

Case No. 78701

**In the Supreme Court of Nevada**

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

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

Respondents.

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**APPEAL**

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

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

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 spelled Christiansen. We say it a little differently.  
2 Don't worry about it.

3 A. Thank you. I'm sure it has a Dutch flair to  
4 it, Christiansen. Thank you.

5 Q. Nobody ever gets it right.

6 Dr. Smith, you were asked opinions and what  
7 your criticisms were. And you voiced those. You  
8 haven't listened to any of the evidence in this case;  
9 is that fair?

10 A. Correct. I've read a little of the  
11 testimony.

12 Q. Did you read Aria Khiabani's testimony about  
13 what his parents and he talked about going forward in  
14 life?

15 A. No.

16 Q. You didn't?

17 A. No.

18 Q. Don't you think that would be important to  
19 make -- come in and tell the jury what the family was  
20 going to do to give probable support to a 16-year-old  
21 boy when his dad is killed?

22 A. I didn't tell the jury what the family was  
23 going to do; I told them it was improbable that all of  
24 it would go to the young boys. And I'm sure there were  
25 some plans, and I'm sure there would have been some

1 funds given. That's without a doubt.

2 Q. I simply was asking you, do you not think, to  
3 come be the educator-type description you gave  
4 yourself, actually seeing information, facts in this  
5 case, could be helpful?

6 A. I think for the jury, yes. It would play no  
7 role in my saying that the maximum \$15 million amount  
8 is extraordinarily improbable. But I don't disagree  
9 with you. Every family has some plans, and they would  
10 have some specific plans. And that's the whole point.

11 Q. Dr. Smith, what was your calculation of the  
12 probable support for Aria and Keon Khiabani?

13 A. I did not make one. I don't have evidence to  
14 do that.

15 Q. Were you told that Keon Khiabani has special  
16 needs?

17 A. I think I heard something along those lines,  
18 but --

19 Q. What were they?

20 A. I don't recall specifically.

21 Q. What would they cost to take care of?

22 A. I don't know.

23 Q. What's the amount MCI is attributing for the  
24 line item?

25 A. It doesn't matter to me.

1 Q. Well, what's the probable support you came  
2 here to tell the jury was reasonable?

3 A. Well, I think you know I didn't come here to  
4 tell them what is reasonable; I came here to tell them  
5 what is unreasonable.

6 Q. And you do this frequently. And I'm not  
7 going to nitpick you, but, I mean, this is something  
8 you do on a regular basis?

9 A. It's the majority of my career, if that's  
10 what you're asking, is to economic analysis in  
11 litigation. We do something outside of litigation for  
12 business valuations, but yes.

13 Q. And do you know an attorney by the name of  
14 Todd Terry? He works for me.

15 A. Okay.

16 Q. Do you remember a case by the name of Louis  
17 Lucido v. Becho?

18 A. I somewhat do. You're going to have to  
19 forgive me because I review a couple dozen cases a  
20 month. By the time some time goes by, I'm forgetting  
21 names.

22 Q. Well, this is a case what was resolved, like,  
23 last month, and you wrote a report in January of 2016  
24 about a 59-year-old man who was killed and left a wife  
25 and three children.

1           A.    I've probably done over 100 reports since  
2 then, so I just didn't remember. I'm glad it got  
3 resolved among the parties.

4           Q.    Do you recall how you went about, in that  
5 case, calculating for the children what was appropriate  
6 compensation for the adult children? I'll tell you the  
7 children in that case were 34, 32, and 27. Mr. Lucido,  
8 when he died, he was on -- maybe I'll refresh your  
9 recollection. He was on, like, a big pump truck, the  
10 pump blew up. Does that help you?

11                   May I approach, Judge?

12                   THE COURT: Yes.

13                   THE WITNESS: The facts of how someone passed  
14 away aren't so important to me as -- whether it was car  
15 crash or a pump truck, but ...

16 BY MR. CHRISTIANSEN:

17           Q.    Let me show you. Smith Economics, that's  
18 your business?

19           A.    Yes.

20           Q.    "Dear Mr. Terry: I've been asked to  
21 calculate the value of certain loss subsequent to the  
22 death of Lucido" -- and then does this look like a  
23 report you would have prepared?

24           A.    Exactly.

25           Q.    With all -- you like tables?

1           A.    My computer likes tables, yes.

2           Q.    All right.  I don't want to talk to you about  
3 how you went about calculating for this 34-, 32-, and  
4 27-year-old children the loss they sustained when their  
5 father died.  You were asked to do that in this case;  
6 correct?

7           A.    Well, I think it was -- I was asked to look  
8 at the loss of potential accumulations from which they  
9 would have received money.  And if I -- you could give  
10 me my report, I -- I could see exactly how we worded  
11 it, but we usually call it the loss of accumulations.

12          Q.    Okay.  The loss of advice, counsel, guidance,  
13 instruction, and training services.

14          A.    Yeah, that's -- that's not part of the  
15 income.

16               MR. ROBERTS:  Your Honor, may we approach?

17               THE COURT:  Yeah.

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

20               THE COURT:  Do any -- do any of the jurors  
21 need a quick comfort break?  No?

22               Okay.  'Cause I -- I do.  And so -- so you do  
23 too?  Okay.

24               All right.  And the parties stipulate that I  
25 don't need to read this admonishment at the moment

1 because this is just going to be a short break. So,  
2 Jerry, make sure you keep everyone.

3 THE MARSHAL: Okay. Absolutely.

4 THE COURT: All right.

5 THE MARSHAL: All rise.

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

8 THE COURT: Okay. I do have some questions  
9 to ask you about -- you're not allowed to have it back.  
10 Did you send this back?

11 MR. CHRISTIANSEN: I sent the blank one for  
12 you, Judge.

13 THE COURT: Actually, I'm using the  
14 highlighted one, if you don't mind.

15 MR. CHRISTIANSEN: Can I have one so I can  
16 look?

17 THE COURT: No.

18 Yes. Just joking.

19 MR. CHRISTIANSEN: Okay.

20 THE COURT: All right. All right. Let me  
21 understand something. First, Dr. Smith is testifying  
22 solely to the income.

23 MR. ROBERTS: Correct. Solely in rebuttal to  
24 Dr. Stokes' economic loss calculation.

25 THE COURT: Oh, I'm sorry. Dr. Smith, may I

1 trouble you to --

2 THE WITNESS: No trouble at all, Your Honor.

3 THE COURT: Thank you.

4 THE WITNESS: I'll forget what I heard.

5 (Witness exits the courtroom.)

6 THE COURT: All right. So it's my  
7 understanding that Dr. Smith -- what I've heard him  
8 testify to --

9 THE COURT RECORDER: Excuse me, Your Honor.  
10 We are not on; right?

11 THE COURT: We need to go on the record.

12 THE COURT RECORDER: We need to go on?

13 THE COURT: Yes, please.

14 Okay. Very good.

15 All right. Again, Dr. Smith has testified in  
16 direct essentially to -- concerning what he agreed  
17 with -- the areas he agreed with with Dr. Stokes, and  
18 everything had to do with the earnings or the income of  
19 Dr. Khiabani. And the distinction was that, out of  
20 approximately a million, 24, Dr. Khiabani's personal  
21 consumption would have been approximately 82,000, which  
22 would have left almost a million dollars and that --  
23 that Dr. Smith disagrees that that would be left to the  
24 children alone; correct?

25 MR. ROBERTS: Correct.



1 THE COURT: I mean, essentially.

2 MR. ROBERTS: Essentially, yes.

3 THE COURT: Okay. And he -- he actually said  
4 that after 22, which was four years later than  
5 Dr. Stokes said, is the cutoff he uses for this  
6 analysis.

7 MR. ROBERTS: For the loss of substantial  
8 economic support.

9 THE COURT: Support; right?

10 All right. Then, with respect to the case  
11 that Mr. Christiansen mentioned -- I haven't had a  
12 chance to read the entire report, but I did go to your  
13 highlighted areas.

14 MR. CHRISTIANSEN: That's scary.

15 THE COURT: Okay. So we're looking at  
16 children that, at the time of the death of their  
17 father, were much older than 22. And I don't  
18 believe -- or from what I look here, the category --  
19 specifically, there were four children, and the ages  
20 were -- I wrote it down in my notes --

21 MR. CHRISTIANSEN: Judge, just three  
22 children. Elizabeth is his wife.

23 THE COURT: I'm sorry. There's a fourth  
24 person here.

25 MR. CHRISTIANSEN: Elizabeth is the wife,

1 Your Honor.

2 THE COURT: Okay. Thank you.

3 They were in their 30s; correct?

4 MR. CHRISTIANSEN: 34, 32, and 27.

5 THE COURT: Right. And this is discussed  
6 with respect to the loss of society or relationship,  
7 not the loss of earnings or the loss of --

8 MR. KEMP: Judge, there's really two issues  
9 here. One is the --

10 THE COURT: But that's certainly one of them.

11 MR. KEMP: That -- the first issue is he has  
12 told the jury that 22 is some magic cutoff date. At a  
13 minimum, we should be allowed to clarify that he  
14 doesn't believe that with regards to the other elements  
15 of support, because -- clearly he doesn't because he's  
16 used that.

17 The second issue is whether you should be  
18 allowed to use the amount, the 2 million he's giving  
19 for those other categories.

20 So, clearly, when he's told the jury that,  
21 quote, it is common, unquote, to stop at 18, and he's  
22 told the jury that he's more generous because he's  
23 going to give age 22 as his cutoff, and then when he  
24 says, quote --

25 THE COURT: Wait. When it comes to the

1 earnings --

2 MR. KEMP: No, he did not say that, Your  
3 Honor. That was what I was trying to show you at the  
4 bench. His answer -- and I'm going to quote it  
5 exactly. "In all my work, we end support to children  
6 at 22." Okay?

7 Mr. Roberts didn't divide that into economic  
8 support or these other categories. So, at a minimum,  
9 Mr. Christiansen should be allowed to say, "Isn't it  
10 true that these other categories do not end at 22, that  
11 even if you're 20 -- or 25, 30, 35, 40, whatever, you  
12 can go up."

13 Because if you -- if you look at the back of  
14 that report, he actually has tables where he's given  
15 \$100,000 a year to these people up to the -- their life  
16 expectancies. So what he is doing is he's saying --  
17 not only is he saying not 22 is a cutoff; in that  
18 report, he's saying for these other categories of  
19 damages they get them for the rest of their expected  
20 lives.

21 So translating that into this particular  
22 case, he is saying in that report that Keon and Aria  
23 should get these other categories of damages for their  
24 entire life. And -- yeah, and for the life of the  
25 father. Excuse me, Your Honor.

1           So -- so, in this case, if you apply his 22,  
2 that means Aria gets it for five more years and Keon  
3 would get it for seven or eight more years. But these  
4 other ones, he's already said in this report that it's  
5 the life expectancy for the father.

6           So, at a minimum, on the first issue we  
7 should be allowed to -- to explain to the jury through  
8 him that when he says the cutoff is 22, he only means  
9 for this particular damages item. And for the other  
10 damages item, you know, you can go on for the age of  
11 the father, because that's what he's done.

12           You know, that's got -- that's -- that's  
13 obviously -- especially with their phrasing it  
14 intentionally to try to apply to everything by saying,  
15 "In all my work, we end support to children at 22,"  
16 well, they don't, Your Honor, as evidence of that.

17           The second issue -- the second issue is the  
18 one you're focused on, which is should we be allowed to  
19 give his \$2 million figure. And I was --

20           THE COURT: No, actually, I was also focusing  
21 on the first issue.

22           MR. KEMP: Okay. On the first issue, I --

23           THE COURT: Just to be fair with you.

24           MR. KEMP: -- think that's as clear as a  
25 bell.

1 But the second issue, on the \$2 million, here  
2 you have a guy who is criticizing -- criticizing a -- a  
3 much smaller amount as unreasonable and ridiculous  
4 because -- because, you know, there's no evidence as to  
5 what the family -- then he's throwing in all these digs  
6 like, "Oh, he could -- he could have got married again,  
7 so" -- implying to the jury that if he gets married  
8 again, he'll give the kids nothing. That's exactly  
9 what he said on the stand, Your Honor.

10 And yet this exact same guy, in a wrongful  
11 death case with two heirs -- or three heirs, he gives  
12 them -- he gives them \$6 million, 2 million apiece.

13 So you're letting him tell the jury that he  
14 thinks that under a million is unreasonable, and yet,  
15 last year, he said it should be 6 million. True, it's  
16 another category, but ...

17 THE COURT: We have apples and oranges here.  
18 Okay? This is not the same category.

19 MR. KEMP: It's a different category.

20 THE COURT: One is earnings.

21 MR. KEMP: Your Honor, truly, can you --

22 THE COURT: One is earnings, Mr. Kemp.

23 MR. KEMP: Okay. On earnings --

24 THE COURT: The other --

25 MR. KEMP: -- can anyone say it's not

1 relevant to his earnings nitpicking that he's -- he's  
2 giving \$6 million in these other categories? It is  
3 earnings nitpicking and knowing full well -- and  
4 Mr. Roberts -- there's no surprise here, Your Honor.  
5 He was in this case. This report was written before we  
6 even filed the complaint in this case. He hired  
7 Dr. Smith knowing full well what the opinion was. So  
8 there's no surprise or prejudice here, Your Honor.

9           They haven't argued that. All they're  
10 arguing is this -- this, oh, well, if we, you know,  
11 just walk -- this one damages plank, the other damages  
12 plank that hurts us can't come in. I mean, it is just  
13 such a large discrepancy, a million versus 6 million.

14           To let this jury think that his real opinion  
15 is that a million's too much and here's why when, in  
16 this other case just last year in this jurisdiction,  
17 wrongful death case, sons are heirs, in this  
18 jurisdiction, he's giving them \$6 million. I mean,  
19 it's just -- it's -- just creates --

20           THE COURT: I understand what you're saying,  
21 but I -- I don't think that the comparisons are -- are  
22 alike. I understand what you're saying, but --

23           MR. KEMP: The only difference is, in the  
24 other case, the life expectancy is much shorter.  
25 Because Dr. Khiabani was 51, so he had a longer life

1 expectancy of 19, and, in this other case, the guy was  
2 56, I believe, or 55, so his life expectancy is a lot  
3 shorter. So what he's saying is you should give less  
4 money to the kids, the younger kids of the guy who has  
5 a longer life expectancy. That is just totally  
6 inconsistent, Your Honor. And that's why we should be  
7 allowed to get into the damages phase.

8 THE COURT: The damages for --

9 MR. KEMP: We should be allowed -- we should  
10 be allowed --

11 THE COURT: -- loss of society or  
12 relationship, because that's what this is under.

13 MR. KEMP: We should -- you know, whether or  
14 not we had a report, we could be allowed to point out  
15 that there's different damages in this artificial 22 --  
16 your limit doesn't apply to those damages. They apply  
17 it to the whole life expectancy. Okay?

18 I mean, we should be allowed to explain that  
19 to the jury because what they've done is they've said,  
20 quote, in all my work, we end support to children at  
21 22, unquote.

22 If that's not saying 22 is it, nothing is,  
23 Your Honor. So, number one, we should be allowed to  
24 show that this age distinction he's making doesn't  
25 apply to these other damages claims. But, I mean, look

1 at what a false impression you're creating. You are  
2 calling an economist to suggest that, in a wrongful  
3 death case, this guy's actual opinion is you should get  
4 under a million, when, in reality, he says it should be  
5 more than 6.

6 MR. ROBERTS: Your Honor, if Mr. Kemp is done  
7 filibustering, can I just state something briefly for  
8 the record?

9 THE COURT: Yes.

10 MR. ROBERTS: And that is that the word  
11 "support" was not chosen by me or Dr. Smith. "Probable  
12 support" is in the wrongful death statute. The supreme  
13 court has defined probable support as money losses.  
14 They cited that very case to the Court when I filed a  
15 motion in limine on Dr. Stokes.

16 So support, there is no evidence he's ever  
17 allocated lost economic support to anyone after 22.  
18 And Mr. Kemp has turned the other elements of the  
19 wrongful death statute into support, not this witness,  
20 not the legislature. And it's nowhere in his report.  
21 The -- page 13, the allocation of money to the heirs,  
22 he defines as loss of relationship. It doesn't say  
23 "loss of support."

24 THE COURT: Of society or relationship.

25 MR. ROBERTS: Correct.



1           And then, moving back toward the front of the  
2 report, he makes an allocation for loss of --

3           THE COURT:   What page are you on?

4           MR. ROBERTS:   I'm on page 11.   Right in the  
5 middle of the page, there's an allocation to the heirs  
6 for loss of accompaniment.   Again, loss of support is  
7 not there in the allocation.

8           Page 9, he includes numbers for loss of  
9 advise, counsel, guidance, instruction, and training.  
10 The word "loss of support" is not in there.

11           So what does he say in this report about  
12 economic loss?   Economic loss is calculated beginning  
13 at page 2 and I(a).   And he talks about all of the  
14 things like Dr. Stokes talks about.   And what he ends  
15 up coming up with are numbers on page 5, where he says,  
16 "Based on these assumptions," he comes up anywhere from  
17 2 to \$5 million.

18           And what is that number?   It's wage loss,  
19 wage loss, wage loss.   And in this section on wage loss  
20 and income, unlike the sections on emotional loss and  
21 grief, which continues for adults, he makes no  
22 allocation --

23           THE COURT:   That's correct.

24           MR. ROBERTS:   -- of the loss of income to any  
25 individual heir after the age of 22.

1           They rested their case. They could have put  
2 on an expert on hedonic damages. They could have put  
3 on an expert trying to value grief and companionship  
4 and instruction and training. They chose not to do  
5 that.

6           And if I had gotten up here with Dr. Smith  
7 and asked him to put low values on the loss of  
8 emotional support, they would have objected as beyond  
9 the scope of his report, beyond the scope of his  
10 opinions. And they can't take my expert for economic  
11 loss and then try to get in numbers from another case.

12           I strongly object to this, and -- and I'd  
13 like to mark the report of January 20th, 2016, to Todd  
14 Terry as a Court's exhibit for the purposes of the  
15 record.

16           THE COURT: Okay.

17           MR. KEMP: Your Honor, the problem is he did  
18 not use the term "economic support" in the -- that he's  
19 arguing now, that the jury's -- he's argued now that  
20 the jury clearly understands that this -- this 22 to --  
21 this 18 or 22 cap applies to economic support. That's  
22 what he's arguing.

23           Not only did he not say that -- and I'll read  
24 it one more time. "In all my work, we end support to  
25 children at 22." He -- he went beyond that. And then,

1 after he got this 22, 18 cutoff, he went to the 9/11  
2 commission, and that was total compensation. That was  
3 not cut up like this. Okay? That was total  
4 compensation given to the victims.

5 So he brought up the -- the 9/11 commission  
6 as a way to suggest that the government, in their  
7 compensation program, caps it just like he does. And  
8 that's capping everything.

9 So he has created the impression with this  
10 jury, first of all, that there's some type of cutoff at  
11 age 22, which there's clearly not. So, I mean, at a  
12 minimum, we should be allowed to explore that with him,  
13 that, in reality, the other damages claims go to the  
14 life expectancy. That's -- that's clear, you know,  
15 to -- to say that he's limited.

16 But with regards to the bigger question,  
17 which -- which I consider the 2 million, like I've  
18 already said, he's telling the jury that a million is  
19 too much and he's turned around and given \$6 million in  
20 less compelling circumstances.

21 THE COURT: Not -- no. With respect to  
22 economic damages, he doesn't -- in this case, he  
23 doesn't -- he doesn't give economic -- or economic  
24 damages that have been compared to your experts --  
25 that's what this testimony has been about -- to any of

1 these children because they were older than 22.

2 MR. CHRISTIANSEN: No, because their mom  
3 lived. That's why he doesn't give it, Judge. That's  
4 the only reason, because the mom's alive.

5 THE COURT: Does it say in here that --

6 MR. CHRISTIANSEN: Yeah. He gives -- look,  
7 Your Honor. Look at the very beginning. He gives  
8 all -- he gives all economic loss goes to Elizabeth  
9 Lucido, the wife.

10 THE COURT: But -- but, not only that, it's  
11 because the children were over 22, they were in their  
12 mid -- early to mid 30s. So that's consistent with  
13 cutting it off at 22.

14 MR. KEMP: Judge, Judge, did you read the  
15 first part of his report where he talked loss of wages  
16 and employee benefits? And he goes on for one, two,  
17 three, four pages. And then he says that "Based on the  
18 above assumptions, my opinion on the wage loss for  
19 Scenario No. 3 is \$9.7 million."

20 So in this case, he's got this low-income guy  
21 and he's saying \$9.7 million is good, but in the other  
22 case, the case we're here today on, he's saying, "Oh, a  
23 million is too high. There's no showing."

24 In this case he's got \$9 million, Your Honor,  
25 I mean that is -- it's the same issue, loss of income.

1 It is the exact same issue they presented him on.

2 So -- so, you know, clearly, we can get into this with  
3 him.

4 And if you take a look at the other section,  
5 page 4, 2A, that's where we start talking about the  
6 loss of household services. So he's sliced it up into  
7 two categories of damages in this report.

8 There could be no possible objection to the  
9 exploring the first one.

10 MR. ROBERTS: You'll note, Your Honor,  
11 under -- under the household services, he also makes no  
12 allocation to adult children --

13 THE COURT: Right.

14 MR. ROBERTS: -- in that either.

15 I think we all had an adequate opportunity to  
16 argue this, Your Honor. I think it's ripe for a  
17 ruling.

18 MR. KEMP: With regards to the \$9 million,  
19 here he's got a guy making much less than us and he  
20 comes up with \$9 million, and you let him on the  
21 witness stand to say that 1 million is too much? I  
22 mean, you've got to be able to use this 9 million to  
23 impeach him.

24 MR. ROBERTS: It's improper impeachment. You  
25 can't impeach with emotional damages to say you're --

1           MR. KEMP: It's not emotional damages. If  
2 you take a look at it, it is -- it is in a column  
3 that's entitled "Loss of wages and employee benefits."  
4 It continues for one, two, three, four pages. He has a  
5 number of scenarios, and he based on -- he has  
6 different assumptions, and he has wage loss in one of  
7 4 million, then he has another one for 2 million, then  
8 he has another one for 5 million.

9           MR. ROBERTS: Wage loss for the decedent,  
10 which he doesn't say all goes to the adult children.  
11 In this case, he actually testified he had no  
12 disagreement with Dr. Stokes' calculation of  
13 Dr. Khiabani's wage loss of 15 million. The only  
14 disagreement is whether that goes to the adult  
15 children.

16           MR. KEMP: No, no. In this case he  
17 calculated a base figure way above the base figure he  
18 uses in this case -- in this other case, and now he's  
19 criticizing the lower base figure in this case trying  
20 to cut it down even more.

21           So the fact he's using a \$9 million base  
22 figure in this case should at least be allowed in his  
23 impeachment. How can he say 1 million is unreasonable  
24 when he's at 9 million for a lower-wage earner?

25           MR. ROBERTS: Apples and orange, Your Honor.

1           MR. KEMP: Not apples and oranges. It's wage  
2 loss. He just got done telling you that -- that we  
3 can't use this for impeachment because there's nothing  
4 about wage loss, and that's not true. The first four  
5 and a half pages is all about wage loss.

6           MR. ROBERTS: Wage loss of 9 million. He has  
7 15 million wage loss in this case. He is agreeing with  
8 15 million in the decedent's wage loss. He's  
9 disagreeing that, under our wrongful death statute, all  
10 of that should go to the adult children as loss of  
11 probable support.

12           And the legislature didn't say economic  
13 support either. It said loss of support, loss of  
14 probable support. And the case law is made clear that  
15 that means economic support, because there are other  
16 categories of the statute that compensate for emotional  
17 losses, noneconomic losses, and he has not commented or  
18 opined on any of those.

19           MR. KEMP: Your Honor, look at the top of  
20 page 5 where he talks about personal consumption in  
21 this case. So he uses different personal consumption  
22 in this case than what he's using in our case because  
23 he wants to get the figure higher in this case. So in  
24 this case the personal consumption is minimal, whereas  
25 in our case he told the jury the doctor could get

1 remarried so he wouldn't give any of his income to the  
2 children.

3           That's not what he's saying in this case. He  
4 doesn't say in this case, "Oh, gee, in theory this  
5 person could have got remarried." You know, that's why  
6 this is -- this part, there's no possible argument that  
7 we can't use this for impeachment, Your Honor.

8           MR. ROBERTS: Your Honor, Mr. Kemp is making  
9 up the record again. Dr. Smith has not given any  
10 opinion on personal consumption other than saying, "I  
11 don't have any major disagreement with Dr. Stokes'  
12 calculation of personal consumption, so I'm not going  
13 to opine differently." And he gave no opinion in this  
14 case to his own opinion of what personal consumption  
15 was. He simply said he had no disagreement with their  
16 expert.

17           MR. KEMP: He testified that it was  
18 speculative beyond 22 because the doctor could get  
19 remarried. That's what he said. He said it was  
20 speculative, Your Honor.

21           MR. ROBERTS: The amount.

22           MR. KEMP: He didn't say it was speculative  
23 in this case.

24           THE COURT: Okay. With respect to the  
25 testimony concerning earnings in this case, it's --



1 Dr. Smith and your expert have testified that that  
2 would be approximately 15,262,417. Okay. He  
3 disagrees. He cuts it off at age 22.

4 In this case -- these are, like, different  
5 cases. I mean, the analysis might be different. It's  
6 just -- and it also is beyond the scope of what  
7 Dr. Smith or what Mr. Roberts introduced.

8 There is no discussion of loss of  
9 companionship or that loss of society or relationship.  
10 That's not -- that's not what's being discussed here.  
11 Okay?

12 So bringing in these numbers in a case  
13 that -- that is different and the children are in their  
14 30s when they're not included in the loss of income or  
15 the loss of earnings, I -- I just don't think that this  
16 is correct impeachment.

17 I would allow only one thing. I would allow  
18 you to ask, without going into numbers, that --  
19 although there's been no testimony to this, but that  
20 if -- if he was talking about loss of society or  
21 relationship or however the wrongful death statute  
22 discusses it, has he testified before that the ages are  
23 older? I -- I would allow that.

24 MR. ROBERTS: That's fair, Your Honor.

25 THE COURT: Okay. But we're not going to go

1 into these amounts and everything else. And you can  
2 say 30s if you want, but -- but that's it.

3 MR. CHRISTIANSEN: I didn't hear your last  
4 comment, Judge. You said no amounts, and then I didn't  
5 hear right after.

6 THE COURT: Well, if you want to say they  
7 were age 30, you know. I mean, have you testified in  
8 cases with respect to loss of society -- what --  
9 what -- the words used in the wrongful death statute --

10 MR. CHRISTIANSEN: Just what's in his report,  
11 those titles, Your Honor.

12 THE COURT: Uh-huh. Have you testified  
13 before that children that are that age would -- would  
14 be eligible to receive compensation for -- for those  
15 losses in their -- in their 30s? And so forth. I  
16 think that that would be all right to do.

17 MR. KEMP: Your Honor, a little more specific  
18 than that. He testified in the other case that they  
19 could get that type of compensation for the expected  
20 life of the decedent.

21 So it's not that people in their 30s could  
22 get that compensation; it's that it's for the whole  
23 expected life of the decedent. And he has that chart  
24 in there. I'm not arguing to get this in, but that's  
25 how he calculates the high \$2 million figure,

1 relatively high \$2 million figure. He says that, for  
2 the life of the decedent, they get all those.

3 So it's not you get it till 30. You don't  
4 impose another thing. You get the life expectancy for  
5 the doctor, which he's already got in his report, and  
6 you make it clear to the jury that the other damages  
7 elements go for that life expectancy, without  
8 mentioning the amounts, of course.

9 MR. ROBERTS: And I believe the jury  
10 instruction which we substantially agree to says that  
11 they're supposed to look at the life expectancy of the  
12 decedent versus the life expectancy of the heirs to  
13 determine how long that would be. And so I don't think  
14 that's improper --

15 THE COURT: Okay.

16 MR. ROBERTS: -- for them to say that.  
17 Obviously, it has to be directed to just the sons  
18 because the estate of Dr. Barin would be governed by  
19 her life expectancy, not Dr. Khiabani.

20 THE COURT: Yes.

21 MR. KEMP: I wasn't suggesting otherwise.

22 THE COURT: No, I understand.

23 And, Mr. Christiansen, in fairness, you  
24 didn't ask your expert anything about providing for  
25 special needs.

1 MR. CHRISTIANSEN: Judge, I know you said  
2 that to me, but let me read --

3 THE COURT: I -- maybe -- maybe I --

4 MR. CHRISTIANSEN: Judge, can I read the  
5 question to you and the answer that this guy elicited?

6 THE COURT: I would like you to because I  
7 don't want to think something that's not correct.

8 MR. CHRISTIANSEN: All right, Judge.  
9 Mr. Roberts asked the question: "So would that be  
10 economic error to make that assumption?" His answer --  
11 this is Lee questioning the expert before I stand up.

12 THE COURT: This is yours?

13 MR. CHRISTIANSEN: No, this is Mr. Roberts  
14 asking Dr. Smith questions. That was the question.

15 The answer is "It would be economic error,  
16 absent any specific evidence, to conclude what  
17 economists rarely see, which is that there is support  
18 after age 22, roughly."

19 All right. So they put at issue, is there  
20 any specific evidence after age 22? I simply asked,  
21 "Do you have evidence of where Aria was going to go to  
22 college?"

23 He said he didn't consider it.

24 I said, "Do you have any evidence of special  
25 needs of Keon?"

1 He said he didn't consider it.

2 He's the one that put it at issue,

3 Mr. Roberts did, with his own expert --

4 THE COURT: But did you ask your expert about  
5 that?

6 MR. CHRISTIANSEN: I asked Aria Khiabani  
7 about it, Your Honor, about his brother's special  
8 needs. I most certainly did. Most certainly.

9 THE COURT: Did you ask your expert to factor  
10 it in?

11 I'm sorry, Mr. Roberts. Go ahead. Is this  
12 accurate? Please speak.

13 MR. ROBERTS: I'm sorry, Your Honor. I  
14 didn't mean to interrupt.

15 I think the record is going to be clear that  
16 they never asked their economist about this, their  
17 economist never considered this in any of his work  
18 papers or in his report, and that they have put no  
19 numbers in front of the jury.

20 They have the burden of proof. They put in  
21 no evidence of how much it takes to take care of a  
22 special needs, which I believe they said is attention  
23 deficit disorder. They've --

24 THE COURT: Which is an Axis I diagnosis.

25 MR. ROBERTS: They put in no evidence of how

1 much it would cost to go to the college that Aria wants  
2 to go to. They just want the jury to speculate about  
3 how much it costs for this, even though there's no  
4 evidence in the record.

5 Trust me, if they'd put in any evidence of  
6 specific dollar amounts which an economist should  
7 consider, I would have sent them to Dr. Smith. They  
8 haven't done it.

9 THE COURT: All right. So do we understand  
10 the rulings here?

11 MR. CHRISTIANSEN: I'm allowed to ask about  
12 the categories that relate to emotional damages that  
13 come from --

14 THE COURT: We're not going into this, like,  
15 for --

16 MR. CHRISTIANSEN: I just -- I understand,  
17 Judge. I just want to make sure I'm on the page as  
18 what you're telling me. I get to talk about the  
19 categories, like the one you were looking at with the  
20 larger numbers, societal support or something of that  
21 nature. And then he's given awards for the life of the  
22 decedent to children older in age in those categories.

23 MR. ROBERTS: And I believe what the Court  
24 said is he can go into the words used in the wrongful  
25 death statute --

1 THE COURT: Yes.

2 MR. ROBERTS: -- which are also the words  
3 that are in the jury instruction we've agreed to --

4 THE COURT: Yes.

5 MR. ROBERTS: -- because there's too much  
6 danger and confusion using different words than in the  
7 statute instruction.

8 THE COURT: I did say the -- use the wrongful  
9 death statute, please. That's the law. Okay? And  
10 that's -- that's being very, I think, very generous  
11 because it really goes beyond the scope. And --

12 MR. CHRISTIANSEN: Judge, I'll respect the  
13 Court's ruling, but I can tell you Dr. Smith, in the  
14 Lucido case, testified in his deposition that financial  
15 support is the same as wage loss. That's what he said.

16 THE COURT: Well, we're going to use the law.

17 MR. ROBERTS: Thank you, Your Honor.

18 THE COURT: Okay? So are we ready?

19 MR. BARGER: Yes.

20 THE COURT: Okay.

21 MR. CHRISTIANSEN: Judge, may I retrieve my  
22 copy of the Lucido?

23 THE COURT: No.

24 MR. CHRISTIANSEN: Please?

25 THE COURT: How can I monitor you,

1 Mr. Christiansen, if I don't have these?

2 MR. CHRISTIANSEN: Do you want a blank copy,  
3 Judge?

4 THE COURT: Not blank.

5 MR. CHRISTIANSEN: I mean, unmarked. Hold  
6 on.

7 THE COURT: Find your wrongful death statute,  
8 and that's what you need to discuss. And --

9 MR. CHRISTIANSEN: May I approach, Judge?

10 THE COURT: Yes.

11 All right. Let's bring the jury back in.

12 MR. ROBERTS: Thank you, Your Honor.

13 MR. BARGER: How about the witness?

14 THE COURT: We should let him back in too,  
15 don't you think? I'm sorry. It's kind of a long week  
16 because ...

17 What happened to our witness?

18 Are we off the record?

19 (Discussion was held off the record.)

20 THE MARSHAL: Are you ready, Your Honor?

21 THE COURT: Don't go away, Jerry.

22 We are ready Jerry.

23 THE MARSHAL: All rise.

24 (The following proceedings were held in  
25 the presence of the jury.)



1           THE MARSHAL: All the jurors are present,  
2 Your Honor.

3           THE COURT: Thank you, Marshal Ragsdale.  
4 Do the parties stipulate to the presence of  
5 the jury?

6           THE MARSHAL: Please be seated. Come to  
7 order.

8           MR. ROBERTS: Yes, Your Honor.

9           THE COURT: Please proceed.

10          MR. CHRISTIANSEN: May I proceed, Your Honor?

11          THE COURT: Yes.

12 BY MR. CHRISTIANSEN:

13          Q. Dr. Smith, before we took a break I showed  
14 you a copy of another report in a different case. I  
15 just want to talk to you about categories. And there  
16 are categories within the Nevada wrongful death  
17 statute; is that right?

18          A. Yes.

19          Q. You have made calculations within those in  
20 different cases -- not this case; in different cases --  
21 for those categories; is that fair?

22          A. Yes.

23          Q. For example, there is a category called  
24 companionship; correct?

25          A. Yes.

1 Q. And in the category called companionship, as  
2 I understand it, you make a calculation for the  
3 emotional loss based upon the life expectancy of the  
4 decedent?

5 A. Yes.

6 Q. To use not lawyer terms, the decedent's the  
7 person who died?

8 A. Yes.

9 Q. So your calculation is based on how long that  
10 person should have lived statistically?

11 A. Yes.

12 Q. And those calculations and -- that you have  
13 made in other cases are for persons of all ages, not  
14 stopping at age 22?

15 A. For the emotional losses, yes.

16 Q. Right. And that's the same for society;  
17 correct?

18 A. Yeah. I think I see them together, society  
19 and companionship. In my reports I use them together.

20 Q. That's fair. In your report, that is how you  
21 do it. I'm trying to just follow exactly what the  
22 statute says.

23 A. I understand.

24 Q. Comfort; correct? And consortium?

25 A. The statute does that; I don't. But I have a

1 category called society and companionship. I  
2 understand there are other categories with other names.

3 Q. Okay. And comfort and consortium, do you  
4 make calculations for loss of comfort and consortium?

5 A. No.

6 Q. How about loss of guidance?

7 A. Yes.

8 Q. Same thing where you make it for the life  
9 expectancy of the decedent?

10 A. Yes.

11 Q. I want to make sure. Did I encompass all the  
12 ones that are contained --

13 A. Yes. Society and companionship and  
14 guidance -- advice and guidance.

15 Q. And those calculations, as I understand it,  
16 do not end when -- we use our case -- when Aria and/or  
17 Keon turn 22; they go on for the duration of what  
18 Dr. Khiabani statistically would have lived?

19 A. Yes.

20 Q. And you were not asked to make those  
21 calculations by MCI; is that fair?

22 A. Correct.

23 Q. You were simply tasked with looking at  
24 Dr. Stokes' report and seeing what criticisms, if any,  
25 you had of it?

1 A. Yes.

2 Q. And other than what we talked a bit about  
3 today, you don't have any specific information relative  
4 to Aria and Khiabani. Is that a fair statement?

5 A. Correct.

6 MR. CHRISTIANSEN: I'm just showing,  
7 Mr. Roberts, the same page you showed. From --

8 MR. ROBERTS: No objection.

9 THE COURT: Okay.

10 MR. CHRISTIANSEN: May I show it, Your Honor?

11 THE COURT: Yes.

12 BY MR. CHRISTIANSEN:

13 Q. Dr. Smith, this was Dr. Stokes' concluding  
14 calculation. And I think you told the ladies and  
15 gentlemen of the jury that generally you agreed that is  
16 an economic loss caused by the premature death of  
17 Dr. Khiabani.

18 A. His income loss, yes, and some service, yes.

19 Q. And that's reduced back to present value?

20 A. Yes.

21 Q. After taking out personal consumption?

22 A. Yes.

23 Q. And that's something you do. I mean, this  
24 isn't new. It's something you do in every case?

25 A. It's standard in a death case, yes.

1 Q. All right. Household services, that's  
2 something you calculate in every case?

3 A. When the person can't do them, injury or  
4 death, yes.

5 Q. And you found no error -- I think you said it  
6 was generally acceptable the way Dr. Stokes had done  
7 it?

8 A. Yes. I didn't spend a lot of time on it;  
9 it's not a big amount. But I didn't have a problem  
10 with what I read.

11 Q. And in other cases on economic loss -- I want  
12 to focus you just on the economic loss -- you add up,  
13 much like Dr. Stokes did, total economic loss, subtract  
14 personal consumption, add in household use, reduce it  
15 to present value, and sometimes your charts are a  
16 little different than his, but you come up with a chart  
17 that's generally the same?

18 A. Well, we -- we come up with a summary like  
19 that, but we don't -- what we phrase is this is what a  
20 person may have made, and from that, money may be made  
21 available. I don't ever conclude that the money that's  
22 made will be given. That's the big difference.

23 Q. Okay. That's the difference in -- like, for  
24 example, in the Lucido case that I talked to you about,  
25 the significant other, the wife, was still alive?

1           A.    Yes.  She would have, of course -- we don't  
2 hesitate giving -- giving to our spouses even after.

3                So children are a little different category,  
4 but we assume that the husband would be sharing with  
5 the spouse, assuming an ordinary relationship, yes.

6               MR. CHRISTIANSEN:  Okay.  Judge, may we  
7 approach?

8               THE COURT:  Yes.

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

11 BY MR. CHRISTIANSEN:

12           Q.    Just my last question to you, Dr. Smith, is  
13 you don't have any problem with Dr. Stokes'  
14 calculation; right?

15           A.    Correct.

16               MR. CHRISTIANSEN:  That concludes  
17 cross-examination, Your Honor.

18               MR. ROBERTS:  No questions, Your Honor.

19               THE COURT:  All right.

20               MR. ROBERTS:  We have no further questions in  
21 front of the jury.

22               THE COURT:  Any questions from the jury?

23               THE MARSHAL:  No questions, Your Honor.

24               THE COURT:  No?  Okay.

25               Dr. Smith, you are excused.  Thank you very

1 much.

2 THE WITNESS: No numbers questions on a  
3 Friday afternoon, Your Honor?

4 MR. CHRISTIANSEN: He should stick around,  
5 Your Honor, the witness.

6 THE WITNESS: I will.

7 MR. CHRISTIANSEN: Thank you, Dr. Smith.

8 THE COURT: Yes, you can just wait outside,  
9 please.

10 All right. I -- quickly, like to see counsel  
11 at the bench.

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

14 THE COURT: Okay. Ladies and gentlemen, I  
15 want to again thank you for your dedication this week.  
16 So we've taken a look at all of the witnesses and the  
17 witnesses that are still to come and a few other  
18 things, and it's my understanding, and I believe, that  
19 we should have closing arguments Wednesday of next  
20 week. That's not set in stone, but that is everybody's  
21 goal.

22 So I want to admonish you for the weekend.  
23 And, again, thank you for your service and your  
24 dedication.

25 You're instructed not to talk with each other

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

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

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

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

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

22           Have a good weekend. See you Monday morning  
23 at 9:30.

24           THE MARSHAL: All rise.

25                   (The following proceedings were held



1 outside the presence of the jury.)

2 THE COURT: Okay. All right. Let's see.

3 It's my understanding that we are going to be -- we're  
4 going to ask Dr. Smith to come back in and ask him some  
5 questions, three different clips on three different  
6 issues --

7 MR. KEMP: Yes, Your Honor.

8 THE COURT: -- or areas.

9 So I don't know if you need a couple of  
10 minutes to prepare your areas.

11 MR. ROBERTS: You guys ready to go?

12 MR. CHRISTIANSEN: Yeah, we're ready.

13 THE COURT: Here's what -- if you're ready,  
14 let me know; otherwise, I'm going to go sign some  
15 orders. Actually, I'm going to bring my orders in here  
16 while you're -- so I'll be right back.

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

19 THE COURT: They're -- they're using the  
20 restroom.

21 (Discussion was held off the record.)

22 THE COURT: Take your time in preparing. I  
23 mean, I can even go sign these.

24 THE WITNESS: We're good. We're good.

25 THE COURT: I'm serious, though.

1 MR. ROBERTS: We're just trying to -- maybe  
2 Sandy can tell him -- when he's talking, I know it's --  
3 detects the audio. Where is the camera that -- okay.  
4 There you go. That's who you talk to.

5 THE COURT: When the witness --

6 THE WITNESS: That one is the National  
7 Security Agency; that one is the courthouse.

8 THE COURT RECORDER: I just know that it's  
9 on.

10 THE WITNESS: All right. Thank you.

11 THE COURT: We're still -- we need still one  
12 other person?

13 MR. CHRISTIANSEN: Yes, Your Honor.

14 THE WITNESS: Just one further question.

15 Will there be any -- this is part of cross?  
16 In theory, will there be more redirect?

17 THE COURT RECORDER: We are on the record.

18 THE COURT: No -- or do you want to be on the  
19 record? Yes?

20 MR. ROBERTS: I don't need to be on the  
21 record. I just answered Dr. Smith. There -- I will  
22 have an opportunity, I assume, to do redirect --

23 THE COURT: Of course.

24 MR. ROBERTS: -- after cross?

25 THE WITNESS: Understood.

1 MR. ROBERTS: Thank you.

2 THE COURT: Okay. Now let's go on the  
3 record.

4 And are we on?

5 THE COURT RECORDER: Yes.

6 THE COURT: Okay. For the record, these  
7 clips are going to be -- I would like to have an idea  
8 of what they are so that --

9 MR. CHRISTIANSEN: Sure. The first one,  
10 Judge, will be sort of the mirror of Mr. Roberts'  
11 questioning of Dr. Stokes relative to what is the  
12 appropriate numbers to use pre- or post-tax dollars,  
13 whether he's supposed to consider income tax brackets  
14 and those things.

15 THE COURT: Okay.

16 MR. CHRISTIANSEN: The second one would be  
17 the Lucido, which is the other case that Your Honor  
18 has, impeachment material, including amounts,  
19 et cetera.

20 And the third would be the final issue that  
21 the Court ended the day on of Dr. Barin -- Katy Barin  
22 surviving Dr. Khiabani and her estate inheriting her  
23 claim for loss of income.

24 THE COURT: Okay. Should those all be cross  
25 or should some of those start with direct?

1 MR. CHRISTIANSEN: I think they all should be  
2 cross, Your Honor.

3 MR. ROBERTS: I -- I believe that's correct,  
4 Your Honor.

5 THE COURT: Are you?

6 MR. ROBERTS: I'm fine with that.

7 THE COURT: It's your witness.

8 MR. ROBERTS: It's my witness, Your Honor,  
9 but it's also beyond the scope of his report. So --

10 THE COURT: Right.

11 MR. ROBERTS: -- you know, we would object to  
12 it being offered just on that basis.

13 THE COURT: Understood.

14 THE WITNESS: Are we going to do a redirect  
15 after each thing, Your Honor, if there is any?

16 THE COURT: I imagine.

17 MR. ROBERTS: Yes.

18 MR. CHRISTIANSEN: So remind me to stop,  
19 then.

20 MR. ROBERTS: Yeah, stop.

21 MR. KEMP: It will be easier to cut it up.

22 THE COURT: Yes. Go on.

23 MR. CHRISTIANSEN: May I proceed?

24 THE COURT: Mr. Christiansen?

25 MR. CHRISTIANSEN: Thank you.

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RECROSS-EXAMINATION

BY MR. CHRISTIANSEN:

Q. Dr. Smith, I want to talk to you a bit about the figures you used when calculating economic loss.

A. Yes.

Q. Isn't it true that the overwhelming majority of jurisdictions -- jurisdictions, including Nevada, use a gross number and do not include taxes?

MR. ROBERTS: Objection. Calls for a conclusion of law.

THE COURT: Sustained.

BY MR. CHRISTIANSEN:

Q. Have you written a book on this issue in part?

A. There's a book with some case law, yes.

Q. "Economic Hedonic Damages" by yourself?

A. And a coauthor.

Q. Okay. And do you conclude in there that -- that it is a small minority of states that allow taxation?

A. I think we show that by account, yes.

Q. And Nevada is not one of them; correct?

A. That's my understanding.

Q. And if you were to allow taxation, and the

1 Court were, in -- to allow income tax brackets and the  
2 like in, then the court -- in those limited  
3 jurisdictions that do it, the court has to undertake an  
4 evaluation, or a multiplier, of the tax to increase a  
5 jury's verdict; correct?

6 MR. ROBERTS: Objection to form.

7 THE WITNESS: Well -- so I think --

8 THE COURT: Overruled.

9 THE WITNESS: I think the book addresses this  
10 in a personal injury case. In a personal injury case,  
11 a person is -- in most states, we're not going to take  
12 taxes out of what we show is the loss.

13 But, here, we're not looking at the earnings  
14 of the person; we're looking at the probable economic  
15 support. And so when a person earns money, if they're  
16 injured, they want the money they earned. But when  
17 there's a probable loss of economic support, then  
18 there's various subtractions. And that reality is  
19 people will pay income taxes. So taxes will not be  
20 available as economic support to a -- to a family  
21 member of a decedent.

22 BY MR. CHRISTIANSEN:

23 Q. Okay. When you did it in the Lucido matter,  
24 did you take taxes out of it?

25 A. Well, there, we looked at the total amount

1 available to the estate. Now, the estate has  
2 obligations --

3 Q. Okay.

4 A. -- including to pay taxes.

5 Q. So let's just be practical about this,  
6 Dr. Smith.

7 If the Court tells the jury the income tax  
8 bracket of Dr. Khiabani was, in 2017, 39 percent, and  
9 we're having a trial in 2018, when Congress has changed  
10 the income tax brackets, isn't there a serious risk the  
11 award will be not based on current law but will be  
12 based on the tax law of previous years?

13 A. I've read the new tax code. And for  
14 high-income earners, it's almost imperceptibly. It's  
15 the middle and lower classes who got the significant  
16 benefit.

17 Q. There's different tax brackets, right,  
18 between the years?

19 A. It's only very, very minimal.

20 Q. Yes or no, Dr. Smith?

21 A. Well --

22 Q. Different tax brackets?

23 A. Tiny, yes.

24 Q. Okay. And the tax bracket from last year  
25 doesn't apply to an award given this year; fair?

1           A.    I didn't memorize the brackets. I can't say  
2 for certain that the top bracket didn't change.

3           Q.    And, finally -- or, additionally, if an  
4 economic award is given to the boys, Aria and Keon  
5 Khiabani, and it's an economic award -- not a  
6 pain-and-suffering award, an economic award -- Uncle  
7 Sam's going to want his percentage of that award;  
8 correct? They're going to be expected to pay taxes on  
9 an economic award?

10          A.    That's a question I don't know the answer to.  
11 That's a question for a tax expert. I have seen  
12 different types of awards in different types of cases  
13 are subject -- may or may not be subject to it. It's  
14 not something I've spent time trying to memorize.

15          Q.    All of these reasons and uncertainties is why  
16 almost no jurisdictions consider taxes in these  
17 calculations; right? Because Uncle Sam figures out  
18 taxes at the end the day with the persons that receive  
19 the money; fair?

20          A.    That -- I don't believe that's the reason.

21          Q.    You don't believe what's the reason?

22          A.    What you just said.

23          Q.    Okay. Well, if we have a trial and the judge  
24 lets the defense put into evidence the income tax  
25 bracket of Dr. Khiabani, and a jury, based upon that



1 introduction of evidence, reduces their award by  
2 35 percent -- you with me so far?

3 A. Yes.

4 Q. -- and then the boys get an economic award  
5 reduced by 35 percent that, because it's economic,  
6 Uncle Sam says they want -- he wants the boys' income  
7 tax on that, then the boys' award gets reduced even  
8 further; correct?

9 A. It's my understanding, just based on my 30  
10 years -- and I will tell you I'm not a tax expert --  
11 that, in personal injury, such matters are generally  
12 exempt from taxes, not for wrongful discharge and not  
13 for other kinds of things, but --

14 Q. You think economic -- you think economic loss  
15 and awards are exempt from income tax? Really?

16 A. I know that in personal injury, I can nearly  
17 guarantee it, yes.

18 Q. No. Awards for pain and suffering, medical  
19 expenses --

20 A. I -- I'd just tell you I've looked at this  
21 issue enough to -- to tell you I don't think you're  
22 correct.

23 Q. All right. And the overwhelming majority of  
24 states, including Nevada, do not allow income tax into  
25 evidence; fair?

1           A.    In a personal injury matter, yes.

2           Q.    Thank you.

3

4                               REDIRECT EXAMINATION

5 BY MR. ROBERTS:

6           Q.    And, Dr. Smith, I -- I believe you may have  
7 presented me with a gift of a signed copy of your book  
8 at some point; is that correct?

9           A.    It's very useful as a paper weight, yes.

10          Q.    But I don't have it here. But correct me if  
11 I'm wrong. Is it true that nowhere in your book do you  
12 say that income tax should not be deducted from the  
13 available pool from which a jury can determine loss of  
14 probable support?

15          A.    Absolutely. You are correct.

16          Q.    And the part of your book Mr. Christiansen  
17 just kept talking about, that the majority of states  
18 exclude income taxes, is when you're dealing with  
19 compensation for a personal injury, not --

20          A.    Not a fatal injury.

21          Q.    -- not a wrongful death statute which  
22 requires that the jury's award be based on loss of  
23 probable support; correct?

24          A.    Correct. A nonfatal injury, the person gets  
25 the same income as if they had gotten it from their

1 employer.

2 Q. Right. And you're not arguing that the  
3 amount the jury wants to award should be reduced by  
4 35 percent to account for taxes? I mean, that's  
5 nowhere in your opinion, is it?

6 A. I -- I haven't expressed that opinion, but,  
7 from the gross amount of money he would have had, there  
8 would have been some amount due.

9 Q. Which would have reduced the pool from which  
10 it's up to the jury to decide how much of that  
11 available pool would have been like -- more likely than  
12 not, given to the children had he lived?

13 A. Yes.

14 Q. Okay. And -- and I know you said you're not  
15 a tax expert, but since Mr. Christiansen got into it,  
16 let me ask you a couple of questions which you may know  
17 about.

18 What the jury's trying to do here is  
19 determine how much the children would have received  
20 from their father had he lived to his normal life  
21 expectancy; right?

22 A. Yes.

23 Q. If he had lived to his normal life  
24 expectancy, Dr. Stokes has opined that his income  
25 starts at just about a million and goes up until he

1 retires; correct?

2 A. Yes.

3 Q. So the numbers that they put in front of the  
4 jury assume that Dr. Khiabani is going to make over a  
5 million a year; right?

6 A. Yes.

7 Q. Okay. Do you anticipate that if you assume  
8 he's going to make over a million a year, is he going  
9 to stay in the top tax bracket?

10 A. Undoubtedly.

11 Q. What's more speculative, the chance that  
12 Dr. Khiabani can keep making a million a year and not  
13 pay federal taxes or how much he's going to give to his  
14 children once they're adults?

15 A. He's going to certainly face taxes. It's an  
16 inevitability.

17 Q. It's not very speculative, is it, that he'll  
18 have to pay tax on his income?

19 A. No. And if you do give significant sums to  
20 your children, that's subject to gift tax.

21 Q. That does get to my point. If he had lived,  
22 he would have paid taxes. And he would have had a sum  
23 left over after taxes, personal consumption, what he  
24 spent on himself, savings that he's putting away for  
25 retirement?

1 A. Yes.

2 Q. Were you aware that Dr. Stokes said that the  
3 income of almost 400,000 a year after he retired would  
4 come from savings?

5 A. I heard that, yes.

6 Q. So if he's given all of his leftover money  
7 after his personal consumption to his kids and his  
8 wife, he doesn't have that savings to draw from that  
9 Dr. Stokes predicted; right?

10 A. Correct. You can't double-count.

11 Q. Okay. But, in any event, he makes money, he  
12 pays his taxes, he takes care of the other things for  
13 himself?

14 A. Yes.

15 Q. He has money left over, and he decides to  
16 give his kids 50,000 bucks. Is that taxable?

17 A. There would be some gift taxes on it.

18 Q. Right. Anything over 14,000 has a gift tax;  
19 right?

20 A. Correct.

21 Q. So there's no double taxation here at all.  
22 Had he lived, he would have paid taxes, and the  
23 children would have paid tax on anything they received  
24 in the form of a gift over 14,000; right?

25 A. There's both -- both taxes, yes, the -- the

1 income and the gift.

2 Q. Okay. Thank you very much. Appreciate it,  
3 Dr. Smith.

4

5

RECROSS-EXAMINATION

6 BY MR. CHRISTIANSEN:

7 Q. Doctor, just let me read from your book for  
8 you. "As discussed in Chapter 3, deductions from gross  
9 earning capacity are usually required in a wrongful  
10 death case to reflect the expenditures by a deceased  
11 exclusively on himself had he not died."

12 Did I read that right, gross?

13 A. Yes.

14 Q. Okay. That's not post-tax, right; that's  
15 gross.

16 A. Well, that's a deduction. But what's left  
17 over, then, is the -- we don't go into what we do with  
18 the leftover.

19 Q. Is it your opinion -- tell me what your --  
20 what your opinion is as an expert who does this all the  
21 time. For what probable -- what number should we use  
22 for a probable support calculation before or after  
23 taxes? For a jury -- not for experts, for a jury to be  
24 told?

25 A. Candidly, I'm almost never -- I don't recall

1 being asked about that. I have assumed somehow the  
2 courts have managed that issue without me. And so I  
3 don't recall ever having a -- just don't recall ever  
4 having to offer an assessment of that. I thought the  
5 courts had these matters --

6 Q. Right. I mean, you've never been -- ever in  
7 your testimony here in the -- I think you told the  
8 judge a couple of dozen times you've testified here in  
9 Nevada?

10 A. Yes.

11 Q. And you've never once testified about  
12 post-tax money being awarded in a probable support case  
13 ever in Nevada, have you?

14 A. Correct. But I've never said taxes wouldn't  
15 apply to a person's income that they may then use to  
16 support children.

17 Q. I'm not arguing with you. You always use  
18 gross numbers when doing your calculation for probable  
19 support?

20 A. Correct. That's different from saying I say  
21 gross numbers are not -- I don't say gross numbers  
22 can't be reduced. I just don't. We don't take the  
23 next step.

24 Q. Ever?

25 A. Have not.

1 Q. And you don't reduce it?

2 A. I don't take that next step.

3 MR. CHRISTIANSEN: Thank you, sir.

4 MR. ROBERTS: Nothing further, Your Honor.

5 THE COURT: Okay. Very good.

6 MR. ROBERTS: We'll say Dr. Smith is probably

7 correct. It probably is an issue for the Court.

8 THE COURT: We are going on to do two?

9 MR. CHRISTIANSEN: Sure. Which is just the  
10 Lucido stuff that Your Honor ruled was inappropriate  
11 for in front of jury and wanted me to do this so you  
12 could think about whether it would be played later.

13 THE COURT: Okay.

14 BY MR. CHRISTIANSEN:

15 Q. Dr. Smith, I want to talk --

16 MR. ROBERTS: Your Honor, as clarification, I  
17 don't recall that being your ruling.

18 THE COURT: No, that wasn't my ruling, but --

19 MR. CHRISTIANSEN: I thought it was. I'm  
20 sorry. What was --

21 THE COURT: No, my ruling was that it -- that  
22 it -- it was a different category and that --

23 MR. CHRISTIANSEN: Oh, you just wanted me to  
24 make a record of it, I think, for this?

25 MR. ROBERTS: A record.



1 MR. CHRISTIANSEN: You're right. You're  
2 right. I misspoke.

3 BY MR. CHRISTIANSEN:

4 Q. In the Lucido case, Dr. Smith, you testified  
5 that adult children in areas of loss of household,  
6 family accompaniment services should receive awards;  
7 correct?

8 A. Well, I calculated one, yes.

9 Q. Similarly, you calculated -- for the area of  
10 loss of household, family advice, counsel, guidance,  
11 instruction, and training services, you calculated  
12 amounts for adult children?

13 A. Yes.

14 Q. And by adult, I think they're 34, 32, and 27  
15 in that case?

16 A. Yes.

17 Q. You further calculated amounts -- did I say  
18 for family accompaniment services already?

19 A. That was the last you mentioned, yes.

20 Q. Loss of value of life?

21 A. Yes.

22 Q. And loss of society and relationship?

23 A. Yes.

24 Q. And in loss of society and relationship, the  
25 calculations for 32-, 34-, and 27-year-old children all

1 exceeded \$2 million.

2 A. The report said it was a benchmark analysis.  
3 It was an example. But the -- the example did show it  
4 at that level, yes.

5 Q. Just in excess -- just under 2.1 million for  
6 each of the three adult children?

7 A. That's -- I didn't memorize it, but that's  
8 likely, yes.

9 Q. And those were -- are areas that you  
10 frequently opine heirs are entitled to recover under  
11 those categories?

12 A. Well, I don't opine about the law, but I give  
13 calculations and opinions about what the amounts would  
14 be, yes.

15 Q. And you did that in the Lucido case, and  
16 that's what I was attempting to get into when it was  
17 objected to?

18 A. Yes.

19 MR. CHRISTIANSEN: That's all from me, Your  
20 Honor.

21 I don't know if you want to talk about that,  
22 Lee.

23 MR. ROBERTS: Your Honor, I don't have any  
24 questions. I think I've already made a record on  
25 this --

1 THE COURT: Yes.

2 MR. ROBERTS: -- outside the presence of the  
3 jury. Thank you.

4 THE COURT: Okay. And then we're going to  
5 our third clip.

6 MR. CHRISTIANSEN: Yes, Your Honor.

7 THE COURT: And --

8 MR. CHRISTIANSEN: This is just the --  
9 Dr. Barin's, had she -- the issue of had she survived  
10 versus her estate. Is that fair, Your Honor?

11 THE COURT: Correct.

12 BY MR. CHRISTIANSEN:

13 Q. Dr. Smith, right as the jury was -- the last  
14 questions posed to you by myself dealt with  
15 calculations in a case where a spouse survived a  
16 decedent.

17 Do you remember those questions?

18 A. Yes.

19 Q. And your off-the-cuff answer to me was that  
20 you always leave all the money to the spouse in life  
21 and in death.

22 A. Well, when we do a personal injury of a man  
23 who's got a surviving spouse, we assume she will be  
24 receiving the amount we calculate after his personal  
25 consumption, yes.

1 Q. And so if Katy Barin were alive today, you  
2 would be agreeing with Dr. Stokes that she would be  
3 entitled to roughly \$15 million?

4 A. Yes.

5 Q. And when Katy Barin passed, her estate  
6 inherits whatever claim she may or may not have;  
7 correct?

8 A. Of course, she wouldn't have that much money  
9 by then, but -- had she lived and had he lived, but  
10 yes.

11 Q. All right. Had she been here at the time of  
12 trial, you would have no criticisms of Dr. Stokes'  
13 opinions?

14 A. Correct.

15 Q. The whole amount would go to Dr. Barin?

16 A. If she were alive, I wouldn't have an issue  
17 with the prospect that she would be the claimant  
18 expecting to receive that, yes.

19 MR. CHRISTIANSEN: Court's indulgence.

20 THE COURT: Yes.

21 BY MR. CHRISTIANSEN:

22 Q. And if she were alive --

23 THE COURT: I would like to see you at the  
24 bench.

25 MR. CHRISTIANSEN: Sure, Judge.

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

3 BY MR. CHRISTIANSEN:

4 Q. Dr. Smith, the Court corrected me on an  
5 issue. If Katy Barin were to have survived under our  
6 wrongful death statute and were here at the time of  
7 trial, you would be dividing the economic loss between  
8 her and her two sons; correct? Or tell me how you  
9 would divide it. Better question.

10 A. My report would simply say this was what  
11 would be available for the survivors. I wouldn't  
12 allocate.

13 Q. That would be the gross amount?

14 A. Yes.

15 Q. The whole 15 million?

16 A. Correct. Available for the survivors, and  
17 the assumption is that the wife would be receiving and  
18 granting to the children. We don't assume children  
19 have a direct right to an allocation. I've never seen  
20 any percentages about that.

21 Q. And if, in fact, there were an award when  
22 Katy Barin was alive, and you've told me what you  
23 would -- how your report would read then, and then she  
24 were to have passed, you wouldn't seek to take the  
25 award back because she passed; right?

1           A.     That's a very strange hypothetical, but -- so  
2 this is not an economic issue at that point.

3           MR. CHRISTIANSEN: All right. That's it.

4           Thanks, Judge.

5           THE WITNESS: Thank you.

6

7                           FURTHER REDIRECT EXAMINATION

8 BY MR. ROBERTS:

9           Q.     Okay. So, Dr. Smith, let's clarify a little  
10 bit about your opinions about life expectancy.

11                  Back when the jury was in the box and you  
12 were being questioned by Mr. Christiansen, he was  
13 asking you about would your calculations go to the life  
14 expectancy of the father when you were considering  
15 things like emotional support to the kids; right?

16           A.     True.

17           Q.     Okay. And when you said that, you were  
18 assuming the life expectancy of the children was going  
19 to be longer than the father; right?

20           A.     Yes.

21           Q.     Okay. So let's say that a child died to a  
22 parent and you were considering loss of emotional  
23 support.

24                  Would you look at the life expectancy of the  
25 decedent or the life expectancy of the parent at that

1 point?

2 A. The parent, because what you really want is  
3 at what point would there be no more relationship and  
4 no more support? So whoever is expected to die  
5 earlier, statistically speaking, at that point you  
6 wouldn't continue on the love and affection. It would  
7 end some day. The question is how does it end? Who's  
8 going to die first?

9 Q. Who's going to die first?

10 A. Right.

11 Q. So whether it's economic support or emotional  
12 support, you're looking at the life expectancy -- the  
13 shortest life expectancy, whether it's the decedent or  
14 the heir?

15 A. Correct. And when we look at economic  
16 support, we usually look at how long a person may work.

17 Q. Very good. So let's go back to April 18th,  
18 2017, when Dr. Khiabani died.

19 At that point, as Mr. Christiansen said,  
20 whatever claim that -- Katy Barin had a claim under the  
21 wrongful death statute; correct?

22 A. Yes.

23 Q. Assume, hypothetically, that Katy Barin's  
24 life expectancy on the day Dr. Khiabani died was less  
25 than two years.

1           A.    Yes.

2           Q.    Would she at that point have a claim for  
3 Dr. Barin -- for Dr. Khiabani's full life expectancy,  
4 or would her claim for lost support be limited to her  
5 shorter life expectancy?

6           A.    Her shorter life.

7           Q.    Okay. So in looking at the claim of her  
8 estate and loss of probable support, you're going to  
9 now look at who's -- which is shorter, her life  
10 expectancy or Dr. Khiabani's life expectancy, in the  
11 absence of this accident?

12          A.    Right. Who -- who is going to require  
13 support for how many years and where is it going to  
14 come from. So if someone's only got two years left to  
15 live, then they're only going to require two years of  
16 support.

17          Q.    Very good. And, in fact, now that we know  
18 Dr. Barin died on October 12th, her estate's claim for  
19 loss of probable support would have been the support  
20 she received from April 18th, 2017, when Dr. Khiabani  
21 died, until October 12th of 2017, when she died;  
22 correct?

23          A.    Correct.

24               MR. ROBERTS: Okay. Thank you, Doctor.  
25



1                   FURTHER RECROSS-EXAMINATION

2   BY MR. CHRISTIANSEN:

3           Q.    Dr. Smith, when Mr. Roberts talks to you  
4 about somebody's life expectancy, you don't ever  
5 determine life expectancy from anything but a  
6 statistical chart; right? You get the chart that's in  
7 the statute, and you say it's a -- statistically,  
8 they're going to live to be -- to age whatever.

9           A.    Well, I don't make any individual  
10 adjustments. I'm often told so-and-so has got this or  
11 that and they may -- not unusual where I'm told here's  
12 a certain number of years the jury will hear, which is  
13 different from the table. I certainly --

14          Q.    And you do that because to consider otherwise  
15 would encourage, for example, a defendant that has  
16 caused the death of one spouse just to get rid of the  
17 other one, theoretically, because it would cut off the  
18 cause for the compensation; correct?

19               MR. ROBERTS: Objection. Prejudice outweighs  
20 the probative.

21               THE COURT: I'm sorry. I didn't hear that.

22               MR. ROBERTS: Prejudice outweighs probative.  
23 The scenario of someone intentionally killing a spouse  
24 to keep them from getting a claim for loss support --

25               MR. CHRISTIANSEN: I just said

1 hypothetically.

2 MR. ROBERTS: -- seems a little unusual. If  
3 this went to the jury, we would object to that  
4 scenario. I don't think anyone's killed off Dr. Barin  
5 so she couldn't receive a claim for loss support.

6 MR. KEMP: Judge, that is the classic example  
7 discussed in law school in every torts class, that  
8 you're better off running -- backing up and killing the  
9 person if it could -- if it could cut off the amount.  
10 We talk about that in every single torts class.

11 And that's the flaw in their analysis.  
12 They're not using a life expectancy of Dr. Barin;  
13 they're trying to use the fortuitous event that she had  
14 a short life expectancy to get a windfall in this case.

15 If she'd lived, they would get -- have to pay  
16 the 15 million. They've admitted that. Now, for the  
17 benefit of her dying --

18 THE COURT: Let's go ahead. And I'm going  
19 to -- it's -- it's really not -- I understand what  
20 you're saying, Mr. Kemp, about what was learned in law  
21 school, but it's -- it's really --

22 THE WITNESS: It's not economics, Your Honor.

23 THE COURT: I think that perhaps a different  
24 type of illustration might be more instructive for the  
25 jury --

1 MR. CHRISTIANSEN: Let me ask it a different  
2 way.

3 THE COURT: -- if this clip goes to them.  
4 Sustained.

5 BY MR. CHRISTIANSEN:

6 Q. What you told me, Dr. Smith, is that you  
7 always use in your reports the gross amount. You put  
8 the total in and you sort of leave it up to the judge  
9 instructing the jury on who gets what.

10 A. Well, on what the likely level of support  
11 would be needed for the various parties. I don't ever  
12 recall hearing it divided when the children are home  
13 because it's the -- what's the word I'm looking for? --  
14 the parent -- the person responsible for the children.

15 Q. Right. They're still minors and the mom's  
16 still got to take care of them?

17 A. Yes. So I don't hear of minors getting  
18 awards. And once they're out of the house, they don't  
19 get -- if the mom's in the house, it's the mom who gets  
20 the money.

21 Q. I just want to show you --

22 MR. CHRISTIANSEN: May I approach the  
23 witness, Your Honor?

24 THE COURT: Yes.

25 /////

1 BY MR. CHRISTIANSEN:

2 Q. I'm showing you our pattern jury instruction  
3 for wrongful death claims. And all these things we're  
4 talking about -- the age of the deceased, the health of  
5 the deceased, the respective life expectancies -- are  
6 those things, just according to the instruction, that a  
7 jury must consider or may consider?

8 A. It says may.

9 Q. So it's for the jury to possibly consider;  
10 they're not forced to take it as true?

11 A. Apparently that's the instruction says, yes.

12 MR. CHRISTIANSEN: Nothing else, Your Honor.

13 THE COURT: Okay.

14 MR. ROBERTS: No further questions, Your  
15 Honor.

16 THE COURT: No further questions.

17 MR. ROBERTS: Thank you.

18 THE COURT: Are we done with Clip 1, 2, and  
19 3? Yes? Clips 1, 2, and 3?

20 MR. CHRISTIANSEN: Yes, Your Honor. That's  
21 all.

22 MR. ROBERTS: May the witness be excused,  
23 Your Honor?

24 THE COURT: Yes. Thank you very much.

25 MR. ROBERTS: Sorry about the flight,

1 Dr. Smith.

2 THE WITNESS: Oh, no, it's okay.

3 THE COURT: Is there anything else that was  
4 left? Anything in general that we need to --

5 MR. CHRISTIANSEN: I don't think so, Judge.

6 MR. ROBERTS: Darrell?

7 MR. BARGER: Nothing I can think of.

8 THE COURT: How we doing on the two -- on the  
9 two -- I'm sorry -- depositions?

10 MR. BARGER: We'll have it done by Monday  
11 morning.

12 THE COURT: Okay.

13 MR. ROBERTS: You can get an update Sunday.  
14 We're going to be together Sunday.

15 MR. BARGER: It will either be played then or  
16 not. We'll get it figured out with Kendelea. You  
17 won't have to worry about it.

18 MR. KEMP: So our plan is Monday we're going  
19 to do Mr. Hoogestraat?

20 THE COURT: Speak a little bit louder,  
21 please.

22 MR. KEMP: Monday we're going to do  
23 Mr. Hoogestraat?

24 MR. BARGER: I don't know about that order.  
25 We're going to do Carhart, Hoogestraat, and if we do

1 Krauss, we'll have Krauss in there. And then what?

2 MR. ROBERTS: Carhart and Hoogestraat and  
3 Krauss all on Monday?

4 MR. BARGER: I'm just telling Will that's who  
5 we're doing. Who knows? It won't be done Monday, no.  
6 It could be Tuesday -- it will be Tuesday afternoon.

7 MR. KEMP: You think we'll be done Tuesday  
8 now?

9 MR. BARGER: I think so.

10 MR. KEMP: Yeah, Judge, because we are -- and  
11 I've told this to Mr. Terry. We are still deciding  
12 whether or not we want to call our one rebuttal expert.  
13 That will probably take, I would think, an hour.

14 MR. ROBERTS: And there's also a  
15 possibility -- we have Detective Salisbury, the chief  
16 investigating officer, subpoenaed and available next  
17 week. The thing that we're going to try to figure out  
18 this weekend is, in light of the Court's ruling  
19 excluding all of his conclusions and opinions, whether  
20 or not we need him for any of his objective  
21 observations at the scene or whether we think we've  
22 covered that through the experts.

23 I believe we're leaning toward thinking we've  
24 covered it through the experts and we don't need to --  
25 we'd still like to put on his opinions, but in light of

1 the Court's ruling, we may not bring him.

2 THE COURT: Okay. Mr. Barger, when you say  
3 that we're going to be ready Monday morning with those  
4 depositions, what exactly does that mean?

5 MR. BARGER: I mean, depending -- you gave us  
6 a tentative strong feeling, so --

7 THE COURT: Yes.

8 MR. BARGER: -- if those strong feelings are  
9 expressed as an order, we're ready to go.

10 MR. ROBERTS: But if there's any danger at  
11 all of opening the door to the sideshow of the  
12 investigator, then we are going to withdraw the  
13 testimony. That's why we want to make sure the Court's  
14 ruling is firm.

15 THE COURT: Okay.

16 MR. ROBERTS: It's not as if it's a live  
17 witness and we can go further than we're arguing; it's  
18 all in writing before the Court.

19 THE COURT: So I need to issue an order.

20 MR. BARGER: Yes, that would be correct, Your  
21 Honor.

22 THE COURT: Okay.

23 MR. BARGER: That's why I say, it's -- it's  
24 ready to go once we receive your order.

25 THE COURT: Got it. Okay.

1 All right. Then I believe we're going to  
2 meet at 1:00 p.m. on Sunday at the offices --

3 MR. ROBERTS: Did we decide Lewis & Roca, I  
4 believe, Your Honor?

5 MR. SMITH: Yes.

6 MR. BARGER: And I --

7 MR. KEMP: Is there any some sort of  
8 arrangement we have to do to get in? Or how does that  
9 work?

10 MR. SMITH: We will make sure the elevator is  
11 marked.

12 THE COURT: Okay.

13 MR. BARGER: I assume it's okay if I don't  
14 attend that. Thank you.

15 THE COURT: All right. Have a great evening,  
16 everyone.

17 MR. ROBERTS: Thank you, Your Honor.

18 THE COURT: Thank you, everyone, for your  
19 help.

20 (Thereupon, the proceedings  
21 concluded at 3:36 p.m.)

22

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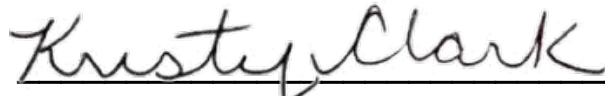
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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
PROCEEDINGS.

A handwritten signature in cursive script that reads "Kristy Clark". The signature is written in dark ink and is positioned above a horizontal line.

KRISTY L. CLARK, CCR #708

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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

KEON KHIABANI and ARIA KHIABANI,  
minors by and through their Guardian, MARIE-  
CLAUDE RIGAUD; SIAMAK BARIN, as  
Executor of the Estate of Kayvan Khiabani,  
M.D. (Decedent); the Estate of Kayvan  
Khiabani, M.D. (Decedent); SIAMAK BARIN,  
as Executor of the Estate of Katayoun Barin,  
DDS (Decedent); and the Estate of Katayoun  
Barin, DDS (Decedent);  
  
Plaintiffs,

Case No.: A-17-755977-C  
Dept. No.: XIV

**MOTOR COACH INDUSTRIES, INC.'S  
OPPOSITION TO PLAINTIFFS' TRIAL  
BRIEF REGARDING ADMISSIBILITY  
OF TAXATION ISSUES AND GROSS  
VERSUS NET LOST INCOME**

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v.  
MOTOR COACH INDUSTRIES, INC., a  
Delaware corporation; MICHELANGELO  
LEASING INC. d/b/a RYAN'S EXPRESS, an  
Arizona corporation; EDWARD HUBBARD, a  
Nevada resident; BELL SPORTS, INC. d/b/a  
GIRO SPORT DESIGN, a Delaware  
corporation; SEVENPLUS BICYCLES, INC.  
d/v/a PRO CYCLERY, a Nevada corporation,  
DOES 1 through 20; and ROE  
CORPORATIONS 1 through 20,

Defendants.

Hearing Date:

Hearing Time:

9  
10 On March 12, 2018, Plaintiffs filed a Trial Brief regarding Admissibility of Taxation Issues  
11 and Gross Versus Net Lost Income. The Plaintiffs' Trial Brief is essentially a motion to exclude  
12 evidence of taxes Dr. Khiabani would have paid had he lived ("Motion"). Defendant Motor  
13 Coach Industries, Inc. ("MCI"), by and through its attorneys of record, hereby opposes the Motion  
14 and seeks to admit evidence of taxes previously paid by Dr. Khiabani so the jury can receive a  
15 more realistic view of the money Dr. Khiabani would have had available for the support of his  
16 family had he lived. Based on the following Memorandum of Points and Authorities, the  
17 pleadings and papers on file herein, and any argument presented at the time of hearing on this  
18 matter, this Court should deny the Motion.

19 DATED this 18th day of March, 2018.

20 /s/ D. Lee Roberts, Jr.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

In the Motion, Plaintiffs argue that the Court should prohibit MCI from introducing evidence related to the impact of income taxes on the amount of “loss of probable support” damages arising under Nevada’s wrongful death statute. But, as explained in more detail below, such evidence is admissible under Nevada’s wrongful death statute. Leading treatises, including the Restatement (Second) of Torts, and courts across the country, including the Supreme Court of the United States, agree that evidence related to the impact of income tax on the amount of “loss of probable support” damages in a wrongful death action is admissible. All of these authorities recognize that precluding such evidence would result in an unfair and unrealistic amount of damages. Further, such a result would render the Nevada Legislature’s use of “probable” in “probable support” meaningless. There is nothing “probable” about an amount of support damages that ignores the inevitable impact of income taxes. Indeed, in this case the probative value of such evidence is heightened because income taxes will have a significant impact on the amount of “probable support” damages as Dr. Khiabani was in the very highest tax bracket. MCI should be permitted to introduce evidence related to the impact of income taxes on the amount of “loss of probable support” damages.

**II. LEGAL ARGUMENT**

In Nevada, relevant evidence is generally admissible. NRS 48.025. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.015. In pertinent part, relevant evidence “is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.” NRS 48.035(1). “Because all evidence against a [party] will on some level ‘prejudice’ (*i.e.*, harm) the [party], NRS 48.035(1) focuses on ‘unfair’ prejudice.” *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011). “Unfair prejudice” appeals to “the emotional and sympathetic tendencies of a jury rather than the jury’s intellectual ability to evaluate evidence” or promotes “decision on an improper basis.” *Id.* (internal quotation marks omitted).

1 Here, as explained below, evidence related to the impact of income taxes on the amount of  
 2 “loss of probable support” damages is permitted under Nevada law and is highly probative,  
 3 particularly in this case where the monetary impact is so significant. Plaintiffs’ arguments to the  
 4 contrary lack merit. Further, keeping in mind the significant probative value of such evidence, any  
 5 risk of confusion, prejudice, or speculation falls well short of warranting exclusion.

6 **A. Evidence related to the impact of income taxes on “loss of probable support”**  
 7 **damages is permitted under Nevada law and highly probative.**

8 Nevada’s wrongful death statute, NRS 41.085, sets forth the type of damages a plaintiff can  
 9 recover in a wrongful death action. *Alsenz v. Clark Cty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d  
 10 285, 286 (1993). The statute provides, in pertinent part, that an heir may recover pecuniary  
 11 damages for the heir’s “loss of probable support.”

12 In Nevada, a district court should interpret a statute according to its plain terms if it is clear  
 13 and unambiguous. *Badger v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 39, 373 P.3d 89, 93  
 14 (2016). The court should not interpret a statute in such a way as to render language in the statute  
 15 meaningless. *Id.* at 94. Indeed, the Nevada Supreme Court has previously recognized that the  
 16 Legislature, in constructing the wrongful death statute, “carefully chose the words ‘*probable*  
 17 *support.*’” *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (emphasis added).

18 Leading treatises, when discussing “loss of probable support” damages in the context of a  
 19 wrongful death action, have concluded that evidence related to the impact of income taxes should  
 20 be admitted. In fact, the Restatement (Second) of Torts goes as far to call this conclusion obvious.  
 21 Restatement (Second) of Torts § 914A. Specifically, the Restatement states that the damages  
 22 recoverable under a wrongful death statute measured by the contributions that the deceased would  
 23 have made to the heirs had the deceased lived (such as the loss of probable support damages under  
 24 the Nevada Wrongful Death statute), “*obviously could not be equivalent to [the deceased’s] gross*  
 25 *earnings, as he could not have given [the heirs] funds that [the deceased] spent on himself or*  
 26 *paid in taxes or used for other purposes; and an appropriate percentage of [the deceased’s]*  
 27 *expected earnings, taking into consideration these various types of expenditures, is proper.*”  
 28

1 *Id.* (emphasis added).<sup>1</sup>

2 Stein on Personal Injury Damages echoes this sentiment. *See* Stein on Personal Injury  
3 Damages, § 3:8 (3d ed.) (October 2017 Update). When discussing loss of support damages in a  
4 wrongful death case, Stein states that “gross earnings are obviously not available for the support of  
5 the family” because “gross earnings are reduced by the amount of income taxes withheld at the  
6 source.” *Id.* In reaching this conclusion, Stein reasons that “[u]ntil the taxes have been paid,  
7 nothing is available for . . . the support of the family.” *Id.*

8 Dobbs on Remedies is in accord. *See* Dan B. Dobbs, 2 Law of Remedies § 8.6(4), at 504 (2d  
9 ed. 1993). Dobbs notes the difference between loss of support damages in wrongful death actions  
10 and economic damages in injury actions. *Id.* Specifically, Dobbs provides that “because the  
11 measure of damages in wrongful death cases gives the survivors only the contributions the  
12 deceased would have made but for the death, and because these contributions could not have  
13 included any sums that would have been paid as taxes, it has been commonly thought that income  
14 tax effects should be considered in death cases *even when not considered in injury actions.*” *Id.*  
15 (emphasis added).

16 Many courts across the country have agreed with these leading treatises. The Connecticut  
17 Supreme Court’s reasoning in *Floyd v. Fruit Industries* on this exact issue is particularly  
18 instructive. 136 A.2d 918, 925 (Conn. 1957). There, the court held that to preclude evidence  
19 related to the impact of income taxes on future support would be “unjust, unrealistic, [and] unfair:”

20 Obviously, if loss to the decedent had he lived is the test, as it must be  
21 under the survivorship theory of our law, the probable income taxes of the  
22 decedent must be deducted from his probable lifetime net earnings to get  
23 any fair or proper basis for assessing reasonable compensation for the loss  
24 caused by the destruction of his earning capacity. It would be difficult to  
25 conceive of a more unjust, unrealistic or unfair rule than one which would  
26 lead a jury to base their allowance of reasonable compensation for the  
27 destruction of earning capacity on the hypothesis that no income taxes  
28 would be paid on net earnings. For all practical purposes, the only usable  
earnings are net earnings after payment of such taxes.

*Id.* at 925. More recently, the Connecticut intermediate court of appeals followed *Floyd* and took

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<sup>1</sup> The Nevada Supreme Court regularly looks to the Restatement (Second) of Torts. *See, e.g., Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. 322, 326, 302 P.3d 1099, 1102 (2013).



1 it one step further, holding that in wrongful death actions, which require a determination of  
 2 damages for loss of support, jurors “must be instructed that, in calculating such damages, they are  
 3 to subtract income taxes and necessary personal living expenses.” *Tesler v. Johnson*, 583 A.2d  
 4 133, 136 (Conn. Ct. App. 1990).

5 The Supreme Court of the United States reached the same conclusion as the Connecticut  
 6 Supreme Court when interpreting federal law. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493  
 7 (1980). In *Liepelt*, the Court had to determine whether damages analogous to “loss of probable  
 8 support” damages in a wrongful death action under federal law – “pecuniary benefits which the  
 9 beneficiaries might have reasonably received” – should take into account income tax. *Id.* In  
 10 deciding that evidence related to the impact of income tax should be admitted, the Court reasoned  
 11 that “[i]t is his after-tax income, rather than his gross income before taxes, that provides the **only**  
 12 **realistic measure** of his ability to support his family. It follows inexorably that the wage earner’s  
 13 income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he  
 14 dies.” *Id.* (emphasis added).

15 Prior to the Supreme Court’s decision, the Ninth Circuit reached the same conclusion when  
 16 interpreting the same federal law. *Burlington N., Inc. v. Boxberger*, 529 F.2d 284, 291 (9th Cir.  
 17 1975). In *Burlington*, the Ninth Circuit held that where “annual gross income is such that future  
 18 taxes would have a substantial effect, evidence of the decedent’s past and future tax liability  
 19 should be admitted if a reasonably fair and accurate estimate of his lost future income is to be  
 20 assured.” *Id.*

21 The Seventh Circuit reached the same conclusion when interpreting Illinois law. *See In re*  
 22 *Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 701 F.2d 1189, 1196-98 (7th Cir. 1983)  
 23 (citing cases that followed this approach under North Carolina, Rhode Island, District of  
 24 Columbia, Iowa, Missouri, and New Jersey law).<sup>2</sup> In *Air Crash*, the Seventh Circuit held that

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26 <sup>2</sup> See also *Canavin v. Pac. Sw. Airlines*, 148 Cal. App. 3d 512, 544, n. 3, 196 Cal. Rptr. 82, 104, n. 3 (Ct. App. 1983)  
 27 (Work, J., dissenting) (stating that “[i]t is just and logical to admit evidence of, and a corresponding deduction to  
 28 account for, future income taxes in all cases, subject to the trial court’s discretion” and citing cases from all over the  
 country that agree). In the Reply, Plaintiffs will likely hinge their argument on the notion that inadmissibility is the  
 majority approach. Support for this notion, however, is outdated. The majority notion is easily traced back to a 1959  
 (footnote continued)

1 failing to adjust loss of support damages for income taxes would render the award “partially  
 2 punitive.” *Air Crash*, 701 F.2d at 1198; *Beim v. Hulfish*, 83 A.3d 31, 44 (N. J. 2014) (“Evidence  
 3 regarding potential income taxes permits the factfinder to more accurately evaluate the decedent’s  
 4 lost financial contributions.”).

5 In reaching the same conclusion, the Fourth Circuit, like Dobbs, focused on the difference  
 6 between loss of support damages in a wrongful death case and economic damages in a personal  
 7 injury case. *Mosley v. United States*, 538 F.2d 555, 559 (4th Cir. 1976). To highlight this  
 8 difference, the court relied on a law review article from noted professor Charles Alan Wright,  
 9 which stated that “I think a good argument can be made for ignoring income tax in computing  
 10 damages in a suit for personal injuries, but that it is ***completely unsound*** to use earnings before tax  
 11 as a measure in a death action.” *Mosley*, 538 F.2d at 559 (quoting Charles Alan Wright, 19 Ohio  
 12 S.L.J. 157 (1958)) (emphasis added).

13 Finally, the Tenth Circuit actually determined that evidence of the impact of income taxes on  
 14 loss of support in a wrongful death action would be admissible under Nevada law. See *United*  
 15 *States v. Sommers*, 351 F.2d 354, 360 (10th Cir. 1965). In *Sommers*, the Tenth Circuit was tasked  
 16 with assessing the propriety of an award of damages in a wrongful death action under Nevada law.  
 17 351 F.2d at 359. Although the language of Nevada’s wrongful death statute at the time slightly  
 18 differed from today’s language, the intent was the same as today’s loss of probable support  
 19 language – the “amount which survivors may receive is to be determined from income which it is  
 20 estimated would have been available to them from prospective future earnings of the deceased had  
 21 he lived.” *Id.* at 360. In assessing this measurement of damages, the Tenth Circuit stated the

22  
 23 A.L.R. This 1959 A.L.R., however, has been superseded by a more recent A.L.R. The more recent A.L.R. does not  
 24 suggest that a majority of courts treat income tax evidence as inadmissible in wrongful death cases. See *Canavin*, 148  
 25 Cal. App. 3d at 539, 196 Cal. Rptr. at 100 (Staniforth, J., concurrence) (citing 63 A.L.R. 1392, 1398 to support the  
 26 majority notion, which has been superseded by 16 A.L.R. 4th 589 (1982), which does not support the majority notion).  
 27 Also, many of the cases that suggest that inadmissibility is the majority rule actually discussed the use of income tax  
 28 evidence in injury cases as opposed to wrongful death cases. As pointed out by Dobbs, the analysis related to the use  
 of income tax evidence in a personal injury case is irrelevant to the analysis in a wrongful death case because the  
 nature of the damages are different. The concurrence in *Canavin* cited above falls victim to this same faulty logic.  
 See *Canavin*, 148 Cal. App. 3d at 539, 196 Cal. Rptr. at 100 (Staniforth, J., concurrence) (relying heavily on  
*Henninger v. Southern Pacific Co.*, 250 Cal. App. 2d 872, 879, 59 Cal. Rptr. 76 (1967), which was an injury case, not  
 a wrongful death case).

1 obvious: “[n]o doubt the income available to the survivors would be after income taxes had been  
2 withheld.” *Id.*

3 Here, there is no doubt that under Nevada’s wrongful death statute, evidence related to the  
4 impact of income taxes on “loss of probable support” damages is permitted. Prohibiting such  
5 evidence would contravene the clear intent of the Nevada Legislature’s use of “probable support”  
6 in the wrongful death statute by rendering the use of the word “probable” completely meaningless.  
7 As discussed in the cases cited above, there is nothing “probable” or realistic about an amount of  
8 damages that ignores the impact of inevitable income taxes. Indeed, to deny the admission of such  
9 evidence would be to give Plaintiffs the chance to recover an *improbable* amount of “support.”

10 Further, in this case, evidence related to the impact of income taxes on the amount of “loss of  
11 probable support” is highly probative of a fact in consequence – the amount of “loss of probable  
12 support” damages. The impact of income taxes on the amount of “loss of probable support”  
13 damages sought by Plaintiffs stretches into the millions of dollars. In a case of this magnitude, to  
14 award “probable support” damages without taking into consideration a significant inevitable  
15 consideration like federal income taxes would be, as stated by the Connecticut Supreme Court,  
16 particularly “unjust, unrealistic, [and] unfair.”

17 **B. Plaintiffs’ arguments that Nevada law prohibits the introduction of evidence**  
18 **related to the impact of income taxes on the amount of “loss of probable**  
**support” damages lack merit.**

19 In the Motion, Plaintiffs argue that evidence related to the impact of income taxes on the  
20 amount of “loss of probable support” damages is not permitted. In doing so, Plaintiffs primarily  
21 rely on one inapplicable Nevada case and three cases from other states. As explained below, none  
22 of these arguments are persuasive.

23 To begin, Plaintiffs rely on a single Nevada case – *Otis Elevator Co. v. Reid*, 101 Nev. 515,  
24 521, 706 P.2d 1378, 1382 (1985). *See* Motion, p. 3. *Otis Elevator*, however, is inapposite. There,  
25 the Court discussed whether the district court should have instructed the jury that personal injury  
26 awards are exempt from income tax. *Id.* The Court held that “tax instructions are appropriate  
27 only in special circumstances when the likelihood that the jury will consider tax consequences is  
28 magnified by discussion of tax-related issues during the trial.” *Id.* at 522, 706 P.2d at 1382. This

1 holding has no bearing on the nature of “loss of probable support” damages arising under  
2 Nevada’s wrongful death statute.

3 Next, Plaintiffs rely on a case out of California – *Henninger*. See Motion, p. 4. *Henninger*,  
4 like *Otis*, has nothing to do with the issue presented here. *Henninger* merely discusses the use of  
5 the same jury instruction at issue in *Otis*. See *Henninger v. S. Pac. Co.*, 250 Cal. App. 2d 872,  
6 878, 59 Cal. Rptr. 76 (Ct. App. 1967).

7 Next, Plaintiffs rely on a Washington case – *Hinzman*. See Motion, p. 4. Yet, *Hinzman* is  
8 distinguishable. In *Hinzman*, the type of recovery is different than the type of recovery available  
9 under Nevada law. Again, Nevada’s wrongful death statute provides for “loss of probable  
10 support” damages. In *Hinzman*, however, the court, when discussing income tax, focused on “loss  
11 of earning power.” See *Hinzman v. Palmanteer*, 501 P.2d 1228, 1231 (Wash. 1972), disapproved  
12 of by *Wooldridge v. Woolett*, 638 P.2d 566 (Wash. 1981). Loss of earning power does not feature  
13 the same directive to consider the impact of income taxes like “loss of probable support.” Further,  
14 in *Hinzman*, the court even recognized that “[w]here extremely high income is involved,”  
15 “injustice to a defendant from ignoring future taxes might outweigh injustice to a plaintiff from  
16 reducing an award of damages to allow for a speculative tax element.” 501 P.2d at 1233. That is  
17 exactly the situation in the case at bar.

18 Finally, Plaintiffs rely on a Second Circuit case – *McKee*. But, in *McKee*, the Second Circuit  
19 actually criticized the law that forced it to ignore income tax. In *McKee*, the Second Circuit  
20 followed authority out of the New York Court of Appeals, which held that wrongful death  
21 damages should be based on gross income, not net income. See *McKee v. Colt Elecs. Co.*, 849  
22 F.2d 46, 48 (2d Cir. 1988) (citing *Johnson v. Manhattan & Bronx Surface Transit Operating*  
23 *Auth.*, 519 N.E. 2d 326 (N.Y. 1988)). In following this precedent, the Second Circuit voiced its  
24 contempt for the New York rule:

25 New York's rule reflects a policy choice made for reasons that are,  
26 perhaps, best understood by its own legislators and judges. However  
27 desirable may be New York’s fictional tax-free world when calculating  
28 lost hypothetical future income, such a fiction nevertheless collides  
harshly with the real world when we seek to determine, in the context of a  
wrongful death suit, the amount of income a decedent actually spent on  
himself.

1 *McKee*, 849 F.2d at 49; *see also* (Dorsey, J., concurrence) (“New York has opted for an unreal, tax  
2 free world in dealing with loss of income.”).

3 Moving to Plaintiffs’ statutory arguments, Plaintiffs contend that the portion of Nevada’s  
4 wrongful death statute providing that “[t]he proceeds of any judgment for damages awarded under  
5 this subsection are not liable for any debt of the decedent” should impact this Court’s analysis.  
6 *See* Motion, p. 5 (citing NRS 41.085(4)). But this language has nothing to do with calculating  
7 “probable support,” and thus, has no impact here.

8 Finally, Plaintiffs argue that the Court should not admit evidence of income taxes because  
9 Nevada’s wrongful death statute does not contain a direct statutory directive to do so. Motion, pp.  
10 2-3, 5. This argument rings hollow. For instance, Nevada’s wrongful death statute does not  
11 explicitly instruct the Court to limit “loss of probable support” damages to the expected life span  
12 of the decedent. But the Court obviously allows life-expectancy evidence because the expected  
13 life span of the decedent directly relates to the amount of lost “probable support.” Taking it one  
14 step further, Nevada’s wrongful death statute does not explicitly instruct the Court to introduce  
15 evidence about the decedent’s income. But the Court obviously allows such evidence (as opposed  
16 to using the national average) because the decedent’s income directly relates to the amount of lost  
17 “probable support.” The impact of income tax is no different and no less obvious. The impact of  
18 future income tax directly relates to the amount of lost “probable support.” Thus, such evidence  
19 must be admissible.

20 **C. The danger of unfair prejudice, confusion, or misleading the jury does not**  
21 **outweigh the significant probative value of the income tax evidence.**

22 Most prominently, Plaintiffs argue that considering income taxes invites undue speculation  
23 into the calculation of “loss of probable support” damages. Motion, p. 3. The Supreme Court of  
24 the United States has rejected this argument. *Liepelt*, 444 U.S. at 494. In *Liepelt*, the Court  
25 pointed out that while predicting income tax requires speculation – the law may change, earnings  
26 may change, new deductions may become available – predicting the amount of income tax is no  
27 more speculative than the multiple other future issues an expert must address – “future  
28 employment itself, future health, future personal expenditures, future interest rates, and future  
inflation.” *Id.*

1 In addition, the Ninth Circuit has called this speculation argument raised by Plaintiffs  
 2 “weak.” *Burlington*, 529 F.2d at 292. In doing so, the Ninth Circuit, like the Supreme Court,  
 3 pointed out that ““future taxes are no more speculative than many other items that go into  
 4 prophecies about future losses in this uncertain world of ours.”” *See id.* (quoting II F. Harper & F.  
 5 James, *Law of Torts* 25.12 (1956)). Indeed, in comparison to the unknowns related to life  
 6 expectancy, income tax seems concrete. It has been said that taxes are one of the only two  
 7 certainties in this life.<sup>3</sup>

8 Next, Plaintiffs argue that evidence of income taxes will hopelessly confuse the jury and  
 9 prejudice Plaintiffs. Motion, pp. 3-4. Yet, if the jury can hear and comprehend days of  
 10 complicated expert testimony on topics as niche as reducing \$20 million in lost income to present  
 11 value and calculating personal consumption based on statistical tables, the jury can certainly hear  
 12 and comprehend evidence related to the relatively simple and familiar matter of income tax. The  
 13 Supreme Court of the United States agrees: “We . . . reject the notion that the introduction of  
 14 evidence describing a decedent’s estimated after-tax earnings is too speculative or complex for a  
 15 jury” because “the trial bar and the trial bench has developed effective methods of presenting the  
 16 essential elements of an expert calculation in a form that is understandable by juries that are  
 17 increasingly familiar with the complexities of modern life.” *Liepelt*, 444 U.S. at 494. The Ninth  
 18 Circuit also agrees: “today’s sophisticated jurors surely have had some personal experience in  
 19 determining their own tax liability, and in today’s tax – conscious society we are confident that  
 20 our juries and judges, with the aid of such competent expert testimony as may be received, are  
 21 equal to the task and the responsibility.” *Burlington*, 529 F.2d at 293. There is no reason that the  
 22 jury in this case should be held in any lower esteem.

23 ///

24 ///

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27 <sup>3</sup> “Our new Constitution is now established, and has an appearance that promises permanency; but  
 28 in this world nothing can be said to be certain, except death and taxes”. — Benjamin Franklin, in a  
 letter to Jean-Baptiste Leroy, 1789.

1 Finally, Plaintiffs argue that accounting for income taxes would unfairly prejudice Plaintiffs  
 2 because they will face “tax consequences for sums awarded for lost income or support.” Motion,  
 3 p. 6. This is not accurate. In *Liepelt*, the Supreme Court addressed this issue and explained that  
 4 “wrongful-death awards . . . are not taxable income to the recipient.” 444 U.S. at 496.<sup>4</sup> Therefore,  
 5 regardless of whether the jury is instructed to consider income taxes, Plaintiffs will get a tax  
 6 windfall if they recover substantial loss of support damages. Had he lived, Dr. Khiabani would  
 7 have provided support in after tax dollars<sup>5</sup>, and then the children would have been taxed again on  
 8 all they received in financial support over \$15,000 per year.<sup>6</sup>

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20 <sup>4</sup> See Lawsuits, Awards, and Settlements Audit Techniques Guide (May 2011), available at  
 21 <https://www.irs.gov/pub/irs-utl/lawsuitesawardssettlements.pdf> (“Claims for wrongful death usually encompass  
 22 compensatory damages for physical and mental injury, as well as punitive damages for reckless, malicious, or  
 23 reprehensible conduct. As a result, both claims may generate settlement amounts. Any amounts determined to be  
 compensatory for the personal physical injuries are excludable from gross income under IRC § 104(a)(2). Any  
 amounts determined to be punitive are not excludable under IRC § 104(a)(2). This is true regardless of whether the  
 punitive amounts are received prior or subsequent to the August 20, 1996, amendment. See *O’Gilvie v. United States*,  
 519 U.S. 79 (1996).”).

24 <sup>5</sup> **May I deduct gifts on my income tax return?** Available at [https://www.irs.gov/businesses/small-businesses-self-](https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#4)  
 25 [employed/frequently-asked-questions-on-gift-taxes#4](https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#4) (“Making a gift or leaving your estate to your heirs does not  
 26 ordinarily affect your federal income tax. You cannot deduct the value of gifts you make (other than gifts that are  
 27 deductible charitable contributions”).

28 <sup>6</sup> **How many annual exclusions are available?** Available at [https://www.irs.gov/businesses/small-businesses-self-](https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#4)  
[employed/frequently-asked-questions-on-gift-taxes#4](https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#4) (“The annual exclusion applies to gifts to each donee. In other  
 words, if you give each of your children \$11,000 in 2002-2005, \$12,000 in 2006-2008, \$13,000 in 2009-2012 and  
 \$14,000 on or after January 1, 2013, the annual exclusion applies to each gift. The annual exclusion for 2014, 2015,  
 2016 and 2017 is \$14,000. For 2018, the annual exclusion is \$15,000”).

1 **III. CONCLUSION**

2 Based on the foregoing, this Court should permit MCI to introduce evidence and argument  
 3 related to the impact of income taxes on the amount of “loss of probable support” damages. The  
 4 Restatement (Second) of Torts, other leading treatises, numerous states, and the Supreme Court of  
 5 the United States endorse this approach. Further, excluding evidence of income taxes would  
 6 contravene the Nevada Legislature’s use of “probable” in “probable support.” There is nothing  
 7 “probable” about ignoring inevitable and significant income taxes. Indeed, excluding evidence of  
 8 income taxes will allow Plaintiffs to present an “unjust, unrealistic, [and] unfair” amount of  
 9 probable support damages to the jury, particularly in a case of this magnitude. Thus, the Motion  
 10 must be denied.

11 DATED this 18th day of March, 2018.

12 */s/ D. Lee Roberts, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of March, 2018, a true and correct copy of the foregoing **MOTOR COACH INDUSTRIES, INC.'S OPPOSITION TO PLAINTIFFS' TRIAL BRIEF REGARDING ADMISSIBILITY OF TAXATION ISSUES AND GROSS VERSUS NET LOST INCOME** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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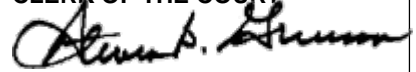
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21 EDWARD HUBBARD

12  
13  
14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 KEON KHIABANI and ARIA KHIABANI,  
17 minors by and through their natural mother,  
18 KATAYOUN BARIN; KATAYOUN BARIN,  
19 individually; KATAYOUN BARIN as  
20 Executrix of the Estate of Kayvan Khiabani,  
21 M.D. (Decedent), and the Estate of Kayvan  
22 Khiabani, M.D. (Decedent),

23 Plaintiffs,

24 v.

25 MOTOR COACH INDUSTRIES, INC. a  
26 Delaware corporation; MICHELANGELO  
27 LEASING INC. d/b/a RYAN'S EXPRESS, an  
28 Arizona corporation; EDWARD HUBBARD, a  
Nevada resident; BELL SPORTS, INC. d/b/a  
GIRO SPORT DESIGN, a Delaware  
corporation; SEVENPLUS BICYCLES, INC.  
d/b/a PRO CYCLERY, a Nevada corporation,  
DOES 1 through 20; and ROE  
CORPORATIONS 1 through 20,

Defendants.

Case No. A-17-755977-C  
Dept.: XIV

**NOTICE OF ENTRY OF ORDER**

1  
2 **NOTICE OF ENTRY OF ORDER**

3 PLEASE TAKE NOTICE that Defendants Michelangelo Leasing d/b/a Ryan's Express and  
4 Edward Hubbard's Findings of Fact and Conclusions of Law and Order on Motion for  
5 Determination of Good Faith Settlement (Filed Under Seal) was entered on the 14<sup>th</sup> day of March,  
6 2018.

7  
8 DATED: March 19, 2018

SELMAN BREITMAN LLP

9  
10 By: /s/ Eric O. Freeman

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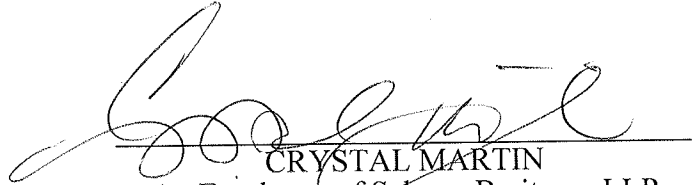
008840  
Selman Breitman LLP  
ATTORNEYS AT LAW

## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Selman Breitman LLP and, pursuant to:

☒ **BY E-MAIL/ELECTRONIC SERVICE:** N.R.C.P. 5(b), I caused the foregoing document to be served upon the persons designated by the parties in the E-Service master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER**, this 19  
day of March 2018.



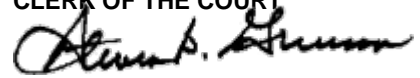
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Steven D. Grierson  
CLERK OF THE COURT

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  
DEPARTMENT XIV

23 DATED MONDAY, MARCH 19, 2018

24 RECORDED BY: SANDY ANDERSON, COURT RECORDER

25 TRANSCRIBED BY: KRISTY L. CLARK, NV CCR No. 708



1 APPEARANCES:

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
David Krauss, Ph.D.	27	89	121, 144	135
Michael Plantz	166			

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
579		35	
582		186	
583		186	
584		186	
573		233	
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1 LAS VEGAS, NEVADA, MONDAY, MARCH 19, 2018;

2  
3 P R O C E E D I N G S

4 \* \* \* \* \*

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

9 THE COURT: Good morning.

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

12 THE COURT: Good morning, everyone.

13 IN UNISON: Good morning, Your Honor.

14 THE COURT: Okay. The jurors are here?

15 THE MARSHAL: Yes, everyone just arrived.

16 THE COURT: Okay.

17 THE MARSHAL: I'll line them up.

18 THE COURT: Anything we need to discuss?

19 MR. CHRISTIANSEN: Judge, just one brief  
20 matter. I don't know if the defense would mind asking  
21 their next witness to step out in the hallway while we  
22 discuss his testimony, Mr. Krauss.

23 Judge -- are we ready, Your Honor?

24 THE COURT: Yes, I'm ready. We're on the  
25 record.

1 MR. CHRISTIANSEN: Your Honor, so the next  
2 witness is the gentleman that was here last week,  
3 Mr. Krauss. Late last night -- or might even have been  
4 early this morning -- Mr. Roberts forwarded a new group  
5 of slides he intends to use with this witness.  
6 Included in that is the witness evidently intends to  
7 testify under the notion of suggestions of warning from  
8 MCI would have changed the outcome of this accident.

9 THE COURT: I'm sorry. Repeat that.

10 MR. CHRISTIANSEN: Sure.

11 I'm just looking -- maybe I can approach,  
12 Your Honor, and give you a copy of what Mr. Roberts  
13 gave me.

14 Just give her your slides, Lee?

15 MR. ROBERTS: Sure. That's fine.

16 MR. CHRISTIANSEN: So those are the slides we  
17 got this morning for this witness's presentation, Your  
18 Honor. If you turn to the last page, that starts off  
19 with No. 5, which is, I guess, page 1, 2, 3 -- the  
20 third page, Your Honor.

21 It says, "Any suggestion that warnings from  
22 MCI would have changed the outcome of this accident is  
23 baseless and misguided." And then Point No. 1 says,  
24 "Breidenthal says the effect is within 3 feet, this" --  
25 this is the part I object to. This adds nothing to

1 what drivers already do with bicycles.

2 I believe that runs afoul of the Court's  
3 ruling from March the 14th. I -- I've pulled the  
4 transcript and went through at great length -- that --  
5 because I believe it invades upon both the province of  
6 the jury and is only intended to raise the -- a  
7 criticism of Mr. Hubbard and what he was or wasn't  
8 already doing. And I think that's specifically what  
9 Your Honor precluded this witness from doing last week.

10 So I wanted to raise that initially, and then  
11 just one other point once the Court has handled this  
12 issue.

13 MR. ROBERTS: Your Honor, if -- if the -- I  
14 could have the Court's indulgence.

15 THE COURT: For the record, we're talking  
16 about Dr. David Krauss, and he is the -- the defense  
17 expert with respect to human factors?

18 MR. ROBERTS: That is correct, Your Honor.

19 THE COURT: Thank you.

20 MR. ROBERTS: And if the Court could give me  
21 just a second to locate this in the transcript.

22 THE COURT: Sure. Not a problem.

23 (Discussion was held off the record.)

24 MR. CHRISTIANSEN: Judge, I'm looking at  
25 page 67 from the transcript from last week, March the

1 14th, where the Court says, at line 8 through 11,  
2 quote, I just will absolutely refuse to have, you know,  
3 anything that starts blending into contributory or  
4 comparative fault, close quote.

5 This can't be offered for --

6 THE COURT: Page 67 --

7 MR. CHRISTIANSEN: I'm sorry, Judge. Line 8  
8 through 10, I read to you.

9 MR. ROBERTS: And we've got about 20 pages  
10 here, Your Honor. I apologize. I haven't identified  
11 it yet. The -- the point that I was relying on and  
12 adding, in keeping this in the outline, was the portion  
13 where the Court said that with regard to warnings, that  
14 he would be able to say that their -- based on their  
15 experts, the zone of danger is 3 feet. And that, based  
16 on his own experience in human factors, that is not a  
17 necessary warning for a vehicle such as this to have to  
18 stay 3 feet away from a bicycle. And for that -- I'm  
19 trying to find the exact portion of that, Your Honor.

20 THE COURT: Well -- so you're saying this was  
21 from Thursday p.m.?

22 MR. ROBERTS: Yes. Somewhere between  
23 pages 52 and 70 of the March 14th transcript.

24 THE COURT: I'm trying to get that up.  
25 Afternoon or morning?

1 MR. BARGER: It's Thursday. It has to be  
2 afternoon if it's Thursday.

3 MR. ROBERTS: Wednesday, March 14th.

4 THE COURT: Wednesday or Thursday?

5 MR. CHRISTIANSEN: It's the 14th, Your Honor.

6 MR. ROBERTS: Morning, Your Honor.

7 THE COURT: 14th a.m.? Okay.

8 All right. 14th a.m. It's page 67, 8 --  
9 line 8 ...

10 MR. ROBERTS: And it's at page 54, Your  
11 Honor --

12 THE COURT: Hang on one second. I'm just  
13 looking at page 67.

14 MR. ROBERTS: -- beginning at line 12.

15 THE COURT: Page 54?

16 MR. ROBERTS: Yes.

17 THE COURT: Okay.

18 MR. ROBERTS: Let me know when you're with  
19 me, Your Honor.

20 THE COURT: Line 12. Okay.

21 MR. ROBERTS: So I was just talking about the  
22 portions of his warning opinion that had been excluded.  
23 And you said that -- actually, beginning of line 15,  
24 "Okay. So -- so Dr. Krauss can give opinions or  
25 discuss 3 feet as a safe distance based upon his review



1 of the plaintiffs' experts."

2 And I viewed that as permission for him to  
3 say that, based upon Breidenthal's testimony, the wind  
4 blast effect is within 3 feet, 3 feet would be the safe  
5 distance for any warning. And he doesn't think that  
6 adds anything to what drivers already do.

7 THE COURT: I'm going to -- excuse me one  
8 second. Okay.

9 (Whereupon a short recess was taken.)

10 THE COURT: Okay. So --

11 THE COURT RECORDER: One moment, please.

12 THE COURT: Okay.

13 THE COURT RECORDER: Okay.

14 THE COURT: It's correct, Mr. Christiansen,  
15 that I am not going to allow anything that comes close  
16 to comparative or contributory negligence, because  
17 that's critical. However, Mr. Roberts has had me  
18 review page 54, where I allowed that -- the discussion  
19 of the 3 feet, but I don't think here, this is -- I  
20 don't believe what you've talked about -- let's see.

21 No. 5, concerning these opinions, "Any  
22 suggestion that warnings from MCI would have changed  
23 the outcome of this accident is baseless and  
24 misguided."

25 First bullet point, discussing

1 Dr. Breidenthal, says that the effect is within 3 feet.  
2 If he has an opinion that this adds nothing to what  
3 drivers already do with bicycles, I don't think that  
4 this is alluding to comparative or contributory  
5 negligence on either -- on either side.

6 MR. CHRISTIANSEN: Judge, if you just look at  
7 page 53 -- I know you're right there -- of that exact  
8 same transcript to the last questions --

9 THE COURT: Hold on. Let me look.

10 MR. CHRISTIANSEN: Sure.

11 Mr. Roberts asked for your permission to do  
12 what he's now proposing to do, and you told him no. He  
13 says, "Your Honor, for one, for a point of  
14 clarification, can he testify to that? Can he say that  
15 Dr. Hubbard -- that Mr. Hubbard said he was attempting  
16 to maintain 3- or 4-feet separation, and, therefore,  
17 any warning to maintain at least 3 feet would be  
18 redundant of what he was already attempting to do?"

19 Your answer is, "No. I think that opens the  
20 door to what -- to what I just enunciated,  
21 Mr. Roberts."

22 And, by that, Your Honor, this effort to tell  
23 the Court that Dr. Breidenthal somehow used the 3-foot  
24 mark is misleading. That was something that Mr. Green  
25 talked about, whose testimony has not been entered into

1 evidence in this trial. Dr. Breidenthal did not say,  
2 from my recollection, 3 feet.

3 MR. ROBERTS: And, Your Honor, I -- I do  
4 recall asking the question about Hubbard. And that  
5 comes from his report, where Mr. Hubbard testified that  
6 he was trying to maintain 3 to 4 feet. And, therefore,  
7 it's irrelevant whether he actually did maintain 3 to  
8 4 feet, because the whole point of a warning is for  
9 someone to attempt to do what the warning says. And  
10 if, according to his own testimony, he was already  
11 attempting to do that, a warning would add nothing.

12 So based on the -- what the Court allowed me  
13 to do and did not allow me to do, we took out any  
14 reference to Hubbard and only have him talk about his  
15 opinions about what drivers are already attempting to  
16 do with bicycles, not in any way opining that it would  
17 be negligence not to do so.

18 THE COURT: Well, I think, Mr. Christiansen,  
19 you may be -- what you're reading is a bit different.  
20 Using Hubbard's testimony that he was trying to give  
21 3 feet is different from saying that drivers generally  
22 or typically give 3 feet.

23 MR. ROBERTS: And, Your Honor, just for the  
24 record -- what exhibit number is that?

25 Brian, can you display 260 for the Court and

1 counsel.

2 THE COURT: Because that conversation had a  
3 lot to do with Mr. Hubbard and his driving.

4 MR. KEMP: But he didn't testify to that at  
5 trial. You excluded him from -- from -- you know,  
6 excluded driver negligence. So Hubbard did not come  
7 here to trial and say he tried to maintain 2 or 3 feet.  
8 That's not in the record. Okay? That was a discussion  
9 at the deposition that was excluded by the motion in  
10 limine.

11 So what they're trying to do here is they're  
12 trying to back-door in this 3-foot rule by two  
13 artificial constructions.

14 One, Dr. Breidenthal did not say that the air  
15 blast extended only 3 feet. If you recall,  
16 Mr. Terry -- and he discussed this for at least 20  
17 minutes, about the affect gradually goes down. And he  
18 says it can't be 3 feet -- he says it gets less, but he  
19 didn't say 3 feet. Doctor -- he said -- and  
20 Dr. Breidenthal was not our warnings expert; Dr. Cunitz  
21 was. And Dr. Cunitz said there should be a air blast  
22 warning, period. He didn't say should be a 2-foot,  
23 3-foot, 5-foot; he said there should a warning about  
24 the air blast danger.

25 But the more important thing, I think, is

1 this adds nothing to what drivers already do with  
2 bicycles. So he's saying -- and who's the driver in  
3 this case? It's Hubbard. All right? So you can't  
4 just say, oh, well, we're going to do what drivers  
5 generally do.

6 This adds nothing to what Mr. Hubbard already  
7 does with the bicycle. So what he's saying to the jury  
8 is that Hubbard already knew he should stay 3 feet  
9 away. And if that didn't happen in this case, it's  
10 Mr. Hubbard's fault. That's the real implication here.

11 And this is just a continuation of what they  
12 first tried to do a little more blatantly with the  
13 Nevada law on 3 feet. Now they've -- they've tried to  
14 tie it into testimony from Breidenthal that doesn't  
15 exist about 3 feet. And now they want to do what  
16 drivers know about 3 feet.

17 Well, this is -- first of all, this is  
18 training. How does he know what the drivers were  
19 trained as? And, second of all, Hubbard's the  
20 particular driver in this case.

21 So, you know, I think the whole area is kind  
22 of getting to a forbidden zone, 5, but, definitely,  
23 bullet point 1 is, you know, forbidden, Your Honor.

24 And -- and, you know, he can say -- he can  
25 say that he thinks Breidenthal says 3 feet. We can --

1 we can show on redirect or during closing that that's  
2 just not true. But he can't say this adds nothing to  
3 what drivers already do with bicycles, because he's  
4 saying there, number one, drivers should be trained  
5 about 3 feet; number two, Mr. Roberts told you they're  
6 relying on his review of the deposition testimony -- of  
7 the forbidden deposition testimony about the 3-foot  
8 rule. And so -- so No. 2 should definitely come out,  
9 Your Honor, bullet point, the whole area.

10 MR. ROBERTS: Your Honor, we've displayed  
11 Exhibit 260, which is the Breidenthal opinion summary  
12 prepared by and admitted by -- into evidence by the  
13 plaintiffs.

14 And it talks about the 10-pound push force to  
15 a bicycle within 3 feet. He's relying upon that. If  
16 they want to cross him on what Breidenthal qualified  
17 about that reducing gradually, there is no evidence of  
18 what it is, if anything, past 3 feet in this record.

19 With regard to their expert, Cunitz, who  
20 testified there should be a warning, I agree with  
21 Mr. Kemp. Mr. Cunitz offered the jury and the Court  
22 absolutely no guidance or opinion on what the warning  
23 should be. He just said there ought to be one. They  
24 want to be able to claim that there should be a  
25 warning, without telling the jury what it is or what it

1 would do, and then preclude us from even contesting it  
2 based on basic human factors which would dictate  
3 whether a warning is appropriate.

4 We -- we've excluded any discussion of  
5 Hubbard, but you can't discuss whether a warning should  
6 be given without talking about whether a warning is  
7 necessary in the context of what people normally do.

8 It -- it's --

9 MR. KEMP: Judge, I didn't challenge the  
10 first part of the bullet point, Breidenthal. I said  
11 fine, let them -- let them use that. I said that.  
12 Okay?

13 It's the second part that I think is -- is  
14 not appropriate. This adds nothing to what drivers  
15 already do with bicycles. You know, we excluded the  
16 evidence that Hubbard did not know about the 3-foot  
17 law. He testified that he did not know about the  
18 3-foot law. So this is really his assumption that  
19 drivers do know about the 3-foot law and the drivers do  
20 try to maintain a 3-foot separation.

21 And the only reason to try to get this in is  
22 for negligence. If he was going to come on and say,  
23 "Gee, I know Mr. Hubbard testified explicitly that he  
24 would have heeded a warning," well, I don't think he  
25 would have heeded a warning for X, Y, or Z reason, I

1 don't have any problem with that.

2 But, here, an attempt to say what generic  
3 drivers know and do with bicycles because they can't do  
4 Hubbard, that's just -- goes into training, goes into  
5 driver negligence, goes into the 3-foot law. It's --  
6 it's not an appropriate area, Your Honor. It's just an  
7 attempt to try to get this contributory negligence idea  
8 rolling.

9 MR. ROBERTS: Your Honor, he's not going to  
10 say bus drivers, drivers with a CDL, drivers with  
11 proper training. This is all drivers of all vehicles.

12 And if I could put this in the context of a  
13 McDonald's coffee case. Let's say the -- the assertion  
14 was the coffee cup should have borne a label saying,  
15 "Warning: Do not pour coffee in your lap." A human  
16 factors expert could say that warning is unnecessary,  
17 redundant. Everyone knows and is trying to not pour  
18 hot coffee in their lap. It's silly to have to warn of  
19 that. It doesn't add anything to what people are  
20 already doing.

21 In this case, it's the -- it's the same basic  
22 opinion in the context of the facts of this case.

23 THE COURT: Okay. I'm going to allow the  
24 second sentence. I think that this has to do with this  
25 expert's opinion, and I don't think that it makes his



1 opinion -- it shouldn't be excluded. And I -- I do not  
2 think that this is starting to get close to  
3 contributory or comparative negligence.

4 MR. ROBERTS: And, Your Honor, if I could  
5 confer with the witness before the jury is called in.  
6 What I'm going to suggest, just to make sure that we  
7 don't run afoul or cross any lines here, is just tell  
8 him he can say that, but not to explain why that is or  
9 why he feels that way, just to offer no explanation.

10 I think it's enough that he can say it, and I  
11 think it's common sense enough that -- that it needs no  
12 explanation. But I appreciate the Court's ruling. I  
13 will limit it to -- to that statement.

14 THE COURT: Very good.

15 MR. CHRISTIANSEN: Judge, I have one question  
16 for my cross. And I want to bring it up with Your  
17 Honor before I do anything that you consider running  
18 afoul of your directives. And I've reread, several  
19 times, your ruling from the 14th.

20 In his deposition, Mr. Cunitz concedes he  
21 does not know Nevada law --

22 THE COURT: Mr. Krauss?

23 MR. CHRISTIANSEN: Did I say Cunitz? I'm  
24 sorry. Mr. Krauss.

25 THE COURT: That's okay. I'm starting to

1 get --

2 MR. CHRISTIANSEN: Mr. Krauss. Thank you,  
3 Your Honor. Mr. Krauss --

4 THE COURT: I just wanted to be sure.

5 MR. CHRISTIANSEN: -- at page 34 of his  
6 deposition, says he doesn't know the requirements under  
7 Nevada law for when a warning is necessary. He says he  
8 does not know, is completely unaware.

9 I think that's proper grounds for  
10 cross-examination, that he doesn't know what Nevada law  
11 requires in terms of warnings, but wanted to make sure  
12 Your Honor does not think that somehow opens the door  
13 to the 3-foot driving law that you've kept out.

14 MR. ROBERTS: Well, first of all, Your Honor,  
15 I'm not sure what law it is that would apply to this  
16 case other than the 3-foot law, because there is no  
17 other law --

18 MR. KEMP: Sea Ray --

19 MR. ROBERTS: -- that would require a warning  
20 of the air blast in this case that the Nevada  
21 legislature has passed that I know of. If  
22 Mr. Christiansen can tell me the law that he believes  
23 Mr. Krauss should be aware of and he's not and it's  
24 applicable to the case, I think that's fair game. But  
25 if he just wants to -- to generally say "You don't even

1 know Nevada law, ' when the witness does know the Nevada  
2 law and the 3-foot rule, and did base an opinion on  
3 that, I think, would be entirely improper.

4 MR. KEMP: Your Honor, the Nevada law was not  
5 the Nevada law on the 3-foot rule. The Nevada law that  
6 he was being asked about in his deposition was Sea Ray,  
7 the Nevada law on warnings, that a manufacturer has to  
8 give a warning if known hazard. That was the Nevada  
9 law.

10 And he said he didn't know what the Nevada  
11 law on warnings was. That's what the thrust of it is.

12 MR. ROBERTS: What's the Nevada law on  
13 warnings? They haven't asked for a jury instruction on  
14 it. They can't have the jury speculating about it.

15 MR. KEMP: We have asked for a jury  
16 instruction on warnings, and the Court --

17 MR. ROBERTS: Not on the statute.

18 MR. KEMP: There is no statute on warnings.

19 MR. ROBERTS: You --

20 MR. KEMP: There's Nevada law that comes out  
21 of Sea Ray on warnings. And, typically, a warnings  
22 expert that's presented in a case knows what the law in  
23 the state is on warnings in the state he's testifying  
24 to.

25 So, to our surprise, we asked him if he knew

1 what the Nevada law on warnings was, the Sea Ray  
2 case -- I think we even had the Sea Ray case there, and  
3 he said, "No, I don't know what the Nevada law on  
4 warnings is."

5 So that is the cross. And, you know, here  
6 you got a warnings expert that doesn't even know what  
7 the Nevada law on warnings is? But that should be  
8 allowed in, Your Honor. It doesn't have anything to do  
9 with the 3-foot rule.

10 THE COURT: So your cross-examination that  
11 you are proposing, Mr. Christiansen, has to do --  
12 specifically concerning that, in his deposition,  
13 Dr. Krauss did not know the requirements of Nevada  
14 law --

15 MR. CHRISTIANSEN: Regarding warnings.

16 THE COURT: -- concerning warnings?

17 MR. CHRISTIANSEN: Yes, Your Honor.

18 THE COURT: All right. I will allow that.

19 MR. CHRISTIANSEN: Thank you, Your Honor.

20 MR. KEMP: Yeah, Your Honor. I think that  
21 would be a good thing for Mr. Roberts to cover with his  
22 witness so we don't inadvertently blurt out the 3-foot  
23 statute.

24 MR. ROBERTS: I'll do so, Your Honor.

25 THE COURT: Okay.

1           Then, would you like -- is there something  
2 else?

3           MR. KEMP:   No.

4           MR. ROBERTS:  Anything else?

5           MR. KEMP:   Not from us.

6           MR. CHRISTIANSEN:  That was all, Your Honor.

7           THE COURT:  Okay.  While Mr. Roberts confers  
8 with Dr. Krauss, Mr. Barger and Ms. Works, I would like  
9 to talk to you at the beginning of lunch about the  
10 depositions of Plantz and Pears --

11          MS. WORKS:  Yes, Your Honor.

12          THE COURT:  -- and that issue.  Okay?

13          MS. WORKS:  Okay.

14          THE COURT:  Right before we come back.

15          MS. WORKS:  Thank you, Your Honor.

16          THE COURT:  Thank you.

17          Do we need to amend the exhibit, Counsel?

18          Mr. Barger is here.  I don't know.

19          Actually, no, it does not need to be amended,  
20 Mr. Pears.

21          THE CLERK:  Okay.

22          THE COURT:  I'm allowing the second sentence.  
23 Okay?  I don't believe it needs to be amended because  
24 I'm allowing it in.

25          THE MARSHAL:  Are you ready for the jurors,

1 Your Honor?

2 THE COURT: I don't know. Let's see. I'll  
3 ask Mr. Roberts how he's doing.

4 THE MARSHAL: You guys need a little while  
5 longer?

6 THE COURT: No, not too much longer.

7 MR. KEMP: Mr. Roberts says he needs two more  
8 minutes.

9 THE MARSHAL: Okay. I'll get them lined up,  
10 then.

11 THE COURT: Thanks, Jerry.

12 MR. ROBERTS: Okay, Your Honor.

13 THE COURT: Are you ready, Mr. Roberts?

14 MR. ROBERTS: We -- we also had a  
15 housekeeping matter with regard to some exhibits that  
16 were used with Granat that didn't get admitted. Do you  
17 want to cover those with -- with -- in front of the  
18 jury?

19 MR. KEMP: You need them for him?

20 MR. ROBERTS: No, we'll need them for -- we  
21 can deal with that at the Court's convenience as long  
22 as it's before Mr. Carhart, who will rely on some of  
23 those same exhibits.

24 THE COURT: Okay. So I can bring the jury  
25 in?

1 MR. ROBERTS: Yes, Your Honor.

2 THE COURT: All right. Very good.

3 MR. ROBERTS: So, interestingly, Your Honor,  
4 yesterday, they withdrew their proposed instruction  
5 based on the Sea Ray case. It's withdrawn.

6 MR. KEMP: That was the additional  
7 instruction based on the Sea Ray case. There's already  
8 a warnings instruction. The reason we withdrew it was  
9 because it was cumulative.

10 MR. ROBERTS: Okay.

11 THE MARSHAL: All rise.

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

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

16 THE COURT: Good morning, ladies and  
17 gentlemen.

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

20 THE COURT: I hope you had a good weekend,  
21 and thank you for being here and of service again  
22 today.

23 Madam Clerk, we're going to read roll call.

24 THE CLERK: Yes, Your Honor.

25 Byron Lennon.

1 JUROR NO. 1: Here.  
2 THE CLERK: John Toston.  
3 JUROR NO. 2: Here.  
4 THE CLERK: Michelle Peligro.  
5 JUROR NO. 3: Here.  
6 THE CLERK: Raphael Javier.  
7 JUROR NO. 4: Here.  
8 THE CLERK: Dylan Domingo.  
9 JUROR NO. 5: Here.  
10 THE CLERK: Aberash Getaneh.  
11 JUROR NO. 6: Here.  
12 THE CLERK: Jaymi Johnson.  
13 JUROR NO. 7: Here.  
14 THE CLERK: Constance Brown.  
15 JUROR NO. 8: Here.  
16 THE CLERK: Enrique Tuquero.  
17 JUROR NO. 9: Here.  
18 THE CLERK: Raquel Romero.  
19 JUROR NO. 10: Here.  
20 THE CLERK: Pamela Phillips-Chong.  
21 JUROR NO. 11: Here.  
22 THE CLERK: Gregg Stephens.  
23 JUROR NO. 12: Here.  
24 THE CLERK: Glenn Krieger.  
25 JUROR NO. 13: Here.



1 THE CLERK: Emilie Mosqueda.

2 JUROR NO. 14: Here.

3 THE CLERK: All present, Your Honor.

4 THE COURT: Thank you very much.

5 Do the parties stipulate to the presence of  
6 the jury?

7 MR. KEMP: Yes, Your Honor.

8 MR. ROBERTS: Yes, Your Honor.

9 THE COURT: All right. Very good. We're now  
10 going to continue with the defendants' case.

11 And, Mr. Roberts, you would like to call your  
12 next witness.

13 MR. ROBERTS: Yes. Thank you, Your Honor.  
14 Motor Coach Industries calls Dr. David Krauss.

15 THE MARSHAL: Watch your step, sir. Face the  
16 clerk and raise your right hand.

17 THE CLERK: You do solemnly swear the  
18 testimony you're about to give in this action shall be  
19 the truth, the whole truth, and nothing but the truth,  
20 so help you God.

21 THE WITNESS: Yes.

22 THE CLERK: Please be seated. Please state  
23 your name and spell your first and last name for the  
24 record.

25 THE WITNESS: Sure my name is David Krauss.

1 D-a-v-i-d, K-r-a-u-s-s.

2 DIRECT EXAMINATION

3 BY MR. ROBERTS:

4 Q. Good morning, Dr. Krauss.

5 A. Good morning.

6 Q. Tell the jury a little bit about your  
7 educational background.

8 A. Sure. I received a bachelor of science  
9 degree from the University of Michigan with a major in  
10 biopsychology and cognitive science. I then went to  
11 UCLA, where I got a master's and a PhD in psychology  
12 with a focus on a field called cognitive neuroscience.

13 Q. Cognitive neuroscience?

14 A. That's right.

15 Q. All right. Tell the jury about the focus of  
16 your graduate studies.

17 A. Sure. So I primarily studied vision and  
18 visual perception. That was sort of the focus of my  
19 master's and PhD work. Specifically, I look at sort of  
20 how the brain takes in visual information and processes  
21 it as to what parts of the brain underlie various  
22 visual functions.

23 As part of that work, of course, with  
24 coursework part of cognitive psychology is also related  
25 to -- to what I would consider kind of general

1 information processing, so not just visual information;  
2 issues related to human memory; those types of things.

3 Q. Thank you, Dr. Krauss.

4 Where do you currently work?

5 A. I currently work at a company called  
6 Exponent.

7 Q. And when did you begin working at Exponent?

8 A. Will be 15 years in June.

9 Q. What is your job title?

10 A. I am a principal scientist in our human  
11 factors practice.

12 Q. Okay. Is there anyone else from Exponent  
13 that you're working with on this case?

14 A. Yes.

15 Q. Who is that?

16 A. Michael Carhart.

17 Q. And I believe the jury's going to hear from  
18 Dr. Carhart either this afternoon or tomorrow.

19 A. That's my understanding.

20 Q. What is human factors?

21 A. Sure. So I often describe human factors as  
22 applied cognitive neuroscience. So when you're in the  
23 academic --

24 Q. Try again, Doctor. Go ahead.

25 A. Yeah. So when -- when you're in academia or

1 at a university, there's a lot of sitting in front of a  
2 computer monitor. Something happens. You push a  
3 button in response to that thing happening. And  
4 depending what that thing is, we can learn a lot about  
5 how the brain works.

6 Human factors is simply taking that and  
7 applying it to the real world. So now instead of a  
8 light or a letter or a word popping onto a computer  
9 screen, now we may be a driver in a car. Something  
10 happens out in the world, and what response do you  
11 choose?

12 So it's really taking a lot of those same  
13 concepts and just applying it to the real world.

14 Q. What types of projects do you get involved in  
15 where human factors are an issue?

16 A. The majority of my work is related to vehicle  
17 accidents. So a lot about driver perception and  
18 behavior. But I get cases involving -- for example, I  
19 get trip-and-fall cases. So somebody will trip over  
20 something. Maybe it's nighttime. So I will be brought  
21 in to assess whether or not the thing somebody tripped  
22 over was visible or not.

23 I get cases related to -- or called products  
24 liability cases, which I guess technically this is  
25 here, but where there's an allegation that some product

1 was defective in a way and, had it either had a  
2 different design or a different type of warning, that  
3 maybe the outcome would have been different.

4 I also do some work, though not a lot, but  
5 some work that is not related to litigation. So I  
6 might get, or have many times in my career, companies  
7 have approached me and said, "Hey, we have this  
8 product. It's going to be released into the public.  
9 We want to understand, A, if people can use it how it's  
10 intended. So is it designed well enough that people  
11 can interact with it how we intend? But also is it  
12 safe to use?"

13 So we'll get a bunch of subjects, bring them  
14 in, have them interact with the product in controlled  
15 ways and understand whether or not the design is being  
16 understood as it's intended.

17 Q. Thank you, Dr. Krauss.

18 Do you have any publications that address  
19 human factors issues that are pertinent in this case?

20 A. I do.

21 Q. Tell the jury about those.

22 A. Sure. So I have several peer-reviewed  
23 publications. Like, I have a couple, I think, related  
24 to this case, related to, for example, warning  
25 effectiveness. So if you're provided a warning with a

1 product, what are the factors in the elements of that  
2 warning that may or may not influence whether or not  
3 it's going to change that user's behavior?

4 I have multiple publications on driver  
5 behavior, including a book that came out 2 1/2 years  
6 ago that specifically addresses human factors and  
7 driver perception and behavior.

8 Q. Who uses your book, Dr. Krauss?

9 A. Hopefully, lots of people. A lot of people  
10 like me. You know, I think my -- I'm a known quantity  
11 largely within my profession, so I think there are  
12 other experts who -- who use my book. It's a sort of  
13 a -- a good cumulative resource on driver behavior.  
14 So, issues like perception-reaction time, issues like  
15 where drivers tend to look when they're driving, things  
16 like that.

17 So, really, anyone who's studying driver  
18 behavior I think probably find my book useful. And I  
19 think that's the case.

20 Q. Thank you.

21 MR. ROBERTS: Your Honor, permission to  
22 question Dr. Krauss as an expert in the field of human  
23 factors.

24 THE COURT: You may so testify, yes.

25 /////

1 BY MR. ROBERTS:

2 Q. Okay. Dr. Krauss, you were retained to  
3 give -- to analyze this case and give some opinions as  
4 it relates to the human factors issues that the jury --  
5 that may be helpful to the jury in considering the --  
6 the facts before them; correct?

7 A. That's my understanding, yes.

8 Q. Okay. What issues did your analysis address  
9 for this case?

10 A. Sure. So a couple of them I just mentioned.  
11 So one is related to whether or not a warning of some  
12 kind would have altered the outcome here.

13 I think all of the other issues are somewhat  
14 related to kind of those driver perception behavior  
15 issues. So studying the visibility from inside the  
16 bus, looking at these issues of perception-reaction  
17 time, which I know you've heard about so far.

18 I think those are sort of the main ones as  
19 really kind of what information could have been  
20 provided or was not available at the time of this  
21 accident to either party to -- to help avoid this.

22 Q. Okay. Dr. Krauss, were you able to complete  
23 your analysis for this case?

24 A. I was.

25 Q. And did you have an opportunity to author an

1 expert report dated October 16th, 2017, in order to  
2 provide your opinions to the Court and counsel?

3 A. Yes.

4 Q. Very good.

5 Tell the jury what your analysis consisted  
6 of. What did you go through before you rendered the  
7 opinions in your report?

8 A. Sure. So before the report, of course, I  
9 reviewed a lot of material associated with the case --  
10 a lot of witness depositions, lot of the sort of  
11 emergency personnel reports, those types of things. I  
12 saw the surveillance video, of course, which I know  
13 you're all familiar with.

14 I also performed an inspection -- a site  
15 inspection. I looked at the bus. I looked at an  
16 exemplar bike. And I believe I looked at the incident  
17 bike as well. I don't recall.

18 And then we also performed a sightline  
19 analysis with the actual bus to -- to understand,  
20 again, like I mentioned before, whether there are any  
21 sort of design issues with the bus that may  
22 unreasonably obscure a bicyclist in Dr. Khiabani's  
23 position.

24 Q. And do you have colleagues who work with you  
25 at Exponent?



1           A.    Yes.

2           Q.    And did your colleagues insist -- assist with  
3 your investigation and analysis?

4           A.    They did.

5           Q.    Who helped you on this case?

6           A.    For this case -- for every case I have, I  
7 have what's called -- what we call a project manager.  
8 In this case my project manager, her name is Dr. Amber  
9 Dunning. She's another PhD. And she assisted me with  
10 many of these analyses.

11          Q.    Okay. Did you break down your conclusions  
12 and opinions that you reached after your analysis into  
13 high-level opinions?

14          A.    I did.

15          Q.    Okay. And how many high-level opinions did  
16 you issue in this case?

17          A.    Five.

18               MR. ROBERTS: Your Honor, I would move to  
19 admit Exhibit 579, a three-page exhibit summarizing the  
20 high-level opinions issued by Dr. Krauss.

21               MR. CHRISTIANSEN: I think he needs to lay  
22 the foundation to authenticate it first, Your Honor.

23               MR. ROBERTS: Sure. May I approach, Your  
24 Honor?

25               THE COURT: Okay. So that's sustained.

1 Yes, you may.

2 BY MR. ROBERTS:

3 Q. Okay. Dr. Krauss, I have handed you what's  
4 been marked as Exhibit 579. Could you -- first of all,  
5 have you previously reviewed this exhibit prior to  
6 today?

7 A. Yes.

8 Q. Okay. Do you recognize that as a true and  
9 authentic copy of the summary of your opinions prepared  
10 for this case and drawn from your report?

11 A. I do.

12 Q. Okay. Is that -- does that accurately  
13 reflect your high-level opinions?

14 A. Yes.

15 MR. ROBERTS: Your Honor, I'd move to admit  
16 Exhibit 579.

17 MR. CHRISTIANSEN: No objection, subject to  
18 what we discussed earlier, Your Honor.

19 THE COURT: Understood. I'm going to admit  
20 it.

21 (Whereupon, Defendant's Exhibit 579 was  
22 admitted into evidence.)

23 BY MR. ROBERTS:

24 Q. Thank you. Okay. We have page 1 up here.  
25 Let's tell the jury about your first opinion.

1           A.     Sure.   So the design of the bus affords  
2 drivers ample visibility around the bus such that  
3 sightline restrictions cannot provide an explanation  
4 for this accident.

5           Q.     Okay.   Now, the jury has heard a lot of  
6 testimony in this case about how the design of the  
7 coach has a blind spot and may have impaired a driver's  
8 ability to see a bicyclist, such as Dr. Khiabani in  
9 this case.

10                   Do you agree with that testimony?

11           A.     No.

12           Q.     Okay.   Explain.

13           A.     So there are several reasons here.   So, first  
14 of all, does the bus have objects that you can't see  
15 through?   Of course.   Right?   There is an A-pillar.  
16 There are parts of the bus that are not window that are  
17 not transparent.   So of course there are parts of the  
18 bus that have the ability to obstruct something out in  
19 the world.

20                   With respect to this case, we have a couple  
21 of factors at play here that are really important.

22                   First off, I did a quantitative assessment,  
23 very careful assessment of the blind spot or if there  
24 were blind spots associated with somebody on the bus in  
25 the driver's seat.

1           And turns out the blind spot is a matter of  
2 inches in a location that is really not pertinent to  
3 this case, based off all of the reconstruction of the  
4 testimony.

5           So, generally speaking, I confirmed there was  
6 no spot where Dr. Khiabani could have been completely  
7 obstructed at any time. Regardless of this case and  
8 what happened, there is just no blind spot that would  
9 have obstructed him.

10           That being said, when you look at how this  
11 case happened, we have the bus closing in on  
12 Dr. Khiabani at a rate of close to 20 feet per second.  
13 So when we work out all the timing and everything, it's  
14 really about can you see somebody out ahead of you  
15 through the windshield until a time when it matters?

16           And the answer's of course you can. There is  
17 no issue whatsoever with a driver being able to  
18 perceive a bicyclist out in front of the bus,  
19 especially given the speed differentials that we're  
20 talking about in this case.

21           Q. Did you have a chance to look at Exhibit 510,  
22 a driver view that was introduced, I believe, through  
23 Mr. Cohen, prepared by Mr. Cohen? Let me --

24           MR. ROBERTS: May I approach, Your Honor?

25           THE COURT: Yes.

1 MR. ROBERTS: Thank you.

2 THE WITNESS: Yes, I did see this.

3 BY MR. ROBERTS:

4 Q. Okay. And this is already admitted into  
5 evidence, I believe, according to the transcript.

6 So I'm looking at this view, and you can't  
7 see the bicycle and you can just see a portion of the  
8 driver.

9 How does this reconcile with the opinion you  
10 just gave the jury that there's not a significant blind  
11 spot relevant to this case?

12 A. Sure. So we have to take -- any stills we're  
13 shown in this case have to be taken with a grain of  
14 salt. Remember, this maneuver is happening at a  
15 relative speed of about 20 feet per second. So I don't  
16 dispute that this condition existed, but keep in mind  
17 here, half a second prior to this, Dr. Khiabani was  
18 visible in his entirety.

19 We know that glances for drivers out in the  
20 world typically take for a driver on the order of about  
21 one second. Had the driver here looked out toward  
22 Dr. Khiabani --

23 MR. CHRISTIANSEN: Objection, Your Honor.  
24 May we approach?

25 THE COURT: Yeah.

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

3 THE COURT: Ladies and gentlemen, we are  
4 going to take a 20-minute break.

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

12 You are not to conduct any research on your  
13 own relating to this case, such as consulting  
14 dictionaries, using the Internet, or using reference  
15 materials.

16 You are not to conduct any investigation,  
17 test any theory of the case, re-create any aspect of  
18 the case, or in any other way investigate or learn  
19 about the case on your own.

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

24 You're not to form or express any opinion on  
25 any subject connected with this trial until the case is

1 finally submitted to you.

2 Jerry, we're going to take a 20-minute break.

3 THE MARSHAL: Okay. All rise. 20-minute  
4 recess.

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

7 THE COURT: Okay.

8 (Whereupon a short recess was taken.)

9 THE MARSHAL: Please remain seated. Come to  
10 order. Department 14 is back in session.

11 THE COURT: Okay. I've walked through my  
12 analysis again.

13 MR. ROBERTS: And, Judge, before you give us  
14 your analysis, could I bring just a couple of things  
15 from the transcript to the attention of the Court that  
16 might be relevant to your ruling? And this confirms --  
17 simply confirms the argument that I made at the bench,  
18 but we've had such a long trial, I would like just a  
19 couple of minutes to refresh the Court's recollection  
20 to the testimony I was referring to.

21 THE COURT: All right.

22 MR. ROBERTS: Okay. Could I have the ELMO?

23 THE COURT: This is this morning; correct?

24 MR. ROBERTS: Yes. And I can -- actually,  
25 let's see.

1           At the bench -- the thing that triggered this  
2 was when Cohen -- I mean, Dr. Krauss referred to the  
3 driver. He didn't refer to Mr. Hubbard; he referred to  
4 the driver.

5           And this is Cohen's direct testimony, put on  
6 by the plaintiffs. Page 19, lines 1 through 5, of the  
7 Cohen testimony. This is what plaintiffs elicited:

8           "I sat in both the driver's seat as well  
9 as the two front passenger seats on either  
10 side, and so the driver -- the driver would be  
11 Mr. Hubbard?

12           "ANSWER: Correct."

13           Page 32, lines 9 to 21.

14           "And this is what your model indicates  
15 that the driver would have seen when the bus is  
16 in the placement that we have indicated in the  
17 exhibit we admitted; right?

18           "ANSWER: If you were looking in that  
19 direction, you would have seen something  
20 substantially similar to what's on the screen  
21 here."

22           That's their expert on direct saying almost  
23 the same thing that Dr. Krauss said.

24           "This is if he's looking directly at this  
25 direction?



1 "ANSWER: Correct.

2 "QUESTION: If he's looking straight,  
3 obviously, he wouldn't see anything here.

4 "ANSWER: Correct."

5 Page 36. So the reason the driver can't see  
6 the bike is because the dash and the opaque door; is  
7 that correct?

8 "That's right."

9 They put on evidence through their experts of  
10 what the driver could not see, and Dr. Krauss simply  
11 wants to say what the driver could see.

12 "But Mr. Plantz and the bus driver can't?  
13 Mr. Pears can see the bike. Mr. Plantz and the  
14 bus driver can't see the bike, either very  
15 little or none at all."

16 So their expert, Mr. Cohen, testified  
17 extensively to what the driver could see and  
18 specifically to what Mr. Hubbard could see if he was  
19 looking.

20 And now, we go to Sherlock, page 42:

21 "If I'm the driver and I'm sitting here  
22 and the dash structure is here, if you lower  
23 the front surface of that -- or the top surface  
24 of that so that it slopes down from your eye  
25 reference" -- again talking about the driver --

1 "the dash should be sloped downward to give the  
2 driver a better sightline."

3 And now we get right into Mr. Hubbard.

4 Page 74 of Sherlock:

5 "ANSWER: That's not true. The blind  
6 areas greatly hindered Mr. Hubbard's ability to  
7 see Dr. Khiabani. And if you can only see a  
8 tiny portion of a person at risk, are you going  
9 to have a slower response time? Almost  
10 certainly yes."

11 So this confirms the argument that I made at  
12 the bench where they want to put on evidence as part of  
13 their case in chief as to what the driver could see as  
14 to whether -- as to what Mr. Hubbard could see, and  
15 that it was because of the blind spots that the  
16 accident was caused. And we simply want to refute that  
17 testimony by disagreeing as to what the driver could  
18 see.

19 And, as I said at the bench, we still believe  
20 that he should be able to say what Mr. Hubbard could  
21 see based on his investigation because that's what  
22 we're rebutting in their case in chief.

23 We're happy with "the driver," but we've at  
24 least got to be able to talk about what a driver in the  
25 position of Mr. Hubbard reasonably could have seen and

1 whether it could have caused this accident based on the  
2 blind spot observed by our human factors expert.

3 Thank you, Your Honor.

4 MR. KEMP: Your Honor, if you recall, when we  
5 put Dr. -- or Mr. Cohen on the stand, Mr. Terry spent  
6 45 minutes with him using our 3-D visualization to show  
7 images of the bike in front, the bike farther in front,  
8 the bike moving 3 feet over, the bike moving 9 feet  
9 over.

10 We didn't object to that. I didn't make one  
11 single objection because, using the 3-D visualization  
12 to show the actual view lines, that's -- that's one  
13 thing. Okay. That is really more scientific. And so  
14 we put on our angle; they put on their angle through  
15 our expert. So they've already been allowed to do  
16 that, Your Honor.

17 Now, what they want to do is, in addition to  
18 showing the actual sightline -- and that went on for a  
19 long time with Mr. Terry, at least 30 minutes with my  
20 expert. But now, in addition to that, they want to  
21 have this expert testify what the driver could or could  
22 not see in his opinion.

23 And, first of all, what -- what Cohen did was  
24 not really an opinion. It was -- I don't want to use  
25 the exact terminology they use, but that wasn't

1 opinion. That's why Mr. Terry was able to show what he  
2 showed and I could show what I showed. That's the  
3 actual bus, the actual 3-D visualization in the case.

4 This guy wants to give an opinion as to what  
5 the driver could see after they already showed the jury  
6 through Mr. Terry's examination of what he could see.

7 And, first of all, it's cumulative.

8 Second of all, this is an opinion; this isn't  
9 the actual scientific demonstration of what he could  
10 see.

11 But, third of all, they're doing this solely  
12 for purposes of negligence. They're trying to  
13 emphasize to the jury that there was some sort of plain  
14 view here and therefore the only logical explanation is  
15 the driver was negligent. And that goes squarely into  
16 1, which is why we've asked for the curative  
17 instruction to be given at this time.

18 THE COURT: Okay. I've actually gone through  
19 the entire exhibit. And so the -- the general rule  
20 here, in this Court's view, is that the defendant must  
21 be able to rebut the plaintiffs' theory that particular  
22 defect caused the accident without a discussion of the  
23 driver's negligence or lack thereof. That's what I  
24 have been saying the entire time.

25 So with respect to this -- the first -- the

1 first opinion of Dr. Krauss, I've actually taken a look  
2 at it and -- again. And the part that says the design  
3 of the bus affords driver -- drivers ample visibility  
4 around the bus, that has to do with refuting the defect  
5 theory of the plaintiffs.

6 With respect -- with respect to the second  
7 part that starts as "Such that sightline restrictions  
8 cannot provide an explanation for this accident," that  
9 seems to be going to causation, not implying that  
10 because a driver -- it just can't imply the driver  
11 wasn't looking but that the sightline restrictions  
12 provide an explanation for this accident. That goes to  
13 causation.

14 Now, the defense can discuss taking into  
15 consideration the -- the premise for all of this, which  
16 I just enunciated, discuss what the driver can see, not  
17 what the driver did see or did not see. That goes to  
18 the product defect. So it gets a little bit fuzzy.  
19 It's very delicate. But -- but that's a bright line  
20 for you.

21 Now, in -- in this Court's view, my view,  
22 it's okay to say if this is the particular time when  
23 the blind spot prevents the driver from seeing  
24 Dr. Khiabani, then the blind spot could not have caused  
25 this accident because it would be too late. It's

1 not -- it's not -- it doesn't go into the plaintiffs'  
2 theory of the -- it rebuts the plaintiffs' theory of  
3 defect.

4 But the witness cannot say that the bike was  
5 visible and, had the driver looked, he would have seen  
6 him, or looked a second earlier, he would have seen  
7 him, because that goes to contributory negligence. I'm  
8 trying to draw the line as brightly as I can. So  
9 let's -- I -- I went to No. 2. Okay?

10 It says, "Within areas that a proximity  
11 sensor would operate to detect a hazard, at least a  
12 portion of Dr. Khiabani or his bike -- bicycle was  
13 visible to the driver." Okay.

14 This -- this part -- this No. 2 does not say  
15 that the driver didn't see him; it says that the  
16 proximity sensor would not have helped a driver. And  
17 it does -- and it cannot go into whether or not the  
18 driver was doing his job or not doing his job properly.  
19 It's very close, but I'm trying to distinguish this for  
20 you so we don't have problems.

21 No. 3, I just took the time to go through  
22 No. 3. It says, "The way in which Dr. Khiabani  
23 impacted the bus did not afford a typical driver  
24 sufficient time to respond and carry out any sort of  
25 effective maneuver to avoid the accident."

1 I think this is all right. This is the  
2 defense's theory that rebuts the plaintiffs', but this  
3 is only so long as the witness does not elaborate as to  
4 what the driver should have done, because that then is  
5 placing his driving into issue -- is making his driving  
6 an issue, which goes to the comparative or contributory  
7 negligence, which is not allowed. I'm trying to be as  
8 clear as possible. Okay?

9 No. 4 --

10 MR. ROBERTS: And -- and, Your Honor, based  
11 on my discussions with him in preparation, I think he  
12 may have said something in discussions that, you know,  
13 part of -- part of the -- the time you need is to  
14 decide what to do. "Should I brake? Should I  
15 accelerate? Should I turn?"

16 Only in the context of the time it takes to  
17 make a complex decision, without opining as to which he  
18 should have done and --

19 THE COURT: He cannot opine as to what he  
20 should have done, but that's getting a little bit  
21 closer, though, Mr. Roberts.

22 MR. ROBERTS: That's why I brought it up.  
23 And I --

24 THE COURT: That one is getting a little --  
25 it's not evident from just reading this. I think -- I

1 think you have to keep it just very close to -- to what  
2 this opinion is. Okay?

3 MR. ROBERTS: Okay.

4 THE COURT: Because then we don't want to  
5 take the step into the contributory or comparative  
6 negligence.

7 Then No. 4 is, "Even if the bus had been  
8 equipped with a proximity sensor, it would not have  
9 afforded a driver sufficient time to avoid  
10 Dr. Khiabani."

11 And there's a -- a -- like a -- not a graph,  
12 but a table. This appears to me -- and then,  
13 underneath, it says "times it would have taken  
14 Dr. Khiabani to travel 3 feet laterally at various  
15 speeds for different varying angles. The times are all  
16 well below typical driver perception-reaction time."

17 At least with what you have here, without  
18 hearing from the witness, this table looks all right  
19 because it's talking about human factor general driver  
20 response time, which is correlated where -- with where  
21 the proximity sensors would have noticed or would have  
22 picked up Dr. Khiabani, his position.

23 But I'm not sure here that the --

24 MR. ROBERTS: And --

25 THE COURT: -- the speeds of reaction time,



1 I'm concerned a little bit because none are specific to  
2 this driver or what a driver should be doing.

3 MR. ROBERTS: And I've eliminated, based on  
4 the Court's ruling from last week, almost all the  
5 foundation that I was going to go into about the four  
6 stages of perception-reaction time, the difference  
7 between a braking and a steering perception-reaction  
8 time that was gotten into with Mr. Sherlock.

9 As I understood the Court's ruling, you  
10 didn't want a lot of foundation or repetition of  
11 evidence already in the case.

12 THE COURT: Correct.

13 MR. ROBERTS: So I just planned to have him  
14 give these opinions without going into it. But just as  
15 a matter of science -- this has already come out --  
16 there is a difference in perception-reaction time based  
17 on both the complexity of the decision and whether the  
18 ultimate action is braking or steering or something  
19 else.

20 So I didn't plan to get -- to get into any of  
21 that, Your Honor, simply based on the Court's caution  
22 about cumulative evidence, other than to say that,  
23 based on the various possible angles and the -- and the  
24 time it would take to traverse that angle of possible  
25 speeds, all of that is less than any of the opinions

1 which have come out in this case as to the  
2 perception-reaction time of the average driver;  
3 therefore, there wasn't time to react.

4           And he's going to base -- give an example  
5 that if we had a glass bus, completely transparent,  
6 with proximity sensors, there's no additional  
7 information that the driver could have received that  
8 was not already available to the driver. And that's  
9 why a proximity sensor would not have made a difference  
10 in this case.

11           THE COURT: Give me one second.

12           MR. ROBERTS: I'm just trying to give the  
13 Court as much information as I can to not have to come  
14 in again.

15           THE COURT: With respect to No. 4, it seems  
16 that -- my concern is that it appears in the graph that  
17 none -- none of these times are specific to this driver  
18 or what a driver should be doing.

19           MR. ROBERTS: Correct. Those are all times  
20 with regard to the time it would take a bicyclist to  
21 traverse a 3-foot distance based on their angle of  
22 approach. And that chart actually goes more toward 3,  
23 but it also goes to 4, as the Court noted.

24           THE COURT: Mr. Christiansen -- Christiansen?

25           MR. KEMP: Judge, I don't think we had a

1 serious objection to 4 -- bullet point 4.

2 THE COURT: Okay. Then you've heard what  
3 I've discussed with respect to 1, 2, 3, 4. We've  
4 already reviewed 5.

5 MR. KEMP: Yeah.

6 THE COURT: Just remember, the -- the general  
7 rule, which is, "Defendant must be able to rebut per  
8 plaintiffs' theory that a particular defect caused the  
9 accident without discussion of the driver's negligence  
10 or lack thereof."

11 I have this here for myself to guide me  
12 through this. Okay? And that's what I've been  
13 discussing with you for -- I don't want to say weeks,  
14 but days at least.

15 Do you need to talk to your witness?

16 MR. ROBERTS: Yes, I think I should, Your  
17 Honor.

18 MR. CHRISTIANSEN: Judge --

19 MR. KEMP: What about the -- I think, as --

20 THE COURT: Well --

21 MR. KEMP: -- as close as we're flying in and  
22 out of these areas -- and I think no one can say we're  
23 not running right up against driver negligence over and  
24 over and over again here. As close as we're flying  
25 through these areas, I would again ask that the Court's

1 instruction be read to the jury, so -- so at least they  
2 have some sort of framework for understanding how  
3 driver negligence relates to the case. Because all of  
4 this is an implied suggestion -- I think it's more  
5 explicit than implied -- but at a minimum it's been  
6 implied suggestion to the jury that the driver did  
7 something wrong and there's a driver negligence issue  
8 here.

9           So -- so you've already read it once. I see  
10 no harm to doing it again if we want the jury to decide  
11 the case on the law as opposed to implied negligence  
12 defenses.

13           MR. ROBERTS: Your Honor, I have no  
14 objection. I just don't want the jury to get a skewed  
15 view that they have to disregard everything. If  
16 they're going to be instructed not to consider driver  
17 negligence again, they should also be instructed that  
18 they can consider causation, just so they have a  
19 framework on both sides of the equation.

20           MR. KEMP: The problem with that is we don't  
21 have an agreed-to instruction on this causation issue;  
22 all we have is what the Court read on the negligence.

23           We know that driver negligence isn't a  
24 defense because the Young's Machine court said that.  
25 So if it's just as simple as contributory negligence of

1 the driver is not a defense, I'm happy with that, Your  
2 Honor, because at least that gives the jury a framework  
3 for hearing these attempts to insinuate that driver  
4 negligence is an issue in the case.

5 MR. ROBERTS: Our position is the same, Your  
6 Honor, and I don't think it has to be carefully  
7 crafted. I think if he just wants you to tell them,  
8 "don't consider the negligence of the bus driver," you  
9 can say, "but can consider -- but you have to consider  
10 the entire circumstances of the accident to determine  
11 if the alleged defect caused the accident," or some  
12 kind of --

13 MR. KEMP: I have no problem with something  
14 like that.

15 THE COURT: All right. So --

16 MR. KEMP: What Mr. Roberts just said is  
17 probably about as close as we're going to get.

18 THE COURT: All right. So I -- I can't  
19 remember exactly how I -- I gave the instruction on --  
20 on -- the other day. If someone can remind me, we can  
21 go a lot quicker.

22 MR. ROBERTS: I think we have a copy of it,  
23 Your Honor.

24 THE COURT: Do you? Okay. Thank you.  
25 Because you can probably access it faster than I can

1 right now.

2 MR. ROBERTS: I know we've got what it was  
3 represented to be because the plaintiffs incorporated  
4 into it "as I previously instructed you" instruction.

5 THE COURT: I'd like -- I'd like to let them  
6 go at 1:00 for lunch, so we have at least one more  
7 hour.

8 MR. ROBERTS: Thank you, Your Honor.

9 MR. KEMP: I'm sorry, Your Honor, I didn't  
10 understand what you said. You want to let them go now  
11 for lunch?

12 THE COURT: No, no. I'd like to have  
13 testimony for another hour.

14 MR. KEMP: Yeah, because I think, if we can  
15 get rolling here, I don't think Dr. Krauss is really  
16 that long.

17 MR. ROBERTS: I just need to be able to go  
18 over the Court's rulings with him.

19 THE COURT: Right.

20 MR. ROBERTS: But do you -- I'll try to  
21 get -- I'm sorry that I don't have it on hand.

22 MS. BONNEY: I have it, I just -- I only have  
23 one computer.

24 THE COURT: If you just tell me what it is  
25 out loud, and then I'm going to add the other part and

1 make sure that the parties stipulate to it.

2 MR. ROBERTS: And then I'll go over this with  
3 Dr. Krauss while you're doing that. Then we will more  
4 efficiently use our time.

5 THE COURT: Do you have it, Ms. Works, by  
6 chance?

7 MS. WORKS: We do, Your Honor.

8 MR. KEMP: We do, Your Honor.

9 THE COURT: All right.

10 MR. KEMP: And let us try to add real quick  
11 what Mr. Roberts said as the second sentence.

12 MR. ROBERTS: And to make sure I don't get it  
13 wrong, he can refer to a driver or the driver what they  
14 can see, but he can't refer to whether they should have  
15 been looking or if he had been looking or what he  
16 should have done?

17 THE COURT: He has to be able to talk  
18 about -- you know, I -- we've already scrubbed the  
19 Mr. Hubbard, but -- but to be able to -- to rebut the  
20 theory of a particular defect, I -- you know, that's  
21 why I wanted to take the time to think about this  
22 calmly. There has to be -- you have to be able to ask  
23 the question, but it cannot discuss the driver's  
24 negligence or lack thereof.

25 MR. ROBERTS: Okay.

1 THE COURT: Okay?

2 MR. HENRIOD: And a clause, I think in  
3 addition to causation itself, the testimony also goes  
4 to whether or not there is a defect. So, on  
5 visibility, it's not just whether or not the  
6 visibility, if it's not good, if it didn't cause the  
7 accident; it also goes to whether or not the vehicle is  
8 defective in that respect.

9 MR. KEMP: Judge, let's get Joel over here  
10 and we'll try to work with Mr. Roberts.

11 MR. CHRISTIANSEN: Let me move, Joel.

12 (Discussion was held off the record.)

13 THE COURT: All right. Back on?

14 THE COURT RECORDER: Yes.

15 THE COURT: All right. We've had a  
16 conference outside the presence of the jury with the  
17 parties and they have agreed to -- thank you -- the  
18 following instruction that the Court will give the  
19 jury.

20 "As you have been previously instructed, any  
21 negligence by the driver is foreseeable as a matter of  
22 law and thus cannot insulate defendant from liability,  
23 if any. So you are not to consider any negligence on  
24 the part of the bus driver; however, you should  
25 consider all the evidence to determine if there was a



1 defect and, if so, whether the defect caused the  
2 collision."

3 Is that correct?

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

5 THE COURT: Okay.

6 MR. HENRIOD: Yes, MCI agrees.

7 THE COURT: Okay. Very good. Thank you.

8 All right. Well, as soon as Mr. Roberts  
9 is -- you might want to show this --

10 MR. BARGER: Let me go find him.

11 THE COURT: You might want to show this to  
12 him so that he has a copy.

13 MR. BARGER: May I take a copy?

14 THE COURT: Yes.

15 MR. BARGER: I don't know where he is. Is he  
16 in that room?

17 MR. KEMP: Judge, I would point out, I think  
18 this solves one of the three remaining issues with  
19 Joel. This was one of the three issues we had  
20 yesterday on jury instructions. I believe we had  
21 three.

22 Doesn't -- it doesn't solve substantial  
23 factor proximate cause --

24 THE COURT: No, it does not.

25 MR. KEMP: -- but it solves the argument

1 about the contributory negligence instruction we had  
2 added to it.

3 MR. HENRIOD: Yes.

4 THE COURT: It does what?

5 MR. KEMP: So now we have two --

6 THE COURT RECORDER: Your Honor, we're off.

7 THE COURT: Okay. Let's go back on. Thank  
8 you.

9 MR. HENRIOD: So, yesterday, we were --

10 THE COURT: We're not on yet. We're not on  
11 yet.

12 No, here. Just -- okay. Go ahead. Yes.

13 Counsel?

14 MR. HENRIOD: So -- actually, Will, do you  
15 want to say what you just said?

16 THE COURT: This is Mr. Kemp and Mr. Henriod  
17 having a discussion about jury instructions.

18 Go on.

19 MR. KEMP: We had three outstanding issues on  
20 the --

21 THE COURT: Yes.

22 MR. KEMP: -- instructions. One of those was  
23 what the contributory negligence instruction should  
24 look like. So I think we've solved that issue with  
25 this instruction. We still have, to my recollection,

1 the issue of the substantial factor, the proximate  
2 cause, and there was one other.

3 MR. HENRIOD: Disfigurement.

4 MR. KEMP: Disfigurement. That's right. So  
5 those are the two still out there.

6 THE COURT: All right. So this will be the  
7 contributory negligence instruction.

8 MR. HENRIOD: I agree. We can include this  
9 again in a second.

10 THE COURT: All right. Very good.

11 All right. Mr. Roberts, I'm not trying to  
12 hurry you. Did you see the --

13 MR. ROBERTS: I did, Your Honor. And  
14 that's -- that's -- that's fine with me. Mr. Barger  
15 came and showed it to me in the back room. And so --

16 THE COURT: All right. And you have notes  
17 on -- on each one of these issues? Are you -- you  
18 remember what we just discussed; right?

19 MR. ROBERTS: I don't have notes, Your Honor,  
20 but I actually was able to take Ms. Bonney's computer  
21 and review the Court's opinion line by line with the  
22 witness. And I believe he -- I believe the Court gave  
23 us some bright lines and the witness understands them.

24 THE COURT: Okay. Very good.

25 So is he ready?

1 MR. ROBERTS: He is.

2 THE COURT: Okay.

3 Jerry, can you grab the jury, please.

4 THE MARSHAL: I will.

5 THE COURT: Okay.

6 MR. CHRISTIANSEN: Judge, the Court, over  
7 plaintiffs' objections, has given us your view that the  
8 witness be allowed to use the term "driver" or "the  
9 driver" as long as he doesn't reference Mr. Hubbard in  
10 particular. So I don't interrupt continuously, can I  
11 have my objection be a standing objection to that?

12 THE COURT: Yes. You know, before, we were  
13 talking about these things sort of in general, but now,  
14 with these specific issues and analyzing it, there has  
15 to be a discussion of the driver.

16 MR. CHRISTIANSEN: I simply wanted to not  
17 have to keep objecting. So the Court, for the record,  
18 will allow me to make my objections preserved and I  
19 won't interrupt Mr. Roberts on that particular issue.

20 MR. ROBERTS: We stipulate to that, Your  
21 Honor.

22 THE COURT: Okay. Very good.

23 And this Court finds that it's almost  
24 impossible for the defense to address this without  
25 saying something about a driver if they follow the

1 rules of this curative -- or this instruction.

2 MR. ROBERTS: So I will take my seat till the  
3 Court instructs the jury, and then I will get back up  
4 and resume.

5 And Brian -- Brian will start back with  
6 Exhibit 510 displayed again when I'm up.

7 MR. CLARK: 510?

8 MR. ROBERTS: 510.

9 Have you been keeping Judge Denton apprised?

10 THE COURT: No, I haven't had a chance to  
11 talk to my friend.

12 MR. ROBERTS: We have -- we have a pretrial  
13 at 2 o'clock, so I'll be sneaking out of the courtroom.

14 THE COURT: You'll have a chance to chat with  
15 him. I haven't had a chance to talk to him, I've been  
16 so busy.

17 MR. ROBERTS: The 27th is when it's  
18 scheduled.

19 MR. KEMP: You've got all kinds of time.

20 THE COURT: In fact, I haven't spoken to any  
21 other judge in the last -- in days.

22 (Discussion was held off the record.)

23 THE MARSHAL: All rise.

24 (The following proceedings were held in  
25 the presence of the jury.)

1 THE MARSHAL: All the jurors are present,  
2 Your Honor.

3 THE COURT: Thank you.

4 THE MARSHAL: Please be seated. Come to  
5 order.

6 THE COURT: Do the parties stipulate to the  
7 presence of the jurors?

8 MR. KEMP: Yes, Your Honor.

9 MR. ROBERTS: Yes, Your Honor.

10 THE COURT: Ladies and gentlemen, before we  
11 continue, I'm going to read you an instruction.

12 As you have been previously instructed, any  
13 negligence by the driver is foreseeable as a matter of  
14 law and thus cannot insulate defendant from liability,  
15 if any. So you are not to consider any negligence on  
16 the part of the bus driver; however, you should  
17 consider all of the evidence to determine if there was  
18 a defect and, if so, whether the defect caused the  
19 collision.

20 Thank you. Please -- you may continue.

21 MR. ROBERTS: Thank you, Your Honor.

22 BY MR. ROBERTS:

23 Q. Okay.

24 Brian, could we get the Exhibit 510 back up  
25 on the screen.

1           And, Dr. Krauss, we'll pick up where we left  
2 off last time. Maybe we can backtrack just to the  
3 beginning of your answer so that we could put it all in  
4 context for the jury after the break.

5           Okay. This is a slide that was prepared by  
6 expert Cohen for the plaintiffs. And I believe you  
7 were explaining to the jury why you cannot consider the  
8 still frames out of context.

9           Could you go -- go back to that explanation,  
10 sort of start at the beginning, so that the jury gets  
11 the full explanation for your opinion.

12          A. Sure. So, again, we have -- the main thing  
13 to keep in mind is that this is a dynamic event. So  
14 both vehicles are moving. They're moving in the same  
15 direction at a pretty decent speed differential, about  
16 20 feet per second.

17           So to take something like a bicyclist and say  
18 that he can be obstructed by the A-pillar, we know,  
19 number one, that is not true. Based on the testing  
20 that I have done, you cannot completely obstruct  
21 someone behind the A-pillar.

22           But, number two, for a lot of the time, the  
23 driver's looking out ahead at the bicyclist -- not with  
24 this view; this view is very transient and -- at which  
25 point, a fraction of a second after this, that view

1 would just translate to looking through the side  
2 window.

3           So there really is never a point where the  
4 structure of the bus creates what I would consider a  
5 consequential obstruction of the bicyclist.

6           Q.   And you mentioned a split second later. What  
7 about a split second before? A quarter of a second  
8 before this, where would the bicyclist have been?

9           A.   Right. So we were talking about 20 feet per  
10 second. So, again, I don't have an image. We can sort  
11 of do a thought experiment. If you move that bike  
12 about 5 feet forward again, you're just going to see  
13 more of it. This is kind of the -- what I would  
14 consider kind of a worst-case scenario of what the  
15 A-pillar could do for a blink; I mean, really, a tiny  
16 fraction of a second.

17          Q.   Dr. Krauss, did one of your colleagues -- and  
18 I think you've already mentioned this -- actually  
19 perform testing to analyze the blind spots in this  
20 coach?

21          A.   Yes.

22          Q.   Okay. Tell us about what your colleague did.

23          A.   So what we did was we had the coach. We had  
24 an exemplar bike, so the same model bike. We put a  
25 person on the bike, who is approximately the same



1 height as Dr. Khiabani. We then had effectively a  
2 camera mounted at a driver eye height in the driver's  
3 seat.

4           What we did was we -- sort of fancy word, but  
5 parameterized where we placed the bike. So we did at  
6 various distances out from the bus and at various  
7 distances back from the front of the bus.

8           Now, it's important to note that we started  
9 at the front of the bus because there just is not any  
10 obstruction in front of that. It's just not an issue.  
11 We didn't even test it because you can always see the  
12 bike.

13           But what we did is we started -- again, I  
14 believe it was maybe 1 foot from the bus, went out in  
15 5-foot increments from the bus, and then moved back  
16 very slowly and just documented where you lose sight of  
17 the bus -- or sorry -- where you lose sight of the  
18 bike.

19           Turns out there's only a very small area  
20 where that bike is not visible using either direct  
21 sight, so looking directly through the window, or using  
22 the mirror.

23           Q. You just told the jury that you didn't worry  
24 about it in front of the bus because there's no  
25 obstruction in front of the bus; right?

1           A.    Exactly.

2           Q.    What about the -- the dashboard?

3           A.    Right.  So, again, for anything consequential  
4 in this case to hide by the -- to be hidden by the  
5 dashboard, again, it would have had to be effectively  
6 right up against the bus and probably squatting down.

7                    So can something hide there?  Sure.  Doesn't  
8 matter for this case.  That condition never existed.

9           Q.    Okay.  Look at this slide prepared by expert  
10 Cohen.  You see the windshield wipers?

11          A.    I do.

12          Q.    Now, in some of the other slides prepared by  
13 Cohen, it appeared that the bicyclist was partially  
14 observed in the illustration by the windshield wiper.

15                   Did you observe that in person as you  
16 evaluated the blind spots in the bus?

17          A.    Well, again, we didn't really do anything  
18 looking out the windshield.  I don't deny that that's  
19 the case.  Like I said earlier, windshield wipers are  
20 not transparent.  So, again, if I hold my finger up in  
21 front of the jury, I'm necessarily obstructing part of  
22 the jury.

23                   One thing that these images don't do is they  
24 don't have two eyes.  So something like a windshield  
25 wiper is about as wide as my finger.  And if you hold

1 your finger out in front of your face, it's something  
2 you can see, but chances are your other eye is going to  
3 compensate for any obstruction that it causes.

4 So to talk about the windshield wiper as an  
5 obstruction, again, is fairly misleading.

6 Q. I know we're going to come back to blind  
7 spots later as they tie into your other opinions, but  
8 let's move on to your second opinion.

9 And, Brian, could we have what? 579, page 1,  
10 again.

11 Tell the jury what your second opinion was  
12 in this case.

13 A. Sure. Within areas that a proximity sensor  
14 would operate to detect a hazard, at least a portion of  
15 Dr. Khiabani or his bicycle was visible to the driver.

16 Q. Okay. First of all, as a preliminary matter,  
17 are you an expert in proximity sensors?

18 A. No.

19 Q. Okay. Are you familiar with the technical  
20 specifications of different proximity sensors?

21 A. I would say I wouldn't really characterize it  
22 as technical specifications. Sort of generally how  
23 they function and the type of input -- or feedback they  
24 give to a driver, that I'm familiar with.

25 Q. Okay. If you don't have knowledge of

1 technical specifications of available proximity  
2 sensors, how can you opine in the area in which they  
3 would operate?

4 A. So, the main issue here again sort of works  
5 back to timing. So we have one of two options here.

6 So number one, proximity sensor to the extent  
7 it gives you input or a beep or a light for something  
8 that you can already detect, it's not giving you any  
9 new information. It's not going to help.

10 So if it's sort of projecting outward, we  
11 already discussed. If it's something you -- that's out  
12 in front of the -- the coach, it's not going to give  
13 you any new information.

14 If it's actually something like a blind spot  
15 detector, well, like I said, we characterized we found  
16 a fairly small blind spot out to the side of the bus.  
17 At that point, to the extent it did go off, it's still  
18 not going to change the outcome here, because, number  
19 one, we had the direct visibility just prior to getting  
20 to that blind spot anyway, owing to the differential  
21 speed between the two.

22 But at that point you also have such a small  
23 amount of time to -- to do anything about it, it  
24 doesn't really change anything in this case.

25 Q. Okay. And before I move on to allow you to

1 explain this a little bit further, to elaborate on your  
2 expertise in the operation of proximity sensors, you  
3 don't have the technical expertise, but does part of  
4 your book deal with these technologies?

5 A. Yes. There's a whole chapter in my book on  
6 what are called assistive -- or sorry -- automated  
7 driver assistance devices. And proximity sensors is  
8 one of them, blind spot detectors, things like adaptive  
9 cruise control, all of these sorts of new technologies  
10 are starting to emerge in newer vehicles, I cover a lot  
11 of that in my book.

12 Q. And in your book, and based on your study in  
13 this area, when are technologies such as proximity  
14 sensors effective?

15 A. So they're going to be effective when  
16 they're, in fact, giving you information you didn't  
17 otherwise have. So, for example, I don't know how many  
18 of us have actually driven a vehicle that has that  
19 blind spot detector. It's typically a light in the  
20 passenger side mirror, for example. We may be going to  
21 make a lane change, and suddenly you see a flashing  
22 light. You don't see a car; you see a flashing light.  
23 It gives you that same information.

24 In a case where you can see that car  
25 independent of the sensor, that car is going to be a

1 better or, at the very least, a redundant cue. We just  
2 don't need to be told the same thing twice.

3 Q. Okay. And could you just reconcile these two  
4 opinions? Do they sort of go together at this point?

5 A. They do. Right. So we've got no sightline  
6 obstruction, so you can see just fine. Any area that  
7 is consequential to how this accident occurred, we have  
8 direct line of sight. So adding some sort of sensor to  
9 effectively reinforce what we already know just isn't  
10 going to change the outcome here.

11 Q. Before we go on to your third opinion, I'd  
12 like you to just cover very generally what the science  
13 shows about the ability of people to estimate distance  
14 and time durations in -- in a quick event like an  
15 accident.

16 A. Sure. Generally speaking, it's bad. So me,  
17 we are just not good estimators of really time,  
18 distance, and speed. It's -- it's sort of -- it's been  
19 studied numerous times, and we're off by a lot,  
20 typically.

21 Q. Okay. What color car did you park next to  
22 this morning?

23 A. I can't answer that question.

24 Q. Does human factors provide an explanation for  
25 that question?

1           A.    Yes.  So I'll be candid.  This is an example  
2 that I use a lot, is that when we talk about human  
3 memory, our memory tends to be focused on the things  
4 that are pertinent to the task that we're doing.

5                So I use this example a lot of "What color  
6 did you park next to?" because we -- none of us can  
7 probably answer that question unless you park next to a  
8 purple Lamborghini or something.

9                But, typically, you get out of your car, you  
10 go about your day, and you don't think about that.  Yet  
11 you probably didn't dent the car that you were parked  
12 next to with your car door.  You definitely knew it was  
13 there.  You knew how close it was.  You knew where it  
14 was in relation to your car.  But the color just  
15 doesn't matter.

16               And that's sort of the way that memory works,  
17 is we're going to encode the things that are important.

18               Now, when we have an event like an accident  
19 and there are a lot of kind of little minute things  
20 leading up to the ultimate outcome, those little things  
21 tend to be overlooked and they only matter once the  
22 impact occurred.

23               And the unfortunate thing is our brains are  
24 not like a DVR, where we can press rewind and go back  
25 and look at it all again.

1           So what our brain does -- again, mine  
2 included -- is we sort of fill in those gaps. Our  
3 brains sort of say, Well, here's the outcome. Here's  
4 where I was. Given that we got from point A to point  
5 B, here's what must have happened in between point A  
6 and point B.

7           And all of those assumptions eventually  
8 actually become memories. They may be accurate, but  
9 they may not. And they're generally based on  
10 assumptions.

11         Q.   And so is this filling in the blanks, is this  
12 lying or deception?

13         A.   Not at all. This is -- again, this is human  
14 memory. So, you know, a lot of times we can come out  
15 and, as an expert, say, look, we have physical evidence  
16 that somebody was absolutely wrong. But it's not  
17 lying. It's not deception. It's just this filling in.

18           Like I said, we're not even aware they're  
19 assumptions. As the person doing the filling in, it  
20 actually becomes memory. And there's been, again,  
21 decades and decade of research on this topic, and it's  
22 just sort of a fundamental characteristic of human  
23 memory.

24         Q.   Based upon your study in the field, do you  
25 typically rely upon witness testimony for reliable



1 estimates of distance and time as a standard procedure?

2 A. No, I do not.

3 Q. So you just disregard all the eyewitness  
4 testimony?

5 A. No. So the witnesses are great at giving  
6 kind of the bird's-eye view. So here's what happened.  
7 Here's the timing. Here's my best recollection of  
8 where things were configured at the time.

9 You can kind of use that, you know, if we --  
10 if we were to sort of take one of our big drawings here  
11 to, you know, put the coach here, put the bike here.  
12 And then you have to go to the physical evidence really  
13 to fine-tune it.

14 And when we're working on a case where we're  
15 talking about something that's in such a short period  
16 of time, that -- that physical evidence is really  
17 critical.

18 Q. Okay. Let's go back to your opinions.

19 Brian could you put up page 2. 579-2.

20 Okay. Tell the jury your third high-level  
21 opinion.

22 A. Sure. The way in which Dr. Khiabani impacted  
23 the bus did not -- excuse me -- did not afford a  
24 typical driver sufficient time to respond and carry out  
25 any sort of effective maneuver to avoid the accident.

1 Q. Explain what you mean here with this opinion.

2 A. Sure. So I think, by all accounts, we have a  
3 relatively small separation between the coach and  
4 Dr. Khiabani. What I have looked at here is -- and  
5 it's actually in this table down below -- is looking  
6 at -- and this is a time to cross.

7 MR. ROBERTS: Brian, could you blow up the  
8 table that's contained in this slide.

9 THE WITNESS: So this is assuming they're  
10 initially separated by 3 feet. And what I've done is  
11 for a range of speeds -- this is just speed for  
12 Dr. Khiabani on his bike at 10, 15, 20. And I think  
13 since I generated this, I think people have kind of  
14 settled in on a speed between 10 and 15. But what I've  
15 done is looked at -- since nobody has physical evidence  
16 for kind of the angle that this leftward motion  
17 actually took, I have looked at a range of angles.

18 So the bigger the number there in that blue  
19 column -- so 10 to 50 -- the bigger the number, sort of  
20 sharper the turn. So 90 degrees would be making a turn  
21 due left and shallower and shallower and shallower  
22 turns.

23 What I've done is calculated how long it  
24 would take Dr. Khiabani to cover those distances at a  
25 range of these angles up until the time where his

1 handlebar strikes the bus.

2 BY MR. ROBERTS:

3 Q. Okay. And what conclusion did you draw from  
4 this table comparing this to -- to perception-reaction  
5 time, which the jury's already heard about from a  
6 number of witnesses?

7 A. Sure. So, generally, again the biggest time  
8 here is 1.18 seconds. That's an extraordinarily short  
9 perception-reaction time for a driver.

10 So bearing in mind this isn't "Could he get  
11 out of the way in 1.1 seconds?" It's "Could he start  
12 getting out of the way in 1.18 seconds?"

13 So all of these times, no matter how you  
14 slice it, no matter what his speed, what his angle,  
15 they're just -- everything -- all indications are  
16 Dr. Khiabani is running straight ahead until this much  
17 time before impact.

18 It's just not enough time for a driver to,  
19 number one, figure out what to do and then actually do  
20 it in a way that prevents the accident.

21 Q. Okay. And to put this in the context of the  
22 additional evidence the jury has seen and you've seen  
23 since you prepared the chart, at 12 1/2 miles an hour,  
24 you'd be in between those two numbers and you would  
25 already be less than a second; right?

1           A.     Exactly.

2           Q.     And that's with just a minor 10-degree angle?

3           A.     Exactly.  So if we -- yeah.

4           Q.     And -- and -- but then let me move on.  If  
5 you accept the plaintiffs' expert reconstructionist  
6 that we heard from, I believe, the first day of trial  
7 that that angle of approach was between 20 and  
8 30 degrees and we're at 12 1/2 miles an hour, then  
9 where are we?  At half a second?

10          A.     Yeah, we'd be about half a second to -- to  
11 cover that gap.

12          Q.     Okay.  And that half a second, how does that  
13 compare to typical driver perception-reaction time?  Is  
14 that enough time to react?

15          A.     No.  There are -- and, again, even if we had  
16 some sort of superhuman response, it would mean that  
17 the steering motion is beginning at the moment of  
18 impact.  Right?  So even if the perception-response  
19 time were half a second, which I've never seen in any  
20 driver behavior study, but even if it were, nothing  
21 would change because that would be the moment the  
22 steering input began and that's the same as the moment  
23 of impact.

24          Q.     Okay.  Mr. Rucoba was our accident  
25 reconstruction expert.  He told the jury that he

1 typically uses in his field 1 1/2 to 2 1/2 seconds for  
2 a range of driver perception-reaction time.

3 Are you in general agreement with that?

4 A. Yes. That's a very reasonable range.

5 Q. Explain to the jury the difference between  
6 your field and Mr. Rucoba's field as it comes to  
7 perception-reaction times.

8 A. Sure. So the accident reconstructionists use  
9 perception-reaction time all the time. They need to,  
10 just like I need to, use things like speeds and angles.  
11 So I often say the accident reconstructionist gives  
12 me --

13 MR. KEMP: Judge, can we approach, please?

14 THE COURT: Yes.

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

17 BY MR. ROBERTS:

18 Q. Okay. Without referring back to whatever  
19 Mr. Rucoba did, are you an expert in PRT?

20 A. I think I am, yes.

21 Q. Is there a chapter in your book on it?

22 A. The biggest one, yes.

23 Q. Okay. Let's go back to proximity sensors.

24 What is your Opinion No. 4?

25 A. So even if the bus had been equipped with a

1 proximity sensor, it would not have afforded a driver  
2 sufficient time to avoid Dr. Khiabani.

3 Q. Okay. How is this different than your prior  
4 opinions?

5 A. So this is sort of, I guess, building on what  
6 I've said thus far. But this one is sort of unique in  
7 that if we kind of think about how this accident  
8 developed. So we've got the bus driving. To the  
9 extent it's sounding, again, when the bus is -- or  
10 sorry -- when Dr. Khiabani is easily visible, when --  
11 when he's not doing anything, indicating anything  
12 abnormal, that's a type of warning that we're likely  
13 not going to pay attention to; right? It's there's a  
14 bike up ahead. Doesn't really affect us in any way.

15 If we imagine we're sort of in a clear bus,  
16 watching Dr. Khiabani the whole time, the proximity  
17 sensor --

18 Q. What do you mean by "clear bus"?

19 A. So let's just say the bus is made of glass.  
20 There's no A-pillar. There's no metal of any kind. We  
21 have 360-degree unobstructed field of view.

22 We're moving along in the bus at the relative  
23 speeds in this case, watching Dr. Khiabani the whole  
24 time. Proximity sensor goes off. Dr. Khiabani isn't  
25 doing anything. Maybe the proximity sensor goes off

1 when he begins that maneuver when, in fact, he becomes  
2 a hazard. Well, now we're just sort of back to that  
3 previous opinion in this table below.

4           So no matter how you slice it, we either have  
5 Dr. Khiabani being visible, Dr. Khiabani riding  
6 straight in the bike lane, no perturbation, everything  
7 is fine. He's an upright cyclist. We don't need to  
8 respond.

9           Or we get some sort of proximity sensor  
10 triggering some warning that, hey, there's a problem  
11 here. We need to respond to that.

12           Well, now we're just back to this table here.  
13 And it's not giving you any more time. Nothing  
14 changes. This time is calculated based on the fact --  
15 or based on the assumption that a driver is fixated on  
16 the bike the entire time and what the capabilities  
17 would be under that condition.

18           Q. Okay. So what you're saying is the -- the  
19 fact that a bicyclist is ahead in the bicycle lane  
20 isn't what triggers your reaction; that it's the  
21 perception of a hazard?

22           A. Exactly. So when we talk about  
23 perception-reaction time, or PRT, PRT is necessarily in  
24 response to a hazard. The hazard here was so  
25 short-lived that a proximity sensor, added visibility,

1 nothing is going to change the outcome.

2 MR. ROBERTS: Brian, can we show admitted  
3 Exhibit 245, page 1.

4 BY MR. ROBERTS:

5 Q. This is another graphic prepared by expert  
6 Cohen for the plaintiffs. And, you know, I think that  
7 we've heard other evidence that the front proximity  
8 sensor could have extended ahead way further than these  
9 lines.

10 But for whatever reason he was showing this,  
11 the point, I think, is that the proximity sensor is  
12 detecting the bicyclist when it's in that position.

13 A. That's how I interpret it, yes.

14 Q. Okay. If the bus had been equipped with a  
15 proximity sensor that would have detected the bicyclist  
16 in this position, tell the jury what impact you think  
17 that would have under the facts of this case.

18 A. Sure. So this is a great illustration of  
19 what I have been talking about; right?

20 So at this point, the bicyclist is upright,  
21 in the middle of the bike lane, and visible. A  
22 proximity sensor -- let's say it's a beep, let's say  
23 it's a light -- there is no new information there.  
24 It's effectively telling you, hey, there's someone else  
25 using the road how they are supposed to use the road.



1           We don't want warnings and noises and lights  
2 going off under normal operating conditions. That just  
3 sort of renders the whole system useless.

4           Q.    Okay. So let's assume that this hypothetical  
5 proximity sensor, the bicyclist is ahead of the bus in  
6 the bike lane and it's beeping and flashing and making  
7 all sorts of noise.

8           Is that a good thing?

9           A.    No.

10          Q.    Why not?

11          A.    So I -- ultimately, when we're talking about  
12 a warning or a system of hazard detection -- we've all  
13 heard about what's called a false alarm. Something  
14 that has a high false alarm rate is really not very  
15 effective.

16                So you can imagine if your -- if this kind of  
17 system went off every time there was -- whether it's a  
18 bike or a person or a car or a motorcycle in this  
19 relative configuration of the vehicle, you would just  
20 be bombarded with lights and buzzers and beeps,  
21 whatever that feedback is, constantly. And the vast  
22 majority of the time, it would be warning you of  
23 something that simply isn't a hazard.

24                So that's going to have potentially two  
25 effects. You're either going to disable it because

1 it's going to drive you crazy, or you're just going to  
2 learn to ignore it. It's sometimes called the cry wolf  
3 effect. Right? We all know the story of the boy who  
4 cried wolf. If you keep saying hazard, hazard, hazard  
5 and there isn't a hazard, you're not going to believe  
6 it when there actually is one.

7 Q. Okay. Let's move on to another topic.

8 Are you familiar with the opinions of  
9 plaintiffs' expert Cunitz, who opined there should have  
10 been a warning from MCI about what's been called the  
11 air blast or the air disturbance caused around the  
12 front of the motor coach?

13 A. Yes.

14 Q. Okay. And did you render an opinion on  
15 whether or not there should have been a warning of the  
16 air turbulence in this case?

17 A. I did.

18 MR. ROBERTS: Okay. Brian, could you put up  
19 579, page 3.

20 BY MR. ROBERTS:

21 Q. And does -- does this slide accurately  
22 summarize your opinion on warnings?

23 A. It does, yes.

24 Q. Okay. What's your high-level opinion here?

25 A. Sure. Any suggestion that warnings from MCI

1 would have changed the outcome of this accident is  
2 baseless and misguided.

3 Q. Okay. Can you explain that to the jury.

4 A. Sure. So this largely goes back to what I  
5 was saying before, is that, first of all, if you -- and  
6 I guess I'll sort of go through -- well, I'll go  
7 through the bullets here. But first of all,  
8 plaintiffs' expert, Dr. Breidenthal, characterized the  
9 air blast hazard as effectively being within 3 feet.

10 There's no evidence this adds anything to  
11 what drivers already do; right? So it's not like  
12 drivers are trying to cut it as close as they can to  
13 bikes. It's unclear that an instruction to stay more  
14 than 3 feet away would change what drivers are already  
15 trying to do.

16 Warnings generally are -- they sort of have a  
17 threefold function. Well, the main function is to  
18 change behavior. But to do that, they describe what  
19 the hazard is, describe how to avoid that hazard, and  
20 then describe the consequences of not avoiding the  
21 hazard.

22 Q. Okay. Are you an expert on warnings?

23 A. I am, yes.

24 Q. Okay. And you just gave the jury the three  
25 things warnings should do?

1           A.    Yes.

2           Q.    Okay. Did Cunitz tell the jury what the  
3 warning should be?

4           A.    I don't believe he did.

5           Q.    Okay. Has -- has anyone in this case that  
6 you've read offered an opinion about what a warning  
7 should have been in this case?

8           A.    No, I haven't seen that.

9           Q.    Okay. Go ahead. Continue, Doctor.

10          A.    Sure. So given that sort of three-stage  
11 process, to the extent you're giving an instruction of  
12 here's how to avoid it and that overlaps with what  
13 drivers are already doing, well, then you're not going  
14 to change their behavior because they're already  
15 complying with that warning. So that's the first bit  
16 here with this first bullet.

17                Secondly -- and this sort of goes back to  
18 what I was just saying about the proximity sensor. But  
19 if a bus in a through lane passing a cyclist in a  
20 designated bike lane is a safe, common occurrence,  
21 warning drivers is improper, misleading, and  
22 ineffective.

23                So it's the same issue as with the proximity  
24 sensors. So if you're going to give some sort of  
25 warning, beware of something that isn't really a

1 hazard, well, guess what? We're going to purge that  
2 warning. We're not going to think about it. It's not  
3 going to have any bearing on our opinions -- or I'm  
4 sorry -- on our behavior at all.

5 Q. Okay. If you're warning about things that  
6 aren't really a hazard, and it's not just this you're  
7 warning about, but now you've got pages and pages of  
8 warning; right?

9 A. Exactly. And this sort of gets to the next  
10 bullet. Logic would dictate that if you warn about  
11 some hazard that has a very low likelihood of occurring  
12 or is really a minor hazard, one of those two, if you  
13 warn about one, well, then you should probably go back  
14 and say, well, what else carries with it this same  
15 level of risk?

16 And, here, we're talking about something  
17 that's ordinarily benign; right? Just someone in a  
18 bike lane. So to the extent we are taking the  
19 condition that existed here and saying, all right,  
20 well, what else could possibly happen with this level  
21 of risk, we would probably end up with a very, very  
22 large volume of warnings that are telling you things  
23 that are very unlikely to occur.

24 Q. And when that happens, does that create a  
25 danger that real hazards and high-risk elements are

1 going to be ignored?

2 A. Yes. So you can put yourself in that  
3 position where you say, all right, here's your new TV,  
4 here are the warnings. And it's a big book. There may  
5 be one or two in there that you really should know, but  
6 if you're given so many, you're probably never going to  
7 look at it.

8 Furthermore, if you do look at it, the  
9 likelihood that the ones that really are important will  
10 stand out from all that other noise is reduced. So  
11 adding more and more warnings, warning about these  
12 really minor hazards, tends to be counter-productive  
13 and, in fact, tends to undermine the warnings that you  
14 do want the user to have.

15 Q. And, in fact, in -- human factors even has a  
16 word for that, right, if you overwarn? What's that  
17 called?

18 A. That's information overload -- information  
19 overload or overwarning. But it's -- but they're sort  
20 of used interchangeably. But if you're just bombarded  
21 with so much information about something that, again,  
22 isn't a major hazard, it's just -- you just say "stop  
23 it" and you sort of purge and you just don't listen to  
24 any of it.

25 Q. Are you offering any opinion to this jury

1 about what the law of the state of Nevada requires from  
2 a -- a motor coach manufacturer?

3 A. No.

4 Q. Do you even know what that law is?

5 A. I don't.

6 Q. Well -- well, do you expect the judge to  
7 explain the law?

8 A. I would hope so, I guess. That's not really  
9 my area.

10 Q. And so the jury can just take your opinions  
11 and look at them in the context of the law and decide  
12 how they apply?

13 A. Yeah, so that's the intent. I develop my  
14 opinions independent of the law, independent of  
15 statutes and regulations. I'm looking specifically at  
16 here's what the science says about the issues as they  
17 pertain to this case.

18 Q. Thank you. So you don't need to know Nevada  
19 law to give the opinions you're giving today to the  
20 jury?

21 A. I do not.

22 Q. Okay. Any further explanations for your five  
23 opinions you believe would be helpful to the jury, or  
24 do you think we've done a good job?

25 A. I hope we have. Nothing comes to mind.

1 Q. Okay. Thank you so much.

2 A. Thank you.

3 MR. ROBERTS: That ends my direct, Your  
4 Honor.

5 THE COURT: Okay. Very good.

6 Mr. Christiansen, cross-examination?

7 MR. CHRISTIANSEN: May I proceed, Your Honor?

8 THE COURT: Yes, please.

9

10 CROSS-EXAMINATION

11 BY MR. CHRISTIANSEN:

12 Q. Good afternoon, Dr. Krauss.

13 A. Good afternoon.

14 Q. Dr. Krauss, have you ever heard this  
15 statement before? "A brief obstruction can lead to an  
16 accident if it occurs at a critical moment. Drivers do  
17 not fixate in any one direction but sample the roadway  
18 environment in a series of brief glances."

19 A. Absolutely.

20 Q. And do you agree with that?

21 A. I do.

22 Q. It's a quote from your book; right?

23 A. Well, I'll take your word for it, but I  
24 absolutely agree with that statement.

25 Q. Chapter 8.8 from "Forensic Aspects of Driver



1 Perception and Response"?

2 A. Sure.

3 Q. It's the same book in which you say, "Big  
4 trucks" -- and I think you include buses -- "have  
5 additional problems that motor vehicles don't have."  
6 Correct?

7 A. Yeah. Probably, I don't know that I would  
8 have used that terminology, but there's probably  
9 something in there about that.

10 Q. In that same book, you talk about A-pillars  
11 causing what you described for the jury as blind spots;  
12 correct?

13 A. Sure.

14 Q. And you talk about the blind spot, if it's  
15 created between two vehicles moving at relatively the  
16 same speed, it becomes more of a problem; correct?

17 A. I don't think I talk about it for vehicles,  
18 but --

19 Q. That's right. It's for vehicles and  
20 bicyclists?

21 A. That might be.

22 Q. Correct?

23 A. Might be. Sure.

24 Q. Well, it is, isn't it?

25 A. I don't recall. You can -- I unfortunately

1 don't have the whole book committed to memory.

2 Q. When vehicles and bicycles -- and this isn't  
3 just a vehicle; it's a large vehicle that has more  
4 problems than a regular car. Fair?

5 A. I wouldn't say problems. Again, there are  
6 certainly issues unique to things like coaches and  
7 trucks that are not consistent with a Honda Civic, for  
8 example. I would agree with that.

9 Q. A-pillar obstruction of intersecting  
10 vehicles, including bicycles and moving pedestrians,  
11 you remember talking about that?

12 A. "Intersecting" is the key word there.

13 Q. Okay. "This can occur when the speeds of the  
14 two vehicles are constant and the ratio of the speeds  
15 is such that the line-of-sight angle from the subject  
16 driver to the intersecting vehicle is the same."

17 Did I get that right?

18 A. When the speeds are similar and constant,  
19 yes.

20 Q. Okay. And "In large truck cabs, high seating  
21 position creates blind spots to the front and sides  
22 large enough to hide pedestrian -- pedestrian -- a  
23 pedestrian that can extend out from the truck for as  
24 much as 4 feet."

25 A. Sure.

1 Q. Correct?

2 A. Absolutely.

3 Q. "A procedure for establishing a direct vision  
4 boundary for objects or pedestrians is outlined." And  
5 then you outline some stuff. Did I get that right?

6 A. Yes. And -- and just to be clear, that --  
7 the "some stuff" is the procedure that I employed in  
8 this case.

9 Q. All right. And if we went to the study of  
10 human factors, Mr. Kemp had an article from one of your  
11 prior experts that had a reaction time in less than .4  
12 seconds. You've seen that?

13 A. I have.

14 Q. In fact, you -- you sat here when Mr. Rucoba  
15 testified; correct?

16 A. I did.

17 Q. You saw the presentation he came with that  
18 had his questions and his answers all ready to go?

19 A. I actually did not see his direct, so I did  
20 not see that.

21 Q. You saw the cross-examination of him?

22 A. I did.

23 Q. The redirect and the recross that went back  
24 and forth a few times; correct?

25 A. That, I did, yes.

1 Q. And you recall Mr. Rucoba -- let me ask it to  
2 you sort of simply. In this case, you got two sort of  
3 groups of opinions, one dealing with proximity sensors;  
4 correct?

5 A. I wouldn't necessarily say two groups; but,  
6 yes, I have opinions about proximity sensors.

7 Q. And you have reviewed the testimony of  
8 Mr. Sherlock?

9 A. I have.

10 MR. CHRISTIANSEN: Shane, you want to pull  
11 the first quote up for me, if you would, please.

12 (Whereupon, recording was played.)

13 "Q. Do you have an opinion as to whether  
14 or not the J4500 bus in this case had the  
15 right-side visibility problem?

16 "A. Yes.

17 "Q. What is your opinion?

18 "A. It's extremely bad and extremely  
19 unnecessary. It takes very little to lower the  
20 windshield base so that you can see down  
21 better. It takes very little to make the  
22 pillars thinner. The structural element in  
23 there that you can't change is only about that  
24 big (indicating). And the rest can be changed,  
25 intelligently designed, so that you have

1 unobstructed vision.

2 "Doors are available that are all glass.  
3 And you'll see that this has large  
4 obstructions. And all of that would help you.  
5 Especially off in this peripheral area of your  
6 view, it's extremely important to have really  
7 unobstructed vision. And it's trivial to do  
8 it."

9 BY MR. CHRISTIANSEN:

10 Q. You agree with Dr. -- Mr. Sherlock's  
11 conclusion that there's a blind spot on this bus;  
12 correct?

13 A. Well, qualitatively, again, I found specific  
14 to -- let me take a step back.

15 A blind spot is only going to be defined with  
16 respect to the target you're going to see. So right --  
17 can I obscure this pointer behind the A-pillar at most  
18 places? Of course.

19 Q. Dr. Krauss, I just asked you if you would  
20 agree with -- wouldn't you agree with Mr. Sherlock's  
21 opinion that there was a blind spot; yes?

22 A. The blind spot I measured for the bike was  
23 5 feet out and about 40 inches long.

24 Q. Is that a yes?

25 A. That's a yes with that caveat.

1 Q. Thank you.

2 And Mr. Roberts asked you some questions  
3 about your knowledge of proximity sensors. Do you  
4 remember those questions?

5 A. I do.

6 Q. And do you remember having your deposition  
7 taken in this case?

8 A. I do.

9 Q. And if I told you your deposition was taken  
10 November the 9th, 2017, do you have any reason to  
11 disagree with me?

12 A. I do not.

13 Q. And, at your deposition, to my recollection,  
14 you didn't know the distance a proximity sensor would  
15 operate at; correct?

16 A. This is true.

17 Q. You didn't know when proximity sensors became  
18 available?

19 A. Correct.

20 Q. And -- and you didn't know -- you knew that  
21 there was no reason for a proximity sensor; right?

22 A. Well, I didn't say no reason. I think what I  
23 said is it wouldn't have changed the outcome here.

24 Q. But you didn't know how specifically any  
25 proximity sensor worked? You didn't know the technical

1 aspects of them; correct?

2 A. I would agree.

3 MR. CHRISTIANSEN: Shane, can I have the next  
4 slide for Mr. Sherlock.

5 (Whereupon, video deposition was played.)

6 "Q. And were Eaton systems, side systems,  
7 available for buses -- when were Eaton side --  
8 are Eaton side systems available for buses?

9 "A. 2005.

10 "Q. Okay. And they've been available  
11 since that time?

12 "A. Yes.

13 "Q. Okay. Now, how far does the Eaton  
14 system extend in terms of how far its  
15 detectability goes out?

16 "A. Oh, it's a very long ways, 350 feet.

17 "Q. Okay. And with regards to the side  
18 system, how far does that go?

19 "A. It's at least 20 feet. I don't  
20 recall the exact dimension.

21 "Q. So if it's 20 feet, the bike lane in  
22 this case is how wide, if you know?

23 "A. 4 1/2 feet."

24 BY MR. CHRISTIANSEN:

25 Q. You -- when you gave your deposition, you

1 didn't have any of that information; correct?

2 A. No, I -- I assumed that a proximity sensor in  
3 any form would trigger in any way to Dr. Khiabani's  
4 presence with respect to range. The question is, does  
5 that matter? And that's what I was evaluating.

6 Q. Do you remember telling me in your deposition  
7 that you didn't have any opinion relative to if the  
8 dynamics of the accident would have changed, would the  
9 outcome have changed?

10 A. Yes.

11 Q. All right. You didn't have any opinions  
12 about that; correct?

13 A. I do not.

14 Q. And you understand the difference between the  
15 outcome versus the accident, do you not?

16 A. Well, I mean, I think the outcome is part of  
17 the accident; but, yes, I think I know what you're  
18 talking about.

19 Q. I mean, the outcome is Dr. Khiabani's head  
20 getting run over, according to your coworker  
21 Mr. Carhart, by less than an inch of the tire; correct?

22 A. I don't want to get into distances; but, yes,  
23 I know his head was run over by the rear tire.

24 Q. Let's see if you recognize this testimony.

25 "All right. Do you agree that the particular



1 nature of this accident -- in other words, the  
2 specifics of it -- where the area of initial contact  
3 was, how the doctor fell, positioning of his body, the  
4 fact that the crown of his head was run over, that's  
5 what led to his death; fair?"

6 "Yes, that sounds reasonable."

7 Do you recognize that?

8 A. Yes.

9 Q. "Then we can agree that if Mr. Hubbard would  
10 have identified Dr. Khiabani 15 feet further away, he  
11 would have had an opportunity to take some more evasive  
12 maneuver?

13 "ANSWER: That sounds reasonable."

14 Do you recognize that?

15 A. Yes.

16 Q. And then I go on to ask Mr. Rucoba, because  
17 this is his deposition, if he has any opinions about  
18 the dynamics changing in the outcome, and he said he  
19 did not; correct?

20 A. I'll take your word for it.

21 Q. And, Dr. Krauss, the truth of an answer, can  
22 we agree, is not dependent upon who is asking the  
23 question?

24 A. Sure.

25 Q. So when Mr. Rucoba -- and you witnessed this.

1 Can I have control of the --

2 MR. ROBERTS: Your Honor, may we approach?

3 THE COURT: Yes.

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

6 BY MR. CHRISTIANSEN:

7 Q. On the redirect -- and this is Mr. Roberts.  
8 And I'll put it up.

9 If I could have the TV.

10 At page 104, Mr. Rucoba is asked, line 18,  
11 "In fact, before I do that, you just answered a  
12 question that explained why .1 to .12 would not have  
13 made any difference with perception-reaction time.  
14 Would you explain what you -- you're only allowed to  
15 say yes or no. Now, explain -- now, explain what the  
16 answer really is."

17 "ANSWER: Well, the answer is that the bus  
18 is moving past the bike at a rate of about  
19 17 feet every second. So what that means, in  
20 .1 seconds, is that the bus would move past the  
21 bike 1.7 feet, but the bus is much longer than  
22 that. And if Dr. Khiabani's bike follows the  
23 same path that it would follow in the last  
24 tenth of a second, it would merely hit another  
25 spot on the side of the bus. So the outcome or

1 the crash itself would not change. That's why  
2 I answered the way I did."

3 Did I read that correctly?

4 A. You did.

5 Q. So this is after his deposition, when  
6 Mr. Rucoba and you just -- I just read it to you and  
7 you recognized it -- told me he did not have any  
8 opinions about if the accident dynamics changed. For  
9 Mr. Roberts on redirect, he does have an opinion. And  
10 he says, "Well, it wouldn't have mattered anyway."  
11 Correct?

12 MR. ROBERTS: Objection, Your Honor. I  
13 didn't redirect.

14 MR. CHRISTIANSEN: I'm sorry. Counsel for  
15 MCI. I misspoke. I apologize, Mr. Roberts.

16 BY MR. CHRISTIANSEN:

17 Q. Is that right?

18 A. I don't know. I'm really not going to  
19 comment on his opinions.

20 Q. Okay. Well, I mean, he's retained by the  
21 same company that retained your company, Exponent;  
22 fair?

23 A. That's my understanding.

24 Q. You're retained by the same lawyers that are  
25 advocating on behalf of MCI; fair?

1 A. That's my understanding, yes.

2 Q. That's who you work for as well?

3 A. Yes.

4 Q. Okay. And then Mr. Rucoba, when Mr. Kemp  
5 stands back up, and he -- he has the following  
6 questions and answers. I'll start -- the answer  
7 starts -- and I'm sorry, I don't have the top of the  
8 question. It says, "that you think the bus would move  
9 to the left in a tenth of a second?"

10 "ANSWER: It would be about approximately  
11 2 inches."

12 Do you remember that testimony?

13 A. I do.

14 Q. You saw it yourself; fair?

15 A. I did.

16 Q. He said that every 1/10 of a second, that bus  
17 would jog to the left or to the east about 2 inches.

18 A. That's my understanding.

19 Q. I get that right?

20 A. That's what he said.

21 Q. Okay. You don't disagree with him?

22 A. It's not my area, so I'll defer to him.

23 Q. He's the accident recon?

24 A. I would defer to him on that.

25 Q. So if the accident could be avoided -- let me

1 rephrase that. That's a real bad question.

2 This is Mr. Kemp. "You understand that  
3 Dr. Khiabani got his head run over by the rear tires?"

4 "Yes, that's my understanding."

5 "QUESTION: All right. So if the bus  
6 started moving to the left .1 second earlier,  
7 it would have moved the bus to the left by  
8 2 inches; right?

9 "ANSWER: Approximately.

10 "QUESTION: And another .1 seconds is  
11 another 2 inches; right?

12 "ANSWER: Approximately. Sure.

13 "QUESTION: So if you had -- I'm sorry. I  
14 keep moving this up.

15 "Okay. and that would have -- under the  
16 defense theory of the case, that would have  
17 kept the rear tires from running over  
18 Dr. Khiabani?"

19 "And then Mr. Kemp says, "Correct?"

20 "Now, before we get into what Mr. Rucoba's  
21 answer is, would you agree that that bus being  
22 2 more inches laterally to the east at the time  
23 Dr. Khiabani's head goes by the rear tires  
24 prevents the tire from hitting his head just  
25 using Rucoba's calculations?

1           A.    I interpret that as a different question.  So  
2 when you're saying, with those questions, are -- is if  
3 the bus moves over 2 or 4 inches preimpact, well, the  
4 impact is still going to occur; right?  It's not that  
5 there's not an impact; it's just everything moves over  
6 2 or 4 inches.

7           Q.    I got you, but you don't have any opinions  
8 relative to changing the dynamics of this wreck, do  
9 you?

10          A.    No, I don't.  But you're asking me -- you  
11 just asked me a different question from what Mr. Rucoba  
12 was asked, so I just needed --

13          Q.    All right.  So Mr. Rucoba is asked, "Would  
14 the rear tires have kept from running over his head?"

15                And his answer, different from what he gave  
16 MCI's counsel a few pages earlier, is "Not  
17 necessarily."

18                "QUESTION:  Well, you have read  
19 Dr. Carhart's report, where he claims the  
20 sidewall pinched the top of his head?

21                "ANSWER:  Yes, that's my understanding.

22                "QUESTION:  And assuming that to be the  
23 case, if you move over 4 inches, that doesn't  
24 happen; right?

25                "ANSWER:  That's not necessarily true.

1           "QUESTION: You think the sidewall still  
2           pinches the head if he -- if you move the bus  
3           over 4 inches?

4           "ANSWER: I can't tell you the outcome  
5           would have been different."

6           Did I read that correctly?

7           A. You did.

8           Q. That's the accident reconstructionist working  
9           with you?

10          A. It is.

11          Q. That's on the heels of him saying in his  
12          deposition he'll never offer an opinion about if the  
13          dynamics changed; correct?

14          A. I don't know.

15          Q. And you're afforded that same opportunity. I  
16          mean, because I asked the questions. At the end of  
17          your deposition, Mr. Kemp -- he's smarter than me; he  
18          has all the technical questions.

19                 And then, at the end, I asked you,  
20          "Dr. Krauss, now, you've got this thing called a  
21          critical window."

22                 Do you remember telling me about your  
23          critical window?

24          A. Wouldn't surprise me. I don't recall  
25          specifically in this case, but I probably did.

1 Q. Critical window is the moment between  
2 perception and reaction that if it's -- the window is  
3 big enough, you can avoid an accident.

4 A. Well, I define -- I published a paper on this  
5 concept called "The Critical Window." It's a  
6 comparison of how much time you have versus how much  
7 time you need; the idea being that if you have more  
8 time than you need, the accident's avoidable. If you  
9 need more time than you have, the likelihood of the  
10 accident gets higher.

11 Q. Do you have your deposition with you,  
12 Dr. Krauss?

13 A. I do, actually.

14 Q. Do you want to turn to page -- if counsel  
15 doesn't mind me using a noncertified copy?

16 MR. ROBERTS: No, that's fine.

17 BY MR. CHRISTIANSEN:

18 Q. You were asked questions, starting at  
19 page 119, about whether you had any opinions relative  
20 to the -- an earlier detection of the doctor changing  
21 the outcome, and you said you didn't have any; is that  
22 right?

23 A. Bear with me here.

24 Q. Sure.

25 Start at page 2 -- I'm sorry -- line 22 of



1 119, had -- "had Mr. Hubbard."

2 A. Sorry. What was your question now? I  
3 apologize.

4 Q. That's all right.

5 You didn't have any opinions and you said you  
6 would not render in court any opinions relative to if  
7 the dynamics of this particular accident changed, would  
8 the outcome have changed. Correct?

9 A. Well, actually, what you just read to me is  
10 the question, "Had Mr. Hubbard had a larger critical  
11 window to react, could the dynamics of this particular  
12 impact have changed?"

13 And my answer was, "It would depend. If it  
14 was large enough to facilitate and enabled a response,  
15 it certainly could have."

16 Q. And then you go on to say you'd defer to the  
17 accident reconstructionist, that's not your area, you  
18 don't have opinions. Fair?

19 You summarize, I think, Dr. Krauss, at  
20 page 121, where you say, "I would imagine" -- line 24  
21 -- "if you change the dynamics of the -- the dynamics  
22 of the accident -- the accident" -- sorry.

23 "If you -- I imagine if you change the  
24 dynamics, the dynamics of the accident would change."

25 Did I get that correct?

1           A.    Yes.

2           Q.    All right.  So going back to proximity  
3 sensors, you didn't know, like Mr. Sherlock did, the  
4 head of the amalgamated union that governs 200,000 bus  
5 drivers, that the proximity sensor in question actually  
6 alerted people to things up to 350 feet in front of  
7 them?  You didn't know that?

8           A.    I made an assumption that it did.

9           Q.    And, at 350 feet, you said that wouldn't have  
10 helped.  That's your conclusion; correct?

11          A.    Correct.

12          Q.    300 feet.  That still wouldn't have helped.  
13 That's your conclusion; correct?

14          A.    Assuming we're using our eyes to drive, no.

15          Q.    And I walk you back through every 50 feet,  
16 and nowhere in there would it have helped.  That's your  
17 opinion on behalf of MCI?

18          A.    That's -- that's my opinion regardless of who  
19 retained me.

20          Q.    Including it's your opinion that it wouldn't  
21 even have helped in the critical window, to use your  
22 term, that Dr. Khiabani was in a blind spot; correct?

23          A.    That's absolutely correct, right.  The  
24 critical window of --

25          Q.    Sir, sir.  That's just a yes-or-no question.

1 Okay?

2 A. Well, it's not really, but ...

3 Q. When it ends --

4 A. No.

5 Q. -- with "correct," it means yes or no.

6 A. It would not have helped.

7 Q. And that's because you have a chart that has  
8 angles of the bus -- I'm sorry -- of the bike -- and,  
9 by the way, you told Mr. Roberts that Mr. Caldwell, the  
10 plaintiffs' accident reconstructionist -- I wrote it  
11 down -- opined that the angle of the turn was between  
12 20 and 30 percent, the angle of the maneuver out of the  
13 bike lane.

14 Do you remember that?

15 A. I think Mr. Roberts represented that to me.  
16 I don't recall.

17 Q. Oh, you got it from the lawyer from MCI as  
18 opposed to you watched it yourself?

19 A. No. Excuse me. Mr. Roberts represented that  
20 to me in the direct.

21 Q. Okay. And you agreed with him. Do you  
22 remember?

23 A. I think I said if that's the case, sure.

24 Q. So you don't know, like the people in the  
25 jury do, that what Dr. Caldwell was talking about was

1 the angle the bike was leaning to create the scuff  
2 mark?

3 A. So I want to be clear. Those are two very  
4 different things. To the extent he's referring to  
5 that, I wholeheartedly agree with you.

6 Q. So if Mr. Roberts tried to talk about a  
7 maneuver at an angle and really the testimony was that  
8 that was just the angle of the bike when it made the  
9 area of initial contact, you'll leave it to the jury to  
10 use their memory?

11 A. Absolutely. That's why I used a range. I  
12 know that both accident reconstructionists, I think,  
13 said the angle of impact is about 20 to 30 degrees.  
14 That is different from the numbers I have in my chart.  
15 I don't think anyone -- this is why I said I use such a  
16 wide range. I don't think there's any physical  
17 evidence for the angle of that actual turn.

18 Q. Sir, and you did a thorough evaluation of  
19 this area of initial impact -- or area of initial  
20 contact; right? You understood it was a hood of the  
21 brake of the left handlebar; correct?

22 A. I didn't. I relied on the accident  
23 reconstructionists for that.

24 Q. Right. If I just turn to your paper and I  
25 look at Footnote 5 -- I mean, it looks like you and the

1 other experts even discussed your relative opinions,  
2 because it says -- Footnote 5 says "discussion with  
3 other experts."

4 A. I'm not sure.

5 MR. CHRISTIANSEN: Can I approach, Judge?

6 THE COURT: Yes. For the record where --

7 THE WITNESS: I'm with you.

8 MR. CHRISTIANSEN: Footnote 5 of his report,  
9 Your Honor.

10 BY MR. CHRISTIANSEN:

11 Q. So much like you got to observe Mr. Rucoba  
12 testify in the preparation of your reports, you and the  
13 other MCI experts would discuss with each other your  
14 various opinions.

15 A. I think that's fair.

16 Q. And was Dr. Baden ever part of these  
17 discussions with you?

18 A. I don't recall that.

19 Q. Because Dr. Baden came in here yesterday and  
20 told the ladies and gentlemen of the jury that he  
21 guessed or surmised that Dr. Khiabani's head had hit  
22 the right side of the bus and rendered him unconscious.

23 Is that an opinion you have?

24 A. No.

25 Q. Did you find any physical evidence of that?

1 A. I didn't look for it.

2 Q. Anybody at Exponent or Carr Engineering or  
3 any other of the other experts retained by MCI come to  
4 that conclusion?

5 A. I don't know.

6 Q. Well, have you ever seen it?

7 A. Sorry. Seen what?

8 MR. ROBERTS: Your Honor, objection. Beyond  
9 the scope.

10 THE COURT: Sustained.

11 MR. CHRISTIANSEN: All right.

12 BY MR. CHRISTIANSEN:

13 Q. At page 105 of your deposition, you didn't  
14 know how proximity sensors worked.

15 Do you remember that?

16 A. Yes.

17 Q. Sounded like Mr. Sherlock had a bit more  
18 information than you when he testified to the ladies  
19 and gentlemen of the jury.

20 A. As to the technological specifications? No  
21 doubt about that. It's not my specialty.

22 Q. As I understand it, regardless of how they  
23 work and if they would have been effective -- well, you  
24 sort of have two opinions. One is if they're too good  
25 they just bother everybody; you ignore them anyway.

1           A.    I wouldn't characterize that as too good.

2           Q.    If they go off too much, you would just learn  
3 to ignore them?

4           A.    Yes.

5           Q.    And the second one is if it went off at that  
6 critical window, it wouldn't be enough time to change  
7 anything?

8           A.    So I don't use the term "critical window"  
9 that way. My point is if it went off at the point  
10 where Dr. Khiabani became a hazard, it's too late  
11 already.

12          Q.    And I understand you did no testing -- strike  
13 that.

14                    You this isn't the first time you've  
15 testified about -- on behalf of bus companies; correct?

16          A.    That's correct.

17          Q.    I mean, you recently, in the last year or so,  
18 testified in, I think, California in a Villa Lobos  
19 case?

20          A.    Yes.

21          Q.    And you had opinions about perception-  
22 reaction time in a bus-motorcycle accident?

23          A.    Yes.

24          Q.    And your opinions were, like they are here,  
25 in defense of the bus?

1 MR. ROBERTS: Objection, Your Honor. May we  
2 approach?

3 THE COURT: Yes.

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

6 BY MR. CHRISTIANSEN:

7 Q. Juries regularly hear testimony from experts  
8 like yourselves and agree to adopt or reject such  
9 testimony; correct?

10 A. I'm not involved in the deliberations. I  
11 don't know.

12 Q. Warnings. So have I summarized accurately  
13 your proximity sensor knowledge about the technical  
14 part?

15 A. I think -- I've summarized it, I think.

16 Q. And why it wouldn't work because it would  
17 have either gone off too often and annoyed the driver  
18 or not gone off fast enough for the driver to do  
19 anything differently?

20 A. I think that's actually a simple way to put  
21 it. I would agree with that.

22 Q. Did you offer those opinions to the Khiabani  
23 boys?

24 A. Excuse me?

25 MR. ROBERTS: Objection. Form.



1 THE COURT: Sustained. Foundation.

2 BY MR. CHRISTIANSEN:

3 Q. All right. You also have these opinions --  
4 I'll ask them relative to hazard. I'm sorry.  
5 Warnings. I misspoke. Warnings.

6 Do you remember those opinions?

7 A. Yes.

8 Q. And the warnings wouldn't help -- and I'm  
9 just looking at the last page -- because it adds  
10 nothing to what drivers already do with bicycles.

11 A. Yes.

12 Q. Warnings demonstrated that a warning about  
13 hazards that are low risk can result in recipients of  
14 warning dismissing it altogether.

15 A. That's right.

16 Q. Tell the ladies and gentlemen of the jury how  
17 many warnings this bus had on it.

18 A. I don't know.

19 Q. You don't know?

20 A. I want to be clear. It's not just on. There  
21 are various types of warnings. So it could be in the  
22 manual. It could be actually on the bus. It could be  
23 from somebody's employer verbally.

24 So warnings take on many forms. I simply  
25 can't quantify it.

1 MR. CHRISTIANSEN: Shane, you want to pull it  
2 up so we can help the doctor?

3 MR. GODFREY: Madam Court Recorder, please.

4 MR. CHRISTIANSEN: Can we have control on our  
5 side, Ms. Court Recorder? Thank you.

6 THE COURT RECORDER: Sure.

7 BY MR. CHRISTIANSEN:

8 Q. This comes right from the sales agreement.  
9 There's one warning that goes out with this bus from  
10 MCI.

11 Did you know that?

12 A. I'm not willing to accept that here. This is  
13 a sales agreement. This is not the manual. This is  
14 not the maintenance --

15 Q. Doctor --

16 A. -- guide.

17 Q. Dr. Krauss, have you seen any warnings that  
18 MCI produced associated with this J4500?

19 A. I haven't. But I haven't -- I didn't look  
20 for that.

21 Q. You also didn't make an assessment as to  
22 whether the air displacement constituted a hazard;  
23 correct?

24 A. That's correct. I defer to others.

25 Q. You said I don't even care if it's a hazard;

1 you still don't need a warning?

2 A. No, that's not what I said at all.

3 Q. Well, if you don't make an assessment as to  
4 whether or not it's a hazard -- and you didn't do that;  
5 correct?

6 A. I did not.

7 Q. But you did say there's no need for a  
8 warning; correct?

9 A. That's right.

10 Q. You don't know how many warnings MCI even put  
11 out with the bus; correct?

12 A. That's right.

13 Q. And, in fact, you don't know the law in the  
14 state of Nevada, as you told Mr. Roberts, as it  
15 pertains to warnings; correct?

16 A. That's correct.

17 Q. But from that pool of knowledge, you opined  
18 warnings wouldn't have worked.

19 A. That's right.

20 Q. You did not know in your deposition that MCI  
21 had commissioned and conducted a 1993 wind tunnel test;  
22 right?

23 A. That's right.

24 Q. You did not know in your deposition that MCI  
25 had commissioned and proffered a safer alternative

1 design, correct, of this bus?

2 A. I did not look at that, no.

3 MR. ROBERTS: Objection. Form.

4 THE COURT: Sustained.

5 BY MR. CHRISTIANSEN:

6 Q. You simply -- and this is a quote -- knew  
7 that warnings wouldn't do the trick. That's a quote  
8 from page 42.

9 A. That's probably at the end of a longer  
10 discussion that I'm happy to rehash with you.

11 Q. You called the use of proximity sensors silly  
12 at page 74.

13 Do you remember that?

14 A. I would like to look at the context.

15 Q. Do you remember using the word "silly" in  
16 your deposition relative to proximity sensors?

17 A. So to --

18 Q. Sir, that's a yes-or-no question. Do you  
19 remember using the term "silly"?

20 A. Using the term "silly," yes.

21 Q. And you opined at page 73, "The warning about  
22 things you can see or too late to fix" as that was  
23 something you shouldn't do; right? That's sort of what  
24 you told both Mr. Roberts and myself?

25 A. So I said you're either warning about

1 something that's visible or you're warning about  
2 something in this case that would be too late to  
3 respond to, yes.

4 Q. Was it too late to respond to the aerodynamic  
5 defects in this bus seven or ten years before they  
6 built it? I mean, they -- MCI -- I'll rephrase.

7 MCI developed a safer alternative design in  
8 1993. Did you know that?

9 A. I haven't done any of the research.

10 MR. ROBERTS: Objection to form.

11 THE COURT: Sustained.

12 BY MR. CHRISTIANSEN:

13 Q. You did not -- I'm sorry.

14 THE COURT: Sustained.

15 MR. CHRISTIANSEN: Okay. Court's indulgence.

16 BY MR. CHRISTIANSEN:

17 Q. Just one final area, Dr. Krauss. And you  
18 told me that you didn't think it would have assisted --  
19 you didn't think it would assist in this bus, if a  
20 proximity sensor alerted to a bicyclist at 350 feet.

21 Do you remember that?

22 A. Yes.

23 Q. Why wouldn't it have helped?

24 A. So really two reasons. So number one, we  
25 have at 350 feet out, there's a direct line of sight.

1 And also at that distance, not only do we have a direct  
2 line of sight, but 350 feet, it's virtually right in  
3 front of you. Right? So we have sort of -- if you  
4 imagine your vision going out as a cone, that bike a  
5 few feet to the right is going to be directly in front  
6 of the driver 350 feet out. That's number one.

7           Number two, at 350 feet out, I don't know  
8 what the response is to a bike who is riding upright in  
9 the bike lane where he's supposed to be with no  
10 indications that anything is wrong.

11           So PRT specifically is looking at response to  
12 a hazard. If -- again, if a light and a beep went off,  
13 it would simply be saying, hey, look, there's somebody  
14 on the road doing exactly what they're supposed to be  
15 doing. It doesn't engender a response in any way.

16           Q. All right. That would be your same answer as  
17 300 feet?

18           A. It would.

19           Q. 250?

20           A. In this case we can short-circuit this. And  
21 really down to the front of the bus.

22           Q. 50 feet. It would have been at 50 feet?

23           A. Again, not -- Dr. Khiabani is upright in  
24 normal posture at that point.

25           Q. And you saw Mr. Rucoba answer my questions

1 couple of days ago; correct?

2 A. I did.

3 Q. And you remember him agreeing with me that  
4 from -- and I can show you the slide -- at slide 4 of  
5 his presentation through slide 9 that a half second had  
6 occurred -- had gone between a tenth for each one, was  
7 that overhead bird's-eye view.

8 You remember that?

9 A. Vaguely, yes.

10 Q. And he agreed that in that half of a second,  
11 the bus hit, veered to the left.

12 Do you remember that?

13 A. I know there were two windows of time. I  
14 think he had the bus veering .6 seconds before impact.

15 Q. Well, let the record -- the jury remember  
16 what they want, but he has it from .4 to .9 and then  
17 from .9 to .15 the bus going to the left; right?

18 A. I don't know -- if I recall, I don't think  
19 the bus was going to the left that whole time.

20 Q. And so at 50 feet, your opinion is a  
21 proximity sensor that alerts a bus driver to a bike  
22 50 feet ahead would not change the outcome?

23 A. That's my opinion, yes.

24 Q. You have proximity sensors on your car.

25 A. I don't, actually, on my car.

1 Q. Your wife's car?

2 A. My wife has just the forward and rear beeping  
3 sensors.

4 Q. So when something gets too close, it alerts  
5 her?

6 A. Yes.

7 Q. And that's done so she can avoid hitting  
8 things?

9 A. Sure.

10 MR. CHRISTIANSEN: That concludes  
11 cross-examination, Your Honor.

12 THE COURT: Thank you.

13 Mr. Roberts.

14 MR. ROBERTS: Yes, I was just trying to see  
15 if Brian could locate a graphic for me. But I will  
16 proceed, Your Honor.

17  
18 REDIRECT EXAMINATION

19 BY MR. ROBERTS:

20 Q. Okay. Dr. Krauss, let's --

21 THE COURT: Before you start, were you able  
22 to find what you needed?

23 MR. ROBERTS: He's going to let me know if he  
24 find it, Your Honor.

25 You got it maybe?



1 MR. CLARK: I got it.

2 MR. ROBERTS: We got it, Your Honor. Brian's  
3 good.

4 BY MR. ROBERTS:

5 Q. Okay. Point by point. Let's talk first, did  
6 you use the word "silly" in your deposition with regard  
7 to proximity sensors?

8 A. I did.

9 Q. And I believe that you were trying to offer  
10 the jury an explanation for the context in which you  
11 used the word "silly" in your deposition.

12 A. I was.

13 Q. Okay. Could you explain to the jury the  
14 context in which you used that word.

15 A. Sure. So I was asked, "So in your view,  
16 buses should have proximity sensors?"

17 And my answer was, "I didn't say that either.  
18 I would leave that to others to determine."

19 What I -- what I said was "I wouldn't  
20 recommend them -- recommend that they don't have them.  
21 But, yes, if they came to me and said, 'We want to  
22 install proximity sensors to prevent this accident,' I  
23 would say, 'Well, that's silly. That's not going to do  
24 it.'"

25 Q. So were you giving the opinion under oath in

1 your deposition that all proximity sensors are silly?

2 A. No. Quite the contrary. I was saying I  
3 would defer to others to determine their utility, but  
4 only that it's silly to suggest that a proximity sensor  
5 would have changed the outcome in this case.

6 Q. All right. You were asked about a proximity  
7 sensor that extends 350 feet out in front. And you  
8 said, no, that still wouldn't have made any difference.

9 Explain why it doesn't matter how far in  
10 front. What about 700 feet in front?

11 A. Right. So my general opinion -- and I think  
12 I said this on cross -- is that I'm assuming these  
13 proximity sensors that I'm opining about do anything  
14 and everything a proximity sensor possibly could do.  
15 We can sort of think about what we would want the ideal  
16 proximity sensor to do, and it just wouldn't make a  
17 difference, only because we have a situation with  
18 nothing wrong and then something wrong for a second,  
19 then we have the accident. And proximity sensor  
20 doesn't change that. Sight lines don't change that.  
21 Nothing changes that fact pattern. And that's why I  
22 opined that proximity sensors wouldn't change this  
23 case.

24 Q. I don't believe -- there were some questions  
25 about a critical window. But I don't think -- you

1 didn't ever explain what that was, did you?

2 A. I think I did.

3 Q. Okay. I must have missed that.

4 I was probably making notes on something  
5 else.

6 A. It's okay.

7 Q. Is there anything about the critical window  
8 analysis in your book that's inconsistent with the  
9 opinions you've offered today to the jury?

10 A. No, not at all. So, like I said, the  
11 critical window is how much time you need minus how  
12 much time you have. If that -- how much you need is  
13 more than what you have, we're in great shape. Okay?

14 So here, again, the driver of the coach has  
15 one second. Unfortunately, in this case, we -- any  
16 driver in this situation would need more than that.  
17 Simply not enough time to both get through that PRT  
18 process and carry out a response that would change this  
19 accident.

20 Q. You were asked or shown, I guess, a bunch of  
21 testimony from Mr. Rucoba. And he doesn't work for  
22 your company, does he?

23 A. No.

24 Q. He was simply -- you're simply both been  
25 hired by the defense?

1 A. Correct.

2 Q. Okay. First of all, some of the questions  
3 indicated or implied that we just need to move the bus  
4 over, give enough time to move the bus over 4 inches to  
5 avoid the accident because it just ran over the tip of  
6 the helmet; right?

7 A. Yes.

8 Q. Would a proximity sensor have given that  
9 4 inches in your opinion?

10 A. No. Again, if we sort of go back to what I  
11 just said -- I won't rehash it all, but if we only have  
12 one second, even in the superhuman best-case scenario,  
13 that response is beginning at the moment of impact.

14 There's no science, there's no basis to say  
15 that a proximity sensor would add .1 second to the  
16 available time or .2 seconds to the available time.

17 So if we want to, you know, make up numbers  
18 and say, if this were true, what would that mean? And,  
19 yes, I would defer to Mr. Rucoba that that would give  
20 an extra few inches. That's fine.

21 But you're absolutely right. It's just that  
22 we're just sort of throwing out numbers without any  
23 basis to do that.

24 Q. And even though you didn't offer an opinion  
25 about the dynamics of the accident, Mr. Christiansen

1 asked you about it, and then said, well, no wait a  
2 minute, you didn't render an opinion.

3 Do you have an opinion about what would  
4 happen if you shift the bus over?

5 A. Well --

6 MR. CHRISTIANSEN: Objection. Improper, Your  
7 Honor.

8 MR. ROBERTS: They opened the door, Your  
9 Honor.

10 MR. CHRISTIANSEN: No.

11 THE COURT: Overruled.

12 THE WITNESS: Yes. So what we're talking  
13 about here -- and I was asked this question. I was  
14 trying to clarify. There's the issue of adding that .1  
15 to .2 seconds and moving the bus over preimpact that  
16 gives the driver more time to respond. All that does  
17 is move everything over. Right? It's not that the bus  
18 is 4 inches further from the bike now when the rear  
19 wheels get to his head; it's that everything moves  
20 over. Right? We're still going to have that impact,  
21 just going to be moved over a little bit.

22 So the relationship between the bike and the  
23 coach doesn't change. It's just everything is moved  
24 over by 2 inches or 4 inches.

25 MR. ROBERTS: Brian, could you display 579,

1 page 2.

2 BY MR. ROBERTS:

3 Q. I want to show you the chart again. And your  
4 point is, based on perception-reaction times of 1 1/2  
5 to 2 1/2 seconds, this is the time available; it's not  
6 enough?

7 A. It's not even close.

8 Q. Okay. Does your book have  
9 perception-reaction time ranges in it?

10 A. It does.

11 Q. What's in your book?

12 A. So in the book, my default range -- I usually  
13 go a little bit higher and use 1 1/2 to 3. There are  
14 scenarios where it can be higher than that, and there  
15 are a lot of variables -- and I don't need to get into  
16 all of the minutia here -- that can shorten  
17 perception-reaction time closer to that 1 1/2 end or  
18 prolong it.

19 But there's generally a range. And we look  
20 at each case individually and try to assess what end of  
21 that range that the PRT is more likely to be on.

22 Q. Okay. But Mr. Christiansen said, you know,  
23 "Hey, are you aware of a paper that was shown to  
24 Mr. Rucoba by Mr. Kemp and that put perception-reaction  
25 time well under a second?" implying that -- that your

1 chart would then -- there would be time to react.

2 Have you reviewed that paper?

3 A. I have reviewed that paper.

4 Q. And was that the paper by Merrick Guzik?

5 A. Yes.

6 Q. And do you have any criticisms of that paper  
7 and its findings as far as perception-reaction time of  
8 less than half a second as it would apply to a  
9 real-life event involving the driver of a vehicle?

10 A. Yes. So this paper, which, by the way, it  
11 was not peer-reviewed either. This was just something  
12 found online.

13 But this was somebody sitting at kind of a  
14 computer with a steering wheel in front of it and some  
15 pedals on the floor. They do -- I think you -- you  
16 recall there was a simple and complex condition is what  
17 they called it.

18 Basically, the simple condition is, a light  
19 comes on, you just slam on the brake; right? That's --  
20 and this is -- this study has validity because it helps  
21 us understand how long it takes to move the foot.  
22 That's about it.

23 The complex condition was a light comes on.  
24 Depending on the color of the light, you either hit the  
25 clutch, hit the brake, steer left, or steer right.

1           Again, this is not anything that had any sort  
2 of an analogue to real driving; right? When we're  
3 driving for real, something in the world happens that  
4 may or may not be something you need to respond to.  
5 And then what response you choose is not told to you  
6 ahead of time. It's not, if you see a bike 300 feet  
7 ahead, swerve to the left; right? We're not given that  
8 information.

9           That's what they were studying. They were  
10 really looking at how long does it take effectively to  
11 move the foot? And if we complicate things a little  
12 bit, how much does it slow it down? But there's no  
13 relationship at all to real-world driving at all in  
14 that paper.

15         Q.    So the subjects in that study were -- knew  
16 that a light was going to come on, they were watching  
17 the light, and they knew they'd only have one of four  
18 choices?

19         A.    One of four in the complex condition. In the  
20 simple condition, there was only one choice.

21         Q.    Okay. Is that study generally accepted as an  
22 accurate predictor of perception-reaction time in the  
23 real world by experts in the community?

24         A.    No.

25         Q.    Have you ever seen any peer-reviewed articles



1 suggesting that it's even possible to have real-world  
2 perception-reaction times of under a second?

3       A.   No. Just to put it in perspective, the  
4 quickest PRTs that you really ever see in the  
5 peer-reviewed science looking at driver behavior is on  
6 the order of about three-quarters of a second. And  
7 this is typically in a driver simulator, so there's  
8 nothing at stake, you're looking at a computer monitor,  
9 sort of playing a video game sort of thing, when you  
10 know something is going to happen.

11               So when you're nice and safe in a room  
12 looking at a computer and you know something's going to  
13 happen, you can respond in about three-quarters of a  
14 second. When we adapt to a real vehicle with real  
15 stakes -- or real things at stake to your response,  
16 you're moving fast, there's a real hazard involved,  
17 it's not expected, that time typically doubles at  
18 least.

19       Q.   Let's -- let's talk about the column for  
20 angle towards the bus in degrees. So if the bus is in  
21 a bus lane, the cyclist is in the cycle lane, and we  
22 know that somehow the bicyclist is turning -- and this  
23 is the angle of the turn. So a 10-degree turn is going  
24 to take a lot longer to intersect than a 50-degree  
25 turn; right?

1           A.     Exactly.

2           Q.     Okay.  And you're correct.  I said if their  
3 expert gave an angle between 20 and 30 degrees, what  
4 would the answer be based on your chart, but you  
5 weren't opining to that; right?

6           A.     That's correct.  If -- and I just don't  
7 recall.  There are two angles that are important here:  
8 one, what you just said; and the other one is the  
9 actual angle of the bike at the time of impact.  And  
10 those don't necessarily correspond.

11          Q.     Mr. Christiansen just said that he -- that  
12 Mr. Caldwell only said the angle of the bike was about  
13 30 degrees -- between 20 and 30 degrees, and not the  
14 angle of the turn; right?  You heard that?

15          A.     Yes, I did.

16          Q.     Okay.  Well, Mr. Caldwell testified to the  
17 jury in this case on February 26th, 2018, and he used  
18 Exhibit 225 to illustrate the hypothetical angle of the  
19 turn.

20                 So -- so this is a hypothetical angle of a  
21 turn to go from the bicycle lane into the bus lane  
22 where the area of impact occurred.  Can you make out  
23 what he says the two potential angles are that are most  
24 probable in his opinion?

25          A.     The two angles denoted here are 20 degrees

1 and 35 degrees.

2 Q. Okay.

3 And could I have the ELMO.

4 THE COURT RECORDER: Yes.

5 BY MR. ROBERTS:

6 Q. And this is at page 65 of his testimony on  
7 February 26th. And can you confirm that he says the  
8 most shallow angle would be if the bike follows a  
9 straight path to the red dot, "And then an approximate  
10 curved path is the yellow line. So the minimum angle  
11 into the travel lane -- the right travel lane, the  
12 minimum angle is 30 degrees and the steeper angle here  
13 is about 35 degrees"?

14 And then he goes on, at line 17 to 18, "And  
15 so it's probably somewhere between those two extremes  
16 of a curved path and a straight path"; right?

17 A. Well, a couple of corrections. One, you said  
18 30 degrees; he did say 20. And I can't see the bottom,  
19 so --

20 Q. Okay. Thank you for correcting my reading.  
21 I'm trying to hurry to get through. I know everyone's  
22 hungry.

23 So -- so Mr. Caldwell did actually testify  
24 both to the angle, that -- of the lean and to the  
25 probable angle of the turn of the cyclist from the bike

1 lane to the bus lane; correct?

2 A. He did.

3 Q. And did my hypothetical to you accurately say  
4 it was about between 20 and 30 degrees?

5 A. Yes.

6 Q. Okay. Going back to your chart, Exhibit 579,  
7 page 2. So between 20 and 30 degrees, or between 20  
8 and 35 degrees, if you went up to 35, that -- at 12 1/2  
9 miles an hour --

10 A. Yes.

11 Q. -- because I said 20 to 30, and it's really  
12 20 to 35, 35 would even give the driver less time to  
13 react; right?

14 A. That's right.

15 Q. So if it was 35, we'd be in the range of  
16 about a quarter of a second?

17 A. In that range, yes.

18 Q. Okay. So now that you've seen the actual  
19 testimony of Mr. Caldwell on the most likely angle of  
20 the turn from the bike lane into the bus's travel lane,  
21 does that change any of the testimony you gave on  
22 direct?

23 A. It doesn't.

24 Q. In discussing your book, Mr. Christiansen  
25 started out with a section in your book, and he was

1 trying to get you to say you said something different  
2 in the context of intersecting vehicles traveling at  
3 about the same speed.

4 A. Yes.

5 Q. Correct?

6 A. Correct.

7 Q. Okay. Based on the accident reconstructions  
8 you viewed that were done by others, were these  
9 vehicles intersecting in the way that you were  
10 describing in your book?

11 A. No.

12 Q. Okay. And were they -- has anyone said they  
13 were traveling at the same speed?

14 A. No.

15 Q. So that example from your book doesn't apply  
16 to these facts at all; is that fair?

17 A. So this example -- so the A-pillar absolutely  
18 can be an obstruction. I mean, it's not a lot, but in  
19 the cases where I see that, it's typically one vehicle  
20 turning and often a pedestrian or a bike, where you've  
21 got two relatively slow speeds, and their trajectory is  
22 changing so that, as one moves in one direction and the  
23 other moves in another direction, the relationship to  
24 the A-pillar remains unchanged. So something can hide  
25 behind an A-pillar but not when you're traveling in the

1 same direction and not at different speeds.

2 Q. One final point. Mr. Christiansen asked you  
3 about testimony in another case involving a bus-bicycle  
4 accident. In that case, were you hired by the seller  
5 of the bus?

6 A. No.

7 Q. So you were not hired by a company like MCI  
8 that sells buses?

9 A. I was not.

10 Q. Okay. You were hired by a company that owned  
11 and operated a bus?

12 A. Correct.

13 Q. Okay. And you're aware that MCI did not  
14 either own or operate the bus in this case; right?

15 A. Yes.

16 MR. ROBERTS: That's all I have for redirect.  
17 Thank you, Your Honor.

18 THE COURT: Mr. Christiansen?

19 MR. CHRISTIANSEN: Sure.

20

21 RECROSS-EXAMINATION

22 BY MR. CHRISTIANSEN:

23 Q. Counsel for MCI went to great lengths to try  
24 to get you to adopt the position that it was  
25 Mr. Caldwell's opinion -- and they showed you the --

1 the picture that comes from Mr. Plantz's deposition  
2 with the red lines on it -- you remember all that? --  
3 and -- and the different -- there we go. It's up in  
4 front of the jury now.

5 Do you remember that?

6 A. If that's where it came from. I don't know.

7 Q. Okay. So we'll let the ladies and gentlemen  
8 of the jury recall whether or not Mr. Caldwell said  
9 that Mr. Plantz opined the bike to be going at 3 or  
10 4 miles an hour and, in the lane to turn into Red Rock,  
11 what angles it would have occurred in.

12 But the testimony Mr. Roberts read to you and  
13 he put up here and he beat his chest about, it was  
14 relative to Mr. Plantz's testimony -- correct? -- not  
15 Mr. Caldwell's opinions?

16 A. I don't know.

17 Q. All right. So is it fair that you can get  
18 led into saying things that aren't true just -- like I  
19 just showed you?

20 MR. ROBERTS: Objection. Form.

21 THE COURT: Overruled.

22 BY MR. CHRISTIANSEN:

23 Q. I mean, I just showed you that Mr. Roberts  
24 just told the jury that Dr. -- Mr. Caldwell had said  
25 angles dealing with his opinions, and when confronted

1 with --

2 Shane, put that back up, please.

3 -- with it, that's not at all what he told  
4 the jury; he was describing how wrong Mr. Plantz was.  
5 Right?

6 A. I don't recall.

7 Q. Well, sir, you can't just agree with  
8 Mr. Roberts and then, when I confront you with the  
9 truth, start forgetting things.

10 A. I -- it's not about forgetting things.

11 So, first of all -- and I want to be clear  
12 here too that my table, as I stated before, I'm not  
13 aware of any physical evidence of that angle. To the  
14 extent he testified it's 20 to 35 degrees, what we just  
15 talked about are the times. It's all in the table. I  
16 don't know what that was. I don't have an opinion.

17 Q. You got some information from counsel from  
18 MCI and put it into a table; correct?

19 A. No.

20 Q. And then counsel for MCI got up and showed  
21 you a picture used earlier in this trial and completely  
22 misrepresented to you that it was the person  
23 testifying's opinion as opposed to the opinion of a  
24 witness; correct?

25 A. I don't know. It was represented to me that



1 was Mr. Caldwell. If it's not, then I suppose you're  
2 correct. But I don't know.

3 Q. Okay. Is it true that you told me at your  
4 deposition, when asked, if there was a larger critical  
5 window to react, could the dynamics of the particular  
6 accident impact have changed? And your answer was, "It  
7 would depend. If it was large enough to facilitate and  
8 enable a response, it certainly would have."

9 That sound about right?

10 A. Yes.

11 What page are you on, by the way?

12 Q. That was 119 and 120, I believe. And then  
13 you go on at page 121 to tell me, "I would imagine if  
14 you changed the dynamics, the dynamics of the accident  
15 would change."

16 Correct?

17 A. Yes.

18 Q. And I asked you six ways from Monday,  
19 Dr. Krauss, "You're not going to show up to trial and  
20 have some new opinions that the outcome would have been  
21 the same had the dynamics of the accident changed?"

22 Did I not ask you those questions, and didn't  
23 you assure me at your deposition you were not going to  
24 come up with some new opinions relative to that?

25 A. I very likely did, sure.

1 Q. Okay. So your wife has a proximity sensor?

2 A. Again, in the front and the back, yes.

3 Q. And the front is so she doesn't run into

4 things she can't see; right?

5 A. Correct.

6 Q. She has a windshield in her car?

7 A. She does.

8 Q. Made of glass?

9 A. Yes.

10 Q. She can see out of it?

11 A. Absolutely.

12 Q. But she's still got a proximity sensor?

13 A. She can't see my kids' bikes in the garage.

14 Q. And -- she can't see your kids' bikes. So  
15 it's important for your wife's car, she be able to see  
16 bikes?

17 A. Well, when you're pulling up -- so, just like  
18 you quoted from my book, that trucks and cars  
19 necessarily will have some sort of blind spot owing to  
20 either the length of the hood or just the instrument  
21 cluster, if you've got a completely flat front, there  
22 is definitely a blind spot.

23 And, like I said earlier, the lower the  
24 object, the greater the blind spot. So if I'm standing  
25 in front of her car, she can see me just fine, probably

1 doesn't need the proximity sensor. But for the bucket  
2 that we have that sits in front of her car in the  
3 garage and for my kids' bikes, she can't see those. So  
4 the beeping is actually very helpful for that.

5 Q. Helpful for things she can't see in her car?

6 A. Yes.

7 Q. And when you're asked by Mr. Kemp at page 74,  
8 "So let's see if we can figure out the words -- these  
9 words, quote/unquote, impractical. So, in your view,  
10 buses should have proximity sensors?"

11 There's an objection.

12 And then your answer is, "I didn't say that  
13 either. I would leave that to others to determine.  
14 What I said was that I wouldn't recommend that they  
15 don't have them."

16 Correct?

17 A. Yes.

18 Q. The bus that -- you would not recommend that  
19 buses do not have them?

20 A. Correct. I'm not saying there's anything  
21 wrong with proximity sensors. What I'm saying --

22 Q. I got you. I just wanted to understand what  
23 you were saying right there.

24 And you use, with Mr. Roberts, the -- the --  
25 I started at 350 feet and walked you back. At

1 350 feet, had a proximity sensor -- had gone on -- and  
2 you said at about 20 feet per second, the bus is  
3 gaining on the bike -- how many extra seconds would  
4 that have afforded the bus driver to maneuver the bus?

5 A. Zero.

6 Q. No. Listen to me.

7 At 350 feet, had a proximity sensor alerted  
8 the bus driver to move the bus, how many additional  
9 seconds, working backwards from the point of impact to  
10 350 feet, would the driver have had just in time to  
11 maneuver the bus?

12 A. Zero.

13 Q. He couldn't have turned that bus for  
14 350 feet?

15 A. Well, you said how many additional seconds.  
16 My answer is zero. He can see the bike at that point.

17 Q. Let me ask it to you differently.

18 How many seconds does that bus travel in  
19 350 feet? Is that easier?

20 A. So are you talking about specifically closing  
21 in on the bike?

22 Q. Yes, sir.

23 A. So at about 20 feet per second, it's going to  
24 be -- is that about 8 -- no -- sorry -- my math is very  
25 bad -- about 17 seconds. Is that right? It's not

1 right.

2 Q. I went to law school for a reason, Doctor.  
3 No math for me, buddy.

4 A. I guess just shy of 20 seconds, I suppose,  
5 about 15 seconds.

6 Q. And at 150 feet, how many seconds -- at a  
7 closure rate of about 20 per -- feet, how many seconds  
8 would the bus driver have had before overtaking or  
9 passing the bicyclist?

10 A. About 7, maybe, give or take.

11 Q. And at 50 feet, how many seconds would the  
12 bus driver have had before he overtakes the cyclist?

13 A. About 2 1/2.

14 Q. And, by all accounts, 2 1/2 seconds is well  
15 within the perception-reaction time you've discussed  
16 and accepted in the scientific community?

17 A. Yes.

18 Q. Forget about what we got in this case, but  
19 that's just generally enough; correct?

20 A. Yes.

21 Q. And you'd agree with me, would you not --  
22 because you've opined to this -- that there's no  
23 problem, none whatsoever, until the nose of this bus  
24 passes the rear tire of the bike?

25 A. No. What I've said is there's no problem

1 until the bike starts to veer to the left.

2 Q. And you'd agree that does not occur until  
3 after the nose of the bus passes the rear tire of the  
4 bike; fair?

5 A. I would not agree with that.

6 Q. Do you have a photo to -- of something to the  
7 contrary?

8 A. No, I just didn't do the accident  
9 reconstruction.

10 Q. And you don't have any reason to disagree  
11 with Mr. Rucoba's statement about every 2 inches --  
12 every tenth of a second, the bus was able to move  
13 itself laterally, east, 2 inches?

14 A. I would not dispute that.

15 MR. CHRISTIANSEN: Court's indulgence?

16 THE COURT: Yes.

17 MR. CHRISTIANSEN: Nothing else, Your Honor.

18 MR. ROBERTS: May I, Your Honor?

19 THE COURT: Yes.

20 MR. ROBERTS: Exhibit 579, page 2.

21 MR. KEMP: Your Honor, this is -- this is --

22 THE COURT: Mr. Kemp, I will allow ...

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

1                   FURTHER REDIRECT EXAMINATION

2 BY MR. ROBERTS:

3           Q.    This will be very quick. I know we're all  
4 anxious to get out of here.

5                   579, page 2, Brian.

6                   Oh, Brian needs the control, Ms. Sandy.

7 Thanks.

8                   Okay. Very briefly. You, in your report and  
9 in your testimony to the jury, are not opining as to  
10 the angle towards the bus; right?

11           A.    Correct.

12           Q.    You're simply providing a tool to the jury,  
13 based on what they find the angle to be, how quickly it  
14 would happen?

15           A.    Exactly.

16           Q.    So let's assume the jury does not find that  
17 the angle -- does not find that the bicyclist was as  
18 far over as Mr. Plantz said it was. And then that's  
19 going to make the angle of approach shallower; right?

20           A.    It would.

21           Q.    So if the jury finds the bus was closer to  
22 the bicyclist in the bike lane, where, for example,  
23 Erika Bradley or Samantha Kolch said it was, and that  
24 lowered the angle from 20 to 30 to 20 to 10, would that  
25 change your opinion that there wasn't enough time for

1 the driver to react?

2 A. No.

3 Q. Okay. It's still below every accepted human  
4 perception-reaction time in the real world based on the  
5 accepted scientific literature; correct?

6 A. Well below, yes.

7 Q. Okay. Thank you, sir.

8 MR. ROBERTS: Thank you, Your Honor. I  
9 appreciate your indulgence.

10

11

#### RECROSS-EXAMINATION

12 BY MR. CHRISTIANSEN:

13 Q. Dr. Krauss, that chart is only for a side  
14 proximity sensor, not the front proximity sensor;  
15 correct?

16 A. The chart has nothing to do with the  
17 proximity sensor.

18 Q. The chart deals with if 3 feet is detected --  
19 the alarm goes off 3 feet on the side, how much time is  
20 there to alter?

21 A. No. All -- all that is is how much time does  
22 it take a bike to cover that distance at that angle?  
23 That's it.

24 Q. Not the bus? Not how far the bus goes?

25 A. That has nothing to do with the bus.



1 Q. Same 2 1/2 seconds for the bus at 50 feet,  
2 enough time to move; right? You just got done talking  
3 to me about it.

4 A. No, I didn't say enough time to move. You  
5 asked about PRT. PRT might end at about the moment the  
6 bus would get even with the bike at 50 feet.

7 Q. We know the bus moved at 50 feet in this  
8 case. You agreed with that?

9 A. Sorry. You lost me.

10 Q. Never mind.

11 MR. CHRISTIANSEN: Nothing else, Judge.

12 MR. ROBERTS: Nothing else, Your Honor.

13 Thank you.

14 THE COURT: You're excused.

15 THE MARSHAL: Any questions? Any questions?

16 No questions, Your Honor. Jury doesn't have  
17 any questions.

18 THE COURT: Okay. It's time to take a late  
19 lunch break. All right. I'm going to admonish you.

20 You're instructed not to talk with each other  
21 or with anyone else about any subject or issue  
22 connected with this trial. You are not to read, watch,  
23 or listen to any report of or commentary on the trial  
24 by any person connected with this case or by any medium  
25 of information, including, without limitation,

1 newspapers, television, the Internet, or radio.

2           You are not to conduct any research on your  
3 own relating to this case, such as consulting  
4 dictionaries, using the Internet, or using reference  
5 materials.

6           You are not to conduct any investigation,  
7 test any theory of the case, re-create any aspect of  
8 the case, or in any other way investigate or learn  
9 about the case on your own.

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

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

17           Let's see. I think I've got an hour and 20  
18 minutes.

19           THE MARSHAL: Yes.

20           THE COURT: Okay. One hour and 20 minutes.

21           THE MARSHAL: All rise.

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

24           THE COURT: So we will meet back here at  
25 approximately 3 o'clock.

1 MR. CHRISTIANSEN: 3 o'clock, Your Honor?

2 THE COURT: For the jury, but I'd like to  
3 meet with Ms. Works and Mr. Barger at about 2:45 so we  
4 can discuss the issues.

5 MR. BARGER: For the Court's -- are you  
6 printing it?

7 For the Court's information, Kendelea and I  
8 have all agreed now on Pears and Plantz on the issue of  
9 what would be played pending the Court's ruling. So I  
10 can hand you those documents, if you want.

11 THE COURT: Okay.

12 MR. CHRISTIANSEN: Judge, she's not here.  
13 She had to do another appearance. Maybe we should just  
14 do it 15 minutes early when they come back. I don't  
15 want to speak out of school.

16 THE COURT: Okay. Very good.

17 MR. BARGER: All right. All right. See you  
18 then.

19 (Whereupon a lunch recess was taken.)

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

22 THE MARSHAL: Please remain seated. Come to  
23 order. Department 14 is back in session.

24 THE COURT: You have me doing a lot of  
25 homework.

1 MR. BARGER: You're correct, Judge. Makes  
2 for a long weekend too.

3 THE COURT: We are back on the record?

4 THE COURT RECORDER: Yes, Your Honor.

5 THE COURT: All right. I wanted to  
6 discuss -- let me just get organized here.

7 I wanted to discuss with Mr. Barger and  
8 Ms. Work the introduction of the depositions of  
9 Mr. Michael Plantz and Anthony Pears. Okay?

10 MS. WORKS: Yes, Your Honor. And I think I  
11 can probably short-circuit this, and I don't think  
12 Mr. Barger and I need to argue anymore.

13 I'm briefly going to make a record as to the  
14 Hildreth issues with respect to Mr. Pears, just so I  
15 state my last final objections. But we understand  
16 where the Court is going with its ruling, and we've  
17 agreed, absent any change from the Court in that, as to  
18 what is coming in and what is not. And I have reviewed  
19 the final excerpts from the defense of Mr. Pears and  
20 Mr. Plantz how it will play this afternoon. It's going  
21 to play without the transcript underneath, just the  
22 audio, and then visually, obviously.

23 THE COURT: Well, okay. Go on.

24 MS. WORKS: Unless the Court tells me they  
25 want to entertain argument and may consider changing

1 something.

2 THE COURT: Here's -- here's what I've been  
3 thinking. I know I gave you an idea of where I was  
4 going, I believe, Friday. I can't remember what day  
5 anymore.

6 MS. WORKS: I think so, Judge.

7 THE COURT: But my thoughts have been that  
8 this is not going to turn into -- I know it's been  
9 proffered -- into a consciousness of guilt and  
10 having -- I'm not -- this is not going to be derailed  
11 that way. No offense, Mr. Christiansen. It's just not  
12 going to happen. Okay?

13 But to the extent that there's testimony and  
14 there's an impeachment, I think perhaps --

15 MS. WORKS: And that's exactly the record I'm  
16 going to make right now, Judge, if the Court wants to  
17 consider it.

18 THE COURT: So if -- if -- it seems to me --  
19 and this isn't -- I'm not -- I'm not making a decision.  
20 I'm having a conversation with the two of you. Okay?  
21 It seems to me that with -- just by -- by themselves,  
22 especially Mr. -- I keep getting them confused.

23 MS. WORKS: Mr. Pears is the one who says he  
24 was -- that's a lot of what was in the affidavit was  
25 incorrect.

1 THE COURT: Right.

2 MS. WORKS: And he's the one I'll make a  
3 record of that actually sort of shifts positions at  
4 different times in the deposition.

5 THE COURT: Right. But I think that -- that  
6 it's reasonable -- you know, I thought maybe we should  
7 just take this out because it's derailing this and  
8 everything else. I don't think that -- but what do you  
9 think about this? I'm -- I'm certainly having a  
10 conversation with you.

11 If this is something that's admissible, if  
12 it's relevant, then perhaps it is admissible and it can  
13 be used as impeachment. But, you know, regular course,  
14 not, you know, making it a consciousness of guilt and  
15 imputing what's been occurring to the company, because  
16 I think that that's more prejudicial than probative,  
17 and for the same reason.

18 On the other hand, if it's something that  
19 there is direct impeachment on, perhaps it should be  
20 admitted and the jury should hear it. And, you know --

21 I'm sorry, Mr. Barger. This is what happens  
22 when you -- my mind is working all the time.

23 MR. BARGER: Well, maybe the best thing --  
24 maybe we could hear what --

25 THE COURT: Do you see what I'm saying? I

1 mean, I don't know that it's really up to me to take it  
2 out. It's just how -- the context in which it, in my  
3 opinion, is more of a -- more of a -- I just said the  
4 words a few minutes ago. I'm tired.

5           You know, you can impeach them and so forth,  
6 but there's no derailment into this consciousness of  
7 guilt and bringing other witnesses in and that sort of  
8 thing. That's just not going to happen.

9           MS. WORKS: Understood. And I think that we  
10 can strike a balance, Your Honor, because certainly  
11 there will have to be some -- assuming the Court finds  
12 there to be some admissible impeachment evidence, there  
13 will have to be some introduction, obviously, of  
14 Mr. Hildreth and who he worked for and that he obtained  
15 those statements.

16           Now, that doesn't necessarily or that doesn't  
17 have to flow into the consciousness of guilt, those  
18 types of arguments, Mr. Roger. But it certainly still  
19 allows us to set the context for Okay. Your statement  
20 was X at one point. And then Mr. Hildreth, the defense  
21 investigator, comes and sees you. This is in the  
22 affidavit. Mr. Pears disavows portions of the  
23 affidavit, specifically, I believe, at pages 144 to  
24 147. And then, it says, you know, that that testimony  
25 is different than what he said earlier on in the

1 deposition.

2 So he's asked one question earlier on --

3 THE COURT: Yes.

4 MS. WORKS: -- that's at page -- I'm sorry --  
5 81, to 82:10. And I think that is in the designation  
6 as well. But this next part I will share with you  
7 since it's not.

8 MR. BARGER: Let me ask a question. What is  
9 it that you think needs to be impeached? Just tell me.

10 MS. WORKS: Yup. And I will say it right  
11 now.

12 THE COURT: I think like -- I think an offer  
13 of proof would be great, actually.

14 MR. BARGER: That's what I want to do.

15 MS. WORKS: 81:20 to 82:10 is the clip. It's  
16 your clip No. 25. The judge isn't looking at that.

17 THE COURT: 81:20 through what?

18 MS. WORKS: Through 82:10. And so he's --  
19 Mr. Pears is asked, "Question" -- and we've cut this  
20 out because there were inadmissible issues that we  
21 agreed to. But 81:20 he's asked:

22 "The next time that you look up,  
23 Dr. Khiabani is parallel with the bus and the  
24 collision takes place."

25 And his answer here, and this is at 81:20,



1 is:

2 "It was -- so he is in the bike lane at  
3 that point. And then he pulls into the through  
4 lane right parallel with the bus. And that is  
5 where I recall him taking his hands off the  
6 steering wheel."

7 Well, if the Court then looks -- so that's  
8 him. Again, he pulls into the through -- into the  
9 through lane, right parallel with the bus.

10 And then at 144, he's asked a similar line of  
11 questions about the declaration that he gave to -- or  
12 that Mr. Hildreth drafts for him. And so, for  
13 instance, at 144, line --

14 THE COURT: What page? 144?

15 MS. WORKS: -- 9. Yes, Your Honor. And,  
16 actually, probably the Court would want to just go up  
17 to 1, and I'll read that in. 144, 1 gives the question  
18 some more context.

19 THE COURT: Okay. 144.

20 MS. WORKS: At line 1.

21 THE COURT: Okay.

22 MS. WORKS: The question is:

23 "So I want to understand how it read  
24 originally. At the intersection, I -- did it  
25 say 'see'?"

1           And the answer is "See."

2           And:

3           "QUESTION: -- 'the cyclist. The cyclist  
4           has moved to the left.' And then you had him  
5           change it to 'I saw the cyclist had moved to  
6           the left.'

7           "Correct.

8           "Okay. I just want to make sure I'm  
9           sequentially getting that correct. Out of the  
10          right turn lane; correct?"

11          And then he answers, "Correct."

12          And then his -- the question is:

13          "Now that's not true either?"

14          And he says, "No."

15          And then he's asked again:

16          "Because when you saw the cyclist when you  
17          looked back up, he was where he was supposed to  
18          be, in the cycling lane; correct?"

19          "Correct.

20          And then obviously, the Court, I know, would  
21          take issue with the next question, "So Mr. X, and FBI  
22          agent," but I don't know that that even has to be  
23          there.

24          So you could get rid of 19, 20, 21:

25          "And he says out of the right turn lane,

1 through the bicycle lane, and fully into the  
2 lane with the bus, that's all a fabrication, is  
3 it not?

4 "Correct."

5 And so -- and then it would end there,  
6 obviously, as far as that portion on 145 at 1, because  
7 functionally that is impeaching the prior statement  
8 that he gives at 81, because he's saying, yeah, that is  
9 incorrect. And that was the statement he gave earlier  
10 on when not talking about what Mr. Hildreth had asked  
11 him and the truth.

12 And so it's similar to what would happen at  
13 trial. On direct, he's asked a question; he answers  
14 "Out of the right through lane." And then you get up  
15 on impeachment and you say, "Well, Mr. Pears, that's  
16 not actually correct, is it?" And then he says no and  
17 he disavows.

18 So that's exactly how the order of  
19 impeachment would go if he were here at trial. The  
20 difference is simply he's in a deposition, obviously  
21 unavailable to testify at this point.

22 So I think the Court can allow that  
23 impeachment evidence in those respects, which are  
24 highly relevant to the facts of this case and the  
25 jury's view of what happened. But we can do it without

1 necessarily -- for instance, I conceded that 144:19,  
2 20, 21 would not come in. And then, you know, starting  
3 at 145, line 2, obviously, that that would not need to  
4 come in.

5 The one issue would be is we would need some  
6 foundation, which occurs earlier in the deposition, as  
7 to who Mr. Hildreth is and how the statements were  
8 taken. And I believe that starts -- it starts around  
9 line 48 -- I'm sorry -- page 48, line 20, Your Honor.

10 And I don't think you have it, Darrell.

11 MR. BARGER: Let me just read yours for a  
12 second. If I may have a minute.

13 THE COURT: If you want, we can review this  
14 again.

15 MR. BARGER: No, I'd like to do it now  
16 because I'd like to play these next.

17 THE COURT: Oh, I see.

18 MR. BARGER: I'm sorry. I will look at where  
19 you said. Where was the impeachment? 144, something  
20 like that?

21 MS. WORKS: Yes.

22 MR. BARGER: Okay. Show me where that is.

23 Judge, I have a suggestion that I think  
24 resolves the issue.

25 THE COURT: Okay. I'm just trying to not

1 to --

2 MR. BARGER: I'm sorry?

3 THE COURT: Go ahead.

4 MR. BARGER: That's the only part she says  
5 that needs impeachment, as I heard it. I'll just  
6 delete that. Then we don't have to worry about it.  
7 I'll just delete that offer. Then there's nothing to  
8 impeach.

9 MS. WORKS: You meant 81?

10 MR. BARGER: Yeah, yeah. 81, 20, through 82,  
11 10. We'll just cut it out and not play it.

12 Is that fine?

13 MS. WORKS: I think that's fine with us, Your  
14 Honor.

15 MR. BARGER: I think that solves it. So,  
16 Judge, for the record -- and, Brian, can I please go to  
17 page -- I want to do this on the back here.

18 Go to 82 -- excuse me. Page 81, line 20, to  
19 82, line 10. Do you see that?

20 MR. CLARK: 81, 20.

21 MR. BARGER: To 82, 10. And just delete  
22 those -- that off.

23 MR. CLARK: This is for Plantz or Pears?

24 MR. BARGER: This is for Pears.

25 THE COURT: Pears.

1 MR. CLARK: Pears? All right 81, 10.

2 MR. BARGER: 81, 10. Excuse me. It's 81,  
3 20, through 82, 10.

4 MR. CLARK: 82, 10.

5 MR. BARGER: Okay.

6 MS. WORKS: All right. And, Your Honor, for  
7 the record, we would still stand by the initial  
8 objections we made, which is that we would want  
9 Mr. Hildreth's, you know, deposition played and we  
10 would want all of the testimony we initially designated  
11 with respect to Mr. Hildreth's investigation to come  
12 in, obviously understanding that we've already made the  
13 record. We're not waiving that objection. With that  
14 deletion, we reviewed the clips and believe that the  
15 clips Mr. Barger is going to play are consistent with  
16 the Court's ruling after our objections.

17 THE COURT: All right.

18 MR. BARGER: Can I -- can I ask, Brian, would  
19 you print two copies of the clean so the --

20 THE COURT: Wait. Let's -- let's chat a  
21 little bit more.

22 MR. BARGER: Okay.

23 THE COURT: With respect to line 144, and  
24 there's also line -- I just want to make sure that --

25 MR. BARGER: It's not even being offered now,