicide cases, the forensic pathologist
10 investigates all kinds of accidental deaths, motor
11 vehicle deaths, most commonly, drug overdose deaths,
12 many of which may come up to civil litigation.

13 So that, from the very beginnings, a medical
14 examiner is involved with civil cases as well as the
15 homicide cases that they're most noted for.

16 Q. So in that role, you testified in civil cases
17 just like the jury has heard from Dr. Gavin, our Clark
18 County coroner, in this civil case?

19 A. Yes.

20 Q. And then you've also been privately retained.
21 Do you always work for defendants?

22 A. No. I -- it's about 50-50, I am hired by
23 defendant or by -- by a prosecutor in -- in a --
24 plaintiff in a civil case. As well as, now that I'm
25 retired from the state -- from the New York -- recently

1 from the New York State Police, even the criminal
2 cases, I may be an expert for prosecution or for
3 defense.

4 Q. Okay. Is -- are -- have there been a lot of
5 very high-profile cases the jury may be familiar with
6 that you've been involved in? Well, let me give you an
7 example. Were you retained in the OJ Simpson cases in
8 California?

9 A. Yes.

10 Q. Both the civil and the criminal cases?

11 A. Yes.

12 Q. And which side were you retained by in that
13 litigation?

14 A. In the OJ Simpson case, I was retained by the
15 defense in the criminal case and by the defense in the
16 civil action.

17 Q. Okay. So -- so in those cases, you worked
18 for Mr. Simpson. You were hired by Mr. Simpson?

19 A. For hired -- hired by them but worked for the
20 forensic science issues that were raised.

21 Q. Thank you, Doctor. And we'll come back to
22 that because the -- the jury -- I'm -- may have an
23 issue to decide with regard to your testimony in the OJ
24 Simpson case. But after we finish your background,
25 we'll come back to that.

1 Let's -- another example, did you do work in
2 the Michael Brown case in Missouri recently?

3 A. Yeah. Michael Brown was shot in a police
4 altercation in -- near St. Louis, Missouri. And I was
5 asked by the family to come down to do a second
6 autopsy. It was in Ferguson, Missouri, not far from
7 St. Louis.

8 Q. And were you able to offer any help to the
9 family in that case?

10 A. Yeah. What happened there, I was, as usual,
11 contacted by the attorneys that represented the Brown
12 family. I went down. The families were concerned
13 about the cause of death of Mr. Brown and were not
14 getting information -- any information from the local
15 medical examiner's office or the police. So I did do a
16 second autopsy and consulted, then, with the family.

17 Q. Have you previously done work in the state of
18 Nevada?

19 A. Yes.

20 Q. And have you been qualified in your field as
21 a forensic pathologist in the Nevada courts?

22 A. Yes.

23 Q. Okay. Any case the jury may be familiar with
24 here?

25 A. Yeah. The -- the most significant one was

1 the Binion -- I'm staying at the Golden Nugget, so --
2 Mr. Binion was from the Golden Nugget. And he owned
3 the Golden Nugget. And I was asked by the district
4 attorney in -- in Las Vegas to consult with them and
5 investigate the death on behalf of the district
6 attorneys' office here.

7 Q. Okay. So you were hired by the prosecution
8 in this matter?

9 A. Yes, two -- two trials.

10 Q. Okay.

11 MR. ROBERTS: Your Honor, I would move to
12 qualify Dr. Michael Baden as an expert in the field of
13 forensic pathology.

14 MR. CHRISTIANSEN: No objection to his
15 qualifications, Your Honor.

16 THE COURT: Okay. Dr. Baden qualifies.

17 MR. ROBERTS: Thank you, Your Honor.

18 THE WITNESS: Thank you.

19 MR. CHRISTIANSEN: Judge, can we approach
20 just real quick on a brief matter?

21 THE COURT: Yes.

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

24 BY MR. ROBERTS:

25 Q. Okay. Let's get to your opinions in this

1 case, Dr. Baden.

2 Did you perform an investigation of evidence
3 in this matter before this jury?

4 A. I did.

5 Q. Okay. And as a result of your investigation,
6 did you form any opinions?

7 A. I did.

8 Q. Okay. Do you have a PowerPoint slide, a
9 five-page slide, in front of you, Doctor, that's been
10 premarked as Exhibit 578?

11 A. I do.

12 Q. Okay. And does this -- well, let me go back.
13 Did you issue a written report in this matter?

14 A. I did.

15 Q. Does Exhibit 578 accurately summarize the
16 opinions issued in your written report?

17 A. Yes.

18 Q. Okay.

19 MR. ROBERTS: Your Honor, I'd move to admit
20 Exhibit 578 into evidence.

21 MR. CHRISTIANSEN: Objection. Hearsay, Your
22 Honor.

23 THE COURT: You're moving to move what?

24 MR. ROBERTS: Moving to admit the summary of
25 his opinions, just like we've seen with all the other

1 witnesses.

2 THE COURT: It's admitted --

3 MR. ROBERTS: Thank you, Your Honor.

4 THE COURT: -- as a summary.

5 (Whereupon, Defendant's Exhibit 578 was
6 admitted into evidence.)

7 BY MR. ROBERTS:

8 Q. Okay.

9 Brian, could we see the first page.

10 Okay. So could you tell the jury about the
11 first conclusion or opinion that you reached in this
12 matter.

13 A. Based on the various materials I reviewed,
14 which included the autopsy report, the medical --
15 medical examiner investigation report, the -- and other
16 information that I looked at, I had determined that
17 Dr. Khiabani was injured when the left side of his
18 bicycle came into contact with the right front side of
19 the bus on April 18th, 2017, that he fell to the ground
20 and was struck by the right -- right -- the first right
21 rear tire.

22 EMS responded and was called at 10:35. He
23 arrived within five minutes, noted that he had agonal
24 breathing -- it was noted that he had agonal breathing,
25 which is breathing that is typical of the dying person,

1 where the brain has been damaged so it no longer
2 controls breathing. And it's a gasping, irregular type
3 of breathing which occurs often within a few minutes
4 before the heart stops.

5 And he did have a palpable pulse initially,
6 but that he was unconscious and unresponsive, that --
7 that his pulse was lost at 10:58, about 23 minutes
8 after the accident, as determined by the EKG in the
9 ambulance.

10 Q. So the jury has heard this, I believe, from
11 two other witnesses -- Captain Horba and -- and perhaps
12 our coroner here who's testified, Dr. Gavin -- the term
13 "agonal breathing."

14 Now, agonal sounds like a lot like agony;
15 right?

16 A. Right. It sounds that way.

17 Q. Is someone with agonal breathing in agony or
18 pain?

19 A. No. The -- the person with agonal breathing,
20 the reason that -- is having difficulty breathing but
21 is unconscious. This agonal breathing occurs after
22 consciousness is lost and the individual is gasping for
23 air for the few minutes before death.

24 Now, occasionally, a person lives longer in
25 coma than a few minutes, but most -- the great majority

1 of deaths occur within a few minutes of this
2 characteristic irregular breathing.

3 Q. So rather than indicating that Dr. Khiabani
4 was in pain, the agonal breathing actually indicates
5 the opposite, that he was unconscious and feeling no
6 pain; correct?

7 A. That's right, that he's unconscious. And
8 once a person is unconscious, he or she cannot perceive
9 pain.

10 Q. Is that part of the medical definition of
11 being unconscious?

12 A. Yes.

13 Q. That you're not perceiving?

14 A. Not conscious. Consciousness, being
15 awareness of the -- one's surroundings; unconscious
16 means one can't -- is not aware of the surroundings and
17 one does not feel or perceive pain.

18 Q. Thank you.

19 Brian, could we go to the next slide, page 2.
20 578, page 2.

21 Okay. Could you explain your second opinion
22 or conclusion to the jury.

23 A. Yes. The X rays show -- taken by the medical
24 examiner's office showed extensive fractures of the
25 skull, within which the brain is, the face, and there

1 were seven irregular fractured ribs, back ribs, on the
2 left side of the chest.

3 The skull fractures were evidence of severe
4 traumatic brain damage, because not only were they
5 multiple encasing the skull, but because part of the
6 fractures were depressed fractures, which could be seen
7 on X ray, going into the area where the brain would be.

8 This becomes very important here, because the
9 medical examiner did feel there was not enough -- that
10 they had enough reason to determine the cause of death
11 and an autopsy wasn't done.

12 So in an autopsy we'd examine the brain and
13 be able to more -- to have a greater interpretation of
14 exactly what parts of the brain were damaged. But here
15 there's certainly enough information to indicate that
16 there was severe brain damage. And one of those
17 indicators was what Dr. Gavin described as blood
18 emanating, coming out of both ears. That was noticed
19 at the scene by an EMT and also Dr. Gavin.

20 When blood comes out of the ears, it's strong
21 evidence that there's extensive fractures of the base
22 of the skull -- that is, the bottom part of what the
23 brain rests on -- and damage to brain and to blood
24 vessels so that blood comes out of the ears. And
25 that's a very serious -- evidence of serious, very

1 serious brain damage.

2 Q. Based on the records that you reviewed and
3 the films that you reviewed, did you determine whether
4 there were any brain bruising, brain laceration, any --
5 any evidence that there would have been brain damage to
6 Dr. Khiabani?

7 A. Yes. I think on the basis of the depressed
8 skull fractures and the extent of the skull fractures
9 and the -- including the base-of-the-skull fractures,
10 is evidence of severe brain damage of lacerations to
11 the -- of the brain as well as bruising in the brain.

12 Q. Is it more likely than not that Dr. Khiabani
13 would have retained any consciousness after he received
14 the depressed skull fracture that you saw on the films?

15 A. No. My opinion strongly that once -- these
16 fractures indicate that, when they occurred, there was
17 immediately extensive brain damage done, that
18 immediately brain started bleeding from the ears, and
19 immediately would have lost consciousness.

20 Q. Let's take a look at a couple films.

21 Brian, Exhibit 247 has already been admitted
22 into evidence. Can you display that for the doctor.

23 Is this one of the films which you reviewed
24 from the coroner's file?

25 A. It is. It's a sideways X ray of the skull, of

1 the head, that was taken on under Dr. Gavin's
2 instructions.

3 MR. ROBERTS: Your Honor, could the witness
4 step down?

5 THE COURT: Certainly.

6 MR. ROBERTS: Here's a -- I have a pointer
7 for you, Doctor, and we'll hold the microphone close to
8 your mouth and the jury will be able to hear you.

9 BY MR. ROBERTS:

10 Q. Could you show the jury with the pointer,
11 explain what you found significant about this X ray
12 view of the skull?

13 A. I'm not sure the judge can see.

14 THE COURT: Thank you. I can.

15 THE WITNESS: This is the back of the head,
16 the front of the head, top, bottom. Incidentally,
17 right here is where the brain -- where the bottom of
18 the brain, of the skull, right near the earlobe here,
19 earlobe, the thing, is where the blood was coming out
20 of the -- of the sides of the head because of fractures
21 down here.

22 Here is the occipital bone and the spine, the
23 cervical spine -- spine, which the spinal cord is in.
24 And in this area, it seems that there's been a
25 disruption, because usually this is very straight, and

1 which would indicate that there's an atlanto-occipital
2 fracture, which was referred to by Dr. Gavin, I think,
3 and referred to by the X ray person at the hospital.

4 That's this. Now, here --

5 BY MR. ROBERTS:

6 Q. Doctor, what significance would that
7 atlanto-occipital dislocation have to the issue of
8 consciousness or pain?

9 A. It indicates it's a severe injury.
10 Everything we do in our brain, all the -- every -- all
11 the billions of nerves and all go down through that
12 small opening underneath the -- at the bottom of the
13 skull, into the spinal cord.

14 So all the vital functions, all the functions
15 of the body go through this area from the -- the brain
16 into the spinal cord. And if certain parts of it are
17 injured, one gets paralyzed or may lose speech or may
18 have a stroke. So that this is a very important area,
19 and usually people with this dislocation at that point
20 means there's some damage to the spinal cord sufficient
21 to cause loss of consciousness just anatomically.

22 But these are the various fracture lines,
23 these little thin black areas. However, the whole top
24 of the skull is intact. This is an issue of having to
25 do with how the injury occurred. But there -- the --

1 the skull. And the face is also good except for
2 there's fractures of the nasal bones here that
3 Dr. Gavin also identified. And these are the teeth.
4 Pretty good teeth.

5 So that on this view, we see a number of
6 fractures, mostly on the left side of the skull, but
7 going into the right side also.

8 Q. Did you also review a front view X ray that I
9 don't believe the jury has seen yet?

10 A. Yeah, could.

11 MR. ROBERTS: Your Honor, I'd move to admit
12 Exhibit 577, page 1.

13 MR. CHRISTIANSEN: No objection, Your Honor.

14 THE COURT: Okay. Admitted.

15 (Whereupon, Defendant's Exhibit 577-1
16 was admitted into evidence.)

17 MR. CHRISTIANSEN: Is it 577-1?

18 MR. ROBERTS: 577-1, yes.

19 MR. CHRISTIANSEN: Thank you.

20 MR. ROBERTS: Brian, can you display that for
21 us?

22 THE WITNESS: Yeah. The next one is an X ray
23 taken with the head, the back of the head on the X ray
24 view -- film, so it's called an anterior-posterior
25 view. And in this side, the -- this is the left side

1 and this is the right side. This is the top, the jaw.
2 And there are various devices, the endotracheal tube
3 and all, that are in the mouth and going down in the
4 trachea and all. So some of these materials we see are
5 the treatments given at the hospital when the person
6 came in.

7 Here are the various sinuses, sinuses where
8 the eyeballs are in here. But this is only showing the
9 bone.

10 Now, in this area on the side of the -- left
11 side of the skull is a fracture which bends inward, a
12 fracture line here that bends inward, Dr. Gavin was
13 able to palpate on it and saw that there was swelling
14 in that area. But the X ray shows a swelling and a
15 fracture, and this would have been evidence of severe
16 brain damage at that point.

17 BY MR. ROBERTS:

18 Q. Is it easier to visualize the depth of the
19 depressed skull from this perspective?

20 A. Not quite. Not -- can't see the whole -- how
21 far it went in because partly it will go in and it will
22 come back out. But this is the area where it's
23 depressed inward instead of being outward. And this is
24 the area where it went into brain and then come out a
25 little bit, but there would be severe brain damage.

1 Q. To a reasonable degree of medical
2 probability, did you have this type of injury to the
3 skull without severe traumatic brain injury?

4 A. No. That's -- that's severe -- severe head
5 and brain injury from this type of compressive injury,
6 causing part of the bone to go into the brain by the
7 amount of forces that were -- by tremendous forces that
8 were applied to it.

9 Q. Okay. I know that the coroner's file had
10 lots of photos; correct? Dozens?

11 A. Pardon me?

12 Q. The coroner's file, did you review a lot of
13 photos from the coroner's file?

14 A. Yes.

15 Q. And the jury's only seen a few of those. Did
16 you select a few additional ones that you thought would
17 be helpful to illustrate your opinions?

18 A. There were a couple that I thought could be
19 helpful. But I'll point out here too, see, even from
20 the front view, the head is intact. It hasn't been
21 crushed in, which was important to me in trying to
22 figure out what caused it.

23 MR. ROBERTS: Pete, do you have any
24 objections to these?

25 Your Honor, we'd offer, additionally,

1 Exhibits 577-2, 577-3, 577-5.

2 MR. CHRISTIANSEN: Which ones did you take
3 out?

4 MR. ROBERTS: This one. This one was not
5 marked, and I think it's redundant.

6 MR. CHRISTIANSEN: Thanks.

7 THE COURT: Okay. Any objections?

8 MR. CHRISTIANSEN: No, Your Honor.

9 THE COURT: All right. So admitted.

10 (Whereupon, Defendant's Exhibits 577-2,
11 577-3, 577-5 were admitted into
12 evidence.)

13 MR. ROBERTS: So could we have first
14 Exhibit 577-2, Brian.

15 THE WITNESS: Yes. This is a photograph
16 taken at the medical examiner's office, after the body
17 was cleaned of the blood that was present on the body
18 and shows Dr. Khiabani's face looking remarkably
19 intact. The top of the head is intact, the face.
20 There are fractures of the nose that Dr. Gavin was able
21 to palpate, to -- to palpate. But the skin is not
22 broken. There's no broken skin here, no broken teeth.
23 And it shows a remarkably intact face for what he went
24 through.

25 /////

1 BY MR. ROBERTS:

2 Q. In reviewing both Dr. Gavin's written report
3 and in looking at the photographs after the body had
4 been cleaned, did you observe any gashes to any part of
5 Dr. Khiabani's face?

6 A. No. In the hospital and at the time of the
7 external examination that Dr. Gavin did and that one of
8 her investigators did, there were no findings of any
9 kind of torn -- broken tissue in the face or head or
10 back of the head. There was no bleeding from the skin
11 of the head or face at all, even though there was a lot
12 of blood on the face at the place where he was found
13 dead -- or found near dead, almost dead.

14 All of that blood was coming out of the nose,
15 the broken nose, and the mouth because the ribs, the
16 nine -- the seven ribs that were broken in the left
17 chest had punctured the lung so that frothy, bloody
18 fluid poured from the mouth and also blood coming from
19 both ears was what caused a lot of initial examiners to
20 think that there was a lot of broken skin, you know,
21 lacerated skin on the doctor when the skin itself was
22 intact.

23 Q. So the jury heard from Captain Horba
24 yesterday who said that he felt around the back of the
25 doctor's head and thought that there was a significant

1 amount of blood coming from a head wound.

2 Did you observe any type of breaks in the
3 skin or gashes to the back of the head that could
4 explain that?

5 A. No. No. But I did observe, also in the
6 video, an enormous amount of blood coming out of the
7 mouth, nose, ear that pools by gravity in that area.
8 And that was probably what the various responders and
9 doctors were seeing at the time that they were trying
10 to resuscitate him.

11 Q. So there were no significant gashes of the
12 skin or -- or open injuries around the area of the
13 depressed skull fracture?

14 A. None were described or seen.

15 MR. ROBERTS: And Exhibit 577-5 has been
16 admitted. It will be in the jury room. Let's not put
17 it up. It will be there if the jury wants to see it.

18 But may I approach, Your Honor?

19 THE COURT: Yes.

20 MR. ROBERTS: So you can take your seat
21 again, Doctor.

22 THE WITNESS: Thank you.

23 BY MR. ROBERTS:

24 Q. So Exhibit 577-5, what -- what was
25 significant about -- about this exhibit?

1 A. That's a photograph showing the left side of
2 the doctor's face and head after the blood was cleaned
3 from it. We can still see that there's bleeding into
4 the -- coming out from the left ear, and we see part of
5 a strap mark around the left side of the head against
6 the scalp area where the hair has been matted downward.

7 Q. So, Doctor, the jury saw with Dr. Gavin a
8 front view showing a strap mark across Dr. Khiabani's
9 forehead.

10 And does this indicate that that strap mark
11 extends around to the side of the skull?

12 A. Yeah. In this photograph, one can see the
13 strap mark clearly around the top part of the scalp,
14 and it connects to the strap mark that's at the top of
15 the forehead on the left side.

16 Q. And also, photo which will be available to
17 the jury, 577-3 -- and we'll mark this for privacy
18 before it goes back. Let me show you this, Doctor.

19 From this view, does this show Dr. Khiabani's
20 back?

21 A. Yes. It shows Dr. Khiabani's back and also
22 the back of his head.

23 Q. Does the back of the head from that view, can
24 you view that the headband of the helmet mark is also
25 extending around the back of the head?

1 A. Yes. And there's no break in the skin.

2 Q. Okay. Other than the strap mark contusion,
3 did you see any other evidence of injury to
4 Dr. Khiabani's skin on his head?

5 A. No. There is an orange material going around
6 the head, and that has to do with resuscitation
7 attempts that were made with various kinds of
8 intubations that were done in an attempt to revive him.

9 But other than that, there's nothing -- no
10 injury to the back either is seen here, even though on
11 the left side noted there are fractures.

12 Q. Okay. Thank you, Doctor.

13 In addition to reviewing the medical -- the
14 medical examiner/coroner's file, did you also have a
15 chance to review some of the expert testimony that
16 might relate to the issue of consciousness or pain?

17 A. Yes.

18 Q. And did you read the deposition of Samantha
19 Kolch?

20 A. I did.

21 Q. Have you had a chance to review the testimony
22 she gave here in court?

23 A. Yes.

24 MR. ROBERTS: Okay. Could we have Opinion
25 No. 3, Exhibit 578-3.

1 BY MR. ROBERTS:

2 Q. Okay. Could you tell the jury about your
3 third opinion and what you got from the testimony of
4 Ms. Kolch regarding the shoulder movement she observed
5 when she first got off her motorcycle and approached
6 Dr. Khiabani.

7 A. Yeah. The only -- my comment is about what
8 she saw could very well have occurred, and that's
9 because, as the person is dying, after losing
10 consciousness, as you go -- as Dr. Khiabani is going to
11 deeper and deeper coma, there are various motions in
12 the body that are not controlled by the brain that are
13 twitchings and muscular activity which occur during the
14 process of dying. So that, assuming that what
15 Ms. Kolch saw was real -- because it's very difficult
16 to observe things --

17 MR. CHRISTIANSEN: Objection, Your Honor.
18 That's vouching and improper.

19 THE WITNESS: Okay. Sorry.

20 THE COURT: Sustained.

21 THE WITNESS: That the -- this is entirely
22 consistent with convulsive movements by a person who's
23 dying and unconscious.

24 BY MR. ROBERTS:

25 Q. So you're not questioning whether she saw

1 shoulder movement; you're just saying that in your
2 medical opinion, more likely than not, that was
3 involuntary movement?

4 A. Involuntary movement while unconscious, yes.

5 Q. And you didn't observe the shoulder movement
6 that Ms. Kolch observed; right?

7 A. That's correct.

8 Q. And certainly there can be both voluntary and
9 involuntary shoulder movement.

10 Why do you think, to a reasonable degree of
11 medical probability, it was -- it was involuntary
12 movement that she observed?

13 MR. CHRISTIANSEN: Objection. Speculation.

14 THE COURT: Overruled.

15 THE WITNESS: Yeah. I think it's involuntary
16 because of the severe brain damage that had occurred,
17 the type of brain damage that causes immediately --
18 immediate loss of consciousness and inability to make
19 intentional voluntary movements.

20 So that's what I'm basing it on, is -- and
21 I've seen many times in the past.

22 BY MR. ROBERTS:

23 Q. Thank you, Doctor.

24 Let's put up Opinion No. 4.

25 And you may have previewed this opinion

1 already. What was your fourth opinion?

2 A. Yeah. My fourth opinion had to do with the
3 fact that unconscious people do not perceive pain. And
4 so loss of consciousness is important in that
5 consideration.

6 Q. Okay. The jury heard from Captain Horba
7 yesterday about the Glasgow Coma Scale that he employed
8 to evaluate the doctor when he arrived on scene.

9 Are you familiar with the Glasgow Coma Scale?

10 A. I am.

11 Q. And is that to -- used to evaluate the level
12 of consciousness of a patient?

13 A. That's used worldwide to evaluate
14 consciousness in somebody who has suffered head injury.
15 It's called Glasgow Coma Scale because it was developed
16 in -- by neurologists in Glasgow, Scotland, and proved
17 to be so valuable in assessing how a person --
18 assessing the ability to treat successfully a person
19 who's had a head injury, usually in car accidents
20 and/or in sports. The National Baseball -- Football
21 League is going through this now with the -- they do a
22 Glasgow Coma Scale whenever you see somebody who's had
23 a head injury being taken off the field to go to the
24 doctor, that's what they do, among the other things
25 they do, to see how severe the brain injury is, how

1 severe the Glasgow Coma Scale is, and whether or not he
2 can play again that day or days later.

3 Q. And if someone is in a coma, are they
4 unconscious?

5 A. Yes. And the Glasgow Coma Scale goes from 3
6 to 15. In general, if it's under 8, a person's
7 unconscious or in coma.

8 All of us here have a Glasgow Coma Scale of
9 15. We're living people. Dead people have a Glasgow
10 Coma Scale of 3 because -- based on a characterization,
11 but one can be alive, in a very, very deep coma, also
12 with a Glasgow Coma Scale of 3; that is, the eyes
13 are -- eyelids aren't working --

14 Q. Could you hold on just a second, Doctor.

15 Have you seen this chart? I know there's
16 several different versions of this that are available.

17 A. I'm familiar with the chart and the Glasgow
18 Coma Scale, yes.

19 Q. And would this be a helpful aid to use?

20 A. I think so, yes.

21 MR. ROBERTS: Your Honor, I'd move to admit
22 Exhibit 247 as a demonstrative exhibit.

23 MR. CHRISTIANSEN: I have no objection to it
24 being used as demonstrative, but it was not represented
25 to me it was going to be moved to be admitted.

1 MR. ROBERTS: That's fine, Your Honor. I'd
2 just like to display it the jury.

3 MR. CHRISTIANSEN: No objection, Your Honor.

4 MR. ROBERTS: Brian, could you -- okay.

5 BY MR. ROBERTS:

6 Q. So let's talk about this in a little bit more
7 detail. What is the eye opening response?

8 A. This was -- after much research and -- in
9 Scotland and other places, it was determined that, when
10 somebody comes into the hospital with a head injury,
11 these are the three best observations to make as to
12 judge how severe the head injury is and how severe the
13 level of consciousness may be.

14 And that -- the eye opening is just look --
15 this can be done very quickly right at the scene, as
16 the EMS person did. Whether or not a person opens and
17 closes the eyes normally, that's worth 4 points out of
18 15. If somebody can't open up the eyes properly or
19 only -- then it's 1 point. And then there's in between
20 of how -- whether they respond to voice or -- as to
21 opening the eyes.

22 Q. And you can't get lower than 1; right?

23 A. You can't get lower than 1.

24 Q. What is the verbal response?

25 A. The verbal is talking. If the person is

1 talking normally, that's a 5 -- 15 -- or 9. And if the
2 person's confused, doesn't know the day of the week or
3 where the person is, they still -- but can talk, they
4 get a 4. And then it goes down to 1, where there's no
5 response at all by this kind of a code.

6 So a normal person would have a 4 -- a 4 --
7 sorry -- a 9 by this -- by this point -- 4 and 5; and a
8 person in varying degrees of unconsciousness -- it's a
9 measure of consciousness -- would go lower than that.

10 And the third -- the third means of
11 evaluating somebody has to do with motor activity. And
12 that's the most important one. If a person can obey
13 commands, say, "Raise your left hand," and the person
14 does that, that's pretty good. That may be a total of
15 6 right there. And if there's no response on requests
16 to move the arms and legs usually, it goes down to 1.

17 So the -- if one -- the way it works out, if
18 one gets below an 8, would indicate --

19 MR. ROBERTS: Could you go down to total
20 score, Brian.

21 THE WITNESS: -- would indicate
22 unconsciousness.

23 BY MR. ROBERTS:

24 Q. So comatose is the same thing as unconscious?

25 A. Yeah. Comatose and unconsciousness. But as

1 we get deeper and deeper into unconsciousness, then
2 it's called coma. This is called a Glasgow Coma Scale
3 because they're concerned about the lower margin as to
4 whether they're retrievable, whether you have five
5 people coming in after some kind of an accident, which
6 are the ones that might survive with proper treatment
7 and which are the ones that won't survive at all no
8 matter what you do.

9 So it's a means of how to treat people and
10 how to allocate resources that are often difficult when
11 there's a mass type of head injury from bombs or from
12 car accidents.

13 Q. So a score of 3 would be the very deepest
14 level of unconsciousness you could get on this test?

15 A. That -- right. But a 3 could be in a
16 living -- in -- a severely damaged living person, such
17 as the people called -- in the vegetative states, you
18 know, people who can live in coma for years and years
19 but whose brain isn't functioning but they're able to
20 be given nutrition and oxygen and things. Or a person
21 could be dead.

22 So a person could be dead, and that's a 3, or
23 a person could be almost dead, and that's a 3. And 4
24 would be barely -- you know, somebody who might be
25 mumbling incoherently.

1 MR. ROBERTS: Brian, could you display
2 admitted Exhibit 75, page 3.

3 BY MR. ROBERTS:

4 Q. And you reviewed, Doctor, the report that
5 Captain Horba filled out?

6 A. I did.

7 Q. Okay. And did he perform the Glasgow Coma
8 test on --

9 A. He did.

10 Q. -- Dr. Khiabani.

11 A. He did, as he was trained to do. Right.

12 Q. And what score did the doctor receive on each
13 one of the tests performed by Captain Horba?

14 A. 1. 1. He felt that total coma scale was 3,
15 which indicates that there's not much they can do to
16 help, although they'll try.

17 Q. So 3 -- the 3 would indicate the deepest
18 level of unconsciousness?

19 A. Yes.

20 Q. And that's consistent with your opinion that
21 these injuries you would expect, to a reasonable degree
22 of medical probability, immediate unconsciousness after
23 the depressed skull fracture was received?

24 A. Yes.

25 Q. And he also indicated unconscious, and that

1 would be consistent in his assessments with the Glasgow
2 Coma score that he performed?

3 A. Yes.

4 MR. ROBERTS: Okay. Could we have the last
5 opinion, Brian, 578, page 5.

6 BY MR. ROBERTS:

7 Q. Okay. Does this summarize what you've told
8 the jury so far today?

9 A. Yes, it does.

10 Q. What is the summary of your opinions reached
11 in this slide?

12 A. In all the material I've reviewed, I reached
13 the opinion that Dr. Khiabani died of fatal injuries to
14 his head and brain as a result of the contact with the
15 bus, that he lost consciousness immediately upon having
16 this impact, and that he did develop some terminal
17 convulsive movements, that Dr. Khiabani did not -- was
18 not conscious enough to perceive, experience, any pain
19 or suffering after the contact with the bus that caused
20 the brain damage.

21 Q. Okay. And when you say there's no conscious
22 pain or suffering, that means there's no pain or
23 suffering at all that he could have experienced;
24 correct?

25 A. That's correct. One has to be conscious to

1 experience pain. And not only was he unconscious, but
2 he was in the deepest level of coma, and that would
3 happen immediately, even though he kept breathing.
4 See, he was breathing initially for 10 or 15 minutes.
5 But he was not aware of his surroundings or able to be
6 aware of any pain.

7 Q. Okay. The last thing I want to do with you,
8 Doctor, is ask you whether or not -- let's go back to
9 the OJ Simpson matter that you were retained in.

10 And that's been a long time ago, probably,
11 what? Over 30 years?

12 A. About that.

13 Q. Okay.

14 A. Yeah. 33 years, I think.

15 Q. Did you offer any opinions in that case that
16 are inconsistent with the opinions you are giving to
17 this jury today?

18 A. No.

19 Q. Okay. You did opine in that matter that,
20 despite receiving a brain injury, Nicole Brown Simpson
21 retained consciousness and -- correct?

22 A. Yes.

23 Q. Okay. Was the brain injury that you found
24 that had been suffered by Nicole Brown Simpson in any
25 way similar to the one suffered by Dr. Khiabani?

1 A. No. The only brain injury was a small
2 contusion, a small bruise on the outside of the brain,
3 which sometimes can cause unconsciousness but most of
4 the time doesn't when -- from a small bruise. There
5 was no skull fracture. There was no damage to the
6 brain itself by the depressed bones.

7 And there was evidence, because whatever we
8 find at autopsy has to be interpreted in the light of
9 how things happen and the past history. The autopsy
10 isn't -- can't be interpreted just by itself. Have to
11 know the circumstances and context.

12 And in the -- with Nicole Simpson, as I
13 remember it, she had defensive wounds on her. So
14 whoever did it to her, she was struggling with and even
15 after she had gotten the bruise.

16 So clearly she died because her -- and lost
17 consciousness because the carotid artery in the neck
18 was cut and not because of any brain damage.

19 Q. And did the angle of impact of the knife
20 wounds you observed indicate that she was standing and
21 conscious at the time she received the knife wounds?

22 A. Yes.

23 MR. ROBERTS: Thank you so much, Doctor.
24 That's all I have -- all I have.

25 THE WITNESS: Thank you.

1 MR. CHRISTIANSEN: Can we approach, Judge?
2 So much for time management.

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

5 THE COURT: All right. Ladies and gentlemen,
6 we're going to conclude the trial for today. I'm going
7 to admonish you for this evening.

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

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

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

23 You are not to talk with others, text others,
24 tweet others, google issues, or conduct any other kind
25 of book or computer research with regard to any issue,

1 party, witness, or attorney involved in this case.

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

5 And please make sure to not even accidentally
6 say hello or chat with anyone in the bathrooms,
7 hallways, elevators, any -- any -- anywhere. Okay?

8 Thank you very much. Have a nice evening.

9 THE MARSHAL: All rise.

10 What time, Your Honor?

11 THE COURT: 9:45.

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

14 THE COURT: We are off the record.

15 (Thereupon, the proceedings
16 concluded at 5:08 p.m.)

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

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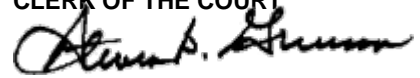


KRISTY L. CLARK, CCR #708

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Steven D. Grierson
CLERK OF THE COURT

1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

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

17 Plaintiffs,)

18 vs.)

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

Defendants.)

21 **REPORTER'S TRANSCRIPTION OF PROCEEDINGS**22 BEFORE THE HONORABLE ADRIANA ESCOBAR
23 DEPARTMENT XIV

24 DATED FRIDAY, MARCH 16, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

TRANSCRIBED BY: KRISTY L. CLARK, NV CCR No. 708

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
Michael Baden, M.D.		19	70	81
Stan Smith, Ph.D.	95	114	163, 175	167, 178

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
263		16	
264		16	

1 LAS VEGAS, NEVADA, FRIDAY, MARCH 16, 2018;

2
3 P R O C E E D I N G S

4 * * * * *

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

9 THE MARSHAL: All rise. Department 14 is now
10 in session with the Honorable Adriana Escobar
11 presiding.

12 THE COURT: Good morning. Just so you know,
13 I have been here --

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

16 THE COURT: -- doing some research. I'd like
17 to -- good morning -- start off by -- please be
18 seated -- very quickly review -- I reviewed the
19 depositions yesterday of Mr. -- last night of Mr. Pears
20 and Mr. Plantz. Okay? And I have taken a look at
21 motion in limine Number -- is it 17 again?

22 And you wanted to discuss it -- where is
23 Mr. Christiansen? You wanted to discuss this again?
24 Or someone.

25 MR. CHRISTIANSEN: Ms. Works is going to

1 discuss it.

2 THE COURT: Okay.

3 MR. HENRIOD: And Mr. Henriod.

4 THE COURT: Mr. Henriod. Thank you.

5 MR. HENRIOD: So where we left off, and we --
6 we haven't confirmed the total list, but we're not
7 going to call them today -- or we're not going to put
8 them on today in any event. But the issue, I think, is
9 looking for inconsistencies where it even might come
10 up.

11 MS. WORKS: Which we did e-mail to defense, I
12 think, late last night. And it was late, so
13 Mr. Henriod and I haven't had a chance to talk yet.

14 THE COURT: Then I will put these aside
15 because I have strong ideas on this after reviewing my
16 motion in limine and a couple of cases and the entirety
17 of these because there's mention of -- is
18 Mr. Hoogestraat? Is that his name?

19 MS. WORKS: The investigator, yes.

20 THE COURT: -- at the beginning and then
21 towards the end, so we can chat about that later.

22 MS. WORKS: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. HENRIOD: Then another thing I think on
25 jury instructions, we were contemplating Sunday.

1 THE COURT: Yes.

2 MR. HENRIOD: That works for us. We can even
3 do it at our office if you like, but I'm wondering if
4 it might be even better for the Court if we were to do
5 it Monday or Tuesday evening, and then that way, over
6 the weekend, we could put together written objections
7 and arguments perhaps that we could give you Monday
8 morning, and that might be of assistance.

9 THE COURT: Here's my fear. We're running
10 very behind on this case. And I understand what you're
11 saying. But we may even need to spend a Monday and a
12 Tuesday to finalize it.

13 MR. HENRIOD: Can it be both?

14 THE COURT: Yeah. I was thinking more along
15 let's do it on Sunday and then we may need more time
16 after trial. So it may even incorporate a Monday or
17 Tuesday. And I'm going to make myself available, okay,
18 because I don't want to lose this jury. So ...

19 Okay. So what I would like, though, is for
20 you to meet and confer before Sunday so we're ready
21 to -- to go on any anything that you're -- or
22 everything that you're not in agreement with. Okay?

23 MS. WORKS: Understood.

24 MR. HENRIOD: Okay.

25 THE COURT: All right. We just need to find

1 a time and a place. I don't -- I would host you here,
2 but I don't think I can.

3 MR. HENRIOD: And we can do it at my place.
4 I can bring in breakfast or lunch.

5 What's that?

6 Right across the street.

7 MR. KEMP: That's agreeable.

8 THE COURT: I'm happy to go wherever. I
9 don't have a -- I don't have a preference where.
10 Whatever works best for the parties. I'm going to be
11 close to the Paradise area again, but, I mean, this is
12 not that hard of a decision.

13 MR. KEMP: Judge, they're in Hughes Center;
14 we're in Hughes Center. So that works out fine.

15 THE COURT: All right. Very well, then. So
16 we just need to establish a time, then.

17 MR. HENRIOD: And we can -- we can do this at
18 lunch or later on.

19 Pears and Plantz. Would you like to give us
20 any strong feelings you have now? And that might
21 expedite --

22 THE COURT: Yes.

23 MR. HENRIOD: -- the discussion.

24 THE COURT: Yes. Let me just pull out my
25 notes.

1 So my thought is, with respect to the
2 impeachment of the -- I'm going to call him the
3 investigator because -- it's Hildreth; right?

4 MR. HENRIOD: Hildreth.

5 THE COURT: Hildreth. Thank you.

6 I've looked at the questions and the answers,
7 and in my mind, under 403 analysis, I think that the
8 probative value of trying to introduce any -- excuse
9 me -- anything like this unduly prejudices the issue
10 that the case, and it -- it just substantially
11 outweighs the probative value.

12 And here -- here's the thing. I reviewed
13 the -- the depos, and the witnesses have an opportunity
14 to give their statement as they saw it in the
15 deposition. So their testimony is there of what they
16 saw.

17 In fact, I forget which one, you know, but
18 they were both very, you know, astute and very -- very
19 serious in pointing out what they really did see and
20 what it was.

21 So there's no question, you know. I -- I
22 didn't see that this -- I just think this is going --
23 for the 403 reasons that I just gave you and for -- and
24 the fact that we do have their testimony in the
25 depositions, I don't -- I don't think this -- I know

1 Mr. Christiansen is very set on this, but I think this
2 is going to derail trial. I think that it is -- I just
3 don't think that this has a place here, especially
4 because we have in the depositions the accurate
5 statements of the witnesses. If we didn't, that would
6 be different.

7 And also I -- I don't think that Mr. -- well,
8 we can talk about that later, but that would include
9 not using Mr. Hildreth's deposition and not allowing
10 the -- the declarations in.

11 That's my thought right now. We can discuss
12 it, just so you know where I'm coming from. We'll
13 discuss it later.

14 MR. BARGER: Judge, we understand your strong
15 feelings. We'll take that in consideration as we're
16 working through it.

17 THE COURT: I want you to work together and
18 be fair about this.

19 MR. BARGER: We will.

20 MS. WORKS: We will, Your Honor. And I
21 believe the depositions, absent the Court changing its
22 mind, actually are for the most part prepared and ready
23 to go. We would want to make a record on the issue
24 later, but we certainly don't have to discuss it right
25 now given the time constraints and witnesses waiting.

1 THE COURT: I just want to let, you know, I
2 took a lot of time reviewing this last night.

3 MS. WORKS: Thank you, Your Honor.

4 THE COURT: I thought it was very important,
5 so that's what my thoughts sincerely are.

6 MR. BARGER: And kind of a reminder, we've
7 decided -- they're only a hour combined. So we've
8 decided not to play it today based upon what we need to
9 work out --

10 THE COURT: Okay. There's another --

11 MR. BARGER: -- which means, obviously, we
12 could get through a little bit earlier today than
13 normal.

14 THE COURT: Okay. There's another --
15 Mr. Barger, I'm sorry. I wasn't listening to the last
16 part.

17 MR. BARGER: Which means we will -- like we
18 suggested yesterday, we might get through a little bit
19 earlier than normal today, on Friday afternoon. We
20 only have two witnesses.

21 THE COURT: Well, to the extent that we can
22 bring anything in like, you know, that -- well --

23 MR. BARGER: Your Honor, a suggestion, if
24 people are prepared, you might want to start talking
25 about the jury instructions this afternoon as opposed

1 to using your Sunday.

2 THE COURT: All I know is I think that
3 Mr. Henriod has a very important appointment this
4 afternoon --

5 MR. BARGER: Oh, that's -- I'm sorry.

6 THE COURT: -- and I'm not going to violate
7 that.

8 MR. BARGER: I apologize.

9 THE COURT: I'm sorry, but that's a
10 once-in-a-lifetime thing -- or maybe twice. Who knows?
11 But I'm not going to deprive him of that.

12 MR. BARGER: Six times, Judge. Six times.

13 THE COURT: That's okay. Oh, yeah, gosh.
14 But that's --

15 MR. BARGER: I apologize.

16 THE COURT: -- important.

17 MR. HENRIOD: Much appreciated.

18 THE COURT: No, I respect that. Yes, we have
19 to respect certain things.

20 Okay. All right. But let's -- let's talk
21 about one other thing. There was a -- a trial brief --
22 do I have it? -- that I just perused, because I didn't
23 see it last night -- it's on here; thank you -- that
24 was received by -- it's -- it's by plaintiffs. It's a
25 trial brief regarding admissibility of taxation issues

1 and gross income -- excuse me -- and gross versus net
2 loss income.

3 I -- I don't have anything from the defense
4 on this, and I would like something, if possible, about
5 this.

6 MR. ROBERTS: Yes, Your Honor. We were
7 planning to get that filed over the weekend, and we'll
8 have that filed this weekend. We had thought that the
9 clip was just being reserved and it was just a question
10 of whether we played the clip or not, which is why I
11 had not prioritized it, but --

12 THE COURT: I just wanted to make sure that
13 you realize this was --

14 MR. ROBERTS: But Ms. Works wrote and said
15 they wanted to cross-examine Dr. Smith regarding this
16 issue. I had not thought that was going to be an issue
17 because he doesn't mention taxes or opine on taxes in
18 his report.

19 However, out of fairness, perhaps what we can
20 do is the exact same thing that Dr. Stokes did. If
21 they want to cross-examine Dr. Smith, even though he
22 doesn't mention it, we can remove the jury from the
23 box, they can do it outside the presence, and if the
24 jury lets our clip in, then they would have the option
25 of putting in their clip.

1 MS. WORKS: Your Honor, the outside-of-the-
2 presence questioning on the cross would be acceptable
3 to plaintiffs, but the defense in the meantime,
4 assuming -- it sounds like Mr. Roberts is saying that
5 Mr. Smith is not going to talk about taxation issues at
6 all. And if that's the case, then we're amenable to
7 doing that outside the presence. But, otherwise, we
8 would ask that the Court rule on it today because
9 Mr. Smith is the defense economist expert which --

10 THE COURT: Understood.

11 MS. WORKS: -- is in response, obviously, to
12 Dr. Stokes.

13 THE COURT: He's on today; right?

14 MR. ROBERTS: He is on today, yes.

15 THE COURT: That's why I wanted something,
16 even if it's during the lunchtime, during lunch, so
17 that I can take a look at anything --

18 MR. ROBERTS: Okay. But he wasn't going to
19 talk about taxes. Has nothing to do with his opinions.

20 MS. WORKS: The issue would be, though, Your
21 Honor, if after the fact defense has Dr. Stokes'
22 testimony on those issues, on the tax issues, recorded
23 and then the Court rules after Mr. Smith is off the
24 stand and gone, then plaintiffs would not have the
25 opportunity to cross-examine Mr. Smith about that.

1 THE COURT: I will start off by taking him
2 out of the presence of the jury and doing that, and we
3 can start from there. Okay.

4 MS. WORKS: Thank you, Your Honor.

5 MR. KEMP: Your Honor, one minor point.
6 Mr. Terry and I have agreed to admit the weather
7 reports that we talked about.

8 THE COURT: Okay. Okay. So I --

9 MR. KEMP: I've given them.

10 THE COURT: Thank you for helping us.

11 MR. KEMP: I gave them to the clerk.
12 Exhibit 263 would be the October 7th; and Exhibit 264,
13 Plaintiffs' 264, would be the October 8th.

14 And so we've agreed to admit them, and I've
15 agreed not to call Dr. Rosenthal -- we've agreed not to
16 call Dr. Rosenthal to authenticate them.

17 THE COURT: All right. So let me just make
18 sure that this is -- I try to keep track of the
19 exhibits over here too.

20 MR. TERRY: We had a discussion outside the
21 presence of the jury about whether or not they could go
22 into those weather reports.

23 THE COURT: Shall we -- are we on the record?

24 THE COURT RECORDER: Yes, we are.

25 THE COURT: Oh, good.

1 MR. TERRY: We had a discussion off the
2 record about whether or not they could go through those
3 weather reports with Kevan Granat, and I brought to the
4 attention of the Court that they were not offered into
5 evidence. And I got Mr. Kemp to commit to bring his
6 rebuttal witness -- Mr.? Dr.?

7 MR. KEMP: Dr.

8 MR. TERRY: -- Dr. Rosenthal to verify, I've
9 prepared -- and I do stipulate that those are business
10 records and can be received as such.

11 THE COURT: Okay. So this is Exhibit 264 and
12 Exhibit 263.

13 MR. KEMP: Correct.

14 THE COURT: And they are admitted.

15 MR. KEMP: Admitted.

16 MR. TERRY: That was for your information,
17 Your Honor.

18 MR. KEMP: I gave the clerk a copy of the
19 report.

20 (Whereupon, Defendant's Exhibit 263 was
21 admitted into evidence.)

22 (Whereupon, Defendant's Exhibit 264 was
23 admitted into evidence.)

24 THE COURT: All right. Are we ready to bring
25 the jury in?

1 MR. KEMP: Yes, Your Honor.

2 THE COURT: All right. Very good.

3 MR. CHRISTIANSEN: Ms. Court Recorder, can I
4 see the ELMO real quick?

5 (Discussion was held off the record.)

6 THE MARSHAL: Are we ready, Your Honor?

7 THE COURT: I'm ready.

8 THE MARSHAL: All rise.

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

11 THE MARSHAL: All the jurors are present,
12 Your Honor.

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

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

16 THE COURT: Madam Clerk, please take roll
17 call.

18 THE COURT CLERK: Yes, Your Honor.

19 Byron Lennon.

20 JUROR NO. 1: Here.

21 THE COURT CLERK: John Toston.

22 JUROR NO. 2: Here.

23 THE COURT CLERK: Michelle Peligro.

24 JUROR NO. 3: Here.

25 THE COURT CLERK: Raphael Javier.

1 JUROR NO. 4: Here.
2 THE COURT CLERK: Dylan Domingo.
3 JUROR NO. 5: Here.
4 THE COURT CLERK: Aberash Getaneh.
5 JUROR NO. 6: Here.
6 THE COURT CLERK: Jaymi Johnson.
7 JUROR NO. 7: Here.
8 THE COURT CLERK: Constance Brown.
9 JUROR NO. 8: Here.
10 THE COURT CLERK: Enrique Tuquero.
11 JUROR NO. 9: Here.
12 THE COURT CLERK: Raquel Romero.
13 JUROR NO. 10: Here.
14 THE COURT CLERK: Pamela Phillips-Chong.
15 JUROR NO. 11: Here.
16 THE COURT CLERK: Gregg Stephens.
17 JUROR NO. 12: Here.
18 THE COURT CLERK: Glenn Krieger.
19 JUROR NO. 13: Here.
20 THE COURT CLERK: Emilie Mosqueda.
21 JUROR NO. 14: Here.
22 THE COURT: Good morning, ladies and
23 gentlemen.
24 IN UNISON: Good morning.
25 THE COURT: Do the parties stipulate to the

1 presence of the jury?

2 MR. CHRISTIANSEN: Yes, Your Honor.

3 THE COURT: And we are now going to continue
4 with Dr. Baden; is that correct?

5 MR. CHRISTIANSEN: Yes, Your Honor. I
6 believe it's cross-examination of Dr. Baden.

7 THE COURT: Okay. Dr. Baden, good morning.
8 Good morning, Dr. Baden. You're still under
9 oath.

10 THE WITNESS: Good morning, Your Honor.
11 Thank you.

12 THE COURT: Please go ahead.

13 MR. CHRISTIANSEN: May I proceed, Your Honor?

14 THE COURT: Yes.

15

16 CROSS-EXAMINATION

17 BY MR. CHRISTIANSEN:

18 Q. Good morning, Dr. Baden.

19 A. Good morning, sir.

20 Q. I have some follow-up questions for your
21 answers that you gave Mr. Roberts yesterday, also
22 stemming from the report you authored October the 16th,
23 2017.

24 You okay with that?

25 A. Yes, sir.

1 Q. All right. You described --

2 And, Shane, can I have the -- what was
3 entered as 577?

4 For the ladies and gentlemen of the jury, the
5 skull fracture suffered by Dr. Kayvan Khiabani April
6 the 18th, 2017.

7 Do you remember doing that?

8 A. Yes.

9 Q. And your description and I -- Dr. Baden, so
10 you know, we all get transcripts, so -- and no mistake
11 what you said. I got to take it home last night to
12 read it.

13 Your description yesterday to the ladies and
14 gentlemen of the jury, and you used Exhibit 577, you
15 told them the left side of Dr. Khiabani's head had been
16 depressed. The skull had been pressed into his brain.
17 Correct?

18 A. That it was a depressed skull fracture and
19 part of his skull had been depressed into the brain,
20 yes.

21 Q. Dr. Baden, I'm going to ask you questions
22 that call for a yes-or-no answer. Okay? That's --

23 A. Yes.

24 Q. -- allowable understand the rules. Fair?

25 A. Yes.

1 Q. All right. So what you told the ladies and
2 gentlemen yesterday is that Dr. Khiabani suffered a
3 depressed skull fracture to the left side of his head,
4 and you used Exhibit 577; correct?

5 A. Yes.

6 Q. You told the ladies and gentlemen of the jury
7 he suffered fractures to the base of his skull, and you
8 talked about those fractures as well; correct?

9 A. Yes.

10 Q. You know, do you not, that this bus weighed
11 approximately 38,000 pounds; correct?

12 A. Yes.

13 Q. You would agree with me, would you not, that
14 the amount of force exerted on Dr. Khiabani's head when
15 the bus rolled over it was substantial; correct?

16 A. Yes.

17 Q. To crush a person's skull, requires
18 substantial force, does it not?

19 A. Yes.

20 Q. It does not -- you did not offer any opinions
21 yesterday that the tip of his helmet had been pinched,
22 thereby crushing the side of his skull; correct? You
23 did not offer that opinion?

24 A. Yes. I wasn't asked, but yes.

25 Q. 'Cause it is your opinion that the bus went

1 over the side of his head, depressed his skull in,
2 causing his death; correct?

3 A. No.

4 Q. Sir, just going to ask you, did you call it a
5 depressed skull fracture yesterday?

6 A. Yes.

7 Q. Okay. Did you author a report in this case?

8 A. I did.

9 Q. Okay. And when you author your report,
10 Dr. Baden, you know you're supposed to include all of
11 your opinions in your report; correct?

12 A. I included my opinions, yes.

13 Q. And in your report, Dr. Baden --

14 Can I have Exhibit 578, No. 2.

15 This is just a summary, Dr. Baden, of the
16 conclusions reached in your report; correct?

17 A. Yes.

18 Q. And between the day you authored your report
19 and the day you testified yesterday, you didn't review
20 any additional documents or X rays; fair?

21 A. I didn't review any additional X rays.

22 Q. Well, all you did was meet with counsel for
23 MCI to prepare for your deposition -- for your trial
24 testimony; correct?

25 A. No. I received additional information during

1 the interval before I testified, you know, on various
2 deposition testimonies and other information in the
3 normal course.

4 Q. Dr. Baden, do you take issue with any of
5 Dr. Gavin -- Dr. Lisa Gavin, the medical examiner here
6 in Las Vegas, that did the examination, the external
7 examination of Dr. Khiabani -- do you take issue with
8 any of her conclusions? Yes or no.

9 A. Yes.

10 Q. Okay. Because when you -- when you wrote
11 your opinion back in October -- it's up for the ladies
12 and gentlemen of the jury -- you opined that there was
13 a possible atlanto-occipital dislocation; correct?

14 A. Yes. That was what I had read in the -- in
15 the information I had received.

16 Q. Right. Well, you just hadn't read it; you
17 looked at the X rays. I'm looking at your report.

18 A. That's right. But -- that's right.

19 Q. All right. So you'd looked at the X rays you
20 were shown yesterday by Mr. Roberts; fair?

21 A. Yes.

22 Q. Prior to writing this report; correct?

23 A. Yes.

24 Q. And your conclusion in the report was that
25 there was a possible atlanto-occipital injury; correct?

1 A. Yes.

2 Q. All right. And yesterday you came before
3 this jury, after meeting with counsel for MCI, and told
4 them that was what you determined had happened --

5 A. Yes.

6 Q. -- to Dr. Khiabani?

7 A. Yes.

8 Q. Correct?

9 A. Yes.

10 Q. And that's a change from what you wrote in
11 your original report; correct?

12 A. Yes.

13 MR. CHRISTIANSEN: Can I have the 577 again,
14 please, Shane.

15 BY MR. CHRISTIANSEN:

16 Q. The base of the skull, is that the image best
17 to describe the base of the skull or would you like a
18 side image, Dr. Baden?

19 A. Well, the -- the side shows additional.
20 However, I'm basing that opinion on the blood coming
21 out from both ears is evidence of severe fractures of
22 the base of the skull --

23 Q. Okay.

24 A. -- because on the x-rays there are lots of
25 different lines at the base, and it's hard to see

1 basal -- base-of-the-skull fractures because of all the
2 different natural lines there.

3 Q. Dr. Baden, you did not opine in your written
4 report or yesterday that the strap injuries that
5 Mr. Roberts showed you to the sort of top of
6 Dr. Khiabani's head were the cause of a crushed or
7 depressed skull fracture. That was not your opinion
8 yesterday or in your report; correct?

9 A. Yeah, I don't think that the straps
10 themselves would have caused those fractures. That's
11 correct.

12 Q. Okay. And that's not in your report;
13 correct?

14 A. That's right.

15 Q. Not in your testimony yesterday; correct?

16 A. That's correct.

17 Q. Okay. And when -- you told the ladies and
18 gentlemen of the jury you were shown photos of
19 Dr. Khiabani's face and then his back, and you said you
20 didn't see any abrasions or scrapes -- I think is the
21 word you used -- or lacerations -- do you remember that
22 testimony yesterday?

23 A. Yes.

24 Q. It left the impression, Dr. Baden, that
25 Dr. Khiabani did not suffer abrasions or bruising to

1 the rest of his body. That's not your opinion, is it?

2 A. No. He showed abrasions elsewhere.

3 Q. And you weren't shown any of those photos
4 yesterday on direct examination, were you?

5 A. I was not.

6 Q. You know he's got a road rash on his arm?

7 A. Yes.

8 Q. Road rash on his hip?

9 A. Yes.

10 Q. Contusion, bruising to his left knee?

11 A. Yes.

12 Q. Broken nose?

13 A. Yes.

14 Q. And, Dr. Baden, in your line of work, you got
15 to choose your words carefully; correct?

16 A. Yes.

17 Q. And when you authored your opinions October
18 the 18th -- 16th of this year, you took the opinion
19 that, to a reasonable degree of medical certainty based
20 on your education and training, Dr. Khiabani incurred
21 fatal injuries to his head and brain as a result of his
22 collision with the bus; correct?

23 A. Yes.

24 Q. His collision with the bus. And then you
25 write that he lost consciousness immediately --

1 A. Yes.

2 Q. -- correct?

3 Dr. Baden, is it your opinion that Kayvan
4 Khiabani lost consciousness when he hit the side of the
5 bus? Yes or no.

6 A. Possibly. It's possible.

7 Q. I didn't ask you what's possible. You
8 know -- you're an expert. You know you got to testify
9 to a reasonable degree of probabilities; correct?

10 A. To a reasonable degree of medical certainty,
11 it's my opinion that he lost consciousness when he came
12 into contact with the bus. Whether it's --

13 Q. Over here, Dr. Baden. Over here. He lost
14 consciousness when he came into contact with what part
15 of the bus? The tire or the side?

16 A. Either one. I can't tell the difference --
17 which one because much of the injury is from the tire,
18 but a sideswiping contact with the left side could
19 cause loss of consciousness, but there's only less than
20 a second difference. See? So I don't know what
21 happened in that second between, you know, the contact
22 with the bus first and then the second contact, but the
23 major injuries were from the tire.

24 Q. I understand --

25 A. Okay.

1 Q. -- that you wrote something that you now got
2 to live with, and I'm going to ask you questions about
3 it. Okay?

4 A. Absolutely.

5 Q. Okay. All right. You don't know -- you --
6 that's a quote. You just said it. I'm looking at the
7 court reporter over her shoulder.

8 You don't know if he lost consciousness when
9 he hit the side of the bus; correct?

10 A. That's correct.

11 Q. So because you don't know, you can't opine
12 that he did; correct?

13 A. That's correct.

14 Q. Okay. And because you can't opine that he
15 did, you can't tell the jury one way or another whether
16 he suffered pain from that initial contact with the
17 bus; correct?

18 A. That's correct.

19 Q. You can't tell the jury one way or the other,
20 after he hits the bus, goes to the ground, breaks seven
21 ribs, whether he was conscious of that pain; correct?

22 A. No, he was conscious of that pain.

23 Q. Okay.

24 A. But -- not from the ribs, but from the
25 head -- the head injuries that occurred at the same

1 time.

2 Q. Okay. Your opinion has always been that the
3 bus tire ran over his head and that's what caused his
4 fatal injuries; correct?

5 A. The bus tire caused the fractures of his
6 skull. It didn't run over his head, because the -- the
7 continuity of the skull was still intact. And if --
8 and in the --

9 Q. Dr. Baden?

10 A. -- bus injuries that I've seen, there's --
11 there's a --

12 Q. Dr. Baden?

13 A. -- there's a severe collapse of that
14 continuity.

15 Q. Dr. Baden, you didn't offer this opinion
16 yesterday, did you?

17 A. No.

18 Q. And so when I asked you, "Isn't it true you
19 didn't offer that opinion?" your -- the answer is "Yes,
20 that's true"; correct?

21 A. Didn't -- didn't offer what opinion?

22 Q. You didn't offer this opinion yesterday or in
23 your report; correct?

24 A. I didn't say yesterday that the tire ran over
25 the -- the bus in its entirety. I think the tire ran

1 over the back of the head, not enough to cause collapse
2 and fractures of the continuity of the skull.

3 Q. Okay. Was the skull depressed on the left
4 side?

5 A. Yes.

6 Q. Okay. Did that depression -- yes or no? Did
7 that depression come from the pinching of the top inch
8 of the helmet?

9 A. It could have. It could have.

10 Q. Don't guess, Dr. Baden.

11 A. Yes, I think that the collapse of the helmet
12 over -- and the contact of the helmet with the skull
13 caused that, yes.

14 Q. The contact of the helmet with the skull or
15 the contact of the bus with the head?

16 A. The bus with the back of the head and skull.
17 It's a sideswipe to the back of the head because it
18 didn't crush the back of the head.

19 Q. When did you determine it was a sideswipe?
20 Because that's not in your report, is it?

21 A. No, it isn't.

22 Q. That wasn't what you testified yesterday for
23 Mr. Roberts; correct?

24 A. That wasn't what I -- I answered the
25 questions that were asked of me.

1 Q. Okay. And what you told -- what you opined
2 to yesterday and is in your report is that Dr. Khiabani
3 immediately lost consciousness when he hit the bus.
4 That's what you said yesterday?

5 A. That's correct.

6 Q. Okay. And what you just got done telling the
7 ladies and gentlemen of the jury today is that opinion
8 you gave just yesterday is wrong; correct?

9 A. No, I think less than a second --

10 Q. Sir -- sir --

11 A. I'm not God. Less than a second is with
12 immediate contact, to my opinion. I can't tell if it
13 was -- you're right. I can't tell if it's immediately
14 when he hit the side of the bus or when the bus tire
15 hit the back of his head. That, I can't do.
16 Certainly, the bus tire in the back of the head was, in
17 and of itself, sufficient to do this. And the contact
18 with the head the first time could have, but I can't
19 tell whether it did.

20 Q. Okay. So you're just guessing?

21 A. I'm saying that there's enough impact that it
22 could cause a loss of consciousness, but it does not
23 necessarily cause loss of consciousness.

24 Q. Did you review Dr. Gavin's testimony?

25 A. I did.

1 Q. Dr. Gavin's the lady that works at the Clark
2 County Medical Examiner's Office?

3 A. She's the medical examiner there, yes.

4 Q. She's the lady that actually physically put
5 her hands on Dr. Khiabani postmortem?

6 A. Yes.

7 Q. She palpated his skull?

8 A. Yes.

9 Q. She witnessed firsthand the six or seven
10 left-side rib fractures?

11 A. Well, she witnessed the x rays, yes.

12 MR. CHRISTIANSEN: Shane, can I have
13 Exhibit 246, please.

14 BY MR. CHRISTIANSEN:

15 Q. Is 246 a correct depiction of the --
16 Dr. Khiabani's rib fractures, Dr. Baden?

17 A. Yes.

18 Q. And the rib fractures, Dr. Gavin told the
19 ladies and gentlemen of the jury that they were
20 splintered fractures. Do you agree with that?

21 A. Yes. Yes.

22 Q. Dr. Gavin told the ladies and gentlemen of
23 the jury that she, to a reasonable degree of medical
24 probability, believed Dr. Khiabani felt pain from those
25 seven rib fractures. Do you agree with that?

1 A. No, I don't. There would have been pain if
2 he were conscious, but no pain if he's not conscious.

3 Q. Okay. Are you an accident reconstructionist?

4 A. I'm an -- a forensic pathologist. I can
5 reconstruct what happened to the body; I can't
6 reconstruct the accident. Right. I do not indicate
7 that I can reconstruct what -- the accident that
8 happened, no.

9 Q. Dr. Baden, do you really intend to tell this
10 jury that those rib fractures took place after his head
11 was run over?

12 A. It was simultaneous.

13 Q. Well, the defense's theory in this case is
14 that an inch of his head got clipped by the sidewall of
15 the tire. What simultaneously broke seven of his ribs?

16 A. Hitting the ground.

17 Q. Okay. You don't know?

18 A. Or -- or even being struck -- even being
19 struck -- could be when his head hits the side of the
20 bus and his back comes -- also comes in contact with
21 the bus is also possible. So ...

22 Q. Doctor --

23 A. He could have suffered both the head and the
24 ribs at that time, then it would have been pain for
25 less than a second.

1 Q. Okay. Dr. Baden, did the rib fracture -- do
2 you have any evidence that hitting the side of the bus
3 caused him a head injury, Dr. Khiabani, hitting the
4 side of the bus?

5 A. I don't have evidence -- did the head -- I'm
6 sorry. Repeat that.

7 Q. Do you have any evidence that his head
8 touched the side of the bus when he was still partially
9 upright on his bike? Yes or no.

10 A. I don't have any scientific evidence to that,
11 right.

12 Q. Do you have any evidence that his ribs were
13 cracked when he hit the side of the bus as opposed to
14 when he went down to the ground?

15 A. No.

16 Q. Okay. And you have no evidence, none
17 whatsoever, that the injuries that are seen on the
18 autopsy photographs, save and except the head injury,
19 didn't occur before the bus ran over his head; correct?

20 A. No, it --

21 Q. Just answer my question.

22 A. You're giving me more credit. I can't think
23 in milliseconds, as far as milliseconds go. And I
24 can't think that even in less than a second -- if I put
25 my hand on a hot stove, it takes me maybe a second to

1 realize that I've hurt myself.

2 So that pain itself doesn't necessarily start
3 immediately. There are milliseconds or seconds in
4 between. So I'm not an expert in that.

5 I'm saying that the injury that he had, just
6 from the -- from the autopsy -- there's no autopsy
7 here. Remember, there's no autopsy. We could answer
8 your questions better if there were an autopsy, but,
9 from the information from the body externally and
10 x rays, show that he suffered severe injuries -- I
11 agree -- head injuries and back injuries.

12 Whether it happened in initial contact while
13 he's -- bike goes against the -- the bus, maybe --
14 therefore, in that position, his head and back might
15 have also, you're right. I -- just speculation -- not
16 speculation, but it's just a possibility that I can't
17 evaluate.

18 But, definitely, after he hits the ground --
19 and the tire and the ground, within that half second,
20 he suffers all these injuries. At that time,
21 definitely, he would. And, yeah, so I can't answer you
22 to a -- to a reasonable degree of certainty about that
23 one second when -- when the injuries occurred.

24 Q. Okay. Can you tell me it was one second
25 specifically?

1 A. Pardon me?

2 Q. Can you tell me it was 1 second versus 1 1/2
3 or 2 seconds?

4 A. That -- that -- that the injury -- my
5 understanding from reading the information, the speed
6 of the bus at 25 miles an hour, is that hitting the
7 side of the -- the bike hitting the side of the bus and
8 his falling to the ground would be less than a second.

9 Q. Okay.

10 A. I can't do better than that.

11 Q. You're just relying on what you read somebody
12 else say; right?

13 A. Well, you know, figuring out also how many
14 feet the bus traveled, he's going -- I haven't figured
15 out --

16 Q. All right. Dr. Baden, let me ask you a
17 different question. Okay?

18 Isn't it true you opined in your report that
19 Dr. Khiabani lost consciousness immediately?

20 A. Yes.

21 Q. Isn't it true you opined in your report that
22 he lost consciousness from striking the right front of
23 the bus?

24 A. Yes.

25 Q. Isn't it true, as you just told the ladies

1 and gentlemen of the jury, that that is a guess on your
2 part? Yes or no.

3 A. No, it's not a guess.

4 Q. Dr. Baden --

5 A. It's less than a second, the whole thing.

6 And I think that I can't distinguish -- a forensic

7 pathologist can't distinguish one second of pain

8 perception. So I would -- to me, less than a second of

9 an injury is immediate.

10 Q. Okay.

11 A. And -- but it -- but it has that -- maybe I'm

12 off by a second.

13 Q. Okay.

14 A. That's possible.

15 Q. And in that second, because you're not God,

16 you can't tell anybody what Dr. Khiabani was thinking?

17 A. That's correct.

18 Q. You don't know if he was thinking of his sick

19 wife and two boys; correct?

20 A. That's correct.

21 Q. You can't read minds; correct?

22 A. Especially when a person is dead. You're

23 right.

24 Q. And -- and would you agree that when the bus

25 tire struck Dr. Khiabani's head, that caused pain?

1 A. No, because --

2 Q. Just listen to me.

3 A. -- simultaneously with the bus --

4 Q. Sir, if you can't answer yes or no, just say
5 no, you don't agree with me. I'm asking you a
6 question.

7 Do you agree that when the tire struck --
8 rolled over Dr. Khiabani's head, at that instant that
9 it happened, he felt pain? Do you agree with me?

10 A. No.

11 Q. Okay. He felt no pain from the tire?
12 38,000-pound bus rolls his over his head. He felt no
13 pain. That's your theory? Yes or no.

14 A. Because --

15 Q. Dr. Baden, yes or no, is that your theory?

16 A. My theory is --

17 Q. Dr. Baden --

18 A. It's my opinion. It's not a theory; it's an
19 opinion. Based on everything I've known, he had a
20 Glasgow --

21 Q. Dr. Baden --

22 A. -- Coma Scale of 3 --

23 Q. Dr. Baden --

24 A. -- immediately at that time.

25 Q. Dr. Baden, this is cross-examination. Sir,

1 I'm trying to be very respectful.

2 A. You are.

3 Q. I'm trying to ask you pointed questions, and
4 I'm just looking for answers. I don't want --

5 A. And I'm trying to explain things, and I
6 apologize.

7 Q. Okay. Mr. Roberts is going to have a chance
8 to have you explain things after I'm done. Okay?

9 A. Yes, sir.

10 Q. All right. Your opinion, when you wrote your
11 report, was that Dr. Khiabani was immediately rendered
12 unconscious and felt no pain and suffering? That's in
13 your report?

14 A. Yes.

15 Q. That was your opinion yesterday when you
16 testified in front of the jury?

17 A. Yes.

18 Q. And then when pressed this morning, you now
19 agree that is not exactly accurate; fair?

20 A. No, it's a definition of immediate. But I --
21 I once said that I agree with you, that within my
22 definition of immediate, there's a second I can't
23 account for.

24 Q. A second or two you can't account for?

25 A. A second.

1 Q. Okay. And you don't know what he felt or
2 thought during that second or two; correct?

3 MR. ROBERTS: Objection --

4 THE WITNESS: That's correct.

5 BY MR. CHRISTIANSEN:

6 Q. And, you know, words are important in your
7 line of work; correct?

8 A. Yes.

9 Q. Making mistakes causes things to go awry in
10 your line of work; correct?

11 A. Well, it means that my -- what I'm saying is
12 not accurate. How much that makes it awry could be a
13 lot or a little, right.

14 Q. And when you testified on direct and you
15 walked through an hour and -- plus of questions and
16 answers with MCI's lawyer -- Motor Coach Industries'
17 lawyers -- Mr. Roberts asked you the question
18 yesterday; correct?

19 A. Yes.

20 Q. And three times, by my count, you said that
21 Dr. Khiabani was rendered unconscious immediately --

22 A. Yes.

23 Q. -- correct?

24 Four times, by my count, you said that
25 Dr. Khiabani felt no pain and suffering?

1 A. Yes.

2 Q. And three times, by my count, you told the
3 ladies and gentlemen of the jury you couldn't see
4 abrasions or injuries on him consistent with
5 lacerations to his head and back.

6 A. Yeah. Limited to his head and back, yes. I
7 didn't describe the extremities.

8 Q. You didn't go through --

9 Ms. Court Recorder, can I have the ELMO,
10 please.

11 You were not asked a single question about
12 the rib fractures yesterday; correct? You didn't even
13 show them in your presentation; right?

14 A. That may be true.

15 Q. Okay.

16 A. I don't recall specifically.

17 MR. CHRISTIANSEN: That's Exhibit 246, Your
18 Honor. I'm sorry.

19 THE COURT: Okay.

20 BY MR. CHRISTIANSEN:

21 Q. You weren't shown any of the photos -- do you
22 know -- I think you do, because it's in your report.
23 Dr. Khiabani was an organ donor; correct?

24 A. Yes.

25 Q. So the ladies and gentlemen of the jury

1 understand, 248, the strips of skin that are removed,
2 that's for organ-type purposes; fair?

3 A. Yes.

4 Q. His eyes were removed to donate?

5 A. Part. The corneas were removed, the front of
6 the eyes, yes.

7 Q. And you didn't talk about this abrasion
8 yesterday, did you -- let me back out here; I'm in too
9 close -- on his shoulder?

10 A. Yeah, there -- that's not present in -- in
11 the photographs of the back.

12 Q. Okay. Let me show you --

13 A. Before -- before organ donation, because, at
14 this photo, it's not only that there's been organ
15 donated, but he has now been embalmed. That is not the
16 normal color of skin; it's the color of embalming. So
17 he went from the hospital to the organ donors to the
18 coroner's office. And then --

19 Q. Doctor, my question was, did you show him the
20 picture? Yes or no.

21 A. No.

22 Q. Okay. I know.

23 A. No, but, see, that picture is a different
24 picture of him --

25 Q. Dr. Baden, I'm asking you what time it is. I

1 don't want you to tell me how you built the watch.

2 Okay? Just focus on my questions, please, sir.

3 A. Yes.

4 Q. You didn't show the ladies and gentlemen of
5 the jury Exhibit 250 --

6 A. That's correct.

7 Q. -- that shows abrasions to Dr. Khiabani's
8 arm?

9 A. Yes.

10 Q. You didn't show the ladies and gentlemen of
11 the jury 251 that shows injury to his hip, his left
12 hip; correct?

13 A. That's correct. Up in the corner.

14 Q. You didn't show the ladies and gentlemen of
15 the jury 252, which show injuries to his knee; correct?

16 A. That's correct.

17 Q. I mean, you walked through an entire
18 examination on direct telling the ladies and gentlemen
19 of the jury Dr. Khiabani -- or leaving the impression
20 that Dr. Khiabani's only injury that was immediately
21 life-ending was his skull injury; correct?

22 A. That the injury that --

23 Q. Sir -- sir -- sir. Yes or no. Yes or no.
24 Is that what you did yesterday?

25 A. There's two things in your question. The

1 part that says that the immediate cause of death was
2 his head injuries, yes.

3 But the fact that I didn't say anything about
4 the other injuries is -- is because I wasn't asked and
5 because it did not cause immediate loss of
6 consciousness.

7 Q. Right. The rib fractures didn't cause
8 immediate loss of consciousness; correct?

9 A. That's correct.

10 Q. The injury to his hip and his arm didn't
11 cause loss of consciousness; correct?

12 A. That's correct.

13 Q. The injury to his left knee didn't cause loss
14 of consciousness; correct?

15 A. That's correct.

16 Q. And have you seen Dr. Gavin's testimony?

17 A. I have.

18 Q. And do you agree with her that all those
19 injuries would have caused him pain?

20 A. If he were conscious, yes.

21 Q. Okay. And do you agree with simple stuff,
22 Dr. Baden, that Dr. Gavin opined about? Time of death,
23 do you agree with her about that? 11:09, he was
24 pronounced deceased?

25 A. Well, that's when he was pronounced dead, but

1 his heart stopped about 15 minutes before that. So ...

2 Q. Is she wrong -- is she wrong on her time of
3 death?

4 A. No, no. The official time of death is 11:09,
5 as she put down.

6 Q. All right. Let's work backwards -- okay? --
7 from 11:09.

8 At 11:58 [sic], a paramedic, a captain who
9 came in, Mr. Horba, said there had been a significant
10 development at 10:58. That's -- you know that;
11 correct?

12 A. Yes.

13 Q. The wreck occurs at 10:35; correct?

14 A. Yes.

15 Q. Mr. Horba, Captain Horba, told the ladies and
16 gentlemen of the jury that it took him about -- by the
17 time he had hands on the doctor, he thought it was
18 probably about 10:42, about seven minutes later.

19 Is that consistent with what you recall?

20 THE WITNESS: Yeah.

21 MR. ROBERTS: Objection. Form.

22 THE COURT: Sustained.

23 THE WITNESS: I'm sorry?

24 THE COURT: Sustained.

25 /////

1 BY MR. CHRISTIANSEN:

2 Q. Do you recall Captain Horba testifying? Do
3 you know one way or another that he told the ladies and
4 gentlemen of the jury it was probably 10:42 before he
5 first put his hands on Dr. Khiabani?

6 A. That sounds right.

7 Q. And Dr. Horba -- Dr. Horba. I'm sorry.
8 Captain Horba was the first person to do a Glasgow Coma
9 test; correct?

10 A. Yes.

11 Q. Prior to that, for those seven minutes,
12 nobody did any type of objective testing on Dr. Kayvan
13 Khiabani; fair?

14 A. Well, not -- not the Glasgow Coma Scale, but
15 there is a video, partial video --

16 Q. I'm going to get to --

17 A. -- that shows things.

18 Q. You understood my question, did you not,
19 Dr. Baden?

20 A. Well, I don't know about nobody. I'm saying
21 that nobody did what Dr. Horba did -- or what Captain
22 Horba did.

23 Q. So for those seven minutes, from the time his
24 head is impacted with the tire until Captain Horba does
25 a Glasgow Coma assessment on him, there's no objective

1 testing -- testing -- here's my question -- done on
2 Dr. Khiabani; isn't that true?

3 A. That's not true. That's not true.

4 Q. Sir, did Samantha Kolch -- was she a trained
5 paramedic? Yes or no.

6 A. No.

7 Q. Zach Kieft, was he a trained paramedic? Yes
8 or no.

9 A. No.

10 Q. You've got a video from Mr. Sacarias that you
11 are referring to?

12 A. Yes.

13 Q. On that video you describe what you called
14 agonal breathing?

15 A. Yes.

16 Q. Can you tell the ladies and gentlemen of the
17 jury from -- how long after Dr. Khiabani's head was run
18 over did the video start playing? How many minutes had
19 elapsed? Do you know?

20 A. I don't know.

21 Q. Prior to the video, you would agree with me
22 you've got no objective evidence as to his
23 consciousness one way or another; correct?

24 A. No, that's not true.

25 Q. Sir, I understand for trial purposes you have

1 developed a new theory, which is the atlanto-occipital
2 dislocation; right? That's changed between your
3 opinion letter and trial; fair?

4 A. Well, when I testified, yes, there was a
5 slight change.

6 Q. I put your slide up there. You don't have to
7 believe me. Here's your slide. You prepared these
8 slides or they were prepared for you.

9 Did you prepare them or were you they
10 prepared for you?

11 A. They were prepared by --

12 Q. Mr. Roberts?

13 A. -- Mr. Roberts.

14 Q. Okay. I mean -- and the slide Mr. Roberts
15 prepared before he threw you up on -- put you up on the
16 stand, sir. I don't mean -- I wasn't trying to be
17 trivial. I'm sorry.

18 A. Thank you.

19 Q. Your opinion was that a possible
20 atlanto-occipital dislocation. I'm just reading from
21 the slide MCI prepared for you.

22 A. That was my opinion in October, yes.

23 Q. No, no, no. This is your opinion --
24 Mr. Roberts just wrote this presentation for you;
25 correct?

1 A. From the October opinion that I had sent to
2 him.

3 Q. So am I to understand correctly, Dr. Baden,
4 that your opinion changed between October, when you
5 wrote it, to yesterday afternoon?

6 A. Yes.

7 Q. Am I to even understand more specifically
8 that your opinion changed from the moment Mr. Roberts
9 wrote the slide show for you, where it says "possible,"
10 which likely was pretty recent, right, until you hit
11 the stand yesterday? Am I to understand that
12 correctly?

13 A. Say that again.

14 Q. Well, when MCI wrote the slide show and
15 talks -- for you to testify yesterday, on the slide
16 show they write that your opinion is a possible
17 atlanto-occipital dislocation.

18 Did -- I'm just -- tell the ladies and
19 gentlemen of the jury am I reading this correctly,
20 Dr. Baden?

21 A. You're reading it correctly, but you're not
22 stating it correctly. You see, I --

23 Q. Dr. Baden, why don't you look at your
24 screen --

25 A. I did. I have it there.

1 Q. -- and follow along.

2 "And a possible atlanto-occipital
3 dislocation."

4 Did I read that correctly?

5 A. Yes. Yes.

6 Q. And this was prepared in anticipation for
7 your testimony yesterday; correct?

8 A. Yes.

9 Q. All right. And are we all to understand
10 correctly that, after the slide was prepared, taken
11 from your report, that you decided you had a new
12 opinion before you hit the stand yesterday, 'cause --

13 A. No. That's wrong. I told Mr. Roberts that
14 that's no longer correct, that since October I had
15 confirmed that it is the definite fracture, and he
16 advised me, by court orders --

17 Q. Don't -- don't talk about --

18 A. -- that -- not to include --

19 Q. Do not talk about what court orders or
20 Mr. Roberts told you. Okay? We don't want to know any
21 of that.

22 A. That I was advised that he had to do it this
23 way to take it directly out -- directly out of the
24 opinion I gave in October and that I could explain any
25 changes that I made if -- if asked, as you are doing

1 now, the basis for it.

2 Q. Dr. Baden, do you agree that, when
3 Dr. Khiabani's head was depressed -- when the depressed
4 skull fracture -- that it disfigured his skull?

5 A. Not to be -- no, not noticeably, no. His
6 skull is not disfigured except by X ray.

7 Q. You don't think pushing somebody's skull in
8 2 inches disfigures their skull?

9 A. Well, it doesn't go in 2 inches. But it goes
10 sufficiently to cause brain damage. And it doesn't --
11 as you -- you saw on the facial photograph, his skull
12 is not disfigured by looking at it from the outside.

13 Q. Does --

14 A. There are disfigurations on the inside, yes.

15 Q. All right. He's severely disfigured
16 internally; correct?

17 A. Not severely. Not severely.

18 Q. What would you call somebody's skull getting
19 crushed? Slight?

20 A. It's not crushed.

21 Q. A slight disfigurement?

22 A. No. It's -- it's a lethal disfigurement. I
23 agree with you.

24 Q. Lethal disfigurement.

25 Dr. Baden, this is not your first foray into

1 testifying; correct? You have been doing this a long
2 time.

3 A. That's correct, yes.

4 Q. You were not called upon in this case to
5 determine, as Dr. Gavin was, cause and manner of death;
6 correct?

7 A. Oh, that was part of what I would always have
8 to do as a forensic pathologist, is to see whether I
9 agree with the cause of death by the person who does
10 the autopsy.

11 Q. And you agree with her, do you not?

12 A. Yes, that's the cause of death.

13 Q. And this is not even the first time you have
14 sort of looked over the shoulder of a Clark County
15 medical examiner opinion either; fair? In the Binion
16 case you did that you told Mr. Roberts?

17 A. Yeah. In the Binion case, I was asked by the
18 district attorney for my opinion as -- and I disagreed
19 with what the Las Vegas coroner had wrote -- had
20 stated, and --

21 Q. Right. And you told the ladies and gentlemen
22 of the jury yesterday that Mr. Binion had once owned
23 the Golden Nugget.

24 You remember telling him that?

25 A. Yeah, he or his father. I said he. I said

1 he.

2 Q. You still stand by that?

3 A. That was my understanding, that Mr. Binion is
4 the one who --

5 Q. You ever heard --

6 A. -- developed the Golden Nugget.

7 Q. You ever heard of the Binion's Horseshoe,
8 Dr. Baden?

9 A. Yes.

10 Q. He didn't own the Golden Nugget, did he?

11 A. Binion's Horseshoe.

12 Q. You were just mistaken yesterday?

13 A. I was mistaken. The Binion's Horseshoe was
14 the -- he developed the poker tournaments in the Golden
15 Nugget. I'm sorry.

16 Yes, you're correct. I made a mistake on
17 that.

18 Q. And that was consistent with what happened
19 when you testified in the Baden trial -- the Baden
20 trial; I'm sorry.

21 You testified in the Binion trial the first
22 time. Do you remember that?

23 A. Yes.

24 Q. Two people were convicted; correct?

25 A. Yes.

1 Q. That conviction was reversed by our state
2 supreme court; correct?

3 A. Yes.

4 Q. You testified a second time?

5 MR. ROBERTS: Your Honor, may we approach?

6 THE COURT: Yes.

7 (A discussion was held at the bench,
8 not reported.)

9 BY MR. CHRISTIANSEN:

10 Q. Dr. Baden, I want to step back a bit with
11 you.

12 It's your testimony today, for the first time
13 on cross-examination, that the head of Dr. Khiabani hit
14 the side of the bus as opposed to his handlebars making
15 initial contact with the side of the bus.

16 Is that what I'm to understand? Yes or no.

17 A. Repeat that, please.

18 Q. Is it your opinion -- I'm hearing it for the
19 first time today -- that Dr. Khiabani's head struck the
20 side of the bus as opposed to his handlebar striking
21 the side of the bus?

22 A. No, that's not my opinion. The handlebar
23 struck -- the -- struck the bus. That's clear from the
24 bruise on the hand --

25 Q. Dr. Baden, it's a easy yes or no.

1 A. It's not my opinion that you said. No,
2 that's not my opinion.

3 Q. Okay. You've just been telling the ladies
4 and gentlemen of the jury, in response to my questions,
5 that it could have struck the side of the bus.

6 A. Yeah, but that's in addition to the
7 handlebars, not instead of the handlebars. Definitely
8 the handlebars struck. Whether or not the head
9 struck -- it could have struck or not. If it did
10 strike, then it could have knocked him out right away,
11 but I don't know that it did strike.

12 Q. Right. So you're just guessing at that
13 stage?

14 A. Well, I think he's -- the shape of the body
15 on the -- on the bike could have happened, but not
16 necessarily.

17 Q. Have you seen the expert testimony, the two
18 accident reconstructionists, one for the plaintiff, one
19 for the defendant, that think -- that do not opine that
20 same thing you said could have happened?

21 A. No, I haven't.

22 Q. You haven't seen those?

23 A. No.

24 Q. Okay. Dr. Baden, did you testify in a case
25 in New York City where a transit worker was run over by

1 a garbage truck? 19-year-old young man?

2 A. There were a number of those -- that kind of
3 situation. There may have been. Yes, that -- that
4 would come to the medical examiner's office.

5 Q. And did you testify, sir -- his name was
6 James Knell, K-n-e-l-l. Do you remember the name?

7 A. No.

8 Q. He was in a coma for 12 hours before he
9 passed.

10 Do you remember the case?

11 A. No.

12 Q. And your opinion was that, in a coma, he had
13 suffered pain and suffering; correct?

14 A. No. I would have never given that kind of
15 testimony, that somebody in coma would suffer pain --
16 conscious pain and suffering.

17 Q. Okay. James Knell doesn't ring a bell?

18 A. No. When was it, please?

19 Q. You told the ladies and gentlemen of the jury
20 that what changed between your day of your report and
21 yesterday afternoon was that you learned that there was
22 blood coming out of the ears of Dr. Khiabani; correct?

23 A. No. No. We -- I knew that right away, that
24 it was coming out, just from the notes I saw before I
25 made my opinion.

1 Q. Dr. Baden, I just asked what you changed, and
2 you told me it was the new information about the blood
3 coming out of his ears.

4 A. No, no, no. It was -- you didn't ask me what
5 made me change it. I'm saying there is blood coming
6 out of the ears. That has certain significance.
7 That -- what changed it was the testimony of Captain
8 Horba, that he could feel crepitus in the back of the
9 head when he examined the body. And crepitus means
10 that there are broken bones there. And that's what
11 I -- which went along with the fact that the X ray, I
12 believe, does show a separation between the atlanto --
13 atlas, which is the first cervical vertebrae, and a
14 portion of the head, which is the occiput.

15 But that in itself doesn't change -- have --
16 doesn't affect my opinion that he was unconscious
17 immediately. With or without that, he was unconscious
18 because of the other brain damage. That is additional
19 factor, though, that comes into it, but not necessary.
20 That just adds on to the other reasons for his being
21 unconscious immediately or within a second.

22 Q. What's the distance, Dr. Baden, between the
23 crown of Dr. Khiabani's head, Exhibit 247 -- put it up
24 right -- and the base of his skull where the crepitus
25 was noted? What's the approximate distance? 4,

1 5 inches?

2 A. Distance from.

3 Q. Crown of --

4 A. You say the top of the head --

5 Q. Yes, sir.

6 A. -- and the inside of the ear?

7 Q. Yes, sir.

8 A. About maybe 4 inches. It varies from person
9 to person, you know. It's from top of the head to the
10 ear, the opening in the ear that you're asking me.

11 Q. This isn't the best picture, but you know
12 these circular fractures that were noted by Dr. Gavin
13 in this area?

14 A. No. There are fractures. How circular they
15 are, that's the kind of information I could answer if
16 an autopsy were done. From the X rays alone, we just
17 said fracture lines extend from the left to the right
18 of the skull.

19 How they do it circular, in a straight line
20 is difficult to tell from just a single X ray.

21 Q. Okay. You have the X rays when you wrote
22 your report and concluded a possible
23 atlanto-occipital --

24 A. Yes.

25 Q. That wasn't new; correct?

1 A. I'm sorry?

2 Q. That wasn't new between the time of your
3 report and the time of your testimony; fair?

4 A. Well, I knew of the issue that was -- had
5 been raised by the radiologist at the -- and by the --
6 by Dr. Gavin, yes.

7 Q. And, Dr. Baden, real early in the
8 cross-examination, I asked you -- I'm looking at it in
9 real time. I asked you why your opinions went from
10 possible to probable had changed, and your answer was
11 "Well, the -- the side shows additional; however, I'm
12 basing that opinion on the blood coming out from both
13 ears in evidence of severe fractures to the base of the
14 skull."

15 Did I read --

16 A. You don't have -- that's not an accurate
17 transcript. You asked me how did I come to recognize
18 that there were fractures at the base of the skull.
19 That's what you asked me. Base-of-the-skull fractures.
20 And I answered not from the X rays alone; it comes from
21 the blood coming out of the ears. But that I knew a
22 long time ago. That's not the basis for changing my
23 opinion on -- from possible -- you know, about the
24 atlanto-occipital injury.

25 Q. Dr. Baden?

1 A. What you had asked me -- about I remember. I
2 was sitting here. How did I know there was fractures
3 at the base of the skull? Can I see them on that
4 lateral -- that side view?

5 And I said, no, I can't really see them
6 because there's too many skull changes normally in that
7 area, but that the basis of -- the fracture of the base
8 of the skull was the ear coming -- the nose -- the
9 blood coming out of the ears, and that's what I noted
10 in my October opinion.

11 Q. All right. That's in your October opinion,
12 the blood's coming out of the ears; right?

13 A. Right. That's the basis for the fractures at
14 the base of the skull.

15 Q. All right. You knew there were fractures at
16 the base of the skull when you opined that an
17 atlanto-occipital dislocation was just a possibility;
18 correct?

19 A. Well --

20 Q. Dr. Baden, listen to my question, sir. I'm
21 trying to be respectful to you, sir.

22 You knew about the fractures at the base of
23 the skull when you wrote your opinion; correct?

24 A. I knew that when I wrote that opinion --

25 Q. And --

1 A. -- yes.

2 Q. And you knew about it -- the blood when you
3 wrote the opinion; right? Because it's at page 2 of
4 your opinion. You knew about it?

5 A. Yes.

6 Q. And when you wrote your opinion, had you seen
7 Dr. Gavin's deposition?

8 A. Yes.

9 Q. And have you since seen her trial testimony?

10 A. Since that time, yes.

11 Q. Okay. And you would agree with me, would you
12 not, that Dr. Gavin did not diagnose an

13 atlanto-occipital dislocation. She considered it a
14 possibility, like you said in your report; correct?

15 A. Yes.

16 Q. And she did not consider it a probability;
17 correct?

18 A. That's correct.

19 Q. You two can agree to disagree, I guess, about
20 that area. Fair?

21 A. That's correct.

22 Q. So I think we've sort of circled back,
23 Dr. Baden. Little bit like mistaking the Golden Nugget
24 for the Binion Horseshoe, which is innocent mistake.
25 Fair?

1 A. Yes.

2 Q. Okay. When you offered opinions to a
3 reasonable degree of medical probability that the
4 initial contact with the bus at the left front side had
5 caused immediate unconsciousness, that was mistake.
6 That's not your opinion to a reasonable degree of
7 medical probability, you've told the jury?

8 A. That's correct. It could have been, but I
9 can't say that to a reasonable degree of medical
10 certainty, yes.

11 Q. So, when you were questioned by counsel for
12 MCI, those questions and your answers yesterday, those
13 were a mistake; correct? Because that's what you told
14 the jury yesterday.

15 A. No. I told your -- the jury yesterday that
16 it was contact made, and I didn't specify the contact
17 because I couldn't be certain of the head injury.
18 That's correct.

19 Q. Sir, you wrote that he lost consciousness
20 immediately as a result of his collision with the bus?

21 A. Yes. Yes.

22 Q. That's a mistake; right?

23 A. No. Well, it's within the second, yeah.

24 Q. Kayvan Khiabani, Dr. Baden, to a reasonable
25 degree of medical probability, did not lose

1 consciousness immediately; correct?

2 A. My medical definition --

3 Q. Dr. Baden. Dr. Baden.

4 A. It depends on the definition of "immediate."
5 Forensic pathologists can't go into milliseconds. It
6 was within -- less than a second. I agree with you.
7 Whether it was immediate or half a second, I can't
8 tell.

9 Q. Those splintered rib fractures -- have you
10 seen splintered rib fractures in your career,
11 Dr. Baden?

12 A. Sure.

13 Q. Take a significant force to create a
14 splintered rib fracture?

15 A. Seven of them, yes.

16 Q. Significant force which, if a person was
17 conscious, would cause significant pain; fair?

18 A. Yes, yes.

19 Q. The road rash that you saw, that would cause
20 pain if a person was conscious?

21 A. Yes.

22 Q. The injuries to his arm, hip, and knee would
23 cause pain if a person were conscious?

24 A. Yes.

25 Q. And you knew all that when you authored your

1 report in October; correct?

2 A. Yes.

3 Q. And yet your conclusion was, on behalf of
4 MCI, that he lost consciousness immediately as a result
5 of the collision with the bus. That's what you wrote
6 in your report --

7 A. Yes.

8 Q. -- correct? That's what you told the ladies
9 and gentlemen of the jury yesterday?

10 A. Yes.

11 Q. And it's not until cross-examination, when
12 you were pressed today, that you concede that that's
13 not actually your opinion; fair?

14 A. It's --

15 Q. That's fair; right?

16 A. -- my opinion, but in my opinion leaves a
17 second. That -- that's right. "Immediate" to me does
18 not rule out less than a second.

19 Q. Well, Dr. Gavin told the ladies and gentlemen
20 of the jury that she was quite certain or sure -- I'm
21 paraphrasing; they can use their recollection -- that
22 Dr. Khiabani, upon initial contact, knew he was in a
23 bad spot.

24 A. Yeah. Well, I'm not testifying about what he
25 knew before he struck the bus, came in contact with the

1 bus, that -- I think Dr. Gavin was including that. I'm
2 not talking about whether he was aware the bus was next
3 to him and what his feelings were. I'm just talking
4 about the moment of contact with the bus, within that
5 one second, he lost consciousness. But -- but I'm not
6 referring to the time before contact with the bus.

7 Q. Okay. Can we at least agree on this? When
8 you wrote your report and when you testified yesterday,
9 you made no differentiation between the initial contact
10 of the bus and the wheel?

11 You just said he lost consciousness
12 immediately, felt no pain and suffering. That's both
13 in your report and you must have said it five times
14 yesterday; right?

15 A. Look --

16 Q. Sir, is that correct?

17 A. -- he -- if he came in contact with the bus,
18 and the head-bus, then it was at that time. If he
19 didn't come in contact with the bus, only his bike came
20 in contact, then the initial contact was the wheel.

21 So, certainly, with the wheel, he loses
22 consciousness immediately. If he had come in contact
23 with the bus, which I'm not sure, with his head --

24 Q. Doctor --

25 A. -- then he could -- he would have -- there

1 was enough energy there to cause loss of consciousness.

2 But, you're right, the bike struck -- that's
3 evidence for that, the -- there's no transfer of any --
4 anything from bus to helmet or vice versa that I could
5 find.

6 If he -- if his head did not strike the bus,
7 then he was still conscious till he -- the tire struck
8 him. I agree with you.

9 Q. Okay. You agree with me today; right? On
10 the 16th of March, on cross --

11 A. First time we've spoken, yes.

12 Q. That's not what you told Mr. Roberts
13 yesterday. Can we agree on that?

14 A. No. I said when he came into collision with
15 the bus. I -- I -- I didn't -- I wasn't asked -- I
16 didn't specify whether it was the head first or not,
17 but the first collision his body had with the bus, head
18 or the wheel, would have made him unconscious --

19 Q. Now --

20 A. -- could have made him unconscious -- could
21 have made him unconscious.

22 Q. No, no, no. That's not what you said.

23 A. Yeah, that -- go ahead.

24 Q. You just told the jury that the head hitting
25 the side of the bus made him unconscious. And then you

1 caught yourself and you said "could have."

2 A. I can't deal in milliseconds. I don't know
3 if the helmet hit the bus or not. If it did hit the
4 bus, then it very well could -- 25 miles an hour, it
5 very well could have caused him to lose consciousness.
6 But if he didn't strike the bus, then he's conscious
7 when he falls down and gets hit by the tire,
8 absolutely.

9 Q. Dr. Baden, if that's your opinion --
10 right? -- that you can't tell one way or another if the
11 initial contact with the bus rendered him unconscious,
12 if that's your opinion, shouldn't you have come in here
13 yesterday and told the ladies and gentlemen of the jury
14 "That's my opinion"?

15 A. I didn't -- no, I didn't think that
16 volunteering that was of any value to the jury.

17 Q. You thought it was okay on behalf of MCI to
18 come in and tell the ladies and gentlemen of the jury
19 that Dr. Kayvan Khiabani felt no pain and suffering
20 because he was rendered immediately unconscious. That
21 was your testimony yesterday.

22 A. That's right. That's right.

23 Q. And between when your PowerPoint slide was
24 prepared and when you decided to testify, your
25 possibilities became probabilities; correct? Is that

1 right?

2 A. That's correct.

3 MR. CHRISTIANSEN: Can I have the Court's
4 indulgence, Your Honor?

5 THE COURT: Okay.

6 BY MR. CHRISTIANSEN:

7 Q. Dr. Baden, I'm almost finished with you.
8 Tell me, if you know, the amount of force necessary to
9 create a depressed skull fracture in Dr. Kayvan
10 Khiabani's head. I'll show you Exhibit 247.

11 A. I do not know.

12 Q. Is a 38,000-pound bus rolling over your head
13 enough force to create a depressed skull fracture?

14 A. Certainly.

15 Q. And do you remember Dr. Gavin calling the
16 fracture a circular fracture? Do you remember seeing
17 that?

18 A. She may have, yes.

19 Q. The circular in -- nature of the fracture, do
20 you remember her describing it this way?

21 A. I believe so.

22 Q. And do you remember seeing her opinion that
23 that was from the tire rolling over the side of the
24 doctor's head? Do you remember seeing that was her
25 opinion?

1 A. I believe that was.

2 Q. And she's a lady that came to conclusions
3 based upon putting her hands on Dr. Kayvan Khiabani,
4 looking at him, doing x rays, palpating his skull;
5 correct?

6 A. Yes.

7 Q. You didn't have an opportunity to do any of
8 that; correct?

9 A. That's correct.

10 Q. You didn't touch Dr. Khiabani; you didn't see
11 him?

12 A. That's correct.

13 Q. You looked at images after the fact and
14 photos after the fact; correct?

15 A. Yes.

16 Q. And -- and when you did that and wrote your
17 initial report, you came to the conclusions we've
18 talked -- I won't rehash those all with you -- fair?

19 A. Yes.

20 MR. CHRISTIANSEN: That concludes
21 cross-examination, Your Honor.

22 THE COURT: Okay. Very good.

23 Mr. Roberts?

24 MR. ROBERTS: Thank you, Your Honor.

25 MR. CHRISTIANSEN: Ms. Clerk, did I take any

1 of your exhibits? I don't think I did. Sorry --

2 MR. ROBERTS: Could I have the ELMO? Thank
3 you so much.

4 REDIRECT EXAMINATION

5 BY MR. ROBERTS:

6 Q. Good morning, Dr. Baden.

7 A. Good morning.

8 Q. Remember when Mr. Christiansen was standing
9 over here, he was going, "Over here, Dr. Baden." You
10 ever had -- you ever had other lawyers try to keep you
11 from looking at the jury when you're answering the
12 questions?

13 MR. CHRISTIANSEN: Objection. Relevance.
14 Improper.

15 THE COURT: Overruled.

16 MR. ROBERTS: I'll move on, Your Honor.

17 THE WITNESS: Yes. Yes.

18 BY MR. ROBERTS:

19 Q. Do you recall Mr. Christiansen asking you
20 several times, "Didn't Captain Horba tell the jury that
21 it was 10:42 before he could see the body"? Do you
22 remember that?

23 A. Yes.

24 Q. And you reviewed the trial testimony of
25 Captain Horba; correct?

1 A. I did.

2 Q. And do you recall that Captain Horba told the
3 jury that it was fair to say that, within a minute of
4 10:40, he had eyes on the patient?

5 A. Yes.

6 Q. So it wasn't 10:42, was it; it was close?

7 A. That's what he said, yes.

8 Q. And, in fact, we've reviewed Exhibit 75,
9 page 3, yesterday afternoon. And that was the report
10 filled out by Captain Horba; correct?

11 A. Yes.

12 Q. And he testified in that report that, in
13 fact, he performed his first Glasgow Coma score at
14 10:41; right?

15 A. Yes.

16 Q. And he testified that Dr. Khiabani was
17 unconscious when he first saw him; correct?

18 A. Yes.

19 Q. And that's consistent with your opinions?

20 A. Yes.

21 Q. When Mr. Christiansen was asking you whether
22 you had any evidence at all before Captain Horba
23 arrived on the scene and did his initial evaluation,
24 you started to say that you saw a video. Was that the
25 gardener video?

1 A. That was one of the things that I had seen,
2 that I took into account, yes.

3 Q. And that was from before Captain Horba
4 arrived; correct?

5 A. Before EMS arrived, yes.

6 Q. Yes. And did you see anything in that video
7 consistent with consciousness?

8 A. No, not at all.

9 Q. And did you observe agonal breathing?

10 A. Yes.

11 Q. And I believe you told the jury yesterday
12 that agonal breathing only happens when you're
13 unconscious; correct?

14 A. Yes. Yes.

15 Q. So, at least from the beginning of the
16 gardener video, Dr. Khiabani was unconscious and
17 feeling no pain; correct?

18 A. Yes.

19 Q. When -- when we talked yesterday and you said
20 there are certain levels of consciousness in the
21 Glasgow Coma Scale?

22 A. Yes.

23 Q. Because you can be an 8 and be deemed still
24 unconscious; right?

25 A. Yes.

1 Q. And then you go all the way down to a 3,
2 which is the deepest level of unconsciousness; right?

3 A. Yes.

4 Q. Even if you're in one of the higher levels of
5 unconsciousness, are you feeling pain?

6 A. No.

7 Q. As long as you're unconscious, there's no
8 pain?

9 A. That's correct.

10 Q. Even if you're an 8?

11 A. Yes.

12 Q. But Dr. Khiabani was way below an 8; he was
13 in the deepest level of unconsciousness?

14 A. Yeah, from the very first -- very first
15 impact with the tires, certainly.

16 Q. So you put "possible atlanto-occipital
17 dislocation" in your report?

18 A. Yes.

19 Q. And -- and that was what I put on the slide
20 because that was your disclosed opinion; right?

21 A. That was the opinion I disclosed that -- that
22 had been in my October opinion report, yes.

23 Q. And you said there was new evidence about the
24 atlanto-occipital dislocation. Was that evidence from
25 this trial before this jury?

1 A. Yes.

2 Q. And you were reviewing the testimony of
3 witnesses before the jury after they testified; right?

4 A. Yes.

5 Q. And was it, in fact, something that Captain
6 Horba told the jury?

7 A. Yes.

8 Q. Can you summarize for the jury what -- what
9 it was that you felt relevant to the issue of the
10 atlanto-occipital dislocation.

11 A. Yeah, I felt it was relevant because he was
12 also a trained paramedic. And when he examined the --
13 he testified when he examined the head of Dr. Khiabani,
14 he felt crepitus, like he described, from broken bone
15 in the back of the neck -- in the back of the head --
16 in the back of the head, which is the area where the
17 head joins the spinal column. And that's where the
18 occipital -- which is the head -- atlanto -- which is
19 the spine -- joins. So that's the -- that's the point
20 we're talking about on the x rays.

21 Q. Okay. The portion that I've highlighted,
22 lines 6 through 8, page 125 --

23 A. Yes.

24 Q. -- of the official transcript of Captain
25 Horba's testimony, is this what you're referring to?

1 A. Yes, sir.

2 Q. "But the back of the skull -- it's called
3 crepitus. When the bone gets broken into smaller
4 pieces, it kind of floats around"; right?

5 A. That's right. And that makes an unusual
6 feeling in that area of little fragments that can be
7 called crepitus.

8 Q. Okay. And the floating, is that indicative
9 of the atlanto-occipital dislocation?

10 A. Yeah. They have a little bit of bone chips
11 that have come off the spine.

12 Q. And had Captain Horba said anything about
13 crepitus or floating of the bone in his report?

14 A. No, not in his October report.

15 Q. And he hadn't said anything about it in his
16 deposition; right?

17 A. That's correct.

18 Q. So the first you heard of that was when
19 Captain Horba testified to the jury?

20 A. Yes.

21 Q. I'd like to talk to you about the discussion
22 you were having with Mr. Christiansen regarding the
23 definition of "immediately."

24 A. Yes.

25 Q. Okay. He said several times where he tried

1 to get you to agree that between the initial impact
2 with the bus, the handlebars against the side of the
3 bus, and contact with the rear wheels was one or two
4 seconds. Was that your opinion, one to two seconds?

5 A. No. When I figured out 5280 feet per second
6 and all that, it turned out less than one second.

7 Q. Okay.

8 A. Less than one second.

9 Q. Closer to half a second, a little over half a
10 second?

11 A. Little more than a half a second.

12 Q. And that was based on the speed of the bus,
13 the feet per second of the bus, and the distance
14 between the mark on the handlebars and the bus versus
15 the rear wheels; right?

16 A. Yes.

17 MR. CHRISTIANSEN: Objection. Leading.

18 THE WITNESS: And that is --

19 THE COURT: Overruled.

20 THE WITNESS: And that is the contact between
21 the handlebar and the bus.

22 BY MR. ROBERTS:

23 Q. And you don't dispute that the handlebars hit
24 the bus? You've seen the evidence of that; right?

25 A. Yes.

1 Q. The physical evidence --

2 A. Yes.

3 Q. -- on the handlebar and on the bus?

4 A. That's correct.

5 Q. But your point was that the lean of the
6 bike --

7 A. Yeah, and my evaluating. With the handlebar
8 to strike there, the bike had to be tilted to the left.
9 And if tilted to the left, the -- the helmet could --
10 could have come in contact with the side of the bus.
11 Going at 25 miles an hour, it would be a sideswipe of
12 the head. That in itself could very well have caused
13 loss of consciousness.

14 However, I don't know if that happened or
15 not. But I do know that less than a half a second
16 later -- more than half a second, it -- the -- his head
17 had come in contact with the wheel. And when the wheel
18 came in contact with the head is the time that he
19 immediately lost consciousness from the injuries to the
20 brain, not from the atlanto-occipital -- that's also an
21 important injury -- but the -- the brain injury is the
22 more important as concerns immediately loss of
23 consciousness.

24 Q. Have you seen football players lose
25 consciousness even wearing a helmet?

1 A. Yes. Yes. And when somebody -- when
2 football players lose consciousness, they're --
3 nowadays, after they got over the causes of how
4 dangerous that is, the football player is taken into
5 the locker room and evaluated by a neurologist -- or a
6 doctor type -- to see whether his -- what his level
7 of -- of consciousness is.

8 And one of the factors they use is the
9 Glasgow Coma Scale. And then whether or not he can
10 return to playing football that -- that game, depending
11 on where 15 -- or -- only 15, 13, probably below 13,
12 they're not going to let him play, but they're still
13 conscious.

14 Q. So your opinion is it's possible Dr. Khiabani
15 could have lost consciousness if his head hit the side
16 of the bus when the handlebars did; correct?

17 A. Yes.

18 Q. It's possible he could have lost
19 consciousness when he fell to the ground?

20 A. Yes.

21 Q. But, to a reasonable degree of medical
22 certainty, he lost consciousness as soon as the tire
23 created the depressed skull fracture?

24 A. Yes. Yes. And that -- and that's such a
25 small period of time, that, to me -- to me, that's

1 immediate and -- but -- but there's -- you know, less
2 than a second area that one could dispute.

3 Q. And what's a synonym? I'm going to throw a
4 curveball here. A synonym, do you remember what that
5 is?

6 A. Yes. For what?

7 Q. What -- what's the definition of a synonym?

8 A. Oh, something that sounds similar, from the
9 Greek whatever.

10 Q. Two words that mean about the same thing;
11 right?

12 A. Yes.

13 Q. And is a synonym for "immediately" a split
14 second?

15 A. Yes.

16 Q. And that's what we had here; right?

17 A. I think that's a good way to put it, a split
18 second, yes.

19 Q. And even if Dr. Khiabani was not unconscious
20 from his first contact with the side of the bus or the
21 ground --

22 A. That's --

23 Q. So even if he was not yet unconscious when
24 his ribs were broken and he received the abrasions,
25 does the brain recognize and interpret pain

1 instantaneously?

2 A. It does not. There's a lot of research going
3 on now about it. But a split second, it's not clear in
4 a split second whether -- as I say, I put my hand and
5 feel a burn on -- on a hot object, and it's -- it takes
6 a split second before I recognize it and pull my hand
7 away, but I don't -- 'cause the pain fibers have to go
8 from the pain to the brain to the other centers.
9 There's the -- the human body is a very complex
10 computer and all this stuff. And it takes time. So I
11 think a split second is fair.

12 Q. You -- you've done litigation before; right?
13 This is not your first time in a legal court?

14 A. Well, I've testified, yes.

15 Q. And you're aware the plaintiff has the burden
16 of proof in a lawsuit like this; right?

17 A. That's what I --

18 MR. CHRISTIANSEN: Objection. This is
19 improper, Your Honor.

20 THE COURT: Overruled.

21 BY MR. ROBERTS:

22 Q. Based on the evidence that you have reviewed,
23 does any doctor, including Dr. Gavin, have enough
24 evidence and information to give a reliable opinion to
25 a reasonable degree of medical probability that

1 Dr. Khiabani did experience pain?

2 MR. CHRISTIANSEN: Objection. Can we
3 approach, Your Honor?

4 THE COURT: Yes.

5 (A discussion was held at the bench,
6 not reported.)

7 BY MR. ROBERTS:

8 Q. Dr. Baden, last question. Let me rephrase
9 it.

10 Is there enough evidence in the record for
11 you to make an opinion to a reasonable degree of
12 medical probability that Dr. Khiabani indeed felt any
13 pain at all after his contact with the bus?

14 A. No, there isn't such evidence in the record.

15 Q. But is there enough evidence in the record to
16 opine that, at least when he received his depressed
17 skull fracture, that at that point he instantaneously
18 would have been unconscious and unable to feel pain?

19 A. Yes.

20 Q. Thank you, Doctor.

21

22 RECROSS-EXAMINATION

23 BY MR. CHRISTIANSEN:

24 Q. Doctor, Mr. Roberts just asked you, "To a
25 reasonable degree of medical certainty, he lost

1 consciousness as soon as the tire created the depressed
2 skull fracture?"

3 And your answer was, "Yes. Yes."

4 Do you agree with that?

5 A. Yes.

6 Q. He then threw you the curveball and said,
7 "I'm going to give you a synonym," and asked you to
8 compare a split second to immediate.

9 Remember that?

10 A. Yes.

11 Q. You been doing this for decades; fair,
12 Doctor?

13 A. Yes.

14 Q. Your -- you've been qualified in multiple
15 states, federal and state court; fair?

16 A. Yes.

17 Q. Words are important to you?

18 A. Yes.

19 Q. When you authored this report, you wrote
20 "Dr. Khiabani incurred fatal head -- injuries to his
21 head and brain as a result of the collision with the
22 bus, that he lost consciousness immediately."

23 Did I read that correctly?

24 A. Yes. Yes.

25 Q. Collision with the bus implies -- and you

1 left the jury with that impression yesterday
2 afternoon -- that it was the initial contact with the
3 bus that rendered him unconscious. Do you agree that's
4 what you did yesterday?

5 A. To me, the --

6 Q. Just yes or no.

7 A. I -- I --

8 Q. Yes or no. Do you agree that's the
9 impression you left the jury with yesterday afternoon?

10 A. That -- my intended -- my intent was the
11 first collision with the bus, yeah, if it hit the side
12 of the bus.

13 But, as you point out, I don't know if the
14 initial contact was the side of the bus or the tire.
15 That, I don't know. But whatever the initial contact
16 was, I think, would have caused immediate loss of
17 consciousness, whether it was the head or the tire.

18 Q. And if the abrasions -- I'm not going to show
19 them again -- that Dr. Khiabani suffered, the seven
20 fractured, splintered ribs, occurred before the contact
21 with the tire, those caused him pain?

22 A. Could have -- well, it would have -- they're
23 certainly sufficient to cause pain, but I'm not a -- an
24 expert on how long it takes to -- the pain to be shown.
25 I think a split second, I thought, was a good way of

1 putting it, you know --

2 Q. Doctor --

3 A. -- to distinguish "immediate" from "a
4 second."

5 Q. Okay. Just going to read, "Dr. Khiabani did
6 not experience any conscious pain and suffering after
7 he collided with the bus." That's what you wrote in
8 your October report?

9 A. Yes.

10 Q. That's what you told these folks yesterday
11 afternoon?

12 A. Yes.

13 Q. And that's what you've agreed to today,
14 you're not quite so sure about; correct?

15 A. No, no. The split -- the -- the contact was
16 less -- the contact to the tire all was less than a
17 second. As I say, in my opinion, it takes more than
18 half a second to -- to appreciate pain, but that's a
19 different issue. So ...

20 Q. Sir, can we agree that in your -- nowhere in
21 your report or your testimony yesterday on behalf of
22 MCI do you talk about feet per second or milliseconds
23 or how long it takes to feel pain? Can we agree on all
24 that?

25 A. Yes.

1 Q. It's not until confronted on
2 cross-examination today that you have to make these
3 concessions; fair?

4 A. Yes.

5 Q. You weren't with Samantha Kolch when she saw
6 Dr. Khiabani moving his shoulders two times; fair? You
7 weren't there?

8 A. That's correct.

9 MR. CHRISTIANSEN: Nothing else. Thank you,
10 Dr. Baden.

11 MR. ROBERTS: Nothing further, Your Honor.

12 THE COURT: Any questions from the jury?

13 THE MARSHAL: Any questions? No questions.
14 No questions, Your Honor.

15 THE COURT: No? Okay. Very good.

16 Thank you, Dr. Baden.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: You are excused.

19 THE WITNESS: Thank you.

20 MR. ROBERTS: We have another witness ready,
21 Your Honor. Would you like to have a comfort break
22 first? Or we can move right to it.

23 THE COURT: I think we should probably have a
24 quick comfort break. Let's take a 15 --

25 MR. CHRISTIANSEN: You have some people

1 giving you the sign, Judge.

2 THE COURT: Jerry, I'm sorry to trouble you.
3 I think I left my admonishment on the table.

4 MR. BARGER: I'm sorry. Judge, are we going
5 to take a break?

6 THE COURT: We are. I just need to admonish
7 the jury.

8 MR. BARGER: Thank you, Your Honor.

9 THE COURT: I grabbed so many papers
10 yesterday.

11 MR. BARGER: Judge, we think we don't need an
12 admonishment.

13 MR. KEMP: We don't need an admonishment. We
14 can stipulate.

15 THE COURT: Well, it's the beginning of the
16 day, so let's -- thank you. All right.

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

24 You are not to conduct any research on your
25 own relating to this case, such as consulting

1 dictionaries, using the Internet, or using reference
2 materials.

3 You are not to conduct any investigation,
4 test any theory of the case, re-create any aspect of
5 the case, or in any other way investigate or learn
6 about the case on your own.

7 You are not to talk with others, text others,
8 tweet others, google issues, or conduct any other kind
9 of book or computer research with regard to any issue,
10 party, witness, or attorney involved in this case.

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

14 Okay.

15 THE MARSHAL: All rise.

16 THE COURT: Take a 15-minute break.

17 THE MARSHAL: 15-minute recess.

18 (The following proceedings were held
19 outside the presence of the jury.)

20 THE COURT: Go off the record.

21 (Whereupon a short recess was taken.)

22 THE MARSHAL: Please remain seated. Come to
23 order. Department 14 is back in session.

24 THE COURT: All right. Is there anything
25 else we need to discuss? We're on the record? Okay.

1 MR. CHRISTIANSEN: Judge, I just wanted to
2 make sure -- Mr. Smith is the next witness. You recall
3 there had been some debate between Mr. Roberts and
4 myself relative to what's the appropriate numbers to be
5 used for economists, gross numbers --

6 MR. KEMP: Judge, can we have Mr. Smith
7 outside?

8 THE COURT: Yes.

9 MR. ROBERTS: It's Dr. Smith.

10 MR. CHRISTIANSEN: I'm sorry. I misspoke.

11 DR. SMITH: It's Stan.

12 MR. CHRISTIANSEN: So I just -- I take
13 Mr. Roberts at his word that he's not going to get into
14 that issue with -- on the direct examination with
15 Mr. Smith.

16 My only concern is in Dr. Smith's report, his
17 one -- his lone criticism of Dr. Stokes is that Stokes
18 attributes -- I'm just reading right from it --
19 attributes an income loss of over 500,000 annually to
20 the surviving children through -- I'm sorry, Your
21 Honor?

22 THE COURT: No, I didn't say --

23 MR. CHRISTIANSEN: I apologize. I apologize.

24 THE COURT: I was listening.

25 MR. CHRISTIANSEN: -- 500,000 annually to the

1 surviving children through Dr. Khiabani's worklife of
2 age 69 and lower six-figure amounts thereafter through
3 their adult years.

4 That's a criticism I have no problem with as
5 long as he's using post -- pretax money. In other
6 words, gross figures versus minus personal consumption
7 to then talk about -- I don't want him to hit the
8 stand, because that's an issue Your Honor stills needs
9 to take up, and say, "Well, you know, what I did for my
10 calculations in this case is I took taxes out first."

11 So that's just making sure -- and I wrote
12 gross -- raised that issue with Mr. Roberts earlier as
13 well.

14 MR. ROBERTS: Dr. Smith did not deal with
15 taxes. He did not take taxes out. He simply uses
16 Dr. Stokes' number and criticizes them on the basis of
17 that Dr. Stokes calculates income minus personal
18 consumption to come up with a loss. And his criticism
19 is that that's economic error to just assume that
20 someone would give their income less personal
21 consumption every year to their children, especially
22 their adult children. That doesn't happen.

23 THE COURT: Then we have no controversy.

24 MR. ROBERTS: So we have no controversy.

25 MR. CHRISTIANSEN: I just wanted to make sure

1 before we started. I didn't want to interrupt
2 Mr. Roberts on his direct.

3 THE COURT: No, very good.

4 MR. ROBERTS: And when we're done, what I
5 think they would like to do is we can go ahead and
6 dismiss the jury, send them to lunch or maybe send them
7 home, according to what Mr. Barger has to say, and then
8 we'll keep him on the stand and they can do their
9 cross-examination on the tax issues outside the
10 presence.

11 THE COURT: Very good.

12 MR. BARGER: I think you -- along those
13 lines, you can do whatever -- obviously, the Court can
14 do whatever they want to do. But after this, that's
15 it.

16 So if you want to work through lunch and then
17 recess them or send them to lunch and come back,
18 however -- whatever the lawyers want to do and if the
19 judge approves.

20 MR. CHRISTIANSEN: Your Court -- you're the
21 boss, Your Honor. Whatever you say.

22 THE COURT: We have nothing else to present
23 them with today?

24 MR. BARGER: Not today.

25 MR. ROBERTS: We had Pears and Plantz

1 planned, but we don't want to rush into that, given the
2 importance of the issue, and we want to be absolutely
3 certain we're not opening any doors before we play it.

4 And there is a personal issue, which would
5 which make it preferrable for me to have the afternoon
6 off, but nothing I want to go into.

7 MR. KEMP: Is Virginia playing?

8 MR. ROBERTS: Not until 6:40 p.m., Your
9 Honor. My team is playing today, but not until
10 6:00 p.m., so that's not the reason.

11 MR. KEMP: You have money on another team;
12 right?

13 I think we probably ought to have lunch,
14 because if we start this witness, we're going to go an
15 hour and a half. We might as well have a quick lunch.

16 MR. BARGER: Makes sense.

17 THE COURT: I don't disagree with that. You
18 want them to pay attention.

19 MR. ROBERTS: Okay.

20 MR. BARGER: Then at the end of the day,
21 it's -- it's going to be till 3:30 or 4:00 o'clock
22 anyway, so then they won't think they wasted a whole
23 afternoon.

24 THE COURT: Right. Good idea. Okay.

25 MR. KEMP: I don't know if they're going to

1 pay attention. This is an economist.

2 THE COURT: I know. Given those
3 circumstances, we want them to pay as much attention as
4 possible.

5 So I've admonished them already. What I can
6 do is I can ask the marshal to let them go so they
7 don't have to come back in.

8 MR. KEMP: We can go to lunch quick too, Your
9 Honor. There's nobody here in the building today.

10 MR. CHRISTIANSEN: It's a ghost town.

11 THE COURT: All right. So an hour? Hour 15?
12 Your choice.

13 MR. KEMP: Hour 15 is fine with us.

14 THE COURT: We'll be back at 1:15.

15 Jerry, I've already admonished them, so I
16 don't want to bring them back in. Please tell the jury
17 to be back at 1:15. Thank you.

18 MR. HENRIOD: When should we start on Sunday?
19 How is noon? I'll bring in sandwiches. When do you
20 want to do it? 1:00? It is Sunday.

21 THE COURT: All right. 1:00 o'clock is
22 great, and you don't have to bring sandwiches. Okay.

23 MR. KEMP: No, bring sandwiches.

24 MR. HENRIOD: I got it. I got it.

25 THE COURT: Okay. And so we're going to be

1 meeting at your office, and you're going to meet and
2 confer before Sunday.

3 MR. HENRIOD: Yes. Yes. So we'll meet --
4 we'll see if there's -- if there's any agreement on the
5 specials.

6 THE COURT: Okay. And Mr. Jayne is going to
7 join me to take notes. And I still have to supply you
8 with the records for the last time. All right. I have
9 that on my to-do list.

10 MR. PEPPERMAN: I do too.

11 THE COURT: See you at 1:15.

12 (Whereupon a lunch recess was taken.)

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

15 THE MARSHAL: Please be seated. Come to
16 order. Department 14 is back in session.

17 THE COURT: Okay. Please be seated. Are we
18 ready for the jury?

19 MR. ROBERTS: Pardon?

20 THE COURT: Are we ready for the jury?

21 MR. ROBERTS: Yes.

22 THE MARSHAL: I will get them lined up, Your
23 Honor.

24 MR. ROBERTS: Well, wait a minute. I don't
25 believe we have Mr. Kemp.

1 MR. CHRISTIANSEN: I will see if I can track
2 him down.

3 MR. ROBERTS: To be clear, I am okay with
4 that, Your Honor.

5 MR. CHRISTIANSEN: Judge, we are fine. We
6 can get going without him. It's my witness, so we're
7 fine.

8 THE COURT: Okay. Okay.

9 (Discussion was held off the record.)

10 THE MARSHAL: Are you ready, Your Honor?

11 THE COURT: Yes, we're ready.

12 THE MARSHAL: All rise.

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

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

17 THE COURT: Thank you, Marshal.

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

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

22 MR. ROBERTS: Yes, Your Honor.

23 MR. CHRISTIANSEN: Yes, Your Honor.

24 THE COURT: All right. Are you prepared?

25 MR. ROBERTS: I am, Your Honor.

1 THE COURT: Okay.

2 MR. ROBERTS: Motor Coach Industries calls
3 Dr. Stan D. Smith.

4 THE MARSHAL: Watch your step, sir. Remain
5 standing facing the clerk and raise your right hand.

6 THE WITNESS: Thank you.

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

11 THE WITNESS: I do.

12 THE CLERK: Thank you. You may be seated.

13 THE WITNESS: Thank you.

14 THE CLERK: Please state and spell your first
15 and last name for the record.

16 THE WITNESS: Sure. Stan D. Smith,
17 S-m-i-t-h.

18 THE COURT: Please proceed.

19 MR. ROBERTS: Thank you, Your Honor.

20

21 DIRECT EXAMINATION

22 BY MR. ROBERTS:

23 Q. Dr. Smith, where are you from?

24 A. Chicago.

25 Q. Did come here today from Chicago?

1 A. Early. Yes.

2 Q. Thanks for flying in to see us.

3 A. Thank you.

4 Q. Can you tell the jury what your profession
5 is.

6 A. Sure. I'm an economist by background,
7 education, and training.

8 Q. So the -- here's your microphone right here.
9 Let's see if we can move that a little closer to you.
10 We have to pick that up.

11 A. All right.

12 Q. That's actually a little bit better.

13 A. Okay.

14 Q. All right. Appreciate it.

15 Who is your employer, Dr. Smith?

16 A. Well, I founded a company in the middle '80s,
17 creatively called Smith Economics. And so I and a
18 staff of 18 people, we work at that company in downtown
19 Chicago.

20 Q. Okay. So you have 18 employees?

21 A. Yes.

22 Q. And do they assist you in doing your
23 analysis?

24 A. About half are analysts and about half are
25 admin, yes.

1 Q. Okay. But are the opinions that you finally
2 render always yours?

3 A. They're always mine. In this case, I
4 actually had no analyst.

5 Q. Okay. One of the issues that the jury may
6 reach in this case if they find liability is economic
7 losses or damages.

8 Is that something that is within your field
9 of expertise?

10 A. Yes. It's something we analyze couple
11 hundred times a year actually.

12 Q. Okay. Could you tell the jury something
13 about the educational background you received that
14 qualifies you to render an opinion on the issue of
15 economic loss.

16 A. Sure. So after graduating high school in
17 Milwaukee, Wisconsin, my original hometown, I went to
18 Cornell University, which is in upper New York state.
19 And I got a bachelor of science in operations research,
20 which is a branch of engineering that is more math and
21 computer science and statistics, and then came back to
22 Chicago, which was my mother's hometown.

23 I got a master's degree and a PhD in
24 economics and the emphasis on econometrics, which is
25 the specialized statistics of economics.

1 And then I've been working in the field of
2 economics ever since and coauthored, actually, the
3 first textbook in my narrow specialty of what's called
4 forensic economics, and I taught the first course in
5 the nation in the field of forensic economics at
6 downtown DePaul University, which is unfortunately not
7 in the March Madness, I guess.

8 And so I've got a lot of background and
9 training. We do a lot of wage loss analysis.

10 Q. Yes. We're making the jury miss the
11 tournament.

12 A. Loyola is in, so ...

13 Q. They upset yesterday.

14 A. Yes.

15 Q. Yes. So you mentioned forensic economics as
16 one of your fields of expertise.

17 A. Yes.

18 Q. You were -- you were just here and heard
19 Dr. Baden testify, right --

20 A. Yes.

21 Q. -- as a forensic pathologist?

22 A. Yes.

23 Q. Could you explain to the jury what forensic
24 economics is?

25 A. Sure. So within the field of economics,

1 there's lots of specialties. You can -- international
2 economics and finance and labor economics, all sorts of
3 specialties. But that portion that applies to
4 analyzing economic damages claims in litigation is
5 called forensic economics.

6 Q. The jury has heard about what peer-reviewed
7 articles are. They've heard about -- several experts
8 have testified --

9 A. Good.

10 Q. -- to what that is.

11 A. Sure.

12 Q. Have you written for peer-reviewed
13 publications?

14 A. I have a good handful of peer-reviewed
15 journals, and I was actually a peer reviewer for the
16 primary journal in our field, which is the Journal of
17 Forensic Economics. And I was on the board of editors,
18 actually, of that journal for 11 years.

19 Q. So you would review other economists'
20 potential publications --

21 A. Yes.

22 Q. -- before they were published?

23 A. Yes.

24 Q. Very good. Are there any economic
25 organizations that forensic economists often join?

1 A. Sure. The -- the primary one is the National
2 Association of Forensic Economics, and I was a -- I
3 can't say a founding member, but maybe within six
4 months of it being created joined. It's in the
5 early -- I'm sorry -- the late '80s.

6 And then I was a vice president of that
7 organization for three years. I was on the board of --
8 on the board as a board member for three years. And,
9 as I said, it publishes the primary peer-reviewed
10 economic journal in the field of forensic economics,
11 and I was on the board of editors for 11 years.

12 Q. That's a national organization?

13 A. National organization. Plenty of, you know,
14 people in Nevada and Reno. I've got friendly
15 competitors all over the country.

16 Q. And you were the vice president of the
17 national organization?

18 A. Yes.

19 Q. Just the local chapter?

20 A. Well, pardon me. No, of the --

21 Q. The whole thing?

22 A. Yeah. There are only -- I mean, we don't
23 have chapters. We're -- we're just one organization.

24 Q. Tell the jury about how you got into actual
25 expert work in which you testify in court.

1 A. Oh, gosh. Well, I mean, it's now a more
2 often heard story than before, but it was a cop in
3 Joliet, Illinois, that shot a kid, and so I was asked
4 to look at the damages in that civil case. And then
5 the work grew. I had some different kinds of theories,
6 and so the work propagated from that.

7 Q. Do you review cases for both plaintiffs and
8 defendants in personal injury cases?

9 A. Certainly.

10 Q. Okay. What would you say -- well, let me ask
11 you this first: Have you been to Las Vegas and Nevada
12 before to testify?

13 A. Many times. It's probably the second --
14 New York, Las Vegas are probably the -- outside of
15 Chicago, the two cities I go to the most.

16 Q. And how many times would you say you've
17 testified in court in a trial in Nevada?

18 A. I don't know if it's as many as two dozen,
19 but it's usually once every four, six, eight months for
20 probably close to 20 years. So maybe 20, 25 times.

21 Q. Out of the times you have testified in trial,
22 before a jury like this, how many times have you
23 testified for the plaintiff versus the defendant?

24 A. In personal injury and in Nevada it's all --
25 only been for the plaintiff. I've only been here for

1 plaintiff.

2 Q. So this is the first time you've testified
3 for defendant in Nevada in a personal injury case?

4 A. In court, yes. I had a defense case, but --
5 there was a deposition, so you could call that
6 testimony, but it wasn't court.

7 Q. Okay. And you've testified for the
8 defendants a few times more back in Chicago; right?

9 A. Oh, yeah. We have defense -- little bit of
10 defense work -- in more -- in more in the Midwest, yes.

11 Q. Over all, nationwide, what's your split
12 between plaintiff work and defense work in personal
13 injury cases?

14 A. About three-quarters for plaintiff overall.

15 Q. Okay. 25 percent or so for defendants?

16 A. Yes.

17 Q. Okay. Let's talk a little bit about this
18 case.

19 MR. ROBERTS: Do I have the Court's
20 permission to inquire about expert topics with the
21 witness?

22 THE COURT: Yes, you do.

23 MR. CHRISTIANSEN: No objection, Your Honor.

24 BY MR. ROBERTS:

25 Q. So in this case the jury has heard from

1 Dr. Stokes -- I believe Dr. Larry Stokes -- another
2 economist?

3 A. Yes. Arizona, I think.

4 Q. Did you have a chance to review his
5 calculations and report he issued in this matter?

6 A. Yes.

7 Q. And did you prepare a report in which you
8 noted some disagreements with Dr. Stokes?

9 A. Yes.

10 Q. And did you bring the report with you here?

11 A. Yes.

12 Q. You can refer to that, Dr. Smith, if you need
13 to.

14 A. Sure.

15 Q. But could you -- well, before we get into any
16 disagreements you have, the jury heard about
17 Dr. Stokes' calculations and opinions about the loss of
18 household services that Dr. Khiabani's sons would have
19 lost as a result of this accident.

20 A. Yes.

21 Q. Did you cite any disagreements with those
22 opinions in your report?

23 A. No. I -- I found that within the range of
24 what an economist might do.

25 Q. Dr. Stokes, in fact, said that those

1 household services likely would not have been provided
2 after age 18, so he included no losses after age 18;
3 correct?

4 A. I think he stopped them after age 18.

5 Q. He stopped them at age 18.

6 A. That's common 18, 20, kid goes to college if
7 he goes away, if he stays home. But around that age,
8 it's common to stop them.

9 Q. Okay. So you're -- you're offering no
10 adverse testimony regarding that --

11 A. No.

12 Q. -- topic?

13 A. No. I thought that was fine.

14 Q. He also calculated -- took a look at how much
15 income Dr. Khiabani was making and extended that income
16 through his worklife expectancy and then reduced that
17 to present value.

18 A. Yes.

19 Q. Okay. Did you have any major disagreement
20 with the way he did those calculations and the interest
21 rates he used to reduce that number to present value?

22 A. That was all within the range of what we see,
23 so I didn't have any major disagreements, no. Not even
24 middle-level disagreements. I can certainly understand
25 that approach, and mine might have been similar if I'd

1 asked so ...

2 Q. The jury is going to be asked, if they -- if
3 they reach the issue of damages, to reach an opinion
4 about the loss of probable support for Dr. Khiabani's
5 sons.

6 A. Yes.

7 Q. Okay. Did you have a disagreement with
8 Dr. Stokes to the extent he intended the jury to use
9 his calculation of lost income as a loss of probable
10 support number?

11 A. Yes.

12 Q. Okay. Could you explain your opinion on this
13 subject to the jury, Dr. Smith.

14 A. Well, what someone makes is a whole lot
15 different from what the family receives, and there's
16 lots of reasons for that. So typically in a case such
17 as this, you -- that involves a death case, certainly
18 the person who was alive would have consumed some food,
19 clothing, transportation, et cetera. And then the
20 other people living in the household, of course, would
21 share in -- I mean, the household shares in all the
22 income.

23 But once the people leave the household, then
24 it becomes more of a statistical question of what are
25 people who are outside the household likely to get?

1 And we have economic statistics on that matter.

2 There's -- there's articles that -- I think one of them
3 is called "Who Gives?" In other words, who is giving
4 to who and how much is given?

5 And that generally shows that, once you leave
6 the household -- true in my family and most families --
7 that the children are then on their own and they don't
8 expect to necessarily get the same level of support
9 outside the household -- I'm sorry -- to college or
10 whatever it is. They go earn their own money, they go
11 do their own thing, and that's frequently the end of
12 it.

13 Q. Dr. Stokes used the age 18 as a cutoff for
14 loss of household services.

15 Did you use the same cutoff of -- as age 18
16 for when the loss of probable support would change for
17 the children?

18 A. I had suggested age 22. Typically, if we
19 look at a household where children are likely to go to
20 college, they're -- whether they actually live at home
21 or live at college, still maintain the household for
22 them, maybe pay some college expenses, some
23 transportation back and forth, you're buying clothing
24 for them, you might be buying their -- so I think it's
25 not unusual to say 18 to 22. In this case, I would

1 probably say they're likely to receive support till age
2 22 at the level that they were receiving as if they
3 were living at home even if they go to another campus
4 and live there.

5 Q. What about after age 22? As an economist, do
6 you need to deal with statistics and
7 more-likely-than-not scenarios?

8 A. Correct.

9 Q. Just like the jury needs to deal with in this
10 case; correct?

11 A. Correct.

12 Q. And after age 22, more likely than not, do
13 adult children receive substantial support from their
14 parents?

15 A. Well, we don't consider that they do. So in
16 all my work, we -- we end the support to children at
17 that time.

18 There is some statistical showing that
19 there's a small amount of support in a low percentage
20 of families where that can happen, but it's -- it's
21 typically between nothing and something fairly modest.

22 Q. Okay.

23 A. Clearly, there are instances where that's not
24 true, where families might, you know, continue to
25 support, for one reason or another, children for some

1 time. But, statistically speaking, it's quite rare.

2 Q. But you wouldn't speculate that the children
3 in this family would be one of the very small
4 percentages of adult children that receives substantial
5 support? You wouldn't be -- have any basis to
6 speculate to that, would you?

7 A. No. I wouldn't have any basis. I wouldn't
8 speculate. I would say the only way you want to think
9 about it is, do we have some particular evidence? I
10 mean, let's say we had a theoretical family where we
11 actually have an 18-year-old and a 30-year-old and the
12 30-year-old is still getting support. Well, then
13 that's evidence.

14 But we don't have that here. So, no, I
15 wouldn't speculate to that.

16 Q. Okay. To say that -- let me actually go to
17 Dr. Stokes' report. Might help illustrate this for the
18 jury.

19 MR. ROBERTS: Your Honor, permission to
20 display the conclusion page from Dr. Stokes' report,
21 which was shown the jury during his direct testimony.

22 MR. CHRISTIANSEN: No objection to publish,
23 Your Honor.

24 THE COURT: Absolutely.

25 MR. ROBERTS: Thank you, Your Honor.

1 BY MR. ROBERTS:

2 Q. I'm going to show page 10 of Dr. Stokes'
3 report, which is a summary of his analysis. The pink
4 on there is mine to highlight the area for you that I
5 wanted to ask about.

6 A. Sure.

7 Q. So Dr. Stokes presented a conclusion to the
8 jury that the present value of the loss of earnings,
9 income, and fringe benefits to Dr. Khiabani was
10 15,262,417.

11 A. Right.

12 Q. Okay. And that's the number that we've been
13 talking about. You don't have any disagreements, major
14 disagreements, with Dr. Stokes as to what the loss of
15 income was to Dr. Khiabani; correct?

16 A. Correct.

17 Q. So would it be economic error to assume that
18 the 15 million 262 number is the loss of support -- the
19 probable loss of support to the children?

20 A. I think that's incorrect.

21 Q. Okay. So that would be economic error to
22 make that assumption?

23 A. It would be an economic error absent any
24 specific evidence to conclude what economists rarely
25 see, which is that there is support after age 22,

1 roughly.

2 MR. ROBERTS: So, Your Honor, permission
3 to -- to show the table on the next page. It was also
4 displayed to Dr. Stokes during his direct.

5 THE COURT: Go ahead.

6 MR. CHRISTIANSEN: No objection, Your Honor.

7 MR. ROBERTS: Thank you.

8 BY MR. ROBERTS:

9 Q. So I'm going to -- to put up a table that
10 Dr. Stokes used to get to the \$15 million number. And
11 the year that I'm going to pick as an example is the
12 year 2018, which was the first full year after
13 Dr. Khiabani's death.

14 A. Right.

15 Q. So the 1,024,000 would be the total earnings,
16 income, and fringe benefits Dr. Khiabani would have
17 earned had he lived; correct?

18 A. Yes.

19 Q. And the \$82,000 number, or \$83,000 number
20 about, would have been the calculated personal
21 consumption; right?

22 A. Yes.

23 Q. And then the difference between those two
24 numbers, you subtract personal consumption from total
25 earnings, and that's 941,611, almost a million bucks;

1 correct?

2 A. Yes.

3 Q. And adding that up with all of the other
4 years and reducing to present value is how Dr. Stokes
5 came up with the 15 million; correct?

6 A. Yes.

7 Q. Would you have expected Dr. Khiabani to have
8 given his children \$941,000 in 2018 in support had he
9 lived?

10 MR. CHRISTIANSEN: Objection. Speculation.

11 THE COURT: Rephrase the question.

12 BY MR. ROBERTS:

13 Q. Yes. As an economist with knowledge of the
14 statistics of how much adults give to their children in
15 support, is it more likely than not Dr. Khiabani would
16 have given 941 children -- \$941,000 to his children in
17 2018 had he lived?

18 A. It defies economic probability. It also
19 defies common sense that that would happen.

20 Q. Okay. Thank you very much, Dr. Smith.

21 Anything else that would be helpful for the
22 jury to understand about your opinions before I sit
23 down?

24 A. Just that there's a big difference between
25 what one earns, even if you take into account food,

1 clothing, transportation. There's still a lot of other
2 things going on in a household. And, you know, I had a
3 household where I was also a single dad for a time and
4 had children, adult children, and I actually, after 20
5 years, remarried.

6 So things happen. You can't predict that
7 someone would -- I'm not saying he would have
8 remarried, but there could be partnership -- a partner
9 where there's some income and the partner may have
10 children, and that's not unusual. They may have, as I
11 did, actually had additional children.

12 There's a lot of moving parts. And to take
13 the maximum theoretical amount and to say that's the
14 loss is economically extraordinarily improbable.

15 Q. And -- and to speculate as to how much he'd
16 be giving his children 15, 20 years from now, in your
17 opinion, would that be highly speculative?

18 A. I think so. And you don't want to give an
19 18-year-old half a million bucks anyway. You'd rather
20 give them a bottle of whiskey, frankly.

21 Q. Before you sit down, I -- I didn't ask you
22 when I was qualifying you as an expert. Have you been
23 retained as an expert by the U.S. government?

24 A. Yes, often.

25 Q. And you've also consulted as part of a

1 commission?

2 A. Yes. To the -- to the 9/11 commission as
3 part -- when I was on the board of the National
4 Association of Forensic Economics, it was -- for a
5 three-year period, they bracketed the 9/11. I did many
6 9/11 cases. But before we actually started the cases,
7 we advised the -- I'm blanking on his name -- the
8 judge -- the magistrate to -- on how -- 'cause there
9 wasn't -- there's not enough money. There wasn't.
10 There was a lot of money, and they were trying to get
11 these things resolved quickly so families could make
12 quick claims and not have to go through litigation.
13 But not enough for the high, high-income earners.

14 So we proposed methodologies that we thought
15 would be straightforward, easy, expeditious, fair to
16 people who were making a ton of money. And there were
17 some that wouldn't get nearly what they lost, but the
18 great majority of the people would get close to what
19 they lost. So, yes, I was on the board, and we made
20 recommendations in terms of how those calculations
21 should be made.

22 Q. And how to divide up a fixed fund among all
23 the people with losses out of the 9/11 incident?

24 A. Right.

25 Q. One thing that the jury's heard -- and I

1 believe Mr. Christiansen mentioned -- for example, his
2 job here is to advocate for his client; I advocate for
3 my client.

4 What is your understanding of your role here
5 as an expert witness?

6 A. I see my role as an educator. I think my job
7 is to put on information to -- my reports -- this one
8 is fairly brief -- usually say it's a tool and an aid
9 and a guide for the jury. It's to give the jury an
10 idea of if you think about things certain ways.

11 So I see it as education, as a -- you know, I
12 sometimes use the word "humble servant." My wife says
13 the word "humble" should never come out of my mouth.
14 But I do think that my job is to give a jury a point of
15 view and let them make the really hard decisions.

16 Q. Thank you very much, Dr. Smith. I appreciate
17 your time.

18 MR. CHRISTIANSEN: May I proceed, Your Honor?

19 THE COURT: Yes.

20

21 CROSS-EXAMINATION

22 BY MR. CHRISTIANSEN:

23 Q. Good afternoon, Dr. Smith.

24 A. Good afternoon, Mr. Christiansen.

25 Q. It's actually Pete Christiansen. It's