

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.

Electronically Filed
Dec 04 2019 06:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

**APPELLANT'S APPENDIX
VOLUME 37
PAGES 9001-9250**

D. LEE ROBERTS (SBN 8877)
HOWARD J. RUSSELL (SBN 8879)
WEINBERG, WHEELER,
HUDGINS, GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, Nevada 89118
(702) 938-3838

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
JUSTIN J. HENDERSON (SBN 13,349)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA
ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Ste. 600
Las Vegas, Nevada 89169
(702) 949-8200

DARRELL L. BARGER (*pro hac vice*)
MICHAEL G. TERRY (*pro hac vice*)
HARTLINE BARGER LLP
800 N. Shoreline Blvd.
Suite 2000, N. Tower
Corpus Christi, Texas 78401
JOHN C. DACUS (*pro hac vice*)
BRIAN RAWSON (*pro hac vice*)
HARTLINE BARGER LLP
8750 N. Central Expy., Ste. 1600
Dallas, Texas 75231

Attorneys for Appellant

CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
1	Complaint with Jury Demand	05/25/17	1	1–16
2	Amended Complaint and Demand for Jury Trial	06/06/17	1	17–33
3	Reporter’s Transcript of Motion for Temporary Restraining Order	06/15/17	1	34–76
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
5	Defendants Michelangelo Leasing Inc. dba Ryan’s Express and Edward Hubbard’s Answer to Plaintiffs’ Amended Complaint	06/28/17	1	81–97
6	Demand for Jury Trial	06/28/17	1	98–100
7	Defendant Motor Coach Industries, Inc.’s Answer to Plaintiffs’ Amended Complaint	06/30/17	1	101–116
8	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery’s Answer to Plaintiffs’ Amended Complaint	06/30/17	1	117–136
9	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery’s Demand for Jury Trial	06/30/17	1	137–139
10	Defendant Bell Sports, Inc.’s Answer to Plaintiff’s Amended Complaint	07/03/17	1	140–153
11	Defendant Bell Sports, Inc.’s Demand for Jury Trial	07/03/17	1	154–157
12	Notice of Entry of Order	07/11/17	1	158–165
13	Notice of Entry of Order Granting Plaintiffs’ Motion for Preferential Trial Setting	07/20/17	1	166–171

14	Reporter's Transcription of Motion for Preferential Trial Setting	07/20/17	1	172–213
15	Notice of Entry of Order (CMO)	08/18/17	1	214–222
16	Notice of Entry of Order	08/23/17	1	223–227
17	Stipulated Protective Order	08/24/17	1	228–236
18	Reporter's Transcription of Motion of Status Check and Motion for Reconsideration with Joinder	09/21/17	1 2	237–250 251–312
19	Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery's Motion for Determination of Good Faith Settlement	09/22/17	2	313–323
20	Defendant's Notice of Filing Notice of Removal	10/17/17	2 3	324–500 501–586
21	Civil Order to Statistically Close Case	10/24/17	3	587–588
22	Motion for Summary Judgment on Foreseeability of Bus Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)	10/27/17	3	589–597
23	Transcript of Proceedings	11/02/17	3	598–618
24	Second Amended Complaint and Demand for Jury Trial	11/17/17	3	619–637
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
26	Motion for Summary Judgment on Punitive Damages	12/01/17	3	642–664
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
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
31	Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7	1572–1583
32	Appendix of Exhibits to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7 8	1584–1750 1751–1801
33	Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.d., or in the Alternative, to Limit His Testimony	12/07/17	8	1802–1816
34	Appendix of Exhibits to Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative, to Limit His Testimony	12/07/17	8 9	1817–2000 2001–2100
35	Motion for Determination of Good Faith Settlement Transcript	12/07/17	9	2101–2105
36	Defendants’ Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	12/08/17	9	2106–2128
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
38	Appendix of Exhibits to Plaintiffs’ Joint Opposition to MCI Motion for Summary Judgment on All Claims	12/21/17	9 10 11	2176–2250 2251–2500 2501–2523

	Alleging a Product Defect and to MCI Motion for Summary Judgment on Punitive Damages			
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
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
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
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
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
45	Plaintiffs’ Addendum to Reply to Opposition to Motion for Summary Judgment on Foreseeability of Bus	01/17/18	11	2654–2663

	Interaction with Pedestrians or Bicyclists (Including Sudden Bicycle Movement)”			
46	Reply to Plaintiffs’ Opposition to Motion for Summary Judgment on Punitive Damages	01/17/18	11	2664–2704
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
48	Defendant Bell Sports, Inc.’s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/17/18	11	2720–2734
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
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
51	Calendar Call Transcript	01/18/18	11 12	2748–2750 2751–2752
52	Motor Coach Industries, Inc.’s Pre-Trial Disclosure Pursuant to NRCP 16.1(a)(3)	01/19/18	12	2753–2777
53	Defendant’s Reply in Support of Motion in Limine No. 7 to Exclude Any Claims that the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	01/22/18	12	2778–2787
54	Defendants’ Reply in Support of Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative to Limit His Testimony	01/22/18	12	2788–2793

55	Defendant's Reply in Support of Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/22/18	12	2794–2814
56	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Joinder to Plaintiffs' Motion for Determination of Good Faith Settlement with Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard	01/22/18	12	2815–2817
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
58	Motions in Limine Transcript	01/29/18	12 13	2998–3000 3001–3212
59	All Pending Motions Transcript	01/31/18	13 14	3213–3250 3251–3469
60	Supplemental Findings of Fact, Conclusions of Law, and Order	02/05/18	14	3470–3473
61	Motor Coach Industries, Inc.'s Answer to Second Amended Complaint	02/06/18	14	3474–3491
62	Status Check Transcript	02/09/18	14 15	3492–3500 3501–3510
63	Notice of Entry of Order	02/09/18	15	3511–3536
64	Jury Trial Transcript	02/12/18	15 16	3537–3750 3751–3817
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
67	Bench Brief on Contributory Negligence	02/15/18	18	4309–4314
68	Reporter's Transcription of Proceedings	02/15/18	18	4315–4500

69	Reporter's Transcription of Proceedings	02/16/18	19	4501–4727
70	Motor Coach Industries, Inc.'s Response to "Bench Brief on Contributory Negligence"	02/16/18	19	4728–4747
71	Defendant's Trial Brief in Support of Level Playing Field	02/20/18	19 20	4748–4750 4751–4808
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
75	Findings of Fact, Conclusions of Law, and Order	02/22/18	22	5315–5320
76	Bench Brief in Support of Preinstructing the Jury that Contributory Negligence is Not a Defense in a Product Liability Action	02/22/18	22	5321–5327
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
84	Addendum to Stipulated Protective Order	03/05/18	28	6879–6882
85	Jury Trial Transcript	03/06/18	28 29	6883–7000 7001–7044

86	Reporter's Transcription of Proceedings	03/07/18	29 30	7045–7250 7251–7265
87	Jury Trial Transcript	03/08/18	30	7266–7423
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
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
91	Plaintiffs' Trial Brief Regarding Admissibility of Taxation Issues and Gross Versus Net Loss Income	03/12/18	33	8018–8025
92	Jury Trial Transcript	03/13/18	33	8026–8170
93	Jury Trial Transcript	03/14/18	33 34	8171–8250 8251–8427
94	Jury Trial Transcript	03/15/18	34 35	8428–8500 8501–8636
95	Jury Trial Transcript	03/16/18	35 36	8637–8750 8751–8822
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
97	Notice of Entry of Order	03/19/18	36	8839–8841
98	Jury Trial Transcript	03/19/18	36 37	8842–9000 9001–9075
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
105	Proposed Jury Instructions Not Given	03/23/18	41	10207–10235
106	Amended Jury List	03/23/18	41	10236
107	Special Jury Verdict	03/23/18	41	10237–10241
108	Jury Instructions	03/23/18	41 42	10242–10250 10251–10297
109	Proposed Jury Verdict Form Not Used at Trial	03/26/18	42	10298–10302
110	Jury Instructions Reviewed with the Court on March 21, 2018	03/30/18	42	10303–10364
111	Notice of Entry of Judgment	04/18/18	42	10365–10371
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
113	Plaintiffs' Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/24/18	42	10375–10381
114	Appendix of Exhibits in Support of Plaintiffs' Verified Memorandum of Costs (Volume 1 of 2)	04/24/18	42 43 44 45 46	10382–10500 10501–10750 10751–11000 11001–11250 11251–11360
115	Appendix of Exhibits in Support of Plaintiffs' Verified Memorandum of Costs (Volume 2 of 2)	04/24/18	46 47	11361–11500 11501–11735
116	Amended Declaration of Peter S. Christiansen, Esq. in Support of Plaintiffs' 4/24/18 Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/25/18	47	11736–11742
117	Motion to Retax Costs	04/30/18	47 48	11743–11750 11751–11760

118	Opposition to Motion for Limited Post-Trial Discovery	05/03/18	48	11761–11769
119	Appendix of Exhibits to: Motor Coach Industries, Inc.’s Motion for New Trial	05/07/18	48	11770–11962
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
121	Supplement to Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/08/18	49	12013–12018
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
123	Opposition to Defendant’s Motion to Retax Costs	05/14/18	49	12039–12085
124	Notice of Appeal	05/18/18	49	12086–12097
125	Case Appeal Statement	05/18/18	49	12098–12103
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
127	Combined Opposition to Motion for a Limited New Trial and MCI’s Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/08/18	49 50	12113–12250 12251–12268
128	Reply on Motion to Retax Costs	06/29/18	50	12269–12281
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
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

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
132	Transcript	09/25/18	50	12333–12360
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
135	Order Granting Motion to Dismiss Wrongful Death Claim	01/31/19	50	12371–12372
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
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
138	Notice of Entry of "Findings of Fact and Conclusions of Law on Defendant's Motion to Retax"	04/24/19	50	12396–12411
139	Notice of Appeal	04/24/19	50	12412–12461
140	Case Appeal Statement	04/24/19	50	12462–12479
141	Notice of Entry of Court's Order Denying Defendant's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants Filed Under Seal on March 26, 2019	05/03/19	50	12480–12489

Filed Under Seal

142	Findings of Fact and Conclusions of Law and Order on Motion for Determination of Good Faith Settlement	03/14/18	51	12490–12494
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 Discovery on Order Shortening Time	05/03/18	51	12495–12602
144	Reporter’s Transcript of Proceedings	05/04/18	51	12603–12646
145	Motor Coach Industries, Inc.’s Motion to Alter or Amend Judgment to Offset Settlement Proceed Paid by Other Defendants	05/07/18	51	12647–12672
146	Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/07/18	51	12673–12704
147	Exhibits G–L and O to: Appendix of Exhibits to: Motor Coach Industries, Inc.’s Motion for a Limited New Trial	05/08/18	51 52	12705–12739 12740–12754
148	Reply in Support of Motion for a Limited New Trial	07/02/18	52	12755–12864
149	Motor Coach Industries, Inc.’s Reply in Support of Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	07/02/18	52	12865–12916
150	Plaintiffs’ Supplemental Opposition to MCI’s Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants	09/18/18	52	12917–12930
151	Order	03/26/19	52	12931–12937

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

Tab	Document	Date	Vol.	Pages
84	Addendum to Stipulated Protective Order	03/05/18	28	6879–6882
59	All Pending Motions Transcript	01/31/18	13 14	3213–3250 3251–3469
2	Amended Complaint and Demand for Jury Trial	06/06/17	1	17–33
116	Amended Declaration of Peter S. Christiansen, Esq. in Support of Plaintiffs’ 4/24/18 Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110	04/25/18	47	11736–11742
106	Amended Jury List	03/23/18	41	10236
114	Appendix of Exhibits in Support of Plaintiffs’ Verified Memorandum of Costs (Volume 1 of 2)	04/24/18	42 43 44 45 46	10382–10500 10501–10750 10751–11000 11001–11250 11251–11360
115	Appendix of Exhibits in Support of Plaintiffs’ Verified Memorandum of Costs (Volume 2 of 2)	04/24/18	46 47	11361–11500 11501–11735
32	Appendix of Exhibits to Defendant’s Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous “Air Blasts”	12/07/17	7 8	1584–1750 1751–1801
34	Appendix of Exhibits to Defendants’ Motion in Limine No. 13 to Exclude Plaintiffs’ Expert Witness Robert Cunitz, Ph.D., or in the Alternative, to Limit His Testimony	12/07/17	8 9	1817–2000 2001–2100

38	Appendix of Exhibits to 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 10 11	2176–2250 2251–2500 2501–2523
119	Appendix of Exhibits to: Motor Coach Industries, Inc.'s Motion for New Trial	05/07/18	48	11770–11962
76	Bench Brief in Support of Preinstructing the Jury that Contributory Negligence is Not a Defense in a Product Liability Action	02/22/18	22	5321–5327
67	Bench Brief on Contributory Negligence	02/15/18	18	4309–4314
51	Calendar Call Transcript	01/18/18	11 12	2748–2750 2751–2752
125	Case Appeal Statement	05/18/18	49	12098–12103
140	Case Appeal Statement	04/24/19	50	12462–12479
21	Civil Order to Statistically Close Case	10/24/17	3	587–588
127	Combined Opposition to Motion for a Limited New Trial and MCI's Renewed Motion for Judgment as a Matter of Law Regarding Failure to Warn Claim	06/08/18	49 50	12113–12250 12251–12268
1	Complaint with Jury Demand	05/25/17	1	1–16
10	Defendant Bell Sports, Inc.'s Answer to Plaintiff's Amended Complaint	07/03/17	1	140–153
11	Defendant Bell Sports, Inc.'s Demand for Jury Trial	07/03/17	1	154–157
48	Defendant Bell Sports, Inc.'s Motion for Determination of Good Faith Settlement on Order Shortening Time	01/17/18	11	2720–2734
7	Defendant Motor Coach Industries, Inc.'s Answer to Plaintiffs' Amended Complaint	06/30/17	1	101–116
8	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery's Answer to Plaintiffs' Amended Complaint	06/30/17	1	117–136

9	Defendant Sevenplus Bicycles, Inc. d/b/a Pro Cyclery's Demand for Jury Trial	06/30/17	1	137–139
19	Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery's Motion for Determination of Good Faith Settlement	09/22/17	2	313–323
31	Defendant's Motion in Limine No. 7 to Exclude Any Claims That the Subject Motor Coach was Defective Based on Alleged Dangerous "Air Blasts"	12/07/17	7	1572–1583
20	Defendant's Notice of Filing Notice of Removal	10/17/17	2 3	324–500 501–586
55	Defendant's Reply in Support of Motion in Limine No. 17 to Exclude Claim of Lost Income, Including the August 28 Expert Report of Larry Stokes	01/22/18	12	2794–2814
53	Defendant's Reply in Support of Motion in Limine No. 7 to Exclude Any Claims that the Subject Motor Coach was Defective Based on Alleged Dangerous "Air Blasts"	01/22/18	12	2778–2787
71	Defendant's Trial Brief in Support of Level Playing Field	02/20/18	19 20	4748–4750 4751–4808
5	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Answer to Plaintiffs' Amended Complaint	06/28/17	1	81–97
56	Defendants Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard's Joinder to Plaintiffs' Motion for Determination of Good Faith Settlement with Michelangelo Leasing Inc. dba Ryan's Express and Edward Hubbard	01/22/18	12	2815–2817
33	Defendants' Motion in Limine No. 13 to Exclude Plaintiffs' Expert Witness	12/07/17	8	1802–1816

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

			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 Judge. My deletion makes that moot at this point.

2 THE COURT: Okay. And just -- just for the
3 record, again, the reason why -- I mean, I think that
4 you could use rebuttal if -- if they introduced it, use
5 it as rebuttal. So I've changed my -- my analysis a
6 bit.

7 But I still think that putting this in the
8 direction as was requested by plaintiffs into a
9 consciousness of guilt and bringing other testimony in
10 is inappropriate. I think it's much more prejudicial
11 than probative. And, just as importantly, the
12 witnesses have had an opportunity to give their actual
13 perception in the depositions. I think that's probably
14 the most important thing, in my view.

15 MS. WORKS: Understood, Your Honor.

16 MR. BARGER: Yeah, we understand.

17 THE COURT: If they hadn't had that
18 opportunity to do then, now they did.

19 MR. BARGER: So Brian is going to print that.
20 What I will do first --

21 THE COURT: Then are we going to -- do we
22 have anything else to discuss with respect to
23 Mr. Plantz?

24 MS. WORKS: Correct.

25 MR. BARGER: So --

1 MS. WORKS: I mean, we have the same general
2 objection to both of those depositions coming in --

3 THE COURT: Understood.

4 MS. WORKS: -- but we have reached an accord,
5 at least as far as we reviewed what's coming in, and
6 it's consistent with the Court's ruling and our
7 agreements.

8 MR. BARGER: So, for the record, just for
9 the -- what we're going to be doing the rest of the
10 day, I'm going to play these two, and that takes one
11 hour five or ten minutes.

12 THE COURT: Both.

13 MR. BARGER: For both total.

14 MS. WORKS: Total.

15 MR. BARGER: Then my next witness is
16 Mr. Hoogestraat, Virgil Hoogestraat.

17 THE COURT: Virgil.

18 MR. BARGER: Virgil.

19 THE COURT: I will never think of him as
20 anything but Virgil.

21 MR. BARGER: I understand. And that's a good
22 name for him.

23 Now, they filed a bench brief this morning
24 about having some potential objections to some of his
25 testimony that we probably need to get some guidance

1 on.

2 THE COURT: That wasn't taxation, was it?

3 MS. WORKS: That was not the taxation issue,
4 Your Honor.

5 MR. BARGER: No, no. It was -- they -- they
6 say that Mr. Hoogestraat can't give certain opinions.
7 I don't think we're going to be giving those opinions
8 like that.

9 THE COURT: I haven't seen those. I have
10 reviewed taxation. I'm still going -- reviewing the
11 cases against, the but-for substantial factor, and
12 disfigurement. And so I've been working. Last night I
13 went all over all the jury instructions again.

14 MS. WORKS: I think Mr. Pepperman may have a
15 copy of the brief that the Court hasn't received it
16 yet.

17 MR. BARGER: What Mr. Kemp and I have
18 discussed is, before Mr. Hoogestraat actually -- when
19 he raises his hand in front of the jury, we could
20 discuss with you some of those issues so he wouldn't be
21 interrupting the testimony. So, I mean, maybe -- why
22 don't I suggest this, is that they give you the brief.
23 We'll play these two depositions for an hour and ten
24 minutes, and then we'll take a short recess and we'll
25 see what you want to do before I put the witness on.

1 THE COURT: Right. Do I have a brief from
2 both?

3 MR. BARGER: No. There's nothing really to
4 brief. We just got it this morning.

5 MS. WORKS: Can I hand you, Your Honor?

6 MR. BARGER: We hadn't been in a position to
7 respond to it today.

8 THE COURT: Thank you.

9 MR. BARGER: So that's the way we'll proceed
10 if that's permissible with the Court.

11 THE COURT: That's permissible.

12 Does anyone need a quick break, comfort
13 break?

14 Okay. Jerry, do you have them lined up?

15 THE MARSHAL: No. Are you ready?

16 THE COURT: I'm going to take a quick break.
17 Start lining them up. Okay?

18 Hold on. Taxation theory too.

19 (Discussion was held off the record.)

20 THE COURT: Are we ready for the jury?

21 MR. CHRISTIANSEN: Judge, I think they're
22 just sort of trying to work out the last sort of
23 technical difficulty, but they're close.

24 (Discussion was held off the record.)

25 MS. WORKS: Judge, we revised just a little

1 bit.

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

3 Go on.

4 MS. WORKS: So we are going to remove and
5 delete page 81, 20, to 82, line 6. But 82, line 6
6 through 10 will stay in, that one question.

7 MR. BARGER: That's fine. I was agreeable to
8 delete the whole thing, but if she wants to limit it to
9 that, that's fine. I have no problem with that.

10 What I need to do is I want to make sure that
11 I -- I'm not wasting time, I promise you. I want to
12 make sure IT, Brian, knows exactly -- I want -- I want
13 Kendelea to look at it just to make sure that we're
14 okay. All right?

15 THE COURT: That's fine. In the meantime,
16 I'll read briefs.

17 MR. BARGER: I'll play Plantz first, and they
18 can look at it.

19 THE COURT: Okay.

20 MR. BARGER: That way we can get started.

21 THE COURT: You ready with that one?

22 MS. WORKS: Yes, Your Honor.

23 MR. BARGER: Yes, we are ready.

24 THE COURT: So why don't we have the jury
25 come back in.

1 (Discussion was held off the record.)

2 THE MARSHAL: All rise.

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

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

7 THE COURT: All right. Very good.

8 Good afternoon, ladies and gentlemen.

9 Welcome back.

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

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

14 MR. CHRISTIANSEN: Yes, Your Honor.

15 MR. ROBERTS: Yes, Your Honor.

16 THE COURT: All right. Mr. Barger.

17 MR. BARGER: Yes, Your Honor. We would call
18 Michael Plantz by deposition.

19 THE COURT: All right. Very good.

20 MR. BARGER: And can the record reflect that
21 he was sworn in the deposition prior to giving his
22 testimony?

23 THE COURT: Yes. The record will reflect his
24 deposition is -- he was sworn in before he gave his
25 deposition.

1 MR. BARGER: For the record, so it's a
2 22-minute-13-second deposition.

3 THE COURT: Very good.

4 MS. WORKS: Your Honor, briefly, can we
5 approach?

6 THE COURT: Yes. Stop it for a moment.

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

9 MR. BARGER: May I check with the gentleman?

10 THE COURT: Certainly.

11 (Whereupon video deposition was played.)

12 BY MR. CHRISTIANSEN:

13 Q. Sir, could you state your name and spell it
14 for the record, please?

15 A. Sure. Michael Plantz, M-i-c-h-a-e-l. Last
16 name is Plantz, P-l-a-n-t-z.

17 Q. Give me a background thumbnail sketch of your
18 education and training.

19 A. I'm trained as a chemist. I have a bachelor
20 in chemistry, I have a master's in analytical
21 chemistry, and I have an MBA.

22 Q. What is it that -- what do you do for a
23 living today?

24 A. I'm employed by Thermo Fisher Scientific as a
25 sales products specialist.

1 Q. What is a -- tell me what a sales product
2 specialty at Thermo Fisher Scientific does.

3 A. My expertise is in trace metal analysis, and
4 I work with customers and with sales representatives to
5 fit equipment and to support those customers in their
6 analysis.

7 Q. Are you in sales?

8 A. I am not in the sales organization, but I do
9 work directly with them.

10 Q. What is your relationship workwise in the
11 work field with Mr. Pears -- Pears, who testified
12 yesterday?

13 A. I have in the past directly supported Robert
14 in his sales, and now we probably don't talk maybe once
15 every three months. Even though we live very close to
16 each other, we don't work in the same -- same circle.

17 Q. How long have you known Mr. Pears?

18 A. 11 years.

19 Q. What were you doing in Las Vegas April the
20 18th, 2017?

21 A. Attending a national sales meeting at the Red
22 Rock Casino.

23 Q. Where did you fly from and where did you fly
24 into on that day?

25 A. Flew from Chicago O'Hare directly to

1 Las Vegas airport, McCarran Airport.

2 Q. Do you have a general recollection of the
3 time of day that you got in?

4 A. I think it was late morning. I didn't review
5 my flight times, but I believe it was late morning. I
6 believe I had something like a 9:00 o'clock departure.
7 So with time differences, it was late morning, around
8 11:00.

9 Q. And had you had anything to drink that
10 morning?

11 A. No.

12 Q. How about your eyesight? Do you wear
13 glasses? You don't have glasses today.

14 A. I have contacts.

15 Q. What's your prescription, if you remember?

16 A. I don't remember.

17 Q. On the day of the incident, were you wearing
18 glasses or contacts?

19 A. Contacts.

20 Q. Is your eyesight fine with your contacts?

21 A. Every time I go, it's better than 20/20.

22 Q. Okay. When you arrive in -- into McCarran,
23 how is it that you make your way to the bus that
24 ultimately transports you to Red Rock?

25 A. We were given directions. There would be

1 greeters there, and I saw the greeter with the sign,
2 with our company sign on it, and they directed us to
3 the bus pickup area.

4 Q. Got it. And when you got on the bus, where
5 was it that you were seated?

6 A. I was seated in the very front row, right
7 behind the driver.

8 Q. Let me show you -- this is Exhibit 2. And
9 it's from the passenger side. That's a -- I think it's
10 a scale animation shot of the bus in question. It's
11 from the passenger side of the bus, but could you maybe
12 draw -- put your initials above the bus where you would
13 have been sitting even though it's on -- understanding
14 it's on the wrong side. And I've handed you a red pen.
15 So ...

16 A. (Complies.)
17 On the left side.

18 Q. Do you mind putting your initials right by
19 that arrow just so all of us and, later on the record,
20 knows what we were looking at?

21 A. Sure.

22 Q. So --

23 A. So I looked down on the driver's head.

24 Q. And we'll get some other pictures from that
25 side of the bus here in a second.

1 This will be -- let me hand you what we've
2 marked as Exhibit 3. And I'm going to ask you to do
3 the same thing with the red pen. That's an overhead
4 view of the bus with sort of the bucket seats that are
5 in the bus.

6 A. (Complies.)

7 So it was on the window side of the seat.

8 Q. Great. So you're seated closest to the
9 window immediately behind the bus driver?

10 A. Correct.

11 Q. And so Mr. -- Mr. Pears yesterday told us he
12 was seated in the front row, it looks like a little bit
13 ahead of you in the window seat on the passenger side.
14 Is that your --

15 A. Correct. Yeah, I don't remember if it --
16 being very far forward, but we were looking at each
17 other and conversing back and forth because we had not
18 seen each other in several months.

19 Q. And it would just appear from looking at this
20 overhead that Mr. Pears would have been a little closer
21 to the front of the bus, maybe a couple of feet or
22 something, if this --

23 A. Maybe 6 inches.

24 Q. And -- and his view would not have been
25 obstructed at all by a driver? In other words, you had

1 the driver in front of you; he didn't have anything in
2 front of him; fair?

3 A. Correct.

4 Q. Would a person near that fire hydrant
5 observing the bus traveling southbound along with the
6 bike on that Pavilion Center have a pretty good vantage
7 point as to the incident in question?

8 A. If they were looking that way, it would
9 appear so. That would be in my opinion. But, again, I
10 did not see them, did not know which way they were
11 facing.

12 Q. Okay. And Mr. Pears just -- where you all
13 were sitting in the bus, would have been closer
14 physically to the cyclist than you would have been;
15 fair?

16 A. Absolutely.

17 Q. All right, Mr. Plantz, if you would for me,
18 place the -- the paper clip, which is the bicyclist,
19 Dr. Khiabani, in the lane that he was in sort of at the
20 corner as he's going to make that southbound turn onto
21 Pavilion Center before he makes it.

22 A. Yeah.

23 Q. Is that the right turn lane?

24 A. It's the right turn lane. He would -- he was
25 in the right turn lane.

1 Q. So at this juncture it's very clear to you
2 that the -- the driver, Mr. Hubbard, sees Dr. Khiabani?

3 A. Yes, 'cause he verbally said, "I see you,
4 buddy."

5 Q. Why don't you make the right-hand turn, as
6 you saw Dr. Khiabani make it, with the paper clip and
7 then --

8 A. Okay.

9 Q. -- place the bus where it was southbound
10 behind him.

11 A. (Complies.)

12 Q. The Post-its are stubborn today.

13 A. So the bus approached the cyclist. As I
14 said, he slowed. I don't remember if the light was red
15 or green or if he made a turn after slowing down, but
16 he turned. And then the bus came up, stopped. And,
17 again, I don't remember if the light was red or green,
18 but the bus stopped. I did notice that the cyclist
19 didn't signal a turn. That's something I observed
20 because I cycle.

21 Q. Okay.

22 A. And so I noticed at that point that he did
23 not indicate his turn. He was -- as I said, his front
24 wheel was wobbling. He was going very slow. He made
25 the turn at that time.

1 Q. Just so I'm clear, he didn't make the turn
2 from the marked bike lane; he made the turn from the
3 right-hand turn lane?

4 A. Correct.

5 Q. Okay. Why don't you then move into the
6 southbound -- I think we all sort of got the idea --

7 A. Okay.

8 Q. -- and put the bus where the bus was behind
9 Dr. Khiabani. And -- that one -- and we'll take a
10 picture next of southbound where he was if you can get
11 that Post-it up.

12 A. Yep. So after the bus stopped for a period
13 of time after it made its corner, the cyclist had gone
14 up -- further up the road. He was somewhere around
15 this -- this bulge.

16 Q. Can you see on this map a marked bicycle
17 lane?

18 A. I do see one.

19 Q. As you -- is it your recollection -- do you
20 have a recollection one way or another, when you first
21 observed Dr. Khiabani going south on Pavilion Center,
22 whether he was in the marked bus lane -- bike lane?
23 Sorry.

24 A. At this point, no, I did not -- whether he
25 was -- he was in either the right lane or he was in the

1 bicycle lane, he was toward the right side of the -- of
2 the right lane of travel.

3 Q. All right. Mr. Plantz, now we got a big
4 giant map for you. And instead of using -- this map is
5 50-to-1 scale. That bus that's in front of you and the
6 bicycle that we've got with it are also to scale. And
7 I'm going to try to stay out of the picture and let
8 you -- are you oriented now as to where we are on
9 Pavilion Center?

10 A. Yes.

11 Q. You see that the -- we've marked about every
12 50 feet with a line running east-west on southbound
13 Pavilion Center. Can you see that?

14 A. Yes.

15 Q. And it -- and it goes -- zero being the
16 beginning of the intersection -- back to 300 feet,
17 which appears to be the start of a right turn lane,
18 which, if we roll this back, would ultimately go into
19 Red Rock Casino.

20 A. I understand.

21 Q. This is not the turn lane that you went into
22 with the second bus to go into the valet. That would
23 be further south?

24 A. Correct. I believe there was a parking
25 facility there on the corner, and the turn was after

1 that parking facility.

2 Q. Where was -- take that bus for me, if you
3 would. At 300 -- put the nose of it at 300, and then
4 put, in the lane that you think it was in, the bus.
5 And then put the bicyclist -- you can push my computer
6 out of your way, Mr. Plantz -- put the bike where you
7 saw Dr. Khiabani at that particular juncture.

8 A. (Complies.)

9 Q. Okay. You've placed Dr. Khiabani in the
10 right -- I'll call it the cutout turn lane of
11 southbound Pavilion Center; is that fair?

12 A. Yes. Accurate.

13 Q. And, as you described for me what you'd
14 witnessed previously of Dr. Khiabani was that when he
15 was going to turn right onto Charleston, he didn't do
16 so from the bike lane but from the turn lane?

17 A. Correct.

18 Q. We're going to engage in this exercise every
19 50 feet. So why don't you move the bus 50 feet to the
20 250-foot mark. And, if you would, move Dr. Khiabani to
21 where you think he was.

22 A. He was riding very slowly. Again, his front
23 wheel -- again, as before, I was watching because it --
24 he appeared to be riding much slower than a cyclist out
25 for an exercise ride. He was not pedaling. He was

1 coasting quite a bit of the time, maybe pedaling a
2 little bit. I believe this is flat here.

3 Q. All right. Before we take a picture, is the
4 bus gaining on the slow-riding Dr. Khiabani?

5 A. Definitely.

6 Q. Thank you. We'll mark as Exhibits 12 and get
7 our videographer to take another picture for us.

8 You can't testify one way or another as to
9 the speed of the bus; fair?

10 A. It felt like a common speed for that -- that
11 size of road.

12 Q. But, now, you have a recollection, as you sit
13 here today, that there may have been some veering --
14 that's my word, not yours -- out of T2 and a blinker
15 may have been turned on as if the driver was going to
16 turn into what you've told me was the parking lot for
17 the casino.

18 A. Yes, I do remember him going slightly into
19 that lane. I don't know if he made -- he made it all
20 the way over to the right, but I do remember him
21 initially going that way and then correcting.

22 Q. All right. Mr. Plantz, you're still on --
23 still on the stage. Put that bus at 50 feet and the
24 bicycle, it's somewhere.

25 A. It's on the other side. I couldn't see it on

1 the white.

2 Q. Get yourself oriented.

3 At 50 feet, you've still got the bus driver
4 in T2; fair?

5 A. Yes.

6 Q. And you've got -- still got Dr. Khiabani in
7 the right cutout turn lane to the right of the demarked
8 bicycle lane?

9 A. Yes.

10 Q. And I didn't do it in -- sequentially in the
11 best order, but I think your answer -- I asked you
12 whether the gardener who was at or near this fire
13 hydrant, who places the bus in the turn lane and the
14 bike in the cycle lane, whether you could explain that
15 different perspective. And I think you said you didn't
16 have an explanation.

17 A. I have no explanation, and I never saw the
18 cyclist in front of -- the only place the cyclist was
19 in front of the bus was back farther down the street
20 before, like, where the road pinched down. That's the
21 only time I remember the cyclist actually in front of
22 the bus.

23 Q. Okay. And then why don't you do again for
24 me, if you will, at zero. You -- you do your
25 placements and -- so I'm not doing mine -- the

1 bicyclist and the bus as they enter the intersection
2 with Griffith Peak and southbound Pavilion Center. Did
3 you place those where you recall everything to be?

4 A. Yes. At this point, the cyclist had slowed
5 down almost to the point of not moving. I thought he
6 was turning right. And the bus driver then proceeded
7 through the intersection. And somewhere around here is
8 where -- how do I say it? -- things went bad.

9 Q. So in Exhibit 17, we're entering -- the bus
10 is entering the intersection along with the bicycle;
11 fair?

12 A. Yes.

13 Q. The bicycle is to the right, cutout lane to
14 the right of the demarked bicycle lane?

15 A. Yes.

16 Q. And the bus driver is in T2, where the most
17 westbound -- western southbound lane?

18 A. Correct.

19 Q. Help me understand -- as I hear what you've
20 told us this morning, you're seated sort of right
21 underneath that yellow sticky?

22 A. Correct.

23 Q. So you're looking across the bus and across
24 Mr. Pears, essentially, to see -- right here, you got
25 to look across four seats and your friend to see the

1 bicyclist?

2 A. Yeah, he's almost not moving. So if I move
3 it back here. And, you know, the -- I don't know
4 exactly where the cyclist was if he was just entering,
5 but he's almost not moving. And then, at that point,
6 that's when I see him take his hand off -- at least the
7 left hand off. I don't see it signal -- I don't see a
8 signal again. I don't see him signal, but I do see him
9 veer out toward the bus --

10 Q. Okay.

11 A. -- at -- at a pretty sharp angle.

12 Q. Well, we took a picture a second ago when you
13 had them both entering the intersection. You had them
14 both nose to nose. I mean, they were entering the
15 intersection at the same time; fair?

16 A. That's my estimate, yes.

17 Q. And so, at that point in time -- freeze that
18 frame in your mind, if you can -- in order for you to
19 see the bicyclist, you had to look across the lane --
20 the width of the bus; fair?

21 A. Yes.

22 Q. Over your friend?

23 A. Yes.

24 Q. Out the window and down underneath this --
25 over top of that metal portion; fair?

1 A. Yeah.

2 Q. Okay. And so your visibility of him would
3 not have been as good at that moment in time when
4 they're parallel as Mr. Pears; fair?

5 A. Yes, and if -- if I can share one thing.

6 When the cyclist veered, he veered -- and my
7 last sight of him was actually -- I saw him through the
8 glass door. I don't -- I believe it was all glass. I
9 remember seeing all of the cyclist. I don't remember a
10 panel here. I think the door may have been all glass,
11 but I do remember seeing the cyclist. And he was
12 passing by the side of the bus.

13 Q. Why don't you show me the angle.

14 A. So somewhere around here. The angle was very
15 sharp. I thought he was -- I thought he was making a
16 left turn.

17 Q. Let's have you take a -- this is next in
18 line?

19 A. And let me adjust this because the last I saw
20 the cyclist was as he disappeared along the side of the
21 bus, which I think was somewhere --

22 MS. WORKS: Can we approach?

23 THE COURT: Yes.

24 THE WITNESS: -- around right --

25 (Whereupon, video deposition clip was

1 paused.)

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

4 MR. BARGER: So he'll pick up right where he
5 left off.

6 THE COURT: Okay. Very good. Thank you.
7 Go ahead.

8 (Whereupon video deposition was played.)

9 THE WITNESS: -- here. He was very close to
10 the bus. He closed the distance. The bus driver was
11 still in T2, but a sharp angle, he came over, took his
12 hand off, and closed the distance to the bus.

13 MR. CHRISTIANSEN: Take a picture of that
14 before I ask any questions. This is next in line. I
15 think it's 18, Ms. Court Reporter.

16 THE WITNESS: And whether that happened in
17 that crosswalk or whether it happened up here, I can't
18 say for sure. Somewhere in this area.

19 BY MR. CHRISTIANSEN:

20 Q. All right. Where we marked Exhibit 18, the
21 photograph we've taken is immediately prior to the
22 contact with the bus, which you don't observe; fair?

23 A. I do not observe it. The side of the bus is
24 too high.

25 Q. The last vision you have of Dr. Khiabani, the

1 cyclist, is through the bus door/window, and it's as
2 you placed items right now?

3 A. Yes. I actually see him change the angle. I
4 see him out in the front of the bus -- well, out the
5 front angle since my angle is this way, I see him
6 drifting this way as the bus is going through the
7 intersection. He's riding very slowly, which changed
8 the angle significantly. So my last vision of him was
9 through the glass of the door.

10 Q. You placed the bicyclist at the last moment
11 you saw him within -- assuming that bike lane continues
12 in the intersection, you placed him, at the last moment
13 in time you see him, within the cyclist lane, don't
14 you?

15 A. In the cyclist lane. I would say you have to
16 be just about to exit the cyclist lane into the -- into
17 the -- the T1 -- let's see -- T2 lane.

18 Q. Okay. But he's in the bicyclist lane?

19 A. Yes.

20 Q. All right. And you told me that you sort of
21 have the vision looking through that window of the
22 door --

23 A. Yes.

24 Q. -- of the bus of him being close?

25 A. Yes.

1 Q. All right. Inside of 3 feet the last time
2 you see him?

3 A. Yes.

4 Q. And the last moment you visualize
5 Dr. Khiabani before he's run over and killed, he is in
6 the cyclist lane; correct?

7 A. Yes.

8 Q. Okay. The bus is within 3 feet of his
9 person; correct?

10 A. That would be my estimate, yes.

11 Q. After the door is south of Dr. Khiabani, you
12 no longer are able to visualize anything that happens
13 because of the body of the bus?

14 A. Correct.

15 Q. Help me understand how you were sitting that
16 day. When your friend's to your right in front of you,
17 I think you said maybe 6 inches, are you facing him?
18 Explain how you were sitting to us.

19 A. I think I may have had maybe one leg
20 stretched out over the other seat. I was not penned in
21 as there was -- any room, so I was probably
22 three-quarters in my seat and had my briefcase sitting
23 on the seat next to me. So ...

24 Q. Sort of to your left, then, and between you
25 and the bus driver would have been some type of --

1 barrier is the right word -- but, like, an armrest, you
2 know, like a thing you could hold on to if you wanted
3 to?

4 A. Yes.

5 Q. And you weren't leaning, like, over the top
6 of that thing; you were sort of just comfortably seated
7 speaking to your friend, who's --

8 A. Probably sitting -- I seem to remember
9 actually sitting in the corner up -- with half of my
10 back up against the side wall and half on the seat.

11 Q. And you never saw -- you yourself never
12 observed, like, a left-hand signal by the bicyclist?

13 A. I did not. I saw his arm off, but I did not
14 see a left turn signal.

15 MR. BARGER: That completes that deposition.

16 And, Judge, if I may approach with the -- the
17 exhibits that were used and have them officially
18 marked.

19 MS. WORKS: No objection.

20 MR. BARGER: I've probably got to get the
21 court's numbers on first.

22 THE CLERK: The first one will be 580. You
23 can just put --

24 MR. BARGER: 580.

25 THE CLERK: And then 581.

1 MR. BARGER: Okay. And this one will be
2 marked as Plaintiffs' Deposition Exhibit No. 12.

3 THE CLERK: Correct.

4 MR. BARGER: And the next one --

5 THE CLERK: 583.

6 MR. BARGER: That is Exhibit 583. That's
7 Exhibit No. 17 at the deposition. By the way, there's
8 two pages, so I'm just going to staple them together.

9 THE CLERK: Okay.

10 MR. BARGER: Do you have a staple?

11 The next one is Exhibit 18 --

12 THE CLERK: 584.

13 MR. BARGER: -- to the deposition. And there
14 are two pages. I'm going to staple them.

15 Your Honor, for the record, I would like to
16 offer Defendants' Exhibit 580 and 581.

17 MS. WORKS: No objection, Your Honor.

18 MR. BARGER: 582 is Exhibit 12 to the
19 deposition of Mr. Plantz.

20 583 is the Exhibit 17 to the deposition of
21 Mr. Plantz.

22 And 584 is Exhibit 18 to the deposition of
23 Mr. Plantz.

24 THE COURT: Okay. Very good. They are
25 admitted.

1 (Whereupon, Defendant's Exhibits 582 -
2 584 were admitted into evidence.)

3 MR. BARGER: And could I have permission to
4 just display on the ELMO those exhibits real quick that
5 you just saw?

6 THE COURT: Yes.

7 MR. BARGER: This is 582, this is 583, and
8 this is 584. Thank you, Your Honor.

9 THE COURT: Okay. Very good.

10 MR. BARGER: And before we play the next
11 deposition, I think Ms. Works and I need to approach
12 for one second.

13 THE COURT: All right.

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

16 THE COURT: Plaintiffs stipulate to the
17 reading of the admonition; correct?

18 MR. CHRISTIANSEN: Yes, Your Honor.
19 Plaintiffs stipulate.

20 THE COURT: We're going to take a five-minute
21 break just back here.

22 THE MARSHAL: You want to read them the
23 admonition?

24 THE COURT: No, I -- the plaintiff -- parties
25 have stipulated to ...

1 THE MARSHAL: All rise. Five-minute recess.

2 THE COURT: Thank you.

3 (The following proceedings were held
4 outside the presence of the jury.)

5 THE COURT: Just close the door. Thank you.

6 All right.

7 You wanted to make a record, Ms. Works?

8 MS. WORKS: Yes, Your Honor. And we did
9 approach and --

10 THE COURT: Yes.

11 MS. WORKS: -- and discussed the issue at
12 sidebar. There was an objection immediately after it
13 happened.

14 Prior to the deposition, we were provided the
15 transcript of the -- at least the written words that
16 were to be played during -- from the deposition of
17 Mr. Plantz, specifically from his deposition
18 transcript, line 82/09 reads, "Very sharp. I thought
19 he" -- and the transcript cuts out the designation at
20 that point, "I thought he."

21 However, on the audio, not appearing on my
22 transcript, but very clear to -- and audible was
23 Mr. Plantz's testimony, "I thought he -- he was going
24 to make a left turn -- or made a left turn."

25 That was supposed to be excluded from the

1 designation. I don't think there's any dispute that it
2 actually played out loud in the courtroom. Again, it's
3 not on the transcript. The written transcript, I
4 believe, is what both Mr. Barger and I reviewed prior
5 to the deposition. So we believed that the audio was
6 going to be correct.

7 However, we would ask that the -- that
8 portion of the testimony with respect to the left turn
9 be stricken from the record in the event that just in
10 case the jury asks for a playback later, they should
11 not hear that portion of the testimony because it was,
12 pursuant to the stipulation of the parties, to be
13 excluded.

14 And, for the record, I would also note I did
15 a quick search of the transcript -- of the written
16 transcript I was provided on my computer. And, based
17 on my reading and that search, there is no other
18 portion of Mr. Plantz's testimony where he indicates
19 that there was a left turn made.

20 So we would ask that, given that that portion
21 of the transcript is going to be stricken from the
22 record, that the defense not be permitted to argue at
23 any point throughout the duration of the trial that
24 Mr. Plantz testified that Dr. Khiabani was going to be
25 making a left turn or he believed he made a left turn.

1 It simply does not appear in the transcript.
2 It should not have appeared on the record, and we would
3 ask that it be stricken.

4 MR. BARGER: Well, first, what was --
5 happened, he -- it got cut off. It was supposed to
6 stop. So I guess he had a problem. It didn't get cut
7 off. I agree. And I will not argue to the jury that
8 Mr. Plantz said he was making a left -- thought he was
9 making a left turn.

10 THE COURT: Understood.

11 MR. BARGER: That solves the problem.

12 THE COURT: We will -- I'm going to order
13 that stricken from the record, and the stipulation is
14 that you won't argue that it -- Mr. Plantz --

15 MR. BARGER: I will not argue Mr. Plantz said
16 he thought he was making a left-hand turn.

17 THE COURT: Okay. Very good. And, for the
18 record, right now, you are taking a look at the next
19 one, Mr. Pears, right, so we don't have any issues?

20 MS. WORKS: I am, Your Honor, at least with
21 respect to the -- the page line that Mr. Barger and
22 I -- or Mr. Barger has stipulated to removing it, I
23 believe at page 81.

24 And again I will say for the record that I
25 have not been provided with the full video and audio of

1 this deposition, same thing with the transcript. I
2 don't believe it was intentional, but, nevertheless,
3 came into the record. And so we're optimistic we're
4 not going to have the same issue.

5 THE COURT: Right. My understanding was that
6 you were going to be able to move to those areas of the
7 clip right now while the jury's gone.

8 MR. BARGER: Right.

9 THE COURT: Not just preserve the record, but
10 so that this -- so there's not an issue again.

11 MS. WORKS: I can move specifically to that
12 portion; however, I would note for the record that
13 there wasn't an issue with the portion of Mr. Plantz's
14 deposition where the error occurred. So we just didn't
15 have any way of anticipating that was going to come.

16 The only other way would be to actually for
17 them to send me the audio, the visual of Mr. Pears
18 tonight and I watch the full thing in its entirety
19 before it's played. I'm happy to do that, but I don't
20 know what the defense wants to do as far as its
21 witnesses go.

22 And Darrell can correct me if I'm wrong, but
23 I believe Mr. Pears is about 59 minutes.

24 MR. BARGER: You know, it's 49. But you know
25 what? I'm fine. Look, I don't want to -- we'll send

1 her the full audio of Pears tonight and we'll just play
2 it tomorrow. I mean, I don't want to take that chance
3 if you don't want to.

4 MS. WORKS: I'm more comfortable with that,
5 Your Honor.

6 MR. BARGER: That's fine.

7 THE COURT: All right. That's fine.

8 MR. BARGER: So what I would like to get for
9 the record now, because the Court will remember, before
10 the jury came out, we were discussing Pears, and we
11 agreed to take out certain page and line numbers. And
12 we took it all out, and then I think she came back and
13 said, no, I want to play a couple lines.

14 I want to get that on the record very clear
15 for the IT guy to know what --

16 MS. WORKS: We did put it on the record. I
17 just think he didn't.

18 MR. BARGER: Let's do it again.

19 MS. WORKS: Okay. Make sure I have the right
20 one.

21 MR. BARGER: It was page 82.

22 MS. WORKS: So we are removing, Your Honor,
23 for the record from Mr. Pears' deposition, page 81,
24 starting at line 20, down to 82 at line 6. So 82, line
25 7 through 10, should remain in the transcript to be

1 played for the jury. But, again, lines 81, 20, to
2 page 82 at 6 should be deleted and removed from the
3 designation.

4 MR. BARGER: I think it might be helpful if
5 counsel --

6 THE COURT: 82, 7 through 10 is removed.

7 MS. WORKS: 82, 1 through 6 is removed. 82,
8 7 through 10 will remain --

9 THE COURT: All right.

10 MS. WORKS: -- in the transcript.

11 MR. BARGER: And I think it would be good for
12 counsel to go over and both show Brian what we're doing
13 so he's 100 percent.

14 THE COURT: Well, you know what? We can
15 probably do that after the jury comes back.

16 MS. WORKS: Yes, Your Honor.

17 THE COURT: Why don't we -- do you have your
18 next --

19 MR. BARGER: Well, the next -- is Mr. Kemp
20 here? The next one is this issue with Virgil
21 Hoogestraat.

22 THE COURT: Right.

23 MR. CHRISTIANSEN: Judge, I think Mr. Kemp
24 may have just gone to the boy's room.

25 THE COURT: I'm going to run to the lady's

1 room.

2 MR. CHRISTIANSEN: Yes, Your Honor.

3 THE COURT: Very quick while I have a moment.

4 (Whereupon a short recess was taken.)

5 THE MARSHAL: Please remain seated.

6 Department 14 is back in session.

7 THE COURT: Okay. So shall we go back on the
8 record?

9 Okay. Let's see. For the record, I have a
10 bench brief regarding limitations on the testimony of
11 Virgil Hoogestraat, and this was filed by plaintiffs.
12 And --

13 MR. KEMP: Yes, Your Honor. I think this is
14 pretty simple, or at least it should be conceptually.
15 This is a fact witness. This is not an expert witness.
16 This is a fact witness. So a fact witness can testify
17 about facts that he personally knows.

18 THE COURT: She can't hear you.

19 MR. KEMP: Okay. The fact witness can
20 testify about facts --

21 THE COURT: I'm sorry. Just want to make
22 sure that you're on.

23 MR. KEMP: Let's make sure we get this on the
24 record.

25 THE COURT: Yes.

1 MR. KEMP: Okay. Let's start out again.

2 THE COURT: Okay.

3 MR. KEMP: This is Mr. Hoogestraat.

4 THE COURT: Correct.

5 MR. KEMP: He's a fact witness. He's not an
6 expert witness. So as a fact witness, he can testify
7 to facts that he has personal knowledge of. Okay? He
8 cannot give opinions.

9 You know, if they had wanted him to be an
10 opinion -- or an expert, they should have filed an
11 expert report, given us, you know, his opinions, and
12 then allowed us to have an expert deposition. And I
13 have seen people do that with people that are employees
14 of the company. They're testifying experts for the
15 company. That's something I have seen. It's done a
16 lot.

17 Okay. But they didn't do that. So what they
18 did is they decided that they didn't want to hire
19 either a bus safety expert -- that was what
20 Mr. Sherlock was for us -- or an aerodynamics engineer.
21 That was what Dr. Breidenthal was for us.

22 So my fear -- and I think it's
23 well-founded -- is that what they're going to try to do
24 is convert Mr. Hoogestraat into some sort of utility
25 expert to address all these points and get opinions

1 from him that he doesn't have personal knowledge of.
2 And let me give you one example.

3 They've told me that they want to have him
4 say, "Oh, I looked at the wind tunnel test from 1993,
5 and Alternative 1 looks kind of like the J4500."

6 So they want to kind of imply to the jury
7 that they really did use the alternative part that
8 they -- that they had developed in the J4500.

9 That would be wrong for so many reasons.
10 First of all, he testified, when we took his
11 deposition, that he did not even see the 1993 wind
12 tunnel test until 2017, after this case was filed.

13 He also testified that he had no involvement
14 with it. And I'm referring to his deposition, page 31
15 line 18:

16 "Okay. And were you involved personally
17 in any way, shape, or form in preparing this or
18 contracting for this wind --

19 "ANSWER: No, I was not.

20 "QUESTION: So any knowledge you have is
21 just from reading it?

22 "ANSWER: That's correct."

23 Okay? That's what he said in his deposition,
24 he didn't see it before 2017. He wasn't involved in it
25 in any way, shape, or form, and any knowledge he has is

1 just from reading it.

2 The second thing he said is we asked him if
3 he knew whether or not the wind tunnel test had been,
4 quote, "relied upon in any way, shape, or form for the
5 design of the E series or the J series."

6 Asking him that specific question, his answer
7 was "I would -- I don't know personally because I was
8 not involved in that part."

9 So he didn't know about the wind tunnel test.
10 Says he didn't know if it was relied upon. And then he
11 also says -- and this is what we highlighted in the
12 bench brief -- that he wasn't on the design team for
13 the E series or the J series. He just came in at the
14 end to try to help them launch it.

15 And it gets a little more specific in the --
16 in the documents I've given -- or the testimony we gave
17 to the Court. He says that not only wasn't -- he not
18 involved, but he wasn't on the design team. And the
19 answer is no to that question.

20 So now what they're going to do, or try to do
21 anyway, is remember when Mr. Granat came in here -- and
22 he also didn't have this in his expert report, that he
23 looked at the wind tunnel tests and he thought
24 Alternative 1 kind of looked like the J4500. But he
25 gave that opinion.

1 So the fourth reason this would be
2 excludable, one, he didn't know anything about the wind
3 tunnel test; two, he wasn't involved in it; three, he
4 wasn't on the design team; four, he doesn't know if the
5 design team relied on it; and, five, it is cumulative.
6 So there should be absolutely no opinion whatsoever in
7 this area.

8 And there shouldn't be any opinions, period.
9 He can't come up here and say that, in his opinion,
10 there's no right-side blind spot; in his opinion, a
11 proximity sensor would not work; in his opinion, there
12 are problems putting on an S-1 Gard. He cannot give
13 that opinion.

14 And the last point I brought up on purpose
15 because, apparently, they have him geared up to
16 flip-flop on his PMK testimony. He was asked, as a
17 PMK, on the subject of the feasibility of using an S-1
18 Gard whether he knew whether it was feasible or not
19 feasible to use that S-1 Gard.

20 He was specifically asked that question as a
21 PMK, and he said, when his PMK deposition was given,
22 that he didn't know one way or the other whether you
23 could put an S-1 Gard on a J4500.

24 Now they've got him juiced up to come in here
25 and say, "Oh, there are problems. We couldn't put an

1 S-1 Gard on a J4500."

2 First of all, Your Honor, that's expert
3 testimony. Second, it is -- doesn't have anything to
4 do with his personal knowledge because he said at the
5 deposition he'd never heard -- he had never even heard
6 of an S-1 Gard before this case. So -- and then third,
7 as I've already indicated, at the PMK deposition, when
8 he was being taken as a PMK on feasibility of using an
9 S-1 Gard on a J4500, he didn't have an answer one way
10 or the other.

11 And now they've got him coming in here and
12 saying, "Oh, we couldn't use the S-1 Gard because" --
13 for whatever reason they're going to give, Your Honor.

14 So, you know, he can testify as to his own
15 personal knowledge. And in the areas in this case his
16 own personal knowledge is extremely limited because, as
17 I've already indicated, he wasn't on the design team.

18 On the right-side blind spot, he said at his
19 deposition that they did not do right-side or they did
20 not do line-of-sight studies for the J4500, the
21 J series. He said in the deposition that, if they'd
22 followed practice, they would have done them for the
23 E series, but he couldn't find them and couldn't locate
24 them, had no personal knowledge about it, couldn't
25 verify whether they were done or not.

1 So he can't come into court and say, "Gee, we
2 did a line-of-sight study on the E series or the
3 J series and we didn't have a blind spot problem." And
4 if he wants to give testimony about whether or not he
5 thinks there's a blind spot, that's an opinion. That
6 is an opinion that an expert should have been
7 designated to give, Your Honor.

8 And they kind of danced around that with --
9 in fact, I would say they presented it with Krauss
10 today.

11 So on the right-side blind spot theory, I
12 don't see anything he can say.

13 Moving to proximity sensors, the only thing
14 he can say is what he said in his deposition, that in
15 2005, 2006, 2007, the three years before the coach in
16 this case was made, that they didn't investigate
17 proximity sensors. He did not know if proximity
18 sensors were available.

19 Any testimony he gives after the manufacture
20 of the bus in late 2007 -- it's a 2008 model -- any
21 testimony he gives after that about proximity sensors
22 goes squarely in the area of postremedial measures. If
23 they're going to start getting into that testimony, I'm
24 going to start getting into postremedial measures, such
25 as what they do in the bus that they make today.

1 This is this week's Bus & Motorcoach News,
2 Your Honor. I subscribe to it. And right on the back
3 they have the new J4500. And guess what it has? It
4 has cameras and proximity sensors. Gee, what a
5 surprise, you know.

6 So, in any event, if they get into any type
7 of testimony with this witness that proximity sensors
8 would or wouldn't have worked or that camera systems
9 would or wouldn't have worked, this is what they're
10 opening the door to, Your Honor. And, again, that
11 would be an opinion they shouldn't be allowed to -- to
12 go there anyway.

13 So those are the areas that are relevant to
14 the case. I don't see where he can give any testimony
15 whatsoever, with the exception of one minor area, and
16 that is that he subscribed to Bus & Motorcoach
17 Industries [sic] so he would have gotten the article
18 that's been admitted into evidence, the October 15th,
19 2007, edition, which has the BCI Falcon 45 on it. It's
20 the one with the ad, and he can say that he knew that
21 other coach manufacturers were using proximity sensors.
22 I will agree he can say that, Your Honor.

23 But to allow him to give opinions, and
24 especially to allow him to contradict a PMK deposition,
25 testimony he gave on specific areas in a PMK

1 deposition, that is just outrageous. There is no
2 possible way that that kind of testimony can come in.

3 So if -- if they can establish that he has
4 personal knowledge of a fact that's relevant to the
5 case, fine. But given -- given what we know about his
6 limited knowledge in, first, the design, no knowledge
7 whatsoever about the wind tunnel test until the case --
8 you know, I've already pointed out what he said and
9 hasn't said in these key areas.

10 I don't see where they get anywhere with this
11 witness if it is truthfully going to be limited to his
12 personal knowledge as opposed to doing what I think
13 they're going to do, which is try to -- to create some
14 sort of bus safety expert that they didn't hire or an
15 aerodynamics expert.

16 And, again, this guy doesn't have a degree in
17 aerodynamics. He doesn't have a master's degree. He
18 doesn't have a bachelor's degree. He doesn't have a
19 juris doctorate. He says aerodynamics is not his
20 issue.

21 Also, he's not even at the headquarters. He
22 is located in Roswell, New Mexico. Their headquarters
23 is in Chicago. They have manufacturing plants in
24 Canada. But he's not even part of the corporate
25 office.

1 So if they're going to try to drag him in
2 here and say things that are germane to the corporate
3 office, they've got to show that he has personal
4 knowledge -- personal knowledge. And personal
5 knowledge is personal knowledge, not something that
6 someone else at MCI whispered in his ear, not some
7 research they had him do going through records at MCI.
8 Personal knowledge.

9 And I just don't see where this guy has
10 personal knowledge. Especially they tell me he's going
11 on for six hours? A guy with this kind of limited
12 knowledge is going to testify for six hours, including
13 my cross? I just don't see it, Your Honor.

14 And so that really makes me paranoid that
15 what we're going to see here is what we shouldn't be
16 seeing.

17 MR. BARGER: I don't know what we're talking
18 about six hours, but let's talk about this.

19 THE COURT: Go on, Mr. Barger.

20 MR. BARGER: Judge, he was the 30 (b) (6)
21 witness on all kinds of areas to include engineering,
22 et cetera, that was read to the jury. They asked him
23 about did they have a right-side blind spot? Yes.

24 Look, I'm not putting him up as an expert on
25 aerodynamics. All I want to do is for -- he's an

1 engineer who's worked with this bus for a lot -- after
2 it was put into the final design. All I want to do
3 is -- he can describe, of his own personal knowledge,
4 the physical characteristics of, for instance, the
5 windshield, the stuff like that.

6 And I don't -- and with respect to how the
7 bus looks from the tires standpoint, from where it
8 looks from the windshield, so forth, that's just
9 engineering personal knowledge. He's not going to say
10 anything about he's an aerodynamic expert. He has far
11 more degrees than Mr. Sherlock who came in here and
12 testified to about ten subjects he wasn't qualified to,
13 but I'm not putting him up for that.

14 Now, with respect to, the Court remembers,
15 the wind tunnel testing. No, he was not involved in
16 the wind tunnel testing. But I think he can be shown
17 what -- what they claim should be a safer alternative
18 design, Proposal No. 2. That's what Mr. Sherlock says.
19 This is by far the best. He can say, "Look at the E
20 coach" -- I mean, "Look at the J coach, and it is not a
21 brick." And he can say it has similar characteristics.
22 He is not going to say that the design team took that
23 into consideration. He's going to just describe what
24 it looks like. And that is a personal knowledge.

25 With respect to the right-side blind spots,

1 he was asked at his -- and played to the jury that he
2 was aware of right-side blind spots. But I think he
3 can also so testify that he's aware of the visibility.
4 He's been working with that coach for many, many years.
5 And there is visibility.

6 He's not going to say anything about
7 causation. He's not going to say whether it did or did
8 not cause -- he is going to give facts with respect to,
9 for instance, the proximity sensor, the VORAD System.
10 I mean, he knows from a personal knowledge that it had
11 problems and people took it off. He knows that. He
12 can -- if he wasn't asked at the deposition, so be it.
13 But that doesn't mean he can't come in here and say
14 what he knows of his own personal knowledge. I'm not
15 going to ask him do you have an opinion about this or
16 opinion about that?

17 With respect to the S-1 Gard, he's an
18 engineer, and I don't see why he can't say -- he's not
19 going to say the S-1 Gard would or would not have
20 worked. It's not what he's saying. He will be saying
21 that the S-1 Gard installation, as we've talked about
22 here, has some problems that you have to deal with, and
23 you just can't throw it on the coach as the rest of the
24 people have kind of talked about. There's no studies,
25 there's no testing or anything.

1 And so that's the kind of stuff that I think
2 he's going to say. And I think if we -- the Court will
3 see he's not giving expert opinions. He's testifying
4 about his own personal knowledge about things.

5 I don't understand the observation that,
6 well, he said he didn't know much about an S-1 Gard, at
7 his deposition, but he certainly can say that he can
8 recognize there might be some issues mounting that on a
9 bus. I mean, I don't understand why that's
10 objectionable.

11 MR. KEMP: Well, it's objectionable, Your
12 Honor, because it's an opinion. He is going to give
13 his opinion that there are issues mounting on the bus.
14 That's the first objection.

15 The second objection is he was asked this
16 specific question at his deposition, as the person most
17 knowledgeable, on whether there were problems mounting
18 it on a bus, and he said he didn't know one way or the
19 other. So now he presumably knows or he's got
20 something he's going to tell us, but it directly
21 contradicts what he said at his PMK deposition.

22 So they want him, first of all, to give an
23 opinion; and, second of all, they're trying to ambush
24 it -- it's even worse than ambush. He's changing the
25 binding opinion he gave at the PMK deposition. That's

1 it. They're done with that particular opinion.

2 On the describing the physical
3 characteristics of the bus, what do we need that for?
4 We have pictures of the bus. And, number two, they
5 asked and got from the Court a jury view of the actual
6 bus. So the jury's actually seen the bus. Why do they
7 need a witness to talk about the physical
8 characteristics of the bus?

9 That's not what they want, Your Honor. They
10 want to show him Alternative 2 and have him say -- and
11 they admit it -- that he looked at the J coach, and
12 it's not a brick.

13 Well, first of all, that is an opinion,
14 number one, and it's an opinion about a wind tunnel
15 test that he didn't see about -- see until 2017.

16 So how can he be allowed to give an opinion
17 on something -- this is a fact witness. Where is the
18 personal knowledge in that particular area, Your Honor?

19 With regards to the VORAD series, we asked
20 him during the deposition whether he -- he knew about
21 any proximity sensor that was available in 2005, 2006,
22 2007. He didn't know of anything, didn't know of
23 anything whatsoever even being available.

24 Now, apparently, that they've had him go out
25 and test the VORAD series, which is nothing that he

1 said during the deposition, and he wants to give an
2 opinion to this jury that there are problems in the
3 VORAD series? That is an opinion, Your Honor. That is
4 not based upon personal knowledge. That's an opinion
5 on the VORAD series.

6 So for those -- and then to say that -- that
7 he has more qualifications than Mr. Sherlock, who is
8 the bus safety specialist for the American Transit
9 Union, who's investigated hundreds of bus accidents,
10 who's actually a driver -- first of all, that's not
11 true; but, second of all, it's not relevant. That's an
12 argument that they could have made him into an expert.

13 They didn't. They didn't file an expert
14 report. They didn't tender him as an expert. And, for
15 that reason, he's limited solely to what he has
16 personal knowledge of, not studies and stuff he's done
17 in preparation for trial, not things he's looked at in
18 preparation for trial, but things he has personal
19 knowledge of.

20 And as you can see, Your Honor, what they're
21 doing is exactly what I said at the very beginning.
22 They're trying to -- to make him into their utility
23 expert on all these areas, the right-side visibility.
24 Really? Come on. They presented a witness this
25 morning on right-side visibility, and now they want

1 this guy to testify on right-side visibility.

2 He's giving an opinion. He can't say what
3 the right-side visibility study said because there are
4 no right-side visibility studies. There were none done
5 for the J series. He doesn't know of any done for the
6 E series.

7 You know, if he -- if he had personal
8 knowledge that right-side visibility studies were done
9 and could tell us about them, that would have been a
10 wonderful thing to learn during the PMK deposition when
11 he was taken as the PMK on right-side visibility and he
12 didn't say anything about this.

13 So, Your Honor, what they're really trying to
14 do is exactly what I said. They're making him to an
15 expert. Law's pretty clear. His personal
16 observations -- and, really, they should be limited to
17 prior to the date of manufacture, prior to 2008,
18 because, otherwise, we're going to blow open this whole
19 thing on remedial measures, and I'm going to be allowed
20 to tell the jury that, "Gee, these people that say a
21 proximity sensor with a camera is such a stupid idea,
22 all the buses they're making now have the stupid idea,
23 ladies and gentlemen."

24 You know, and if that's where they want to
25 go, there's where we're going to go. But I think he

1 should be limited to personal observations prior to the
2 date -- and if you remember, they made a big deal out
3 of this yesterday, that it is -- it is the date of the
4 sale of the coach. That's what the jury instruction is
5 going to say.

6 So whatever he knows prior to the sale of the
7 coach that he really knows, not something he's been
8 spoon-fed to try to slip in as an opinion or repeat as
9 a hearsay fact from someone else, that's fine with me.
10 But none of these areas that we've talked about so far
11 even come close to personal knowledge in a personal
12 observation.

13 MR. HENRIOD: Your Honor, if you'll indulge
14 me, because I think this one is really important. He's
15 not just some guy who is testifying. He was not
16 deposed as some guy for his own personal knowledge.

17 This is the 30(b)(6) witness. And, as you
18 will -- they've got a punitive damage claim, which
19 brings up conscious disregard. So we're talking about,
20 for that claim, what the knowledge of the institution
21 was, what the thoughts of the institution were. What
22 was the analysis? What's the thought process? How
23 does the -- what is the defendants' perspective on this
24 evidence that's being thrown out in this trial?

25 I understand Mr. Kemp is acknowledging that

1 the standard for the jury is going to be what was known
2 in the community in 2007, but I don't hear any
3 agreement to throw out any of the exhibits that go to
4 news of technological development since then.

5 So does this defendant not have the ability
6 to respond to those exhibits and what the defendant
7 thinks in terms of its regard for the safety of others?

8 As you will instruct the jury, a corporation
9 is entitled to the same fair and unprejudiced treatment
10 as an individual would be under like circumstances.
11 Any individual would be able to come in here, faced
12 with punitive damages, and say, "Here's our perspective
13 on this evidence that you've heard. Here's the
14 thoughts that go into this. Here's our perspective on
15 the product. Here is our thinking about the safety.
16 Here's why we think it's safe."

17 A PMK necessarily, especially of a large
18 organization, is never limited to just personal
19 knowledge. It requires going out and studying and
20 preparing to testify. You necessarily have to survey
21 and find out what's going on in -- in different areas.
22 PMK depositions wouldn't really work if it was always
23 just taken as if it is the sole knowledge of the person
24 who was sitting there.

25 Now, a person's not a computer, so even when

1 you prepare, it doesn't mean you're going to know
2 everything. But if you are sitting there as the PMK,
3 it's because you are effectively putting forward the
4 perspective of the corporation. Any defendant would
5 have an ability to defend itself -- him or herself when
6 it comes to conscious disregard, their perspective on
7 the evidence and what they think it shows and why
8 they've done what they've done. And I don't see how
9 that can be any different for a corporation.

10 MR. KEMP: Judge, 30(b)(6) is not a
11 substitute for the expert report requirements and the
12 limitation of lay witnesses to facts within their
13 personal knowledge. 30(b)(6) is a technique that's
14 available to a party under the rules to have its
15 adversary produce a witness on a specific topic area.

16 In this case, we had -- I don't know -- you
17 looked at it. It was about 32 topic areas. They went
18 out and they found this guy and they said, oh, he is
19 the responsive person most knowledgeable on these 32
20 topic areas. You know, to be candid, that's not true
21 with a lot of the areas. He didn't know anything about
22 them, but, in any event, even if he had been totally
23 responsive on the -- on the 30(b)(6) topic areas, that
24 doesn't mean he's an expert. That means they produced
25 him as a witness at a 30(b)(6) deposition.

1 If they wanted him to give expert opinions --
2 or I guess "perspective" is the new word -- you know,
3 what is a perspective but an opinion? But if they
4 wanted him to give expert opinions, they should have
5 filed an expert report setting forth those opinions and
6 the basis for those opinions, which is what the rules
7 require.

8 I mean, I think the rules are crystal clear
9 on this. And, if you recall, they've been changed
10 recently because the problem we had is the defense
11 attorneys -- and sometimes the plaintiffs' bar -- were
12 sneaking in here with the treating physicians. And
13 they were trying to get opinion testimony from the
14 treating physicians. And that's been clarified under
15 the rules now.

16 But that just shows you that, under our
17 system, any witness who's going to give a perspective
18 or an opinion has to be disclosed in an expert report.
19 They can't just say, oh, we unilaterally selected him
20 as a 30(b)(6) witness on these topics, so that
21 qualifies him as an expert. I mean, one of the topics
22 was the wind tunnel test. He admitted he'd never even
23 seen them before until 2017. So now he's an expert on
24 wind tunnel tests because they produced him at the
25 30(b)(6) deposition? That just doesn't follow.

1 But, first of all, he's not been designated
2 as an expert. Second, he didn't know anything about
3 these facts. And I think you've got a tacit admission
4 now that they're really not trying to get personal
5 knowledge from this person; they're trying to get his
6 perspective, his opinion on these areas. And that is
7 the forbidden area that they cannot go to because there
8 was no expert report filed.

9 When you don't have an expert report filed,
10 you cannot give an opinion. It's just that simple.
11 You know, it would be trial by ambush. If they had
12 filed an expert report saying, oh, gee, these VORAD
13 Systems don't work good, we could have taken his
14 deposition on that. We could have explored that.

15 You know, to come in here at the last minute
16 and say we're going to have a fact witness become the
17 VORAD System expert, it's just not appropriate, Your
18 Honor.

19 MR. HENRIOD: If they want to cross him and
20 dispute that he has expertise or some basis, then they
21 can do that. This is all cross-examination. But it's
22 not exclusively expert domain because Mr. Kemp keeps
23 saying that. I mean, the reason that we had the most
24 recent development in personal injury is because we
25 were talking about areas of medical expertise where,

1 under Nevada law, you need an expert to talk about
2 medical causation, you need an expert to talk about
3 prognosis and reasonable care.

4 Whether or not we think that -- the
5 defendant -- whether or not the defendant thinks that
6 the changes to the E system and the J system reflect
7 proposed improvements in the '93 wind tunnel test, that
8 is not the exclusive domain of an expert, and I don't
9 see any authority that says only experts can talk to
10 any of this.

11 MR. KEMP: Judge, I'm supposed to challenge
12 his expertise on cross-examination? He's not an
13 expert. He's limited to his personal knowledge. They
14 say again he's supposed to be allowed to give
15 comparisons with this wind tunnel test, the shapes in
16 the wind tunnel test that he never saw until the year
17 2017, that he hasn't rendered an opinion on?

18 That's -- first of all, that's exactly what
19 Mr. Granat did, so it would be cumulative. But, second
20 of all, there's no personal knowledge there. That is
21 an opinion. And so all they're trying to do is they're
22 trying to gear up this guy to be a jack-of-all-trades
23 expert on -- on undisclosed opinions, Your Honor.

24 These opinions aren't disclosed. And that's
25 why they shouldn't be allowed. You don't get to come

1 in at the last day of trial -- well, one of the last
2 days of trial -- one of the last days of trial and say,
3 jeez, you know, we didn't hire an expert on these
4 areas, but here's someone that we think we should have
5 hired as an expert, and he's going to give you a bunch
6 of opinions or perspective. You just can't do that,
7 Your Honor.

8 MR. BARGER: Can I add one thing? I know
9 this is late in the day, everybody's yelling, but let
10 me -- let me give you an example, just an example, what
11 is not an expert opinion; it's just a fact.

12 Now, this gentleman has worked as an engineer
13 all of his life in the bus manufacturing business. I
14 keep going back to Mr. Sherlock, who has a high school
15 diploma -- and I'm not being critical of that -- and he
16 comes in and says, well, all you got to do is just kind
17 of move the A-pillar a quarter of an inch.

18 Well, you can't just do that. And this --
19 this guy can say why you can't just move an A-pillar a
20 quarter of an inch. That's not an expert opinion;
21 that's his absolute knowledge. And Mr. Sherlock's
22 never designed a bus in his life. And I've got to be
23 able to refute statements like that with somebody
24 saying you don't just come in and start moving an
25 A-pillar a quarter of an inch.

1 And that -- that stuff is not expert
2 testimony judge. That is the observations of an
3 engineer who does design buses, who says this guy is
4 just -- you can't do that. You got to take into
5 consideration a lot of things.

6 So I think we're overplaying what expert role
7 he has, to be honest with you. That's one example. I
8 can give others, and --

9 MR. KEMP: Judge, the key difference is
10 Mr. Sherlock filed an expert report in this case. He
11 filed an expert report. All the opinions that you
12 heard him give were disclosed to them back in October.
13 Okay? They took his expert deposition in December.
14 They were allowed to ask him the basis for his
15 opinions. Okay?

16 They had an opportunity to file a rebuttal
17 expert -- or even -- either an opposing expert or a
18 rebuttal expert to Mr. Sherlock. They didn't do that.
19 If they didn't like what Mr. Sherlock was saying, they
20 should have filed a rebuttal expert, maybe even this
21 guy. But they didn't do that, Your Honor. They can't
22 not utilize the procedure that's required by our rules
23 and then at the last minute come in here and say, oh,
24 jeez, we want some expert opinions, so here's a guy
25 that we think we can qualify because he's got

1 experience.

2 I'll concede he does have experience in a lot
3 of areas, Your Honor. I will concede that. But they
4 didn't designate him as an expert. He's not allowed to
5 give opinions. He can say what he saw, what he has
6 personal knowledge of, but he can't say, oh, in my
7 opinion, Mr. Sherlock's wrong; we can't change the
8 pillar like that. In my opinion, Mr. Sherlock's wrong;
9 we can't build an opaque door like that.

10 He just can't do that, Your Honor. If they
11 wanted to do that, they should have -- they should have
12 designated him as an expert.

13 MR. PEPPERMAN: And, Your Honor, I can add
14 one thing to this for the sake of consistency.
15 Because, during the other MCI employees, Couch and
16 Lamothe, when we went through those deposition
17 designations, over and over and over again, I made the
18 same exact argument that Mr. Barger just made that
19 these are employees, they know about what's going on,
20 they should be able to testify to that.

21 And over and over and over and over, Your
22 Honor excluded that testimony because these two
23 witnesses were not experts. And we accepted that in
24 the deposition designation rulings, all their
25 testimony -- or significant amounts of testimony was

1 excluded for this precise reason that they're not
2 experts and, for the sake of consistency, it should be
3 the same here with Mr. Hoogestraat.

4 MR. HENRIOD: They also weren't 30(b)(6)
5 witnesses.

6 MR. KEMP: What difference does that make?

7 MR. HENRIOD: Because the corporation is
8 entitled to have a voice. And -- and if this witness
9 is excluded -- no, no, because you can't just take a
10 few employees, put them on the stand, say, "Do you
11 personally know?" And if I can't have -- in a massive
12 corporation, if I can't have in front of me everybody
13 who has personal knowledge right now, then that is --
14 you're going to get from them all of the comments that
15 you're going to get from the defendant.

16 And that's -- that's not the law. If the
17 corporation cannot have a voice to address these
18 charges comprehensively, then we really are, as a
19 party, being treated differently than an individual
20 would be under the circumstances.

21 I think that is the biggest issue. He is the
22 one who was designated as the 30(b)(6). He's the one
23 who gave this testimony. He's the one who would be
24 coming in to give that viewpoint of the corporation.

25 MR. KEMP: Judge, the individuals in this

1 case, the plaintiffs, designated their expert,
2 Mr. Sherwood [sic]. They exposed him to the
3 defendants. They took his cross -- deposition. They
4 were allowed to prepare for his testimony at trial, his
5 opinions. And 30(b)(6) is not a substitute for the
6 expert designation requirements. All 30(b)(6) is is a
7 discovery tool.

8 THE COURT: I'm ready.

9 MR. KEMP: Thank you, Your Honor.

10 THE COURT: Okay. So I -- I've reviewed
11 plaintiffs' trial memorandum -- or bench brief --
12 excuse me -- and the arguments of both parties
13 concerning Mr. Hoogestraat's testimony.

14 And, with respect to Mr. Hoogestraat, Virgil,
15 he was deposed as a 30(b)(6) witness. And he gave the
16 answers at the time of everything that he knew and that
17 he didn't know. Okay? I -- I heard his deposition.

18 And so I do -- I do believe that a
19 corporation should be treated as an individual, but
20 even an individual facing punitives cannot testify
21 outside of the statutory limits as a lay witness. They
22 would have to hire an expert or designate an expert and
23 have a result -- have a report.

24 So, in this case, Mr. Hoogestraat will only
25 be able to testify as to his personal knowledge. And I

1 remember sincerely observing his -- I can't remember
2 one by one exactly, but it's not -- it's not a
3 corporation-versus-an-individual issue. It's either
4 one has to designate a witness to be an expert in order
5 to give opinions and testify on certain areas.

6 And in the 30(b)(6) deposition, you know,
7 what he didn't know about is already his 30(b)(6)
8 testimony. So you can't just testify as an expert
9 because you're a defendant or because you are a
10 plaintiff. You have to have a report. You have to
11 have a designation as an expert to testify, give
12 opinions, be able to rely on hearsay, and everything
13 else that the -- everything else that's contemplated.

14 And, also, I think, with respect to 16.1,
15 this is very important as well. So there's no
16 designation. So Mr. Hoogestraat will not be able to
17 testify to anything but his personal knowledge. And
18 that's my ruling.

19 MR. BARGER: Can I get some guidance?

20 THE COURT: You know, I keep giving guidance,
21 but I don't know if that's a good idea. I mean, I
22 think that's a pretty clear-cut thing. You know
23 what -- Mr. Barger, I'm not trying to be rude.

24 MR. BARGER: I understand.

25 THE COURT: But, you know, whatever he

1 testified to in his 30(b)(6) deposition that he didn't
2 know about, he doesn't know about. And I agree that he
3 couldn't study for this and everything else as a
4 30(b)(6) witness. Yes, as an expert designated with an
5 expert report, but not as a 30(b)(6) witness. So
6 that -- that's the guidance that I can give you. You
7 know -- I don't know if --

8 MR. BARGER: Begging the Court's indulgence,
9 without being -- have a book thrown at me, can I ask
10 one question for guidance?

11 THE COURT: I may or may not be able to give
12 it to you, but you may ask it, yes.

13 MR. BARGER: You may not answer, but, with
14 all due respect, I'd like -- let's say, for instance,
15 if he has recognized problems with an S-1 Gard being on
16 a bus, for instance, damage problems and damage to
17 certain things that it could possibly cause, he has
18 personal knowledge of that. Can he testify that he
19 recognizes there could be -- in the -- potential damage
20 to the bus and to the equipment if you put an S-1 Gard
21 on it?

22 MR. KEMP: Your Honor, that would be the
23 absolute worst because that was a specific PMK topic,
24 whether he knew or didn't know about problems with S-1
25 Gards.

1 THE COURT: I thought the answer was that he
2 didn't know.

3 MR. KEMP: He didn't know. So he didn't know
4 when I took his deposition on October 13, 2017.

5 THE COURT: Which means, then, that he has
6 studied and is relying on things as an expert witness
7 would.

8 MR. BARGER: Okay. I hear what the Court
9 said. I'm just trying to get some guidance. So
10 probably makes no sense to start today. So it's 15
11 minutes. I have to go back and kind of make sure my
12 witness understands on certain things and so forth. I
13 wouldn't want to --

14 THE COURT: Right. So let me tell you about
15 my schedule tomorrow.

16 THE MARSHAL: Want me to line them up, Your
17 Honor?

18 THE COURT: Just a moment, Jerry.

19 MR. HENRIOD: Your Honor, I think we'll also
20 have to set aside a time to do an offer of proof with
21 him on the stand. We can -- can do that before or
22 after. After?

23 THE COURT: After.

24 MR. HENRIOD: I suppose it is probably more
25 effective -- or is more efficient.

1 THE COURT: When you say "after," what do you
2 mean?

3 MR. HENRIOD: After he testifies.

4 MR. BARGER: Oh, he's got -- he's got
5 other -- obviously, subjects to talk about that would
6 not fall into what they've talked about. So he'll be
7 on the stand as -- with fact information and so forth.
8 But --

9 THE COURT: To his personal knowledge?

10 MR. BARGER: But if you're going to
11 exclude -- yes.

12 If you're going to exclude certain opinions,
13 which you've said you are, then I'll just have to make
14 a quick offer of proof outside the presence of the --

15 THE COURT: So that would be before his
16 testimony?

17 MR. HENRIOD: Well, not just proof -- or not
18 just quick -- I mean, everything that -- everything
19 that -- that we would be relying on him for to express
20 the views of the corporation --

21 THE COURT: Not as an expert witness.

22 MR. HENRIOD: Well, and -- and, again, we
23 disagree on what the meaning of --

24 THE COURT: I know you do.

25 MR. HENRIOD: -- expert is, whether he's

1 retained, whether he's not retained, whether or not
2 this is even the purview exclusively of experts, but
3 what he would have spoken to as the corporate
4 designated witness, I think we still need to get in the
5 record, if you'll indulge.

6 THE COURT: I understand that. I do want you
7 to remember that he -- he was deposed as the 30(b)(6)
8 witness and -- and many of the answers were "I don't
9 know. I haven't seen it. I wasn't part of this. I
10 wasn't part of that." I was listening very carefully.

11 MR. HENRIOD: Right. And, just like any
12 individual who wouldn't be told to stop and say, well,
13 that answer is different from what you said in your
14 deposition, when you took your -- when we took your
15 deposition, you said you didn't know, I think you don't
16 treat a corporation differently than you would the
17 individual in that circumstance.

18 You don't stop testimony, in the first place,
19 because it might be crossed with prior deposition
20 testimony. But it -- Your Honor, I understand you've
21 made your ruling.

22 MR. KEMP: Judge, can I make one suggestion.
23 Maybe you guys can tender this in writing rather than
24 us having to spend trial time on it. A lot of times,
25 they'll do offers of proof in writing afterwards.

1 MR. HENRIOD: I'd rather put him under oath
2 and -- and have him offer what his testimony would have
3 been. I don't want to just do it as an affidavit.

4 THE COURT: Before or --

5 MR. KEMP: That's fine with me, Your Honor.
6 I'm trying to get this case finished.

7 MR. HENRIOD: Well --

8 MR. BARGER: Well, you know, we are too. And
9 we've had a week of our case as opposed to three of the
10 plaintiffs. So we're not trying to slow anything down.
11 Trust me.

12 MR. KEMP: Actually, this is day six, and we
13 took ten.

14 THE COURT: Wait. The first week was -- the
15 first week and a half was voir dire.

16 MR. BARGER: But the plaintiffs took two
17 weeks to put on their case; right? And we've had a
18 week, basically.

19 THE COURT: No, but let's remember that the
20 first week and a half was voir dire.

21 MR. BARGER: I misstated that. I'm sorry.

22 THE COURT: Okay. All right. I think we
23 should let the jury go at this point.

24 MR. KEMP: I think so.

25 THE COURT: It's kind of -- all right. It

1 looks like I should be able -- I should be done by
2 11:00 or 11:15, which means we could start -- I just
3 saw what's on my calendar tomorrow. I think 12:30,
4 just to give -- to be sure that everyone -- I'm done
5 and everyone can take a break on the staff. Okay?

6 All right. Jerry, you want to bring them in,
7 please.

8 THE MARSHAL: All rise.

9 (The following proceedings were held in
10 the presence of the jury.)

11 THE MARSHAL: All the jurors are present,
12 Your Honor.

13 THE COURT: All right. Thank you.

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

16 THE COURT: Do the parties stipulate to the
17 presence of the jury?

18 MR. ROBERTS: Yes, Your Honor.

19 MR. CHRISTIANSEN: Yes, Your Honor.

20 THE COURT: All right. So, Counsel, we are
21 going to be meeting at 12:30. Let me ask the jury to
22 come at 1:00. So -- all right. All right. Ladies and
23 gentlemen --

24 MR. ROBERTS: Yes, Your Honor.

25 THE COURT: -- I'm going to admonish you for

1 the evening, and I'd like you to be here tomorrow at
2 1 o'clock sharp. I will be meeting the parties
3 beforehand. So -- so, hopefully, there won't be much
4 wait.

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 Have a great evening, ladies and gentlemen.

3 See you tomorrow at 1 o'clock.

4 THE MARSHAL: All rise.

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

7 THE COURT: So, Counsel, perhaps tomorrow we
8 can start at about -- a little bit earlier so that we
9 can --

10 THE MARSHAL: Please be seated.

11 MR. KEMP: Us?

12 MR. BARGER: Do you want us here at 12:30?

13 Is that what you said?

14 THE COURT: No, 12:45, because I've got to
15 make sure that -- that Department 14 staff has time to
16 have lunch.

17 But if there's going to be an offer of proof
18 in any way, I'd like you to do that before the -- you
19 know, as much as possible so they don't have to wait.

20 MR. BARGER: So you want us at 12:45 here?

21 MR. CHRISTIANSEN: 12:45 here for us, Your
22 Honor; jury at 1 o'clock?

23 THE COURT: Yes.

24 MR. CHRISTIANSEN: Just making sure we're
25 getting it right.

1 MR. KEMP: Your Honor, I have renewed my
2 offer that they can do this by some sort of written
3 presentation that doesn't have to be filed tomorrow; it
4 can be filed the day after --

5 THE COURT: I can't hear.

6 MR. KEMP: I said I renewed my offer to the
7 defense that they can make their offer of proof through
8 some sort of written submittal.

9 MR. HENRIOD: What -- I'm sorry.

10 MR. ROBERTS: I was just going to say, Your
11 Honor, I think there are twofold purposes to making a
12 proffer. One is to preserve the issue which that would
13 be relevant to.

14 The second purpose is so the judge can get a
15 better idea for the exact testimony that's being
16 excluded to give the judge one last chance to modify
17 the ruling before it goes to the jury.

18 THE COURT: Will you please -- if you would
19 remind me what day Mr. Hoogestraat -- what I need to
20 look for -- what day --

21 MR. KEMP: What day his testimony was played?

22 MR. BARGER: I got it. I've got it right
23 here. I got the testimony printed if you want it. I
24 could give it to you. I'm trying to look at the day.

25 MR. KEMP: I have the day, Your Honor.

1 MR. BARGER: It was by deposition.

2 MR. KEMP: No, you're talking about the trial
3 transcript day; correct?

4 THE COURT: Wasn't it videoed?

5 MR. BARGER: It was a video.

6 THE COURT: The 27th?

7 MR. BARGER: Right.

8 THE COURT: A.m. or p.m.?

9 MR. KEMP: Do you remember?

10 MR. CHRISTIANSEN: I don't, Your Honor.

11 MS. WORKS: My guess -- I think afternoon,
12 but I --

13 THE COURT: Maybe --

14 MS. WORKS: I can't be certain.

15 THE COURT: Saves me a little bit of time.

16 MR. GODFREY: I believe it was a.m., Your
17 Honor.

18 THE COURT: A.m.? All right. Thank you.

19 MR. KEMP: I could probably get you a page
20 number, Your Honor.

21 MR. BARGER: I've got the page number. It's
22 page 6.

23 MR. KEMP: No, this is his trial testimony.
24 It starts on page 6.

25 THE COURT: And I -- I don't know if I have a

1 copy of his deposition at this point.

2 MR. BARGER: You want his deposition or the
3 trial or both?

4 THE COURT: Both.

5 MR. BARGER: We can get you both.

6 MR. GODFREY: You were -- did you want to
7 play it in court or the full transcript?

8 THE COURT: Probably the full -- I'd like to
9 know what was played in court. And --

10 MR. GODFREY: Videowise? Because I can
11 export the video for you.

12 MR. BARGER: This is what was played in
13 court.

14 THE COURT: This was played in court.

15 MR. BARGER: I'm going to hand you next the
16 deposition.

17 THE COURT: Thank you.

18 MR. KEMP: Judge, can we come at 12:45? The
19 jury's coming at 1:00? Will that be enough time to --

20 THE COURT: Try 12:30 and we can start then.
21 Even if everyone's not back from lunch, we can talk and
22 make a record.

23 MR. KEMP: Okay.

24 THE COURT: Let's do 12:30.

25 MR. CHRISTIANSEN: 12:30. Thank you, Your

1 Honor.

2 THE COURT: All right. This is what was
3 played in court.

4 Hello, Mr. Russell.

5 MR. RUSSELL: Hello, Your Honor.

6 THE COURT: And then I wanted to see
7 Mr. Hoogestraat's entire deposition. I don't know if I
8 have it or not at this point.

9 MR. BARGER: You want the exhibits to it or
10 just actual deposition?

11 THE COURT: The deposition.

12 MR. TERRY: Mr. Kemp.

13 MS. WORKS: Will.

14 MR. KEMP: Yeah.

15 THE COURT: Thank you.

16 MR. TERRY: Yes, Your Honor.

17 THE MARSHAL: Your Honor, we still on the
18 record then?

19 THE COURT: Anything else?

20 We can go off the record.

21 (Discussion was held off the record.)

22 THE MARSHAL: Court is back in session.

23 MR. TERRY: Come to order.

24 MR. ROBERTS: Your Honor, at this time we
25 would like to move four exhibits into evidence that

1 were used with expert Granat. Exhibit 573, which are
2 slides of Granat's conclusions; 574 are pictures of the
3 bus used by Granat; 575, a demonstrative side-by-side
4 of buses; and Exhibit 576, which is a flash drive
5 containing Granat test videos 52, 69, 113, 119, 122,
6 135, 145 --

7 THE COURT: Can you repeat those last --
8 the -- what the flash drive videos are.

9 MR. ROBERTS: Yes. The flash drive videos --

10 THE COURT: Slowly.

11 MR. ROBERTS: I'll start over and go a little
12 bit slower.

13 THE COURT: Thank you.

14 MR. ROBERTS: Granat test videos 52, 69, 113,
15 119, 122, 135, 145, 139, and 147.

16 MR. KEMP: Your Honor, I don't think we have
17 an objection, but could I get a clarification on what
18 575 in comparing two buses?

19 MR. TERRY: Those were the side-by-side.

20 MR. KEMP: Side-by-side?

21 MR. TERRY: Of MCI 1993 wind tunnel test
22 study from real product J4500.

23 MR. KEMP: Yeah, I don't have any objection.

24 THE COURT: No objection. Okay? They are
25 admitted.

1 MR. ROBERTS: Thank you, Your Honor.

2 (Whereupon, Defendant's Exhibits 573 -
3 576 were admitted into evidence.)

4 THE COURT: All right.

5 MR. CHRISTIANSEN: See you at 12:30, Your
6 Honor.

7 THE COURT: We are off the record.
8 (Thereupon, the proceedings
9 concluded at 4:57 p.m.)

10

11

12

13

-oOo-

14

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

17

18

19

20



21

KRISTY L. CLARK, CCR #708

22

23

24

25

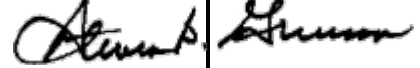
99

99

9/13/2018 1:25 PM

Steven D. Grierson

CLERK OF THE COURT



1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

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

17 Plaintiffs,)

18 vs.)

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

Defendants.)

21 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

22 BEFORE THE HONORABLE ADRIANA ESCOBAR
23 DEPARTMENT XIV

24 DATED TUESDAY, MARCH 20, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

1 APPEARANCES:

2 For the Plaintiffs Keon Khiabani and the Estate of
3 Kayvan Khiabani, M.D.:

4 BY: WILLIAM S. KEMP, ESQ.
5 **BY: ERIC PEPPERMAN, ESQ.**
6 KEMP, JONES & COULTHARD, LLP
7 3800 Howard Hughes Parkway, 17th Floor
8 Las Vegas, Nevada 89169
9 (702) 385-6000
10 e.pepperman@kempjones.com

11 For the Plaintiffs Aria Khiabani and Katayoun
12 Barin:

13 BY: PETER CHRISTIANSEN, ESQ.
14 BY: KENDELEE WORKS, ESQ.
15 **BY: WHITNEY J. BARRETT, ESQ.**
16 810 South Casino Center Drive, Suite 104
17 Las Vegas, Nevada 89101
18 (702) 570-9262
19 pjc@christiansenlaw.com
20 kworks@christiansenlaw.com

21 For the Defendant Motor Coach Industries, Inc.:

22 BY: D. LEE ROBERTS, ESQ.
23 BY: JOEL D. HENRIOD, ESQ.
24 WEINBERG, WHEELER, HUDGINS, GUNN & DIAL
25 6385 South Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
- AND -

For the Defendant Motor Coach Industries, Inc.:

BY: DARRELL BARGER, ESQ.
BY: MICHAEL G. TERRY, ESQ.
BY: HOWARD RUSSELL, ESQ.
HARTLINE DACUS BARGER DREYER
8750 North Central Expressway
Suite 1600
Dallas, Texas 75231
(214) 369-2100

009077

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

Witness: Direct: Cross: Redirect: Recross:

ROBERT ANTHONY PEARS 118
(Video Deposition played)

E X H I B I T S

Number	Admitted
Ex. 585	153
Ex. 586	153
Ex. 587	153
Ex. 588	153
Ex. 589	153
Ex. 590	153
Ex. 591	153

009078

1 LAS VEGAS, NEVADA, TUESDAY, MARCH 20, 2018;

2 1:27 P.M.

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

4 * * * * *

5 THE COURT: You can remain seated.

6 Okay. I've been researching. All
7 right. Let's see. What would you like -- we're
8 taking Virgil first?

9 MR. HENRIOD: Yes. And I think we need
10 to do the offer of proof outside the presence
11 first. It may take a while.

12 THE COURT: That's okay. If we're on
13 the record. Let me just log on to this really
14 quickly.

15 Okay. So your appearances for the
16 record, please, Counsel.

17 MR. KEMP: Your Honor, Will Kemp on
18 behalf of Keon Khiabani and the estate of
19 Dr. Kayvan Khiabani.

20 MR. PEPPERMAN: Eric Pepperman on behalf
21 of the estate of Kayvan Khiabani and Keon Khiabani
22 as well.

23 MR. CHRISTIANSEN: Pete Christiansen and
24 Kendelea Works on behalf of Aria Khiabani and the
25 estate of Katy Barin.

009079

009079

1 MR. ROBERTS: Good afternoon, Your
2 Honor. Lee Roberts for Motor Coach Industries.

3 MR. BARGER: Darrell Barger, Your Honor,
4 for Motor Coach Industries.

5 MR. HENRIOD: Joel Henriod for defendant
6 as well.

7 MR. TERRY: Michael Terry, MCI.

8 THE COURT: Very good.

9 Just for the record, we are discussing
10 the 30(b)(6) witness designated by MCI, Mr. Virgil
11 Hoogestraat. And so there are some things that we
12 need, an offer of proof and a discussion by the
13 parties to see whether or not certain areas could
14 be covered.

15 MR. HENRIOD: Yes, Your Honor. Thank
16 you. We respect the Court's ruling at this point.

17 Before we proceed with Mr. Hoogestraat's
18 testimony in front of the jury, the best practice
19 on offers of proof is to give the Court a full and
20 clear picture of what we understand to be
21 excluded. I think some people have a cynical view
22 of offers of proof, that it is just there to set
23 up appellate issues; but, actually, the genuine
24 good-faith point is to give the Court a clear view
25 and to give you an opportunity to make your record

009080

1 as much as it's an opportunity for us to make
2 ours.

3 THE COURT: Correct.

4 MR. HENRIOD: And you know I mean this
5 very respectfully. This may take a while, but
6 there's a chance the next three years could be
7 about these 24 hours.

8 THE COURT: I understand.

9 MR. HENRIOD: So we need to get him on
10 and get from him, or at least have him explain for
11 us, the testimony that we understand to be
12 excluded. If it turns out that we are
13 misinterpreting your ruling and actually assuming
14 it's broader than it is, then we can also get
15 clarity on that.

16 THE COURT: Right.

17 MR. HENRIOD: And to save time, we've
18 submitted some legal authorities in writing so
19 that you have those.

20 THE COURT: Yes.

21 MR. HENRIOD: Unless you want to take
22 them up, I don't want to push the issue because I
23 really want you to know I'm not aggressively going
24 for reconsideration.

25 THE COURT: Understood. I have read --

009081

1 I believe I have read the brief. I can't remember
2 when I received it, if it was this morning or last
3 night; but Motor Coach Industries, Inc.'s
4 opposition to plaintiff's trial brief regarding
5 Virginia Hoogestraat. And I believe this was
6 authored by Mr. Roberts.

7 MR. ROBERTS: Yes, Your Honor.

8 THE COURT: I have taken a look at --
9 yesterday I had only one brief before me, which
10 was the plaintiffs' brief. And now I have both
11 parties' brief. And I have taken a look at the
12 federal rules and the federal -- some of the
13 federal cases and some others as well. And so
14 it's my understanding that that's where the area
15 of the 30(b)(6) witness is going, that we are
16 following the federal rules in regard to this.

17 So I've seen several things, and I've
18 read, like, five cases on this. But there's some
19 issues that I would like to discuss with you after
20 doing more research myself.

21 Let's see. So Mr. Hoogestraat was
22 designated at -- is he in the courtroom?

23 MR. BARGER: He's outside, Your Honor.

24 THE COURT: -- designated as the PMK or
25 the 30(b)(6) witness for MCI. Okay. And the rule

009082

1 requires the defendant to produce a person
2 knowledgeable about the topics noticed in the
3 notice of deposition with respect to the 30(b)(6)
4 witness.

5 It appears that said witness need not
6 have personal knowledge as they are representing
7 the company and they can testify as to what the
8 corporation or the company knows, which was not
9 what I was stating yesterday, but I've done more
10 research.

11 So here -- there's some other issues,
12 though. Many of -- and we can go line by line.
13 This may take a long time, whatever. But so you
14 know -- I think you know I'm very straightforward
15 about my thoughts.

16 When -- in Mr. Hoogestraat's deposition,
17 many of the answers were he didn't know, the gist
18 of were he wasn't on this team or he didn't know,
19 he came in at the end. I remember it clearly, and
20 I've reviewed a bit of it.

21 All right. And so, in a sense, when
22 that deposition was taken, whether it's personal
23 knowledge or the knowledge that that witness is --
24 that's available to that witness on behalf of the
25 company, that witness needs to be prepared to

009083

1 testify to everything that is required or is asked
2 in the notice of deposition.

3 And it appears that at this point he was
4 not, in my view. You may have a different view on
5 this. But because of so many answers that he
6 didn't know -- and I've read articles also, not
7 just cases, that say, you know, this is the most
8 important deposition, it's going to take the most
9 time, you need to be very prepared, and so forth,
10 by attorneys all around the country.

11 So, regardless of that duty, just like
12 any individual that could have changed his or her
13 answers within 30 days, pursuant to Federal Rule
14 30(e) or Nevada Rule 30(e), it doesn't appear that
15 that happened here, that there was a change. You
16 know, the classic change that occurs. I don't
17 believe I have any information on that.

18 So with respect to the Great American --
19 Nevada has Great American Insurance company, in my
20 view, it doesn't appear that the defendant
21 complied with its obligation with a duty to
22 prepare the 30(b)(6) witness.

23 It does go beyond matters of personal
24 knowledge as to what the witness knows in order to
25 be designated and to be able to testify on behalf

009084

1 of the company.

2 "Rule 36 deposition notice requires a
3 responding party to prepare a designated
4 representative so that he or she can testify in
5 matters within and without his or her" -- I'm
6 writing "her" -- "a corporation has a duty to make
7 a conscious, good-faith effort to designate
8 knowledgeable persons for a Rule 30(b)(6)
9 deposition and to prepare them fully and
10 unevasively about the designated subject matter."

11 And here it appears that that didn't
12 occur.

13 Now, I also have here -- you know, I
14 don't believe any errata was filed to
15 Mr. Hoogestraat's testimony. That's what would
16 have occurred if an individual had changes to the
17 deposition.

18 So that's my concern. And it's a
19 legitimate concern. And it mirrors what the
20 plaintiff is saying, but looking at the federal
21 issues that -- and the federal cases, that it
22 seems to be where we're headed.

23 But the rule -- the Federal Rule 30(e)
24 and the Nevada Rule 30(e) say that anything that's
25 changed in the deponent's answers must be cured

009085

1 within 30 days. And it doesn't appear that that
2 happened here.

3 So that's -- I wanted to update you on
4 my new -- my research that I've been doing.

5 And, also, that's also discussed in
6 the -- in your -- in the defense's -- at least
7 part of it in the defense's --

8 MR. ROBERTS: It is, Your Honor,
9 although we did not address the errata issue. But
10 I would submit that whenever someone, an
11 individual, testifies inconsistent with their
12 deposition, the fact that they did not fill out an
13 errata within 30 days in a personal deposition
14 doesn't prevent them from taking the stand and
15 testifying differently. They just get impeached
16 with their prior testimony in front of the jury.

17 And I think the point in our brief is
18 that a corporation has to be treated the same as
19 an individual. And if an individual can testify
20 inconsistently with their deposition and get
21 impeached, then a corporate witness ought to be
22 able to -- be able to testify inconsistent with
23 their deposition and get impeached.

24 I understand the Court's concern about
25 the duty to prepare, and -- I understand, but I

009086

1 also think that, as the Court said, it may be a
2 line-by-line issue as to whether the PMK notice
3 gave sufficient detail with regard to the need to
4 prepare for a specific question and whether or not
5 the witness failed to prepare for that specific
6 question based on the topic. I don't think the
7 Court can make an overarching ruling that there
8 was a failure to prepare when the witness
9 testified to so many things.

10 So I understand the Court's concern, but
11 I think, at least under the federal approach --
12 and I didn't see anything to the contrary under
13 Nevada law -- there's very little 30(b)(6) Supreme
14 Court precedent that I could find and none dealing
15 with this particular issue.

16 So looking at the majority federal rule,
17 I believe that Mr. Hoogestraat should be allowed
18 to testify beyond the scope of his deposition or
19 give different answers and simply be impeached by
20 that testimony.

21 MR. KEMP: Your Honor, 30(b)(6)
22 deposition is supposed to be binding on the entire
23 corporation. In other words, if Mr. Hoogestraat
24 had appeared at the deposition and said the car is
25 red, that is binding on the entire corporation,

009087

1 even if there's 20,000 people. They can't bring
2 in 20,000 other people and say the car is blue.
3 That was binding testimony.

4 Their argument is that it's not even
5 binding on him as the PMK when he didn't file an
6 errata sheet. And I think that is just
7 ridiculous.

8 So, one, we have a PMK who wants to
9 flip-flop on his PMK deposition. He specifically
10 said during the PMK deposition that he didn't have
11 any knowledge about functionality problems with
12 the S-1 Gards, and they told you yesterday he
13 wants to flip-flop on that and bring in a whole
14 litany of problems he thinks there are with S-1
15 Gards.

16 So he appears at the deposition and
17 says, "I don't have any knowledge of any problems,
18 can't tell you one way or the other," and now they
19 want him to come in and be their anti-S-1 Gard
20 expert.

21 Your Honor, that is just inappropriate,
22 first of all, because of the monkeying around they
23 did at the PMK deposition; and, second, because
24 it's a direct violation of 16.1, which is where
25 the Court started yesterday.

009088

1 16.1 requires that they have a written
2 report -- and I'm just quoting from 16.2(b). "The
3 report shall contain a complete statement of all
4 opinions to be expressed and the basis and reasons
5 therefor, the data or other information considered
6 by the witness in forming the opinions, any
7 exhibits to be used as summary or support of the
8 opinions, the qualifications of the witnesses,
9 including a list of publications authored by the
10 witness within the preceding ten years, the
11 compensation paid for the testimony, and a listing
12 of other cases he's testified to within the past
13 four years."

14 They haven't done any of these things
15 for Mr. Hoogestraat. There's no report. There's
16 no opinions. There's no statement of what he's
17 basing the opinions on. There's nothing with
18 regards to other cases he's testified. There's no
19 publications. There's nothing.

20 And when we get these expert reports, we
21 take them seriously, Your Honor. We do two
22 things. One, we research what the basis of the
23 opinion is, including anything he's relying upon
24 in the publications. And, two, we take his
25 deposition. And, three, we had the right to file

680600

1 a rebuttal expert after -- if he had filed an
2 expert report, we have the right to file a
3 rebuttal expert.

4 And they've deprived us of all of these
5 things. So we can't explore the basis of his
6 opinion.

7 Discovery was still open. If he was
8 going to jump up here and say, "Oh, gee, Bus
9 Company B in Iowa told me that they had a problem
10 with S-1 Gards," I could have gone up to Iowa and
11 taken a deposition of Bus Company B and see if his
12 hearsay report is true or not.

13 I can't do that now. They bring him in
14 on the last day of trial. It's just outrageous,
15 Your Honor. The 30(b)(6) problem is just one
16 aspect of it. But what they really want to do,
17 and they were honest with the Court -- at least
18 Mr. -- well they were honest with the Court in
19 that they were trying to propound opinions from
20 this guy.

21 And the opinions they want are, oh, the
22 S-1 Gard has problems, when he said at the
23 deposition, that he didn't correct, didn't file an
24 expert report on, that there are no problems with
25 the S-1 Gard that he knows of one way or the

009090

1 other.

2 They want him to say that, oh, proximity
3 sensors don't work. I guess he's done some
4 investigation, when he said in the deposition --
5 and I'm quoting from page 76, lines 16 through 22:

6 "Okay. Do you know of any efforts to
7 investigate collision-avoidance proximity
8 sensors prior to 2014?

9 "Well, I was involved in looking into it
10 prior to that, but that's where it became --
11 where we could then obtain it" -- so, in
12 other words, he was looking for suppliers --
13 "and then we started the development to
14 install it."

15 And then he continues to say later on
16 that he really wasn't involved in that area, and
17 that comes on page 80:

18 "Okay. Before that, did MCI -- and
19 that's 2014. Did MCI investigate whether or
20 not to use any of those?"

21 And these are the kit sensors, like the
22 Eaton sensor that we have involved in the case.

23 "ANSWER: Not that I was involved in."

24 So he specifically says in the
25 deposition that he was not involved in any

009091

1 investigation of proximity sensors, doesn't know
2 anything about proximity sensors on October 13,
3 2017.

4 Apparently, they've had him doing
5 research on this Eaton proximity sensor system,
6 and he wants to get up here and tell the jury
7 that, ah, this proximity sensor wouldn't work for
8 this bus for whatever reason.

9 That's what they're trying to do, Your
10 Honor. They're trying to bring in an expert to
11 ambush us on the last day of trial that wasn't
12 designated.

13 None of this was personal knowledge,
14 because if it was personal knowledge, he would
15 have popped up with it at the deposition. Instead
16 he says, "Not that I was involved in," doesn't
17 know one way or the other on the S-1 Gards.

18 So, you know, this is just so wrong on
19 so many fronts, Your Honor, and it just can't be
20 allowed. You know, the real reasons -- you want
21 to know the real reason we're wasting all day on
22 Mr. Hoogestraat? The real reason is they're
23 trying to drag this thing out and get a mistrial,
24 Your Honor.

25 They know that teacher has to leave on

009092

1 Friday. So then they move someone into Chair
2 Number 7. They don't like the teacher. The jury
3 constructionist told them, we got to get rid of
4 this teacher because she's a special needs teacher
5 and Keon is a special needs plaintiff.

6 So they want to get rid of the teacher
7 and move 1 in. And then they know once they start
8 replacing one with the other. So that is why
9 these gentlemen, who told you two weeks ago that
10 they had five days to present their case, they're
11 on day 7. And I would point out that the first
12 six days have not been jam-packed full of
13 witnesses. They're on day 7 because we have
14 filibuster after filibuster, issue after issue.

15 And to suggest that we can't do
16 Mr. Hoogestraat's offer of proof until after he
17 testifies about whatever his personal knowledge
18 is --

19 THE COURT: I've never had an offer of
20 proof, to be honest, made after testimony or a
21 decision. It's always before, at least in my 26
22 years.

23 MR. KEMP: Well, Your Honor, with
24 Mr. Smith, who was just on Friday, we made the
25 offer of proof after he was done giving his

009093

1 testimony to the jury. We did that just on
2 Friday. So when the Court says it's never been
3 done --

4 THE COURT: I'm sorry --

5 MR. KEMP: -- that's the way you usually
6 do it. Usually you have the expert in, and if
7 there's an offer of proof area, usually you do it
8 afterwards or you do it in writing. Okay. In
9 writing.

10 You know, usually when they do it in
11 writing, like in the Actos case. We had this
12 exact same issue. The -- Takeda tried to come in
13 at the last minute and say, "Oh, gee, all these
14 employees are really experts. They get to give
15 opinions."

16 So Judge Wiese said, "Are you kidding
17 me? People who didn't file an expert report,
18 you're going to come in and call them, get opinion
19 testimony from them?"

20 And they were arguing, "Oh, well, this
21 is within the scope of their job function."

22 They weren't even PMKs that had blown
23 the first chance of giving the opinion. These
24 were just employees that they were trying to drag
25 in.

009094

1 Judge Wiese says, "No way is this going
2 to happen in my courtroom. If you want to file an
3 offer of proof, go ahead and file a written offer
4 of proof."

5 And they filed five boxes full of stuff
6 that no one ever read. Okay. They have the
7 ability to do that. They can do it. I'll stay
8 here until midnight if they want to. You can have
9 a deposition prepared for an offer of proof. We
10 don't have to waste valuable jury time.

11 Because that's what they want to do.
12 Okay. This whole thing is a stall job to get rid
13 of Juror Number 7. They don't want to close
14 tomorrow. They don't want to close on Thursday.
15 You know, they don't want to close, period. They
16 just want to drag the case out and try for a
17 mistrial. That's the last-ditch effort here.

18 So, Your Honor, I think the Court's
19 given a clear ruling. I would ask that either we
20 proceed or that they give an offer of proof that's
21 limited to something like ten minutes and we get
22 going.

23 THE COURT: If I misspoke, I'm sorry.
24 It's been a lot of witnesses and a lot of stuff
25 going on. But there's also a case --

009095

1 MR. HENRIOD: May I address this?

2 THE COURT: Yes. Go on. I just want to
3 let you know another issue that I read. But go
4 ahead.

5 MR. HENRIOD: We started this, us trying
6 to get underway, and instead what I've heard is a
7 ten-minute soapbox rant about how we are trying to
8 filibuster and conspiracy theories about our good
9 faith.

10 THE COURT: I want you both to know that
11 I'm just trying to -- I know I take a little time
12 in researching. I know that. But I'm really
13 trying to move this trial forward.

14 MR. HENRIOD: And I respect that you do,
15 Your Honor. And if you are telling us that -- you
16 are electing, as the bench, to decline to hear any
17 of this before he takes the stand, that's your
18 call.

19 I think that under the best practices
20 and our good-faith duty to put this before you so
21 that you can make the most educated decision you
22 can, I think we need to offer to present him to
23 you before he is put to the jury or instead of
24 having to recall him.

25 THE COURT: Oh, I see. I misunderstood

960600

1 you. I thought that the offer of proof came after
2 the witness was presented to the jury, and I've
3 never seen that -- that's what I've never seen
4 before.

5 MR. HENRIOD: Yeah, it's done. And
6 frequently the Supreme Court says that doesn't
7 count. Because by that point --

8 THE COURT: Well, no --

9 MR. HENRIOD: -- the district court
10 doesn't have the opportunity to make the educated
11 ruling.

12 THE COURT: That won't happen in this
13 court. Right.

14 MR. HENRIOD: So, frankly, it doesn't
15 inure to any of our benefit that the jury is kept
16 waiting, but I think that we are harmed more than
17 anybody else.

18 Nevertheless, this is important. As I
19 say, I think the next three years could be about
20 this. So unless you are telling us that, despite
21 the offer to hear this now, you are declining to
22 do this --

23 THE COURT: No, I'm going to accept an
24 offer of proof. But I just wanted to let you know
25 that there's also another area of cases -- this is

009097

1 what I was trying to finish -- that the company
2 required to prepare. The issue was is the
3 testimony contradictory -- I'm sorry --
4 contradictory or new?

5 And one case says that, although the
6 company has an obligation to prepare its 30(b)(6)
7 witnesses, it may not offer a new or different
8 account of the facts at the trial.

9 MR. HENRIOD: And some also --

10 THE COURT: I understand.

11 MR. HENRIOD: Right. And some go the
12 other way. Some say you've got to have some kind
13 of a showing to explain the difference. What's
14 new here, for instance, we've got opinions about
15 molding for the first time and only time at trial.
16 And there's been no opportunity of the corporation
17 to speak to those.

18 But I think on the particularities on
19 whether or not any area is opinion- versus
20 fact-based, whether or not something is genuinely
21 new, whether or not a fair question during the
22 deposition precludes us from taking even a nuanced
23 position now, I think all of that could be
24 addressed once we get this underway.

25 THE COURT: Let's go.

009098

1 MR. ROBERTS: Your Honor, I feel
2 compelled to add one thing very briefly. We're
3 not trying to delay the trial.

4 THE COURT: We may have to tell the jury
5 to start staying late and we'll start an hour
6 earlier. Whatever we have to do, but we need to
7 get this done.

8 So let's go on with your offer of proof,
9 please.

10 MR. BARGER: Your Honor --

11 THE COURT: I'm trying to find what the
12 designation was for Mr. Hildegard [sic] from
13 plaintiff in the beginning.

14 Mr. Kemp, do you have the area of
15 questions, remember, that you provided?

16 MR. KEMP: I just asked that be printed,
17 Your Honor.

18 THE COURT: I have them, but they're
19 starting to merge into --

20 MR. KEMP: Your Honor, are you talking
21 about the 30(b)(6) designations or the outlined
22 areas that would make it --

23 THE COURT: Yes.

24 MR. KEMP: I'm getting the 30(b)(6) now.

25 MR. BARGER: Judge, before I start -- I

660600

1 am not trying to delay.

2 THE COURT: Understood.

3 MR. BARGER: I've got to go through this
4 outline with respect to his credentials and so
5 forth, see how it comes into play.

6 This is Mr. Hoogestraat, Your Honor.

7 THE COURT: Hello, Mr. Hoogestraat.

8 MR. BARGER: I think she wants you to
9 take the stand.

10 THE COURT: He needs to be sworn in.

11 THE MARSHAL: Go on the stand and turn
12 around and raise your right hand.

13 THE CLERK: You do solemnly swear the
14 testimony you're about to give in this action
15 shall be the truth, the whole truth, and nothing
16 but the truth, so help you God.

17 THE WITNESS: I do.

18 THE CLERK: Thank you. Please be
19 seated. State and spell your name for the record.

20 THE WITNESS: Virgil Hoogestraat,
21 spelled V-i-r-g-i-l; last name, Hoogestraat,
22 H-o-o-g-e-s-t-r-a-a-t.

23 THE COURT: Go on.

24 MR. BARGER: May it please the Court.

25 OFFER OF PROOF EXAMINATION

009100

009100

1 BY MR. BARGER:

2 Q. Mr. Hoogestraat, would you tell the
3 judge, if you will -- the Court -- how you're
4 employed and by whom and your title currently.

5 A. I'm employed by Motor Coach Industries.
6 My title is design engineering vice president.

7 Q. Tell the Court your educational
8 background.

9 A. I have a bachelor of science in
10 mechanical engineering from South Dakota State
11 University. I've worked for MCI for 33 years in
12 the engineering group on motor coaches and transit
13 buses.

14 Q. Okay. Before employment with MCI and
15 after college with your engineering degree, where
16 did you work?

17 A. When I first came out of college, I
18 worked for a company called Chamberlain
19 Manufacturing, which was an ordnance group.

20 Then I went to a company called Trane,
21 T-r-a-n-e, an air-conditioning firm, where I
22 worked on air-conditioning for buses and subway
23 cars.

24 From there, I went to a small firm
25 called Kelvinator, making ultra-low refrigeration.

009101

1 And then I went to Volvo of America,
2 where I worked on transit buses for several
3 years, then became chief engineer.

4 From there, I went to TMC, which is part
5 of the MCI Group.

6 Q. Okay. Now, I'm not going to go into the
7 difference of transit buses and coaches because
8 that's already in the record and the Court's heard
9 that.

10 So how long total have you worked with
11 respect to a company designing buses of one sort
12 or another?

13 A. Counting Volvo of America, 36 years.

14 Q. Okay. Now, tell us about your
15 involvement of the design of the E coach.

16 A. My only involvement with the E coach was
17 I was brought in at the very end to assist it in
18 going into production.

19 Q. Okay. And, briefly, we need to
20 distinguish for the Court the coach numbers or
21 names with respect to how we got to the J coach.
22 And I want you to do it briefly because we're
23 trying to get to the jury.

24 You may hear this longer, Your Honor, in
25 front of the jury, but, for now, for the record, I

009102

1 would like to do that.

2 A. In the mid '80s we changed to an
3 alphabetic nomenclature system, where we started
4 with the A model, the B model, the C model, the D
5 model, the E model, the G model -- excuse me -- I
6 missed the F model -- F model, G model, then the J
7 model. He didn't have an I model.

8 Q. The coach involved in this accident is
9 the J4500; correct?

10 A. Yes.

11 Q. All right. And with respect to the
12 design of the J4500, how does MCI approach
13 designing a bus? Do they use a team of people,
14 consultants, or what? Tell the Court.

15 A. It's a combination. We have a team of
16 people that will work on a bus design, depends on
17 the number. We have teams of -- in engineering
18 assigned to certain areas. Then we also --
19 obviously, we'll have support groups such as
20 manufacture, engineering, purchasing, production,
21 other groups that support it.

22 Q. With respect to the styling on the J4500
23 to include the front and the rear cap design, who
24 made those designs?

25 A. It was a joint effort between Winnipeg

009103

1 engineering and Designworks, which is a BMW
2 company out in California.

3 Q. Winnipeg engineering, is that MCI?

4 A. Yes.

5 Q. Is that one of the locations of MCI?

6 A. Yes.

7 Q. Now, the Designworks is a BMW company,
8 you say. What does that mean?

9 A. I don't understand. I mean, BMW is the
10 auto manufacturer, and they have a design studio
11 in California.

12 Q. Is that a consultant that MCI uses?

13 A. It was a consultant.

14 Q. Okay. And is that typical with respect
15 to MCI designs?

16 A. MCI uses consultants for all its
17 styling.

18 Q. All right. Now, in 2002, did you become
19 the vice president of engineering for MCI?

20 A. Yes.

21 Q. All right. And would the J4500 fall
22 under your purview once you became the chief
23 engineer?

24 A. Yes.

25 Q. Now, I do want to talk to you about what

009104

1 you did with respect to the design of the J4500.

2 A. Okay.

3 Q. Just tell the Court.

4 A. Oh. I was brought in after the styling
5 was done by Designworks. I was brought in to line
6 up personnel to work on the J coach. At that time
7 I was in Roswell, New Mexico, and working with
8 DINA. And also I was brought in to Winnipeg to
9 round up people that will work on the various
10 areas of the changes from it -- from the E coach.

11 Q. And, at some point, you became, in 2002,
12 in charge of the J4500 --

13 A. That's correct.

14 Q. -- in charge of engineers?

15 A. That's correct.

16 Q. So you're familiar with the J4500?

17 A. Yes.

18 Q. All right. Now, with respect to how you
19 put together a J4500, or any coach at MCI, tell
20 the Court what you do with respect to parts that
21 are added to it. Did you manufacture all the
22 parts, or do you have outside suppliers and
23 vendors with respect to parts?

24 A. We have outside suppliers that make a
25 lot of the parts. We manufacture some of the

009105

1 parts ourselves, but some of the parts are
2 purchased outside of MCI, depending on what the
3 part is. Engines, transmissions, axles, brake
4 control systems, interior lighting, exterior
5 lights are all purchased.

6 Q. Okay. Some of your customers, like
7 Greyhound -- is Greyhound one of your customers?

8 A. Yes.

9 Q. Okay. Does Greyhound also have input
10 into what you want to do with respect to the coach
11 as to certain things to be put on it?

12 A. Yeah. All customers have input into
13 what we want to do with the coach.

14 Q. Okay. And do they have a lot of input
15 sometimes with respect to what goes on it?

16 A. Greyhound is a large customer, so they
17 have a lot of input, although we will survey
18 smaller customers and get their input also.

19 Q. With respect to vendors and the roles
20 that vendors play in supplying you equipment from
21 somebody else, what kind of expectations does MCI
22 expect of those vendors and the parts that they're
23 supplying, whether they were tested, certified, et
24 cetera?

25 A. Well, we expect the vendor to test and

009106

1 certify their parts with the applicable standards,
2 that they do all the manufacturing, all the
3 coordination to make sure it's applicable for the
4 market. That includes being durable for the
5 marketplace and reliable to the customer so that
6 the customer is satisfied with the product.

7 Q. Okay. Now, what is the word "NHTSA"?
8 Tell the court what NHTSA is.

9 A. NHTSA is the National Highway Traffic
10 Safety Administration. They oversee vehicles on
11 the highways. And they are the agency that
12 oversees our group of vehicles.

13 Q. Okay. And NHTSA is an agency that
14 regulates, to some extent, what goes on the bus;
15 correct?

16 A. Yes. They have what they call FMVSS
17 standards, and those standards apply to the bus.

18 Q. Okay. And are you familiar with those
19 standards and have you been familiar with them
20 throughout your career?

21 A. Yeah. You can't design a bus or any
22 vehicle and not be familiar with those standards.
23 Yes, I'm very familiar with them.

24 Q. You have to comply with the federal
25 government standards?

009107

1 A. Yeah, you have to comply.

2 Q. Okay. What is the Federal Motor Carrier
3 Safety Administration?

4 A. Federal Motor Carrier oversees the
5 operator and the drivers of the vehicles. They
6 are the agency that oversees the operation of
7 vehicles on the interstate highways, commercial
8 vehicles.

9 Q. And do you have to design a bus with
10 respect to not only NHTSA rules and regulations,
11 but you have to take into consideration the
12 Federal Motor Carrier?

13 A. We have to do it to Federal Motor
14 Carrier regulations because, when we sell the
15 product to the customer, he has to comply to
16 Federal Motor Carrier's, but if it's not designed
17 so he can comply, then it's of no value to him.

18 Q. Okay. I want to visit with you briefly
19 for the Court about what kind of design
20 considerations that occur with respect to the
21 design of a motor coach, such as regulatory
22 requirements, customer requirements, things of
23 that nature.

24 A. Well, yeah, regulatory requirements,
25 obviously, customer requirements, you have to meet

009108

1 the weight limitations of the vehicle. You have
2 weight requirements. You have manufacturability.
3 You have to have a product that is cost-effective
4 to the customer. You then also have to be
5 serviceable because he has to service it; these
6 buses are on the road for extended periods of
7 time. And it has to be reliable.

8 Q. Okay. Now, the J4500 was an
9 evolutionary design; is that correct?

10 A. The J was an evolutionary design from
11 the E coach.

12 Q. Okay. So tell the Court briefly the
13 difference between the E coach and then
14 subsequently the J coach.

15 A. The J coach is basically -- the E coach
16 was a ground-up design. The J coach was built --
17 a design that basically simplified the E coach
18 because some customers didn't like the E coach
19 because they felt it was too complex.

20 So the J coach, in addition to changing
21 the styling -- so how it looked -- was -- the
22 parts were removed and simplified, like the
23 steerable tag, the electronic stability --
24 electronic ride control, some of those features
25 that the customer didn't want, because -- some

009109

1 customers, not all -- but some customers didn't
2 want because they thought it was too complex,
3 wanted it removed -- wanted a vehicle without
4 that.

5 Q. Are MCI coaches intended for operation
6 as a commercial vehicle with licensed drivers?

7 A. Yes.

8 Q. With a commercial driver's license?

9 A. Yes.

10 Q. All right. Are they in compliance with
11 Federal Motor Carrier Safety Regulations?

12 A. They have to be.

13 Q. Okay. Now, let's talk briefly about
14 some of the theories that the plaintiff had in
15 this case. And I want to talk to you about
16 whether or not those theories are governed by
17 government requirements and regulations. Okay?

18 Let's take the first one. Are there any
19 NHTSA FMVSS standards that are governed with
20 respect to aerodynamics or drag coefficient in
21 2007?

22 A. No.

23 Q. Are there any today?

24 A. No.

25 Q. All right. Are there any -- all these

009110

1 questions have to do with NHTSA and FMVSS
2 requirements and standards. Okay?

3 Are there any in 2007 for front-corner
4 roundness and sweep?

5 A. No.

6 Q. Are there any today?

7 A. No.

8 Q. In 2007, were there any NHTSA government
9 standards requirements for height?

10 A. NHTSA? No.

11 Q. In 2007?

12 A. No.

13 Q. Are there any -- what are the standards
14 for height of a coach?

15 A. Height of a coach is defined by
16 infrastructure.

17 Q. And what does infrastructure mean?

18 A. It means you have to have clearance for
19 bridges. They go into hotels, so for the awnings
20 for the hotels, you have -- in the port
21 authorities you have multilayered parking for the
22 buses. They have to be able to get into there.
23 There's airports' overhangs you have to meet
24 underneath. So the height is driven by the
25 infrastructure of the U.S. and Canadian

009111

1 environment.

2 Q. Okay. But there's no particular
3 government standard saying how high it cannot be?

4 A. No, there's no government standard.

5 Q. How about width in 2007?

6 A. NHTSA, no.

7 Q. How about today?

8 A. No.

9 Q. Okay. Is there a standard for width of
10 a bus?

11 A. Yes, federal highway.

12 Q. Okay. Not from NHTSA; it comes from
13 another group. Right?

14 A. That's a different agency.

15 Q. And is there a standard in 2007 for that
16 width?

17 A. Yes.

18 Q. Is there a standard today for that --

19 A. Yes.

20 Q. All right. How about bus length? Was
21 there a standard in 2007 for how long a coach can
22 be?

23 A. NHTSA, no.

24 Q. Okay. By whom?

25 A. Federal highway.

009112

1 Q. And what was that standard?

2 A. 45 feet.

3 Q. And how about today?

4 A. Yes, federal highway.

5 Q. And what's that standard?

6 A. 45 feet.

7 Q. Okay. So can a bus be any longer than
8 45 feet?

9 A. Not and operate on the federal highways.

10 Q. Okay. Now, in 2007 -- let's talk about
11 S-1 Gards. Were there any standards in 2007 for
12 an S-1 Gard requirement to be on a coach?

13 A. No.

14 Q. Is there today?

15 A. No.

16 Q. How about -- the Court has heard the use
17 of the word "spats" on the rear wheels. Were
18 there any standards in 2007 with respect to a
19 requirement to have spats on the rear wheels by
20 the federal government?

21 A. No.

22 Q. How about today?

23 A. No.

24 Q. All right. I don't want to go over all
25 the standards, but are there many standards and

009113

1 rules and regulations that are dictated by the
2 federal government as to how the coach has to
3 function?

4 A. There's multiple standards.

5 Q. Okay. And just give me a couple of
6 examples. There's pages of them, are there not?

7 A. Yeah. FMVSS 121 covers brakes.
8 FMVSS 101 covers displays, what's in front of the
9 driver. You've got FMVSS 217 that covers the rear
10 window, the ability to -- of exit, that they
11 become an exit. FMVSS 205, that covers glazing.
12 That's just a few of them.

13 Q. And I want to go back to the standards.
14 Were there any in 2007 that applied to proximity
15 sensors being required to be on a motor coach?

16 A. No.

17 Q. Are there today?

18 A. No.

19 Q. Have you ever heard of an accident where
20 it was claimed that someone was sucked into the
21 side of a J4500 coach?

22 A. No.

23 Q. Do you think you would have heard of
24 that if it occurred?

25 A. Yes.

1 Q. I want to talk for a moment -- you're
2 familiar with the J45 and its features,
3 characteristics; correct?

4 A. Yes.

5 Q. Okay. I want to talk to you -- tell
6 us -- tell the Court what kind of features we're
7 talking about with respect to radius curves,
8 beveled sides, curved top in the rear. Just
9 describe the J4500.

10 A. The J4500, the front end has a 200-inch
11 radius curve in the front end, and it comes into
12 an 8-inch corner. And then it's a sweepback from
13 that A-post corner to the B-post where it goes to
14 the 102 inches. The top is radiused. The rear
15 has got a slope in the back. And then the rear
16 end is slant -- radiused in or swept in to reduce
17 the rear end --

18 Q. Is it a brick?

19 A. No.

20 Q. Is it shaped like a brick?

21 A. No.

22 Q. What is the corner radius of the J4500
23 coach?

24 A. It's about 8 inches.

25 Q. Okay. Now, there's been some testimony

009115

1 from a Dr. Breidenthal here. And I understand you
2 haven't been attending the trial, but did you read
3 his deposition?

4 A. No.

5 Q. Okay. Now, I want to tell you, he
6 suggested that the J4500 has a flat front end with
7 no significant corner radius on the sides.

8 Is that true?

9 A. No.

10 Q. And why isn't that true?

11 A. As I spoke before, it's got a 200-inch
12 radius in the front and goes into an 8-inch radius
13 in the corners.

14 Q. Dr. Breidenthal, I want you to assume,
15 told this jury that the corner radius of a
16 flat-front bus should be 1/8 of the front width of
17 the bus. Is the J4500 a flat-front bus?

18 A. No.

19 Q. Dr. Breidenthal also suggested that the
20 J4500 is like the CJ3 model discussed in the 1993
21 wind study. Have you examined the CJ3 in a 1993
22 wind tunnel study to see if it was constructed the
23 same?

24 A. It did not look the same to me.

25 Q. Now, I want to make sure we understand

009116

1 here. You didn't even know about the 1993 wind
2 study; correct?

3 A. Not until sometime in October when I had
4 my deposition, right before that.

5 Q. Right. You were not involved in the
6 wind study?

7 A. No.

8 Q. And you're not here testifying that the
9 J is a -- anything to do with the wind study at
10 this point, are you?

11 A. No, because I don't know that --

12 Q. I want to show you some charts that have
13 been in evidence. And all I want you to do is
14 make your personal observations; I don't want you
15 to give me an expert testimony or anything.

16 Look at -- do you remember the CJ3
17 and then the proposals that were there? You've
18 seen those charts before; right?

19 A. Yes.

20 Q. All right. With respect to the CJ3 on
21 this chart on the left-hand side, you see it?

22 A. Yes.

23 Q. All right. And with respect to the
24 J4500, do you see it?

25 A. Yes.

009117

1 Q. So my question to you is, are there
2 characteristics of the J4500 as -- with the CJ3 or
3 are they different?

4 A. No, they're different. The CJ3, this
5 model C, looks like a C coach we were building
6 back at that time, the front end of it.

7 Q. All right. And I'm going to show you
8 the CJ3 -- excuse me -- the Proposal 2 from that
9 wind study that you've looked at; right?

10 A. Right.

11 Q. And you looked at that at your
12 deposition, did you not?

13 A. Yes. And that was at the deposition.

14 Q. The J4500, are there similarities? I'm
15 not asking you to say they were incorporated, but
16 are there similarities between this Proposal 2 and
17 the J4500?

18 A. In my opinion, there's characteristics
19 that are similar.

20 Q. Okay. Now, tell us -- tell the Court
21 what kind of characteristics that are similar in
22 your opinion as an engineer in charge now of the
23 J4500.

24 A. It looks like it has a radius in the
25 front. It has a change in contour in the back.

1 Whereas the J is a sweep, it looks more truncated,
2 but it's hard to tell from that picture. The
3 radius in the corners and -- incorporated in the
4 J coach and -- part of it into the windshield,
5 predominantly in the windshield, it's not clear if
6 that's the case here, but it looks like the radius
7 is approximately the same and it looks like it's
8 got a sweepback, which the J has.

9 Q. Okay. Now, could MCI have designed the
10 J4500 coach with corner radii that were 1/8 of the
11 total width of the front?

12 A. And not -- it would have been
13 detrimental to the product.

14 Q. And why would it be detrimental?

15 A. Well, to increase that corner radius
16 means your front end would have to come out
17 further. And, therefore, you have to meet the
18 federal highway regulation of 45 feet, which means
19 that width, that increase, to hold the length, you
20 have to take that spacing out of the passenger
21 compartment. You can't take it out of the front
22 door area because that's required by ADA. You
23 can't take it out of the driver's area. It has to
24 come out of the passenger compartment. And that's
25 detrimental. Either you reduce the seat spacing

1 between seats, reducing passenger comfort, or you
2 take out seats.

3 Q. Okay. So would there be potential
4 problems with adopting what somebody suggested to
5 make the corner radii 1/8 of the total of the
6 width of the front?

7 A. In my opinion, yes.

8 Q. Okay. Now, there was a discussion for
9 the first time in this trial about the Setra glued
10 windshield. Okay?

11 A. Yes.

12 MR. BARGER: Your Honor, just if I can,
13 this was brought up -- I want to establish for the
14 record that it was brought up the first time at
15 the trial by Dr. Breidenthal.

16 BY MR. BARGER:

17 Q. I understand you weren't here, but I
18 want you to discuss with the Court, did Setra, to
19 your knowledge, use a glued windshield?

20 A. Not in the U.S.

21 Q. Okay. Did they use it somewhere else?

22 A. They use them in Europe.

23 Q. Okay. And does MCI use a glued
24 windshield in the United States?

25 A. No. In the United States they use glued

009120

1 windshields -- excuse me. They use nonglued
2 windshields.

3 Q. Let me ask the question again. Does MCI
4 use glued windshields?

5 A. No.

6 Q. To your knowledge -- by the way, are you
7 familiar with other bus manufacturers and you
8 study their products as well?

9 A. Yes, we do.

10 Q. Does any bus manufacturer in the United
11 States of America use glue to put their
12 windshields in?

13 A. Not that I'm aware of.

14 Q. Tell the Court why MCI does not -- by
15 the way, does Setra use glue in its windshields in
16 the United States?

17 A. No.

18 Q. Tell the Court why MCI does not use glue
19 and you use a rubber strip to hold the windshields
20 in place.

21 A. Federal Motor Carrier, if you have a
22 crack in the windshield of the driver's field of
23 view, it's considered out of service. Or if you
24 have -- they have a definition of how much pitting
25 is allowed in the windshield.

009121

1 So to be able to change the windshield
2 expeditiously, they use a rubber strip. The
3 customers will not accept from us that we glue the
4 windshield in because of the time involved to do
5 that. That's also why we have split windshields.

6 Q. For example, if there's a coach taking
7 people on a tour and they have a windshield that
8 gets cracked, can that bus be used on the road
9 until it's repaired?

10 A. Per Motor Carrier Regulations, they are
11 not supposed to do that.

12 Q. Okay. It would be improper to put
13 that --

14 A. Improper.

15 Q. Okay. So does the bus owner then have
16 to get it changed as fast as possible?

17 A. That's what he's supposed to do, yes.

18 Q. And if it's glued, can that happen?

19 A. Not with those large a windshields.
20 That takes some time.

21 Q. And if it's done with rubber strips and
22 separate windshields, can it be done a lot quicker
23 and easier for the customer?

24 A. Yes.

25 Q. All right. Now, I want to talk to you

009122

1 about some areas of visibility. And I don't want
2 you to talk about proximity sensors. Okay. I
3 just want you to talk about, on the J4500, based
4 upon your knowledge, what means are provided for
5 visibility? And let's start with the windshield.

6 A. The windshield is obvious -- is quite
7 large and it sweeps around to the side so it
8 allows them visibility around both sides.

9 The other part of the visibility is the
10 mirrors. The mirrors are on each side located so
11 they can see along side the vehicle.

12 And then the driver sits quite high so
13 he can look down from his position down through
14 the lower part of the windshield.

15 Q. How about the windows in the passenger
16 entry door? There's been some discussion of
17 people here on that.

18 A. Well, the passenger entry door, you can
19 see through -- see through those also should the
20 driver choose to look in that direction.

21 Q. I think Dr. Breidenthal -- I believe it
22 was Dr. Breidenthal; could have been
23 Mr. Sherlock -- testified in front of this jury
24 about all-glass passenger entry door.

25 A. You see some all-glass entry doors in

009123

1 transit buses. They have a metal frame around
2 them and then the rest is glass. You don't see
3 that on a motor coach simply because of noise.

4 Q. What do you mean, noise?

5 A. Well, the passenger noise. Those are
6 very noisy. They work fine on transit buses, but
7 they don't work for motor coaches. You never see
8 them.

9 Q. Why do they work on transit buses?

10 A. Well, you're only going -- average speed
11 is maybe 10 to 13 miles an hour. So that is not
12 as big a concern as on a motor coach.

13 Q. And on a motor coach, are you going at
14 highway speeds?

15 A. Highway speeds, 60 to 70 miles an hour.

16 Q. If you had an all-glass passenger door,
17 would that create wind noise?

18 A. It may. But it's a very noisy
19 situation. They expect noise to be much less on a
20 motor coach than on a transit bus.

21 Q. If you're not using all glass but are
22 using some glass and some metal to hold it in, do
23 you reduce the noise level?

24 A. Well, we have to be able to seal the
25 door to keep the noise level down. You don't seal

1 the doors like you do in a motor coach.

2 Q. Okay. There's been some discussion --
3 and there was some discussion with you, I believe,
4 at your deposition -- about A-pillars being
5 somewhat of a right-side blind spot.

6 Do you agree with that?

7 A. An A-pillar, it can be a blind spot.

8 Q. Okay. And I don't want you to talk
9 about blind spots from the standpoint we've had
10 expert testimony about that, but that blind spot
11 in the A-pillar, what's your statement about how
12 big that is, the A-pillar?

13 A. It's about 4 inches.

14 Q. Objection. And also want you -- well,
15 I'll get to that in a minute.

16 There was some testimony by
17 Dr. Breidenthal at the trial for the first time
18 about European -- I believe it's for the first
19 time, about the European-style bug mirrors.

20 Do you know what kind of mirror I'm
21 talking about?

22 A. Yes.

23 Q. And I think we had Mrs. Witherell
24 testify at the trial that she liked those type of
25 mirrors. Some people do; some people don't.

009125

1 You don't put the bug mirrors on an MCI
2 coach, do you?

3 A. No, we don't.

4 Q. And why not?

5 A. Generally, the customers won't accept
6 it. The drivers, we tried them one time, and we
7 had to take them off because the drivers will not
8 accept them. And the drivers do not like to look
9 up to a mirror. They want to just glance
10 horizontally, either using only their eyes or
11 slightly turning their head to look at a mirror.

12 Q. And you have personal knowledge of that?

13 A. Yes. We tried in -- in 2000, we tried
14 to. Used to provide that, and we had to take them
15 off.

16 Q. All right. There was some discussion
17 about the Setra bus having to add a second set of
18 mirrors.

19 Are you familiar with that?

20 A. Yeah.

21 Q. And how are you familiar with that?

22 A. Well, the Setra buses, when they came to
23 the U.S., they had described here as bug mirrors.
24 The customers would not accept them, so they had
25 to add a second set of mirrors down below so the

009126

1 customers could do what I described previously of
2 just moving their head.

3 Q. All right. Now, I want to talk to you
4 not about proximity sensors, but I want to talk to
5 you about your understanding of the -- there was
6 some discussion that Mr. Sherlock introduced into
7 this trial for the first time and did not talk
8 about in his deposition or his report, the
9 proximity sensors, the VORAD system. Okay? The
10 Eaton VORAD system.

11 Are you familiar with that?

12 A. Somewhat, yes.

13 Q. Okay. Now, I don't want you to talk to
14 anybody about whether you recommend or don't
15 recommend proximity sensors or whether it would
16 have made any difference in this case.

17 But since your deposition -- well, prior
18 to your deposition, did you have any information
19 about the VORAD system and whether or not it had
20 some effect -- it had some characteristics that
21 people did not?

22 A. Yes.

23 Q. What information did you have?

24 A. It was from Greyhound. Greyhound put
25 VORAD systems on in 1992 on about approximately

009127

1 1500 buses. And by 1995, they had started taking
2 them off, and they were all off by 1996.

3 Q. As part of your role at MCI, are you
4 personally aware that Greyhound put those VORAD
5 systems on their buses and then took them off in
6 the '90s?

7 A. Yes.

8 Q. Okay. Before the deposition --
9 before -- were you familiar with what's called
10 radar-based systems?

11 A. Yeah, most -- yeah. Yes.

12 Q. Now, what did you know about a
13 radar-based system as to what it can and cannot
14 detect?

15 A. Well, we use some radar-based systems
16 even today, and they can detect large metal
17 objects or metal objects. That's what they're
18 best used for.

19 Q. Okay. Now, we're not going to talk
20 about what we put on the bus today or don't put on
21 the bus today, but I want to know what knowledge
22 you had prior to your deposition about radar
23 itself, how it works.

24 A. Well, I don't know in detail how it
25 works. I just know that it senses metal.

009128

1 Q. Okay. Now, let's talk about the
2 S-1 Gard briefly.

3 Mr. Barron has testified here and had
4 suggested that MCI, as a coach manufacturer, was
5 made aware of the S-1 Gard, offered the S-1 Gard
6 for free to test and rejected that opportunity.

7 To your knowledge, did that ever happen?

8 A. Not that I'm aware of.

9 Q. Okay. If that would have happened,
10 would the engineering department have known about
11 it or should have known -- had known about it?

12 A. If they'd have known about it, I'd have
13 known about it.

14 Q. To your knowledge, with respect to
15 engineering, you were unaware of the S-1 Gard
16 being offered to anybody for testing or a look?

17 A. Nobody was aware of that.

18 Q. Okay. I want to talk about one witness,
19 Mr. Fierros. Did Mr. Fierros ever tell you that
20 somebody showed him an S-1 Gard at a trade show?

21 A. He never told me.

22 Q. Okay. To your knowledge, did he tell
23 anybody?

24 A. Nobody in engineering that I know of.

25 Q. Okay. Now, you've seen an S-1 Gard;

009129

1 right?

2 A. Yes.

3 Q. And, now, is it not correct that, prior
4 to this lawsuit, you were unaware of the S-1 Gard?
5 Is that correct?

6 A. That's correct.

7 Q. All right. But you have seen one;
8 right?

9 A. Yes, since this lawsuit.

10 Q. Okay. If someone, like a vendor who
11 makes S-1 Gards, came to you -- came to you -- and
12 said, "You ought to put this on our -- on your
13 coach," the question to you is what
14 considerations -- and I understand, not at your
15 deposition -- let me go back.

16 You said you were unaware of the
17 S-1 Gard until this case and you didn't have any
18 knowledge with respect to its feasibility at that
19 time; you would have to look into it. Correct?

20 A. Yes.

21 Q. All right. Now, I'm not going to ask
22 you to say what the problems are -- I mean, you
23 have an opinion today what some problems are;
24 correct?

25 A. I have an opinion as to potential

009130

1 problems.

2 Q. That's not the question I'm asking you.
3 The question I'm asking you, if it was brought to
4 you, what kind of things would you expect to have
5 been done with the S-1 Gard going back to its
6 testing, et cetera?

7 A. We would have expected that the vendor
8 would have done testing on the S-1 Gard as to how
9 effective it was.

10 Q. Okay. And would that be something that
11 you would want to know?

12 A. Yes.

13 Q. And would you want to know if other
14 people had tested it?

15 A. We would have wanted to know what all
16 testing had been done.

17 Q. Okay. Before what? Before you even
18 consider putting it on?

19 A. Well, we would want to know before we
20 looked into it what testing had already been done,
21 if any, and if no testing had been done, we would
22 expect the vendor to run some testing.

23 Q. Okay. Now, would you want to know or
24 want to evaluate what it does to the effectiveness
25 of driving the coach down the highway?

009131

1 A. Yes.

2 Q. All right. Now, what kind of things
3 would you at least want to know before you would
4 be able to put this or consider putting this on
5 your system?

6 A. We would be concerned about the failure
7 mode because the suspension on an intercity coach,
8 its travel -- it's much more travel than a transit
9 bus, which they have been applying them to up to
10 now predominantly.

11 The intercity coach goes up in travel
12 plus or minus 4 inches, the suspension travel.
13 The bottom of the coach is roughly 12 1/2 inches.
14 This S-1 Gard is over 8 inches. So with
15 suspension travel, this S-1 Gard gets within a
16 half inch of the ground.

17 And as a result of that, it would have a
18 potential for hitting curbs or other things in the
19 roadway, like speed bumps, but predominantly
20 curbs.

21 Q. Is that something that would have to be
22 evaluated to determine yes or no whether that's a
23 problem?

24 A. Yes.

25 Q. All right. Now, would you want to

009132

1 consider failure modes with respect to the
2 S-1 Gard?

3 A. Yeah. As I spoke previously, the
4 failure mode, if I'm striking something, would be
5 a major concern simply because the fuel tank is
6 right above where the S-1 Gard would be mounted.
7 The failure -- we would be concerned that, if it
8 failed, it would get into the tires, cause an
9 issue. And, certainly, if it broke off, since the
10 bus -- if it broke off at the curb is one issue,
11 but if it eventually came off the vehicle going
12 down the highway at 60 miles an hour, that would
13 be a major issue.

14 MR. BARGER: Okay. Your Honor, in his
15 trial testimony that was played to the jury, there
16 was a question. I want to read the question.

17 BY MR. BARGER:

18 Q. The question was by Mr. Kemp.

19 "I know it's been almost -- or only two
20 years, but are you aware of any problems" --

21 They were talking about the Austin
22 commuter coach. Okay? Do you remember that?

23 THE COURT: I'm sorry.

24 MR. BARGER: What page? Let me go back
25 and re-ask it.

009133

1 THE COURT: I just need to know the name
2 of the coach.

3 MR. BARGER: It was the Capital Metro
4 System in Austin, Texas. He was asked questions
5 about that.

6 BY MR. BARGER:

7 Q. And one of the questions was:

8 "Are you aware of any problems that
9 they've had with the S-1 Gard on the D series
10 coaches purchased by the Austin transit
11 authority?"

12 And your answer was:

13 "The only information we have at this
14 time is that they had a lot of damage with
15 the S-1 Gard."

16 You knew that at the time of your
17 deposition; right?

18 A. Yes.

19 Q. And you told counsel that the Capital
20 Metro System was having and reporting a lot of
21 damage.

22 You're aware of that personally; right?

23 A. Yes.

24 Q. All right. Now, and your source of
25 information was from the MCI people that work at

009134

1 MCI reporting that to you; right?

2 A. Yes.

3 Q. All right. There was some discussion
4 about the New Jersey Transit testing or wanting
5 this. Are you aware -- have you been to the New
6 Jersey Transit Authority offices in New Jersey?

7 A. Yes.

8 Q. Have you been there many times?

9 A. Yes.

10 Q. Have you ever seen an S-1 Gard on
11 anything, the J4500 or any coach like that, at the
12 New Jersey?

13 A. No.

14 Q. To your knowledge, based upon what you
15 know and what you've seen, has New Jersey Transit
16 ever ordered a coach with an S-1 Gard on it?

17 A. No.

18 Q. In fact, based upon your personal
19 knowledge and through the company, what is your
20 understanding as what the New Jersey Transit
21 company has said about if they were to install the
22 S-1 Gard?

23 A. They referred to it as a maintenance
24 nightmare.

25 Q. Okay. And has anybody specified, ever,

009135

1 installation of an S-1 Gard for a J4500? Any
2 customer you have asked for it?

3 A. No.

4 Q. Okay. Has MCI ever installed an
5 S-1 Gard on any customer?

6 A. No.

7 Q. Okay. There was -- now, the last area
8 quickly.

9 MR. BARGER: Your Honor -- well, let me
10 finish this first.

11 BY MR. BARGER:

12 Q. Mr. Sherlock came to this trial and
13 wanted to discuss about A-pillars, about you ought
14 to change the size of the A-pillar.

15 Now, understanding Mr. Sherlock is not a
16 design engineer; you are. Correct?

17 A. Yes.

18 Q. All right. Would there be -- can you
19 just willy-nilly -- that's not a legal word, but
20 can you just change designs of buses by changing
21 it a quarter of an inch or anything without taking
22 into consideration the entire bus?

23 A. No, you can't because --

24 Q. Tell Her Honor why.

25 A. The intercity coach is a monocoque.

009136

1 Q. A what?

2 A. Monocoque.

3 Q. What does that mean?

4 A. It means the structure is what holds --
5 the structure of the vehicle. There's no frame
6 rails on an intercity coach. The sidewalls, the
7 roof is the structure. And the front end of the
8 bus hangs off, cantilevers off the front of the
9 axle, unlike most vehicles.

10 Q. Does a transit bus have side rails?

11 A. No.

12 Q. A motor coach does not have side rails?

13 A. We do not have side rails.

14 Q. Okay.

15 A. Most transit buses, all of them,
16 generally do not have rails, chassis rails. So
17 the front end hangs over and the load from the
18 front end must be transferred to the roof. That
19 cantilever load is carried by the roof.

20 So it -- because you have a large
21 opening for the front door, so that's the only way
22 you can carry the load from the front end is
23 through the roof, and that's through the A-post.

24 You can't arbitrarily just change the
25 A-post to be -- as maybe suggested by some or

009137

1 viewed by some, without making sure the load
2 transfer is accomplished.

3 Q. And, obviously, design engineers have to
4 be involved in doing things like that and not
5 people like Mr. Sherlock?

6 A. Well, yeah. It's the responsibility of
7 a design engineering group in the company to do
8 that.

9 Q. Okay. Now, there's been some discussion
10 about spats. And I don't know if you were even
11 asked at your deposition about spats, but will
12 spats work on a motor coach?

13 A. No.

14 Q. And why not?

15 A. Tire and braking. You can't -- motor
16 coaches go down the road at 60, 70 miles an hour.
17 They'll come down mountains. There's a lot of
18 tire and braking. You cannot enclose that
19 compartment off and be able to -- you have to have
20 air flowing through there to be able to cool the
21 tires and brakes. You just simply cannot close
22 that off.

23 Q. So if you had spats on a motor coach,
24 would you be closing off the area?

25 A. You would be closing off the part that

1 the spat covers, and that would reduce the flow
2 around the tires.

3 Q. And what kind of potential safety hazard
4 would that be, putting on a spat?

5 A. Well, then you've got a potential for
6 braking issues and tire issues, overheating tire
7 issues. Plus the spats, as the bus is designed
8 today, would not -- would exceed the 102-inch
9 dimension.

10 Q. Okay. Now, one last area.

11 Mr. Sherlock, I'm going to tell you at
12 this trial, testified that he told you personally
13 that the J4500 was dangerous because of blind spot
14 hazards. Okay? Excuse me. Let me go back and
15 rephrase that.

16 He testified, I believe at the trial,
17 that he told New Jersey Transit the J4500 was
18 dangerous because of blind spot hazards. Okay? I
19 want you to assume that.

20 Does New Jersey even own J4500 coaches
21 to your knowledge?

22 A. No, they don't own any.

23 Q. So MCI, to your knowledge, has not sold
24 a J4500 coach to the New Jersey Transit?

25 A. No.

1 Q. And you know that of personal knowledge?

2 A. I know that of personal knowledge.

3 Q. All right. Now, have you ever engaged
4 discussions with Mr. Sherlock about the dangers of
5 a J4500?

6 A. No.

7 Q. Did you discuss at any trade show with
8 Mr. Sherlock about the issues of aerodynamics or
9 visibility or blind spots on MCI coaches?

10 A. No.

11 Q. I'm going to tell you Mr. Sherlock said
12 that he went to a trade show and he sat and talked
13 to you about some dangers with respect to the dash
14 problem and that MCI has not responded but did
15 consider the issues.

16 That's what he told the jury. Okay?

17 Have you ever -- you said you spoke to
18 him at a trade show?

19 A. Yes.

20 Q. How many times?

21 A. Once.

22 Q. Where?

23 A. I believe it was a trade show in 2014.
24 I believe it was in Houston.

25 Q. And what type of show was it?

009140

009140

1 A. It was an APTA show.

2 Q. What is APTA?

3 A. American Public Transportation
4 Association show.

5 Q. And what does American Public
6 Transportation Association stand for?

7 A. Predominantly stands for transit buses
8 purchased. It's a transit bus organization.

9 Q. Okay. In other words, it's a public or
10 governmental body that has transit buses and they
11 have shows?

12 A. Well, it's a trade group that has shows.
13 They have this major show every three years. And
14 they've had a show predominantly for transit
15 buses, and it will have some commuter buses at it.

16 Q. Does MCI ever take a J4500 to an APTA or
17 Public Transportation Association show?

18 A. No.

19 Q. Why not?

20 A. It doesn't meet Buy America.

21 Q. What is Buy America?

22 A. You have to have a percentage of the
23 funding comes from the federal agency, FDA. And
24 you have to meet a certain amount of requirements
25 that are American-made. And, at that time, it was

009141

1 60 percent, but that's increasing. But you have
2 to prove that you have 60 percent of the product,
3 at that time in 2007, was made in the U.S.

4 Q. And it was not?

5 A. Excuse me?

6 Q. You don't take J4500s --

7 A. Because the J4500 does not meet Buy
8 America because it's made in Canada.

9 Q. Okay. Now, when you did talk to
10 Mr. Sherlock, what did you talk about?

11 A. Suspension. We were -- we had a bus
12 that was on a lift. It was sitting up in the lift
13 and he was underneath the bus looking up at the
14 underside of the bus. And I walked over and I
15 said, "Can I help you?"

16 And he says, "Well" -- he was talking
17 about suspension and that they had some transit
18 buses with Gillig. And he mentioned Gillig, where
19 drivers were reporting back problems, and that for
20 some reason, also Seattle, through Pierce Transit,
21 had some motor coaches and they seemed to be
22 having less back problems. So he assumed it was
23 something to do with suspension. So we talked
24 about suspension.

25 We talked about that a little bit, about

009142

1 the difference between a transit bus and an
2 intercity coach. And then he said, "Well, I'm
3 going to go see -- find the general manager for
4 Seattle." And he walked off, and that's the last
5 I saw of him.

6 MR. BARGER: Your Honor, just if I could
7 confer.

8 (Discussion off the record.)

9 MR. BARGER: Let me just go back to one
10 area and make sure that I offered this question.

11 BY MR. BARGER:

12 Q. You have knowledge of the Federal Motor
13 Vehicle Safety Standards; right?

14 A. Yes.

15 Q. Is that required in your job as
16 engineer?

17 A. On any vehicle engineering, you're
18 required to know that.

19 Q. And you know those. You obviously don't
20 know them by heart, but you know the ones we've
21 talked about, that's accurate, because you've
22 looked at those; right? And you use those, do you
23 not?

24 A. Yes, and I use them.

25 MR. BARGER: Judge, that would be my

1 basic -- I know it took a little while.

2 THE COURT: It's okay --

3 MR. BARGER: -- but that would be my
4 basic -- you know, I would have questions that
5 involve the same topics, maybe I would rephrase
6 differently, but that's what I intend to do. And
7 I'll let my --

8 MR. KEMP: Judge, I get to ask some
9 questions. We're making a record here.

10 THE COURT: Yes.

11 MR. BARGER: No, I said, later, when
12 they argue it, I'll let my counsel argue it, if
13 that's okay.

14 THE COURT: Understood.

15 MR. BARGER: Okay.

16 OFFER OF PROOF EXAMINATION

17 BY MR. KEMP:

18 Q. Good morning, Mr. Hoogestraat.

19 Mr. Hoogestraat, counsel asked you a
20 couple of questions about whether you were
21 familiar with testimony by Dr. Breidenthal,
22 Mr. Sherwood, a couple other people. Have you
23 looked at any of the trial testimony in this case?

24 A. No.

25 Q. Okay. Have you had excerpts of it

009144

1 provided to you?

2 A. No.

3 Q. Did you know prior to walking in here
4 today that he was going to ask you about the
5 meeting with Mr. Sherwood -- Sherlock?

6 A. Mr. who?

7 Q. Sherlock.

8 A. Oh, Sherlock. Yes, I knew he was going
9 to ask me about a meeting with Sherlock.

10 Q. So someone told you that Mr. Sherlock
11 had testified at trial about a particular meeting
12 before today?

13 A. No. He asked me -- he brought up
14 Sherlock, that I recall.

15 Q. No. Before today -- when you walked in
16 here today, did you know that he was going to ask
17 you a question about a meeting with Mr. Sherlock?

18 A. Yes.

19 Q. And, before today, did you know he was
20 going to ask you a question about Mr. -- or
21 Dr. Breidenthal's trial testimony?

22 A. Yes.

23 Q. And the reason you know that is they
24 told you something about what Dr. Breidenthal and
25 Mr. Sherlock had said at trial?

009145

1 MR. BARGER: Your Honor, at this point,
2 I think he's going into attorney-client privilege.

3 MR. KEMP: It's not attorney-client
4 privilege, Your Honor. It addresses -- they've
5 already -- he's already admitted they violated the
6 exclusionary rule. The exclusionary rule applies
7 to every witness except for experts. He's not an
8 expert. They've told him about testimony by other
9 witnesses.

10 MR. BARGER: He's the PMK.

11 MR. KEMP: Not entitled to -- doesn't --
12 PMK doesn't get around the exclusionary rule, Your
13 Honor. We had --

14 THE COURT: I'm going to overrule it.
15 Go ahead.

16 MR. KEMP: Okay.

17 BY MR. KEMP:

18 Q. Other than Mr. Breidenthal and
19 Mr. Sherlock, have you been provided any other
20 information about what other witnesses have said
21 at time of trial?

22 A. No.

23 Q. Did you have a conference call with
24 Mr. Granat before he testified?

25 A. No.

1 Q. You've never discussed with Mr. Granat
2 the reasons why the coach is good, bad, or
3 indifferent?

4 A. No, I have not talked to him.

5 Q. Now, in other cases, you've filed what's
6 called an expert report?

7 A. In other cases?

8 Q. Not this case; in other cases.

9 A. In other cases, I have.

10 Q. MCI has made you their expert witness in
11 other cases; right?

12 A. Some other cases, yes.

13 Q. Not this case; right?

14 A. I'm not an expert in this case.

15 Q. Okay. And when you file an expert
16 report -- first of all, how many of these other
17 cases have you filed expert reports in?

18 A. I think there was one in Campbellton.

19 Q. In where?

20 A. Campbellton.

21 Q. Have you expressed any opinions in those
22 other cases with regards to whether a standard was
23 met or not met?

24 A. I don't think that was the request of
25 that -- if that expert report was part of -- in

009147

1 reference to a standard.

2 Q. And you've seen expert reports that
3 discuss the Federal Motor Vehicle Safety Standards
4 with regards to buses?

5 A. Could you --

6 Q. You have seen expert reports that
7 discuss federal standards with regards to buses?

8 A. Not that I recall.

9 Q. Okay. All right. You said that you had
10 no involvement in the design of the E coach but
11 you came on at a later point in time to assist in
12 production; is that correct?

13 A. That's correct.

14 Q. The same would be true in the J coach?
15 You weren't involved in the actual design of the
16 J coach, but you came to assist in production?

17 A. No. What I said is I was asked to bring
18 in -- to help bring together people to do the
19 design after the styling was done.

20 Q. Okay. And Mr. Lamothe and Mr. Couch
21 were actually designers for the J coach?

22 A. No. Lamothe was the test engineer;
23 Couch was in charge of product planning.

24 Q. Was there a designer for the J coach?

25 A. A what?

009148

1 Q. A designer? A bus designer?

2 A. Well, there's multitude of people that
3 work on the design of the bus. There isn't so
4 much a bus -- I don't know what a bus -- there's
5 multitude -- or a group of individuals because
6 there's multiple areas in a bus. You don't have a
7 single person that designs a bus.

8 Q. Okay. But you weren't involved in the
9 design of the overall shape of the bus?

10 A. No.

11 Q. Okay. And you referenced a place called
12 Designworks owned by BMW?

13 A. Yes.

14 Q. That's actually in California; correct?

15 A. Yes.

16 Q. It's owned by a Dutch gentleman, isn't
17 it?

18 A. I think it used to be, but I think it's
19 owned by BMW today.

20 Q. Well, it was owned by BMW when the Dutch
21 gentleman was involved, wasn't it?

22 A. He was there. As far as who owned what,
23 I don't know.

24 Q. And with regards to the styling, how the
25 front and back looked, that would have been the

1 decision of the Designworks people; correct?

2 A. No. That would have been in conjunction
3 with Designworks and people in Winnipeg.

4 Q. Fair. But you weren't involved in that?

5 A. I was not involved in that.

6 Q. So you don't know what they considered
7 in determining whether or not the coach should
8 look this way or that way or have this type of
9 configuration or that type of configuration?

10 A. That's correct.

11 Q. Now, with regards to the wind tunnel
12 test, you didn't know about the wind tunnel test
13 before this case?

14 A. That's correct.

15 Q. And you've indicated that you've now
16 looked at pictures from the wind tunnel test?

17 A. I looked at pictures in the wind tunnel
18 test, yes.

19 Q. And that was done, I assume, after your
20 deposition taken in this case?

21 A. No. I looked at the wind tunnel test,
22 as I had indicated at the deposition, prior to the
23 deposition.

24 Q. Okay. Well, I think you expressed an
25 opinion on direct that, in your opinion, the CJ3

009150

1 did not look like a J4500. Is that what you said?

2 A. That's correct.

3 Q. That's an opinion; right?

4 A. That's my opinion.

5 Q. When did you formulate that opinion?

6 A. I formulated that opinion when I looked
7 at the pictures the first time.

8 Q. Now, with regards to the NTSA standards,
9 there's no standards with regards to proximity
10 sensors; correct?

11 A. Yes.

12 Q. Yes, there are standards?

13 A. No, there are not.

14 Q. So there's nothing about a federal
15 regulation that prohibits a coach manufacturer
16 from putting proximity sensors on a coach; right?

17 A. That's correct.

18 Q. And there's nothing in the federal
19 regulations that prohibits the coach manufacturer
20 from making changes to the right corner area to
21 increase visibility; right?

22 A. No, there's no regulation on it at all.

23 Q. Okay. And with regards to molding, you
24 discussed the molding a little bit. Molding? The
25 mold in the right front corner?

009151

1 A. Mold?

2 Q. Did you discuss the mold with
3 Mr. Barger?

4 A. Mold?

5 Q. The molding?

6 MR. BARGER: I think you say rubber
7 stripping.

8 THE WITNESS: Oh, the rubber stripping.
9 BY MR. KEMP:

10 Q. Okay. Sorry. I've got this southern
11 Nevada accent.

12 A. No, no. I didn't understand what you
13 meant.

14 Q. Rubber stripping?

15 A. Yeah.

16 Q. And that's in the right front corner?

17 A. No. You're talking about the windshield
18 fence that goes around to hold the windshield in?
19 Is that what you're --

20 Q. Right.

21 A. That goes all the way around the
22 windshield.

23 Q. And that's in the same approximate
24 place, the right front corner, in both the CJ3 and
25 the J4500?

1 A. No.

2 Q. No? Okay.

3 All right. So there's no federal
4 standard on right-side visibility? In other
5 words, there's no test that they do to determine
6 whether or not a coach has good visibility?

7 A. No, there's no requirement in that
8 regard.

9 Q. And there's no standard that they issue
10 with regards to aerodynamics? You don't have to
11 be a certain drag coefficient; right?

12 A. Correct.

13 Q. And there's no standard on whether or
14 not you can put on an S-1 Gard; right?

15 A. That's correct.

16 Q. Now, with regards to proximity sensors,
17 did you not tell us during your deposition that
18 you had had no involvement at MCI with regards to
19 proximity sensors prior to 2014?

20 A. That's correct.

21 Q. So where did this stuff about Greyhound
22 come from?

23 A. Well, Greyhound, when I came -- when I
24 was working at MCI, Greyhound installed the
25 proximity sensors. They installed it, and we were

009153

1 just knowledgeable of what occurred.

2 Q. So this was done at a completely
3 different company?

4 A. No. Greyhound installed them on their
5 own. MCI did not install them; MCI just knew what
6 occurred with them.

7 Q. Okay. Let's back up.

8 At one point in time, Greyhound actually
9 owned MCI; right?

10 A. Years ago.

11 Q. Okay. But at the time you're referring
12 to, Greyhound and MCI were two completely separate
13 companies; right?

14 A. I don't know that for a fact.

15 Q. They were different corporations?

16 A. They were different corporations.

17 Q. All right. And what you think you heard
18 is that Greyhound had some sort of problem with
19 the VORAD system?

20 A. No. When -- we deal directly with
21 Greyhound maintenance, so I don't know what you
22 mean by somehow we were -- heard it directly from
23 Greyhound.

24 Q. Let's put it this way: Did you test the
25 VORAD system with regards to Greyhound's

009154

1 experience of it?

2 A. I did not personally.

3 Q. Okay. And did you even ride in a
4 Greyhound bus that had a VORAD system at any time?

5 A. I did not personally.

6 Q. Okay. But you think someone did?

7 A. I was told by the engineering group,
8 when I took it over, that the intercity
9 engineering group, that they had tested it.

10 Q. You were told by the engineering group
11 for Greyhound or MCI?

12 A. MCI.

13 Q. So someone at MCI told you something;
14 correct?

15 A. Yes.

16 Q. So you don't have personal knowledge of
17 it; you're relying on what someone told you?

18 A. That's correct.

19 Q. And who is that person that told you
20 that?

21 A. Gunter Dietz.

22 Q. And when did this occur?

23 A. That was in 1996.

24 Q. And this subject was not discussed at
25 your deposition; agreed?

1 A. I agree.

2 Q. Now, with regards to -- strike that.
3 You said if there had been an accident involved
4 with a J4500 where someone sucked it in, you think
5 you would have heard about it?

6 A. Yes.

7 Q. Is it not a fact that accidents are
8 reported to the legal department?

9 A. They go through the legal department.

10 Q. Legal department is in Chicago?

11 A. Yes.

12 Q. You're not part of the legal department?

13 A. That's correct.

14 Q. And you're in New Mexico; correct?

15 A. My wife lives in New Mexico.

16 Q. That's where you live too?

17 A. Sometimes.

18 Q. Okay. And you say you think you would
19 have heard about it. As we sit here today, can
20 you say that you have heard about every accident
21 reported to MCI's legal department?

22 A. I cannot guarantee I've heard every
23 accident reported.

24 Q. So you are speculating that you would
25 have heard about it?

009156

1 A. I would have heard about that kind of
2 accident, being extremely unusual.

3 Q. Is there any standard or procedure that
4 MCI has for reporting accidents to you?

5 A. No. We have a safety committee that
6 reviews them. We started that just recently.
7 But, prior to that, we had frequent conference
8 call with legal in regard to anything that was
9 reported. We also have email documents that come
10 to us on any accident that's reported.

11 Q. Okay. Moving forward, you were asked a
12 question about whether you've looked at the CJ3
13 and the wind tunnel test; right?

14 A. Yes.

15 Q. And you said it doesn't look the same to
16 you as the J4500; correct?

17 A. That's correct.

18 Q. That's an opinion?

19 A. That's an opinion.

20 Q. Have you discussed that opinion with
21 anyone prior to today?

22 A. No.

23 Q. More specifically, have you talked to
24 Mr. Granat about it?

25 A. No, I have not.

009157

1 Q. And with regards to Proposal 2 from the
2 wind tunnel test, and you said, quote, there are
3 similarities, unquote, between Proposal 2 and the
4 J4500, do you remember that testimony?

5 A. Yes.

6 Q. Is that opinion too?

7 A. That's my opinion.

8 Q. Prior to today, had you given that
9 opinion?

10 A. Have I given that opinion?

11 Q. Prior to today, had you given that
12 opinion to anybody?

13 A. No.

14 Q. So today, whatever day it is --
15 March 20th, I think -- is the first day that you
16 have formulated the opinion that Proposal 2 is
17 similar to the J4500; correct?

18 A. No.

19 Q. No? You had the opinion before today?

20 A. Yes. You asked me if I'd talked to
21 anybody about it.

22 Q. Oh, you haven't talked to anybody about
23 it, but you had the opinion?

24 A. That's correct.

25 Q. That didn't come up in the deposition

1 either, did it?

2 A. No, it did not.

3 Q. Excuse me? No?

4 A. No.

5 Q. All right. Now, you said it was
6 detrimental to the J4500 to increase the corner
7 radius of the product because you'd have to take
8 out either seats or baggage-handling capability;
9 correct?

10 A. No, I did not say baggage.

11 Q. Okay. You said seats?

12 A. I said that's an option. I said either
13 seat spacing or seats to get it -- because you
14 have to take the space out of the passenger
15 compartment.

16 Q. Would I be correct that the current
17 edition of the J4500 has increased the corner
18 radius compared to the 2008 edition of the J4500?

19 A. The present day?

20 Q. The present day?

21 A. No, it has not.

22 Q. You think it's the same?

23 A. It's the same.

24 Q. What's the corner radius of the current
25 J4500?

009159

1 A. 8 inches.

2 Q. And you think the old -- can you
3 translate that for me in terms of .125 like
4 Dr. Breidenthal was using? Are you familiar with
5 Dr. Breidenthal's testimony about a .125 corner
6 radius?

7 A. About what corner radius? I don't know
8 what you're talking --

9 Q. You remember Dr. Breidenthal -- has
10 anyone told you that Dr. Breidenthal gave
11 testimony about the optimum radii?

12 A. No.

13 Q. Anybody told you that?

14 A. I told you previously I hadn't seen his
15 testimony.

16 Q. All right. All right. Now, you said
17 that a passenger -- passenger noise would be
18 caused by a glass door on a motor coach. Do you
19 remember that testimony?

20 A. Yes.

21 Q. And with regards to the J4500 and the K,
22 in this case, what do you call that area where the
23 handle is? What part of the door is that?

24 A. You mean the door?

25 Q. What part of the door is this piece?

009160

1 A. That's just part of the door.

2 Q. Okay. Could this have been made out of
3 glass?

4 A. I don't think so.

5 Q. Just like the bottom, you don't think
6 the top could have been made of glass?

7 A. In my opinion, no.

8 Q. Why is that?

9 A. Structurally.

10 Q. Is this the first time you've expressed
11 that opinion in this case?

12 A. I don't know what you mean. I expressed
13 that opinion --

14 Q. Here today is the first time you've
15 expressed that opinion that you couldn't make that
16 section of the door out of glass? This is the
17 first time we've heard about it?

18 A. I was not asked in my deposition, so,
19 no, I didn't communicate that.

20 Q. I'm just asking. Is this the first time
21 you've expressed that opinion?

22 A. In the court, yes.

23 Q. Anywhere else?

24 A. I didn't express it anywhere else.

25 Q. Okay. So today is the first time you've

009161

1 expressed this opinion; correct?

2 A. Openly, yes. I guess, if that's what
3 you mean.

4 Q. Now, with regard -- you were asked a
5 couple questions about European mirrors?

6 A. Yep.

7 Q. Would I not be correct that the current
8 version of the J4500 has mirrors -- I don't know
9 if you want to call these European mirrors, but
10 they're more to the front than the old J4500?

11 A. They're what?

12 Q. They're located in a different position
13 than the 2008 J4500.

14 A. They're slightly different, yes.

15 Q. Well, not that they're slightly
16 different. They're moved to a completely
17 different area of the bus?

18 A. I disagree. They still come off the
19 A-post.

20 Q. They come off the A-post in the front,
21 not on the side; right?

22 A. No. They're mounted to the same point
23 on the A-post.

24 Q. That arrangement could have been used
25 for this bus?

009162

1 A. Well, any arrangement can be used, I
2 guess, if you want to use it that way. But that
3 bus -- that A-post mirrors are mounted to the --
4 those mirrors are mounted to the A-post. They're
5 not bug mirrors or -- as you referred to them.

6 Q. I didn't refer to them as bug mirrors.
7 I think Mr. Barger referred to them as bug
8 mirrors.

9 In any event, this mounting arrangement
10 could have been used for the 2008 J4500; right?

11 A. It's possible, yes.

12 Q. And the reason that you changed over --
13 you being MCI -- to this mounting mechanism is
14 that this increases the right-side visibility;
15 correct?

16 A. No.

17 Q. That's not the reason you changed?

18 A. That's correct.

19 Q. Why did you change?

20 A. We did a styling change.

21 Q. And "we" would be the people in
22 California again?

23 A. They worked with people in California
24 that did the styling change.

25 Q. The BMW outfit?

009163

1 A. That's correct.

2 Q. Okay. Now, at your deposition, you were
3 asked whether you were aware of the S-1 Gard and
4 you said no?

5 A. That's correct.

6 Q. Never even heard about it before your
7 deposition?

8 A. That's right.

9 Q. Okay. And now you're prepared to give
10 testimony that there's a lot of considerations and
11 you don't think that it's working good; right?

12 A. At the deposition I also said -- I
13 reported that it wasn't working good.

14 Q. Well, at the deposition did I not ask
15 you a question as to whether or not you could say
16 yes or no as we sat here as to whether there were
17 problems with the S-1 Gard?

18 A. I reported, I believe, in my deposition
19 that the Capital Metro had expressed concerns,
20 issues with it, because you asked me about Capital
21 Metro.

22 Q. Didn't you tell me that, when I asked
23 you -- and I read the PMK deposition -- as to
24 whether or not you were aware if there were any
25 functionality problems with the S-1 Gard, you

009164

1 said, "I don't know if it's feasible or prudent."

2 That was your answer?

3 A. Yep.

4 Q. And your answer is different today?

5 A. I don't disagree.

6 Q. You don't disagree that you have a
7 different answer today?

8 A. No. I disagree I have a different
9 answer.

10 Q. So your answer today is you don't know,
11 as we sit here today, whether it's feasible to put
12 the S-1 Gard on the 2008 J4500? That's still your
13 answer?

14 A. I said feasible or prudent.

15 Q. Okay. So you don't know if it's
16 feasible?

17 A. And I don't know if it's prudent to do
18 that.

19 Q. And you don't know if it's prudent.

20 So what was this testimony concerning
21 alleged problems with S-1 Gards?

22 A. That was just concerns that, since then,
23 that I've developed in thinking about putting it
24 on.

25 Q. So since the deposition, you are

009165

1 changing what you told me back on October 13th,
2 2017?

3 MR. BARGER: Objection to the form of
4 that question.

5 THE COURT: Overruled.

6 THE WITNESS: No, I disagree. I still
7 said in the deposition whether it was feasible or
8 prudent. I still don't know if it's feasible or
9 prudent. These are just things you take into
10 consideration in regard to whether it would be
11 deemed feasible or prudent.

12 BY MR. KEMP:

13 Q. Okay. Let's see if I can get this
14 right.

15 So you don't know, as we sit here today,
16 whether it's feasible; correct?

17 A. That's correct.

18 Q. You don't know if it's prudent, as we
19 sit here today?

20 A. That's correct.

21 Q. What you're saying is you want to do
22 more testing?

23 A. We would have to do a lot more testing.

24 Q. Which hasn't been done yet?

25 A. That's correct.

009166

1 Q. So you don't have a basis, as we sit
2 here today, to give an opinion that's feasible or
3 an opinion that's prudent; correct?

4 A. That's correct.

5 Q. With regards to Pablo, he was the
6 employee that worked for the coach parts division?

7 A. I think he ran the coach parts division.

8 Q. Right. And at the deposition, you told
9 me that you had made inquiry and no one -- not
10 just you, no one at MCI had ever heard of an
11 S-1 Gard?

12 A. That's correct.

13 Q. Okay. But Pablo had heard of an
14 S-1 Gard, had he not?

15 A. If he had -- he doesn't work for MCI at
16 the time I did the inquiry. So everybody at MCI I
17 looked into had not heard about it.

18 Q. So when you prepared to give testimony
19 as the person most knowledgeable on whether or not
20 anyone at MCI had ever heard about S-1 Gards, you
21 limited your inquiry to current employees; is that
22 correct?

23 A. I looked into current employees,
24 employees that were around at the time period the
25 bus was built, yes.

009167

1 Q. Did you talk to Jim Bernucchi?

2 A. Jim who?

3 Q. Is it Bernucchi?

4 A. I don't know.

5 Q. Who was the president of MCI?

6 A. Bernacchi.

7 Q. Bernacchi. Did you talk to

8 Mr. Bernacchi about whether he had heard of

9 S-1 Gards?

10 A. No, I had not.

11 Q. So as we sit here -- is he still alive,
12 by the way?

13 A. Is he what?

14 Q. Is he still alive?

15 A. I don't know.

16 Q. So, as we sit here today, we don't know
17 whether or not the president of MCI, the direct
18 supervisor of Pablo, we don't know whether or not
19 he knew about S-1 Gards; correct?

20 A. That's correct.

21 Q. Did you ask anyone else at upper
22 management at MCI --

23 A. Yes.

24 Q. -- from the time period '97 through
25 2000, whether they heard about S-1 Gard?

009168

1 A. No, I did not go back to '97. The J4500
2 coach didn't come out to 2001, so I did not go
3 back to '97. I went to the employees that were at
4 MCI.

5 Q. Okay. And then you said that you had,
6 quote, personal knowledge through the company that
7 New Jersey Transit had some sort of nightmare
8 experience.

9 Do you remember that testimony?

10 A. No. They said it was a maintenance
11 nightmare.

12 Q. Okay. Said what was a maintenance
13 nightmare?

14 A. The S-1 Gard. They perceived it as a
15 maintenance nightmare.

16 Q. Okay. So you said you had personal
17 knowledge through the company.

18 Does that mean you did not talk to
19 anyone at New Jersey Transit?

20 A. No, I talked -- no, I did not talk to
21 anybody at New Jersey Transit. I talked to
22 somebody else who spoke to people at New Jersey
23 Transit.

24 Q. So you talked to another MCI employee.
25 Who was that?

009169

1 A. Terry Fordyce.

2 Q. And that employee told you that New
3 Jersey Transit was having a maintenance nightmare?

4 A. No. I said they perceived it as a
5 maintenance nightmare. They had not ever
6 installed one, as far as I know.

7 Q. Oh, so someone at New Jersey Transit
8 perceived it as a maintenance nightmare?

9 A. Yes.

10 Q. Who's that person?

11 A. Stan Wrobel.

12 Q. So, basically, what you're telling me is
13 that you had a conversation with one MCI employee
14 about a conversation he had with a New Jersey
15 Transit employee who had some sort of perception
16 about an S-1 Gard; is that it?

17 A. That's what he said, yeah.

18 Q. Okay. And you called that personal
19 knowledge; right?

20 A. I called it personal knowledge, yes.

21 Q. Okay. That's really double hearsay,
22 isn't it?

23 A. I don't know what double hearsay means.

24 Q. Okay. But that's what your definition
25 of personal knowledge is?

009170

009170

1 A. That was my personal knowledge that I
2 was told that, yes.

3 Q. Somebody tells you something, that
4 becomes personal knowledge?

5 A. It was company knowledge.

6 Q. Okay. All right.

7 MR. KEMP: All right. I don't have any
8 further questions, Your Honor.

9 MR. BARGER: I've got just a few, if
10 it's okay.

11 THE COURT: Okay.

12 MR. BARGER: Just real quick.

13 CONTINUED OFFER OF PROOF EXAMINATION

14 BY MR. BARGER:

15 Q. The last question or last -- just before
16 the last question, Mr. Kemp asked you about you
17 would not do the testing -- well, would MCI do the
18 testing of the S-1 Gard or would they expect its
19 vendor, who is trying to sell it to them, to have
20 done the testing?

21 A. We would expect the vendor to do the
22 testing.

23 MR. BARGER: One last thing just for the
24 record, Your Honor. On page 43 of his deposition,
25 he was asked the following question by Mr. Kemp:

009171

1 "Would any portion of this wind tunnel
2 test that I see as Exhibit 3 be directly
3 applicable to either the E series or the J
4 series?"

5 That's the 1993 study.

6 And the answer was:

7 "As I stated previously, I believe they
8 used some of this as a guideline to the
9 styling for the E series at that time, but I
10 wasn't involved. So exactly what they used,
11 I don't know. But the effect of certain
12 shape changes and stuff, I'm sure was a
13 guideline on what you should look at."

14 So I have no further questions, Your
15 Honor. Thank you for your indulgence.

16 Oh, I do have one more statement.

17 With respect to the bug antennas, I
18 wouldn't ask those questions. I would delete
19 those questions.

20 THE COURT: Okay. Now that we have this
21 offer of proof, is there anything else counsel
22 would like to discuss as far as making the record?

23 MR. HENRIOD: I want to make sure --

24 MR. KEMP: Judge, can we excuse the
25 witness?

009172

1 THE COURT: Yes.

2 MR. HENRIOD: Sure.

3 MR. BARGER: I need you to step outside.

4 (Witness excused.)

5 MR. HENRIOD: Your Honor, I think what
6 we're looking at now is -- is trying to make sure
7 that we understand what line the Court is drawing.
8 I don't want to presume that the Court's ruling
9 means he can't get into any of that. I'm trying
10 to figure out exactly what is excluded, what is
11 not.

12 And in light of the Court's comments
13 before we started, I am looking through this
14 deposition again for questions that were asked
15 that he said "I don't know" to that mark some type
16 of significant change. And I was listening for
17 that, but I didn't really hear it.

18 The last comment that Mr. Barger made,
19 it's because I had handed to him the question
20 about the 1993 test as an example, and on one page
21 he says he had looked at it. He does see some
22 changes incorporated. Can't say exactly what they
23 are.

24 And then that's followed up with:

25 "Okay. So specific to the E coach, you

009173

1 don't have direct knowledge?

2 "No.

3 "Specific to the J coach?"

4 And he said, "No."

5 But I don't think that's the standard
6 for whether or not he can give his understanding
7 of whether or not there was general incorporation
8 of the principles that were learned there.

9 So, one, I don't see questions that
10 curtail him from going into any of this,
11 especially when we look at the language of those
12 or the terms used in those questions that ask for
13 pinpointed information. He denies that he has
14 very specific, pinpointed information. And then
15 those questions are blown up today to say that he
16 had no testimony whatsoever about the topic.

17 So I think that if we are precluding him
18 from giving MCI's story on this stuff, we need to
19 look at those questions that allegedly preclude
20 him from going into it.

21 I don't see "I don't know" very often in
22 this deposition transcript, and where I do see it,
23 it is in response to questions that insist on a
24 very particular answer.

25 And so I think that it would be misusing

009174

1 those to say that they preclude MCI.

2 MR. ROBERTS: And, Your Honor, I
3 mentioned looking at every question compared to
4 the scope of topics. The wind tunnel is a good
5 example. The scope of the topic was wind tunnel
6 testing performed from the time period 1997 to
7 2016.

8 He then shows up in the deposition, he's
9 shown a 1993 wind tunnel test. Again, the topic
10 is '97 to 2016. That's what he had a duty to
11 prepare on.

12 He then gets sprung with a 1993 one,
13 which he had seen and he did talk about, but he
14 didn't prepare on that topic for all of the
15 corporation's knowledge because it was outside the
16 scope. There were no topics on federal
17 regulations.

18 The proximity sensors was any that they
19 had considered. Well, because he had never
20 considered an Eaton VORAD side proximity sensors,
21 he wasn't prepared on that. That's outside the
22 scope of the topic.

23 Those are just some examples that I
24 picked up as he was on the stand. But it
25 illustrates the need to compare any topic to the

009175

1 proposed testimony before the Court excludes any
2 topic.

3 Thank you, Your Honor.

4 MR. KEMP: Judge, I don't even know
5 where to start. He's been their expert on other
6 cases where he filed expert reports like he should
7 have. He didn't file an expert report in this
8 case. He admitted it. It's obvious.

9 His definition of personal knowledge is
10 what other people tell him. You know, we went
11 through that on three or four areas. So personal
12 knowledge?

13 "Oh, yeah, so-and-so told me that they
14 talked to someone in New Jersey and that person
15 had a perception."

16 And they want to bring that in here as
17 personal knowledge? That's not personal
18 knowledge, Your Honor.

19 The opinions, we went through them with
20 him. They're all new. You know, didn't give them
21 to anybody -- two of them were brand-new today,
22 the last day -- well, supposedly the last day of
23 trial. Two brand-new opinions today that have
24 never been disclosed.

25 They violated the exclusionary rule. I

1 mean, he's not an expert. He was not in the
2 exception area. They shouldn't have told him
3 about the testimony. You know, they told him
4 about Breidenthal's testimony. They told him
5 about Sherwood's testimony.

6 You can't do that. If you violate the
7 exclusionary rule and you tell another witness
8 who's supposed to be testifying about his personal
9 knowledge and facts he knows, if you talk to
10 another witness and tell him what the other
11 witness said, that's a violation of the
12 exclusionary rule.

13 And they violated it with regards to
14 trial testimony, because Mr. Sherwood's testimony
15 about the meeting -- and I didn't bring that up on
16 my direct, Your Honor. If you recall, Mr. Terry,
17 when he was cross-examining Mr. Sherwood -- Sherlock. I
18 keep getting this wrong, Your Honor. I apologize.
19 It's Mr. Sherlock.

20 When Mr. Terry was cross-examining
21 Mr. Sherlock, he said, "Why didn't you tell this
22 to anybody?"

23 He said, "Well, I did tell MCI."

24 And he says, "Who did you tell?"

25 He goes, "I told Virgil."

009177

1 And Mr. Terry was kind of taken aback
2 and he said, "Virgil?"

3 I did not bring that up. That is not in
4 the deposition. It wasn't brought up in direct.
5 It was brought up in their cross. Then they took
6 trial testimony and they went and told this
7 witness about it. I mean, that is a direct
8 violation of the exclusionary rule.

9 The PMK testimony, he said one thing
10 then and now he's saying another thing. The
11 proximity sensor testimony, he admitted on the
12 stand it's all hearsay from another MCI employee.
13 You know, someone at Greyhound talked to some
14 other MCI employee who gave a report to him. So
15 it's double hearsay, and he called it personal
16 knowledge.

17 He didn't test the proximity sensors.
18 Didn't test the VORAD system. Didn't see a VORAD
19 system. Didn't look at the Greyhound bus that had
20 the VORAD system on it. And in the PMK deposition
21 he told me he had no involvement prior to 2014,
22 and now he comes up with this story.

23 The design features of it, he admitted
24 he's not on the design team. I thought he was
25 pretty candid about that.

009178

1 The S-1 Gard, you know, we're back to
2 double hearsay, you know. Someone from New Jersey
3 said that they thought in their perception --
4 someone from New Jersey. We don't even know where
5 they're getting this perception from. They say
6 they're not using them at New Jersey Transit, but
7 someone from New Jersey has a perception that it's
8 a nightmare, and he tells an MCI employee this,
9 and this MCI employee tells Mr. Hoogestraat.

10 They want to bring that evidence in
11 front of a jury? That is the most outrageous type
12 of double hearsay that I've ever heard of, Your
13 Honor. It's certainly not personal knowledge.

14 So we've gone through all of these
15 areas, and I think we've explored them. And
16 there's a record. And this -- this person should
17 be totally excluded, Your Honor, from the areas
18 that they're proposing to designate him on.

19 MR. BARGER: Can I just say one thing
20 real quick?

21 Judge, with respect to Dr. Breidenthal,
22 my questions to him was "Dr. Breidenthal has
23 suggested; is that true?"

24 It is correct. They're absolutely
25 correct. I asked him -- I told him Sherlock said

009179

1 he was at a meeting, and he told me that's never
2 happened.

3 If that violates the exclusionary rule,
4 then I'm not aware of that. But that's what
5 Sherlock said. That's the only thing that he was
6 told. And I take the blame or credit for that.
7 But I don't see why that would prevent him from
8 responding to say he was not at Sherlock's
9 meeting.

10 MR. HENRIOD: And I would just point the
11 Court to the authorities that we laid out on
12 page 6 and 7 at the bench brief as to what
13 constitutes personal knowledge when we're talking
14 about a corporate representative.

15 We don't need to bring in -- and in
16 light of the accusations that are being made
17 today, I think we would be criticized for bringing
18 in 20 to 30 people who would have particular
19 knowledge of all of these different little
20 aspects.

21 But when it comes to representatives of
22 a corporation, hearsay is allowed if they go and
23 they expand their knowledge by talking to others.
24 It's the only way to represent corporations and to
25 have them represented in court efficiently.

009180

1 And then let me just wrap this back
2 around in the punitive damages.

3 They may think that these are not good
4 reasons for having made the choices that we did.
5 And they can make that argument. But here to
6 exclude this would be to say we can't say why we
7 did what we did for whatever value might be seen.

8 Unless Your Honor has any questions.

9 THE COURT: No, I don't have questions.

10 So the plaintiffs have made their
11 objections and made their record.

12 As I indicated at the beginning, this
13 morning, before the offer of proof -- or early
14 this afternoon, I've taken a look at the federal
15 cases, okay, that were presented and discussed in
16 defendant's brief. And when I look at that, it
17 does appear that the representative, a 30(b)(6)
18 witness of a corporation, can include hearsay in
19 their information in order to be able to discuss
20 what the company or the corporation -- to
21 represent them. Okay?

22 However, my concern is not that, because
23 I understand where the cases are going and what
24 they're saying. And here is my concern with this.
25 When plaintiffs -- again, I'm looking at the

009181

1 preparation for the deposition testimony, okay, of
2 Mr. Hoogestraat when the plaintiffs had the
3 ability to depose him. Okay?

4 When the plaintiffs took the 30(b)(6)
5 depo, the rule required the defendants to produce
6 a person who has knowledge about the topics
7 noticed in the notice of deposition. With respect
8 to 30(b)(6) witnesses, it appears in many
9 instances that he did not have, whether it was
10 knowledge -- I don't know if it was personal or
11 any knowledge. Okay.

12 So even if it wasn't personal, he
13 testified on various topics that he didn't know.
14 Okay? He didn't know. And because the witness
15 didn't know, in my view, the defendants -- no
16 offense, but this is what I honestly believe --
17 failed in the duty to prepare the witness. He
18 wasn't properly prepared. Everything that he's
19 done afterwards should have been done before the
20 deposition so that the opposing party, whether
21 it's the defendant or the plaintiff -- it doesn't
22 matter to me -- has the ability to have an
23 effective examination of them in the deposition.
24 Okay.

25 So I've seen cases that say, if the

009182

1 testimony is contradictory or new, if it's
2 different or new, that the defendants' obligation
3 to prepare its 30(b)(6) witness, it may not offer
4 a new or different account of the facts at trial
5 than those that were given at the time of the
6 deposition.

7 All those facts and all those issues
8 were available, whether they were hearsay, whether
9 they needed to be discussed with another witness
10 and so forth.

11 Now, I haven't gone line by line with
12 this, but in various areas, because of this duty
13 to prepare the 30(b)(6) witness, in my view -- and
14 there's another one that says for a Rule 30(b)(6)
15 deposition, the defendants must prepare them fully
16 and unequivocally about the designated subject
17 matter.

18 So I haven't gone line by line, but in
19 some or many of these areas I think that this is
20 such a significant issue that the cases in the
21 federal court, I don't think it's analogous to
22 that. I think they're not talking about such a
23 discrepancy in testimony and in preparation.

24 And so I don't think that those cases
25 that give cross-examination as a cure, I don't

1 think this is along those lines. I think that
2 this is so severe and so far beyond that in
3 certain areas that it would be unfair -- unfairly
4 prejudicial, substantially prejudicial to
5 plaintiff or any party to effectively take a
6 deposition.

7 It's almost like having a different
8 witness and it's not analogous to the federal
9 cases. I think this goes far beyond what their
10 recommendation of the cure is. So anything that's
11 been learned since, whether it was learned because
12 of hearsay, because of all the proper channels to
13 represent the company, I do not believe this is in
14 line with what those federal cases discuss as a
15 cure. That's my problem.

16 So it would be incumbent upon -- I'm not
17 saying he can't testify. That's not what I'm
18 saying. I'm going to be very clear. But it would
19 be incumbent upon the parties, because I'm not
20 going to sit down with you first, to see what
21 areas were testified, what he didn't know about in
22 the deposition, what he did.

23 But anything that's new, contradictory,
24 or different, for the reasons I've just
25 enunciated, I do not feel that cross is the cure

1 that these other cases that I've read
2 contemplates. I think this goes beyond. That's
3 my distinction. That's this Court's analysis.

4 And it would be true if it was the other
5 way around. I just don't feel that the party who
6 deposed this person was talking, in many areas, to
7 the same witness. And to not have that ability, I
8 think creates unfair prejudice, substantial
9 prejudice to that party. And I don't believe
10 direct can cure it. That's my -- that's my
11 finding.

12 Now, can Mr. Hoogestraat testify? Yes,
13 as long as it's not different, contradictory, or
14 new in the areas where he didn't have the
15 information and he wasn't prepared.

16 MR. BARGER: May I ask a question?

17 THE COURT: So I'm not saying he can't
18 testify.

19 MR. BARGER: And, obviously, I think I
20 can go over his background and that kind of stuff.
21 But the question was not part of the 30(b)(6)
22 notice about government regulations, in his job he
23 uses them, so I think I should be --

24 THE COURT: I don't know that right now,
25 Mr. Barger. I'm not trying to be rude to you. I

1 think I'm just giving you a good feel for where
2 I'm coming from.

3 MR. HENRIOD: Right. And I think that
4 the general notion behind that particular
5 application would be whether or not a topic was
6 even designated. So I don't think that we are
7 curtailed to our responses to questions that they
8 chose to ask. I think the issue is whether or not
9 they asked a question and whether or not the
10 answer that we gave at the deposition was an "I
11 don't know" and what we're doing now really
12 departs from that.

13 I think this question just clarifies
14 that it is both the -- we're limited if the
15 answers that we gave to questions that were asked
16 was "I don't know," for instance. But it doesn't
17 mean that we can't talk about things that they
18 never chose to ask about.

19 MR. KEMP: Any of them, they can't, Your
20 Honor, because they didn't file a report. If it's
21 an opinion, you've already ruled that it's
22 personal knowledge only. So if it's an opinion,
23 they can't for the other reason, which is there's
24 no expert report.

25 MR. HENRIOD: And I don't think this is

1 an opinion. It's within the scope of what he
2 considers what he knows about this vehicle. And
3 just like any ordinary party who is put on the
4 stand, they're not limited to the questions that
5 the opposing party happened to ask them during the
6 deposition.

7 If it didn't come up during the
8 deposition, if it wasn't designated as a topic, I
9 don't think Your Honor is saying that he would be
10 precluded from testifying about those things. But
11 that's why Mr. Barger asks.

12 MR. KEMP: Judge, he can't get up here
13 and give new opinions now on the last day of
14 trial. He's not an expert. They used him in
15 other cases as an expert. They filed expert
16 reports from him in other cases. They didn't file
17 an expert report in this case. He cannot give any
18 opinion testimony.

19 And his definition of personal
20 knowledge, triple hearsay based on a perception,
21 that's not personal knowledge. You know, if
22 that's the definition of personal knowledge, we
23 might as well throw the hearsay rule in the
24 garbage can.

25 MR. HENRIOD: I think it's a straw man

1 to say he can't talk about opinions. I don't
2 think it necessarily is an opinion.

3 MR. KEMP: The opinion that it would
4 violate the regs to do it a certain way, the
5 opinion that he doesn't think an S-1 Gard would
6 work, the opinion -- you know, these are all
7 opinions.

8 And he told me on the witness stand,
9 Your Honor, that two out of the three he came up
10 with today. Today, he came up with them. So a
11 new opinion formed on the last day of trial, it's
12 just outrageous that they're even suggesting that
13 they can sneak this in.

14 MR. HENRIOD: That's a pretty expansive
15 definition of opinion.

16 THE COURT: It's expansive, but it has
17 to do with anything that, you know, is fairly
18 related to the areas that were -- this is
19 semantics.

20 MR. HENRIOD: Well, it is largely
21 semantics. And like Witherell was asked for
22 opinions --

23 THE COURT: This is semantics. So,
24 Mr. Henriod, I think that if it was anything
25 closely related -- not just the actual question,

1 but you know what I'm talking about, something
2 that's closely related -- I think that it's off --
3 it's off limits. But that's for you and -- I'm
4 not going to -- I'm not going one by one.

5 MR. HENRIOD: I think we can work with
6 that.

7 THE COURT: I'm already researching
8 other things and will have many answers for you
9 today on jury instructions and on everything else
10 and taxes and all of those other things. And I
11 had a full calendar this morning, so -- I still
12 looked at 30(b)(6) last night for quite a while
13 after I got home after I left here at 10:00.

14 MR. HENRIOD: Thank you, Your Honor.

15 THE COURT: No, I'm happy to. It's my
16 job. It's my job.

17 But, anyway -- so I don't know if you
18 want to take a break now and discuss that, discuss
19 this at night, whatever your choice as long as I
20 have a moment to use the -- to take a comfort
21 break.

22 MR. BARGER: That's our signal for going
23 to the bathroom. Let me look at it. Give me a
24 couple minutes. I'll ask the question. I'll try
25 to phrase it properly. If he objects, then you

1 can rule and we go from there. I don't want to
2 run up to the bench every five minutes.

3 THE COURT: I just want it to be clear
4 that I'm not putting a muzzle over -- not a
5 muzzle -- but I'm not fighting him. He's just not
6 going -- I think I've been very clear.

7 MR. BARGER: You have been. I
8 understand.

9 THE COURT: I don't know how much
10 clearer I can be.

11 MR. ROBERTS: No, no. Thank you, Your
12 Honor.

13 THE COURT: And, by the way, I'm being
14 very sincere when I tell you that if the
15 plaintiffs were doing the same thing, I would be
16 holding the same way. Okay? Because I truly feel
17 there wasn't a significant opportunity to move
18 forward and, you know, develop things in a
19 deposition which should have -- this person should
20 have been thoroughly briefed and educated
21 beforehand as the 30(b)(6) witness.

22 MR. KEMP: Judge, you asked me for the
23 30(b)(6) designation. Here it is.

24 THE COURT: You may need this when
25 you're --

009190

1 MR. KEMP: I have my own copy.

2 THE COURT: I want you to know I do have
3 it. For me to find it right now is -- all right.

4 I recommend we take a 10- to 15-minute
5 break. And you can decide if you're going to
6 discuss this later. We can start earlier
7 tomorrow. Tomorrow, I have no calendar. I'll be
8 here whenever you want. I'm not a morning person,
9 but I will become one happily so that we don't --
10 we don't go over the time that we need to.

11 MR. HENRIOD: Thank you, Your Honor.
12 Nobody wants that.

13 THE COURT: I'll be back in about 10 to
14 15 minutes.

15 THE MARSHAL: Court is in recess 15
16 minutes.

17 (Whereupon, a recess was taken.)

18 THE MARSHAL: All rise. All the jurors
19 are present, Your Honor.

20 THE COURT: Thank you, Marshal.

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

23 THE CLERK: Calling roll, Your Honor, of
24 the jurors.

25 Byron Lennon.

009191

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: Pamela Phillips-Chong.
19 JUROR NO. 11: Here.
20 THE CLERK: Raquel Romero.
21 JUROR NO. 10: 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 COURT: Do the parties stipulate to
4 the presence of the jury?

5 MR. BARGER: Yes, Your Honor.

6 MR. CHRISTIANSEN: Yes, Your Honor.

7 THE COURT: Ladies and gentlemen, I just
8 want to welcome you back and let you know that the
9 Court has been -- because I feel it necessary,
10 discussing legal issues with the parties. So
11 don't blame them. Okay? I just want to make sure
12 that's clear. The buck stops here. All right?

13 Please go ahead.

14 MR. BARGER: Your Honor, we call
15 Mr. Pears by deposition.

16 THE COURT: All right.

17 (Video played.)

18 BY MR. CHRISTIANSEN:

19 Q. Sir, would you state your name and spell
20 it for the record, please.

21 A. My name is Robert Anthony Pears.

22 Q. What do you do for a living, Mr. Pears?

23 A. I am a regional sales manager.

24 Q. For who?

25 A. For Thermo Fisher scientific. Do you

009193

1 need that spelled?

2 Q. Nope. I have the spelling. What does
3 Thermo Fisher Scientific do?

4 A. We are the leading supplier of
5 scientific instrumentation and services to the
6 scientific world.

7 (Video paused.)

8 MR. BARGER: That's very distorted and
9 very loud.

10 THE COURT: It is.

11 (Discussion off the record.)

12 (Video resumed.)

13 BY MR. CHRISTIANSEN:

14 Q. Tell me that in a layman's version.
15 What are scientific instruments? Like,
16 microscopes?

17 A. Microscopes; everything from testing
18 your water purity, air purity, fruit,
19 pharmaceutical purity. Is it -- we also get into
20 testing whether or not you have cancer. We work
21 with the medical industry providing various tests
22 for illnesses, things like that.

23 Q. Were you in Las Vegas at the time of the
24 accident?

25 A. Yes.

1 Q. What were you doing there?

2 A. We were attending a national sales
3 meeting.

4 Q. Were you a passenger in the bus that
5 collided with Dr. Khiabani on Pavilion Center and
6 Griffith Peak, at that intersection?

7 A. Yes.

8 Q. The court reporter has placed in front
9 of you a picture that we've got our hands on that
10 is the make and model of the bus that you were
11 traveling in. Does that look familiar to you?

12 A. Yes.

13 Q. Does that look like the bus you happened
14 to be in on that day in April of this year?

15 A. Yes.

16 Q. And now if I give you an aerial view --
17 we'll have her mark that as No. 3 for us.

18 Does that appear to be an aerial view of
19 the same bus containing -- I guess we'll call
20 them, for lack of a better term, the bucket seats
21 within the motor coach we're here to discuss?

22 A. Yes.

23 Q. And could you mark with an X on
24 Exhibit 3 where you were seated at the time of the
25 incident.

009195

1 A. There you go.

2 Q. And what time did you arrive -- you
3 personally arrive in Las Vegas on April the 18th?

4 A. I believe it was around 10 o'clock in
5 the morning.

6 Q. Looks like you're in the front-most
7 passenger side seat abutting the passenger window
8 front seat of the bus; fair?

9 A. Yes.

10 Q. How did you get there?

11 A. So a group of us arrived at close to a
12 similar time. And there were people from the bus
13 company at the airport guiding us to where the
14 buses were. And then, once they had a certain
15 amount on the bus, they then took the bus to the
16 hotel -- or resort.

17 Q. About how long a ride was it, to your
18 recollection, between leaving the hotel and when
19 the incident took place?

20 A. I believe it was, like, 30 minutes. I'm
21 guesstimating.

22 Q. Fair enough. And during the ride, did
23 you have a passenger to your left in the seat next
24 to you?

25 A. No.

009196

1 Q. Where was Mr. Plantz? Is it --
2 pronounce his name correctly.

3 A. Plantz, P-l-a-n-t-z.

4 Q. Where was Mr. Plantz seated? And if you
5 could take my red pen and maybe use a -- let's
6 see -- why don't you do a circle where he was
7 seated, to the best of your recollection.

8 A. So Mr. Plantz was opposite me.

9 Q. So he was on the front seat immediately
10 behind the driver closest to the driver's side
11 window?

12 A. Yes.

13 Q. And what was, Mr. Pears, to your
14 recollection, the time that the incident took
15 place?

16 A. I believe it was around 11:30-ish.

17 Q. A.m.?

18 A. A.m.

19 Q. Daylight?

20 A. Yes.

21 Q. Clear skies?

22 A. It was a beautiful, sunny day, but very
23 windy.

24 Q. You obviously didn't see how
25 Dr. Khiabani incurred the injuries that ended his

009197

1 life. You couldn't see that, could you, from
2 where you sat?

3 A. Part of me is persuaded that I did see
4 him go under the tire, but I cannot -- I have --
5 it blacks out and I don't know.

6 Q. Okay. Let's talk about what you saw.
7 Let's just talk about some physics, some sort of
8 objective, easy things.

9 A. Okay.

10 Q. If the bus is depicted accurately in
11 Exhibit 2 and you're seated above the exit you've
12 marked, and then we look at Exhibit 3 -- and you
13 marked an X where you're seated in Exhibit 3 --
14 you obviously can't see through the floorboard;
15 right?

16 A. Correct.

17 Q. And you can't see through the metal
18 that's beneath the windows?

19 A. Correct.

20 Q. So you'd have no way to visualize the
21 rear wheels; fair?

22 A. Correct.

23 Q. And the front wheel would be out of your
24 visual sight? You can't see down through the
25 floorboards; correct?

1 A. Correct.

2 Q. All right. You can see, generally
3 speaking, in front of the bus and some to the
4 side --

5 Can I see those pictures there.

6 -- to the right side of the bus as a
7 vantage point; fair?

8 A. Correct.

9 Q. All right. So let's break that down a
10 little bit. Before the collision, the pedal
11 cyclist, Dr. Khiabani, was in the bicycle lane?

12 A. Yes.

13 Q. That's the lane that -- I didn't ask you
14 this question. Do you have any special education,
15 training, experience in driving a commercial bus?

16 A. No, I do not.

17 Q. Same question about a bicycle. Do you
18 have any special training as a cyclist?

19 A. I ride a bike, but I am not professional
20 or a serious cyclist.

21 Q. There was a demarked bicycle lane on
22 southbound Pavilion Center that you observed
23 Dr. Khiabani in prior to the accident?

24 A. Yes.

25 Q. All right. And the bus was in the lane

009199

1 immediately to the left of the bicycle lane?

2 A. Yes. Yes.

3 Q. So I take that to mean that when the
4 doctor turns over -- turns his head around and the
5 bus is on his left side, that's the first time,
6 from your perspective, he realized the bus was
7 there?

8 A. That the bus was that close and to the
9 left of him, yes.

10 Q. When he looked over his back shoulder,
11 he was surprised, from your perspective?

12 A. I saw his face.

13 Q. You said he had a look of shock, did you
14 not?

15 A. Yes. I realize he had sunglasses on, if
16 I am correct, but -- in other words, I didn't see
17 his eyes, but it's just that sense of shock.

18 Q. And it was after that that he lost
19 control and hit the bus; correct?

20 A. Yes.

21 Q. Okay. I want to mark a couple of
22 pictures. So you know, all of us -- Darrell might
23 not have been there, but all the lawyers for the
24 parties went out recently and looked at the bus.

25 Exhibit 6 is a picture that I think one

009200

1 of the experts in the case took at our bus
2 inspection a week or so ago out at a yard in North
3 Las Vegas, where we actually got on the very bus
4 that we're here to discuss.

5 And it appears to me to be taken from
6 the seat you told all of us from Exhibit 3 you
7 were seated in.

8 A. Yes.

9 Q. Does that look about like what your
10 perspective would have been?

11 A. This is looking forward. So looking
12 forward, yes.

13 Q. And on the right side, is that the
14 window of the door?

15 A. That is the window of the door.

16 Q. That you can sort of see in exhibit --
17 what exhibit is this -- 2?

18 A. 2, yes.

19 Q. And the door is in front of the first
20 tire?

21 A. Yes.

22 Q. And it's also your observation and your
23 testimony today that when Dr. Khiabani turns his
24 head to the left and sees that bus was within feet
25 of him, that was a surprise?

009201

1 A. Yes.

2 Q. And you would agree with me that after
3 the bus overtook Dr. Khiabani -- in other words,
4 after the front of the bus was past the
5 bicyclist -- the collision took place?

6 A. Correct.

7 Q. As the bus overtook the cyclist at the
8 intersection of Griffith Peak on southbound
9 Pavilion Center, the side of the bus came into
10 contact with the bicyclist; fair?

11 A. Correct.

12 Q. On Pavilion Center, was Dr. Khiabani in
13 the bike lane?

14 A. Initially, he was in the through lane.
15 He was not in the bike lane when we turned the
16 corner.

17 Q. On eastbound Charleston, there's a
18 marked bike lane there too, is there not?

19 A. Correct.

20 Q. And then as Red Rock Casino and the
21 Pavilion Center street approaches, there's a
22 cutout for the right turn?

23 A. Correct.

24 Q. Dr. Khiabani got into that right turn
25 lane?

009202

1 A. Correct.

2 Q. Made the right turn onto southbound
3 Pavilion Center?

4 A. Correct.

5 Q. And then proceeded in the bike lane on
6 Pavilion Center southbound?

7 A. I believe initially he wasn't in the
8 bike lane and then pulled over. Because we
9 were -- on east Charleston we were not able to
10 turn, so we were behind him and we had to go slow.
11 But when we pulled on Pavilion, we were still held
12 up behind him --

13 Q. I'm sorry. Finish your answer. I
14 apologize.

15 A. He seemed to pull into the right lane,
16 much like we did. That is the point where, until
17 I looked down and see him parallel, I stopped
18 looking at the cyclist. And then the next thing
19 that I saw was looking down, seeing the cyclist to
20 my right. So I do not know the sequence of events
21 of how --

22 Q. Very good. Let me back you up, and
23 we'll just go frame by frame with you.

24 When you observe Dr. Khiabani for the
25 first time on eastbound Charleston, he's in the

009203

1 bicycle travel lane?

2 A. Correct.

3 Q. As Pavilion Center approaches, there's a
4 right turn cutout lane for vehicles and/or
5 bicyclists to enter if they're going to turn right
6 or southbound?

7 A. Correct.

8 Q. And then when you looked up,
9 Dr. Khiabani was parallel with the bus?

10 A. Correct.

11 Q. And the bus, sometime before then, had
12 to make its way from the right turn lane past the
13 bike lane and into the through lane; fair?

14 A. Fair.

15 Q. Less than 3 feet away from him when he
16 sees it and he loses control of the bike, the bus
17 and the bike collide, he's run over and dies?

18 A. Yes.

19 Q. How far south of the crosswalk do you
20 think that bus stopped, to the best of your
21 memory?

22 A. 30 feet.

23 Q. Okay. And where was it that you got out
24 and stopped and viewed whatever you viewed?

25 A. So I came out onto the sidewalk. And I

009204

1 went about halfway back on the bus. So I'm
2 looking --

3 Q. North?

4 A. -- north and see the doctor lying on the
5 ground.

6 Q. You're showing me now a photograph that
7 you took, and it looks like the bus is stopped.

8 Is that the area where the bus stopped?

9 A. Yes.

10 Q. That's the bus that was in the
11 collision?

12 A. Yes.

13 Q. And it looks like the back of that bus
14 is stopped about even with the stoplight on the
15 north -- I'm sorry -- on the south end of the
16 intersection, the Red Rock resort sign; is that
17 fair?

18 A. Yes.

19 Q. And when you observed things before
20 going back to the bus and then ultimately checking
21 into the hotel, this is about the area that you --

22 A. Now I'm recalling this one. This was
23 taken at the accident because this was after they
24 removed him, I believe. I don't think he's in it.
25 No, he's not. So this is where I was standing

009205

1 because I had gone back. This is where I'm
2 standing. The bus is still there. He's not in
3 that, because I didn't take any pictures of him.

4 Q. Did you see a landscaper standing over
5 on the --

6 A. Yep.

7 Q. -- northwest corner?

8 A. So this is the security guard that I
9 spoke with.

10 Q. How about the landscaper?

11 A. Yes.

12 Q. Did you see him?

13 A. Yes, I do.

14 Q. That's the northwest corner of Griffith
15 Park and Pavilion Center Drive?

16 A. Yes.

17 Q. At the break you were kind enough to
18 forward to me, and then I caused to be forwarded
19 to all counsel, two photos that you took from your
20 iPhone, I think, on the day in question.

21 A. Yes.

22 Q. Those photos appear to reflect -- I have
23 them actually up on my iPad -- the scene of the
24 accident after Dr. Khiabani had been removed by
25 probably the paramedics or the ambulance?

009206

1 A. Correct.

2 Q. In the photos you're able to see the
3 security person who you spoke to and told us about
4 earlier?

5 A. Yes.

6 Q. As well as a landscaper on that
7 northwest corner, looks like, standing near some
8 kind of little maintenance cart or something?

9 A. Yes.

10 Q. So the front tire would have gone past
11 the doctor before the area of initial contact
12 occurred; fair?

13 A. Fair.

14 Q. And from your vantage point out of -- if
15 we look at Exhibit 6 -- that window on the door,
16 the doctor, you would have seen that look of shock
17 in his face out of that window; correct?

18 A. I recall seeing it out of looking down.
19 So it would have been this way. Where is the --
20 want to go back to here?

21 Q. Sure. Go back. Just tell us which one
22 you're looking.

23 A. So it would have been --

24 Q. So you're on Exhibit 2.

25 A. Exhibit 2. So I'm looking at -- so he

009207

1 would have been at the level of the tire.

2 Q. All right. So when you see the look of
3 shock on his face?

4 A. Yes.

5 Q. Why don't you, in a different colored
6 pen -- I had him -- so the record is clear, this
7 is Exhibit 2. Why don't you draw a number 1 with
8 a black pen where you saw the look of shock.

9 Okay. And --

10 A. The tire was behind, but it was there.

11 Q. Understood. And it's after that look of
12 shock the doctor lost control of his bicycle?

13 A. Correct.

14 Q. And now you've seen the photograph
15 Exhibit 7, which has the doctor's bicycle actually
16 next to the bus in question and the -- you saw on
17 the day in question; fair?

18 A. Correct.

19 Q. And it appears consistent with that
20 particular mark to the rear of the front passenger
21 tire being the area of initial contact; correct?

22 A. Correct.

23 Q. And if I'm -- so I'm clear, the nose of
24 that bus had passed -- in other words, was in
25 front of or more south of Dr. Khiabani before the

009208

1 contact between the bus and the bicyclist
2 occurred?

3 A. Correct.

4 Q. We'll mark that as 12.

5 In Exhibit 12 you've got the bus,
6 Mr. Pears, starting to veer as it's traveling
7 southbound west into the cutout right turn lane
8 into Red Rock Casino; is that fair?

9 A. Correct.

10 Q. And you've placed Dr. Khiabani's bike in
11 that same right cutout turn lane?

12 A. Correct.

13 Q. And from your testimony earlier,
14 somewhere -- or the bus is unable to go around
15 Dr. Khiabani because he's in that cutout lane; is
16 that fair?

17 A. Correct. And so the next time I see and
18 look we're closer to the -- so I cannot tell
19 you -- I know he pulled up and crossed, but I
20 can't tell you where he did that.

21 Q. You can't tell me where he came out of
22 the right-hand cutout turn lane at any of -- from
23 250, 200, 100 -- or 150, 100, and 50; fair?

24 A. So line 150 is about the point where you
25 look back. So this part, no.

009209

1 Q. Between 250 and 50 you can't, one way or
2 another, testify as to when that bus came out of
3 the right-hand turn lane; fair?

4 A. Fair.

5 Q. Okay. Now, I want to get it right. I
6 think that's because you started talking to your
7 friend or looking --

8 A. Began looking at the bus driver and I
9 said I was not looking at the cyclist.

10 Q. Your testimony, was it not, that once
11 Mr. Hubbard started into the cutout turn lane, you
12 quit paying attention to the road?

13 A. Correct. So I cannot tell you where
14 until here I looked back and saw the cyclist. So
15 I don't know where the cyclist was or where the
16 bus was until about 50.

17 Q. Okay. And that's your last known
18 position of the bus and the bike before you looked
19 up; fair?

20 A. Yes.

21 Q. Now we're at the 50-foot line. And
22 you've placed -- is that your recollection of
23 where the doctor was and where the -- I'm sorry --
24 the bus was at the 50-foot line?

25 A. Yes.

009210

1 Q. And the bike is in the bike lane; fair?

2 A. Correct.

3 Q. And you've got the bus in the travel
4 lane?

5 A. Correct.

6 Q. And isn't it true that, if you can't
7 tell me where the bus was between 250 and 50, that
8 you can't tell me the angle the bus was in either
9 when you looked up?

10 A. When I saw at this point, the bus was
11 pretty straight parallel. I mean, it was --

12 Q. Was it partially in the bike lane? Do
13 you know one way or another?

14 A. It was straight. At the point where I
15 looked down, he was parallel. He was pretty
16 straight, yes. I was not at an angle, no.

17 Q. And he was -- if I use the distance
18 you've told me, you're sitting right above the
19 passenger tire?

20 A. So I'm above the passenger tire. And so
21 initially when I saw him, he's in the bicycle
22 lane, and I would place him about there. So I'm
23 about here. So I'm looking down at him. And, of
24 course, this is occurring very quickly.

25 Q. Is this where the doctor looks over his

009211

1 shoulder and you see the look of shock?

2 A. He then pulls over. This is right here.
3 He pulls over. So he pulls this way.

4 Q. I think you turned the bike around.
5 Keep the bike going.

6 A. Okay. There we go. So he pulled out of
7 that.

8 Q. Sort of at an angle towards the bus?

9 A. Correct. And he is very, very close.

10 Q. All right. So we've got pictures, but
11 so the record is clear, you've got the nose of the
12 bus being in the northernmost crosswalk of the
13 intersection?

14 A. Right.

15 Q. And that's your best approximation;
16 right?

17 A. Yeah.

18 Q. And the nose of the bus is -- and even
19 the front tire of the bus now is in front of
20 Dr. Khiabani on the bicycle?

21 A. Correct.

22 Q. And he's -- as the bus starts to pass
23 him, it's your testimony that the bike rider, at
24 sort of a small angle, starts to veer into the
25 bus?

1 A. Correct.

2 Q. It's not a 45-degree angle. He didn't
3 turn dead into the bus; right?

4 A. No. He's -- if I do it this way, he is
5 at a slight angle and he falls in towards the bus,
6 if that makes sense.

7 Q. That's right after you see the look of
8 shock on his face; correct?

9 A. Correct.

10 Q. The bus is overtaking him, going faster
11 than him, is it not?

12 A. Correct.

13 Q. And once the nose of the bus and even
14 the tire passes him, you see him lose control?

15 A. Correct.

16 Q. It's after he outstretches his arm?

17 A. Correct.

18 Q. And once he loses control, there's a
19 loud bang?

20 A. There's a bang.

21 Q. Did you, prior to the wreck -- I know
22 you said you looked up at the bus driver -- did
23 you look at the speedometer?

24 A. No, I didn't see the speedometer.

25 Q. You can't tell me with any degree of

009213

1 certainty the speed the bus was going, can you?

2 A. No.

3 Q. Although you do know it's going faster
4 than the bike?

5 A. Yes.

6 Q. The speed limit is 35. The bus -- the
7 bike certainly isn't going 35 miles an hour. Can
8 we agree on that?

9 A. Correct.

10 Q. After the loud noise that you hear --
11 and you've shown us where you think that actually
12 contact took place -- do you see anything else
13 until you stop and get out, Mr. Pears?

14 A. I remember apples. It's weird, but I
15 remember apples being on the ground and the water
16 bottle. I do remember that.

17 Q. The water -- the bike water bottle we
18 looked at sort of rolling?

19 A. And there were apples rolling.

20 Q. Okay. Anything else before you get out?

21 A. That was it. Before I get out, no.

22 Q. And you don't know why Kayvan Khiabani
23 raised his hand on that day before he and the bus
24 collided, do you?

25 A. No.

009214

1 Q. But you do know, when he raised it, that
2 bus was inside of 3 feet from him?

3 A. Correct.

4 Q. Overtaking him at an intersection?

5 A. Correct.

6 Q. I'm going to ask you to come back to the
7 map real quick.

8 You placed the bus and the bicycle at
9 the 50-foot line, but we didn't get a photo of
10 that position. So I just want to -- so we have a
11 full record. At the 50-foot mark.

12 Is that your best recollection of where
13 the bus and bicycle were at this point?

14 A. Yes.

15 Q. Mr. Pears, you can have a seat.

16 Okay. So at this point where the bus
17 and bicycle are at the 50-foot line, the bicycle
18 is in the bike lane; correct?

19 A. Correct.

20 Q. And the bus is in travel lane Number 2;
21 correct?

22 A. Correct.

23 Q. And I believe that what you said earlier
24 is the last time you were aware of the position of
25 the bus and the bicycle, the bicycle was in the

009215

1 right-hand turn lane and the bus was in -- was
2 getting into the right-hand turn lane; correct?

3 A. Correct.

4 Q. And so somewhere between that point at
5 the 250-foot line to this point at the 50-foot
6 line, Dr. Khiabani got out of the right-hand turn
7 lane and into the bicycle lane; correct?

8 A. Correct.

9 Q. So when you did finally look back to the
10 bicycle at the point that you did --

11 A. Yes.

12 Q. -- what made you -- what drew your
13 attention to Dr. Khiabani on the bicycle?

14 A. The shock that he was there. I did
15 not -- when you suddenly look down, you see a
16 bicycle pull over so close to the bus and then
17 look in his face. I mean, it just -- it occurred
18 very quickly, but I would say I was in as much
19 shock as he was.

20 Q. Well, isn't it true that you said that
21 you saw -- when you next looked up to see
22 Dr. Khiabani, he was in the bike lane?

23 A. Correct.

24 Q. Was he driving normally at that time?

25 A. To my knowledge, yes.

009216

1 Q. Okay. And then you saw him come closer
2 to the bus; right?

3 A. Yes. Yes.

4 Q. When he came closer to the bus, that's
5 when you saw that he noticed the bus and he had
6 the look of shock on his face; correct?

7 A. Correct.

8 Q. Now, you said that you got into the
9 travel lane with the bus; right?

10 A. Correct.

11 Q. Okay. Could you see Dr. Khiabani in the
12 same lane as the bus?

13 A. At that point where he sees the bus, he
14 looks over, he was in the travel lane.

15 Q. How do you know that?

16 A. Because I'm looking down at him.

17 Q. What made you believe that he was in the
18 same lane as the bus as opposed to in the bike
19 lane just close to the bus?

20 A. Because I'm looking down and seeing him
21 in the travel lane at that point.

22 Q. How did you know he was in the travel
23 lane?

24 A. Because I'm looking down.

25 Q. Could you see the line between the

009217

1 travel lane and the bicycle lane?

2 A. Yes.

3 Q. And you saw that he was on the outside
4 of the line of the bicycle lane?

5 A. Yes.

6 Q. At the point when you first saw
7 Dr. Khiabani in the bicycle lane next to the bus
8 around the 50-foot mark, do you have an estimate
9 of the space between the bus and the closest part
10 of the bicycle?

11 A. I would say 5 foot.

12 Q. Did you leave anything out today?

13 A. As I said, to be clear, he looked over
14 his shoulder, took his hand off, lost control, and
15 fell headwards towards the bus.

16 Q. Okay. And that's --

17 A. That's what I saw.

18 Q. At some point after the impact occurred
19 and the bus is moving across the intersection, do
20 you recall that moment in time?

21 A. Yes. Yes.

22 Q. Okay. Now, just tell us again -- we
23 want to slow it down.

24 A. Yes.

25 Q. Did you hear a thud first?

009218

1 A. So he -- the bus driver swerves.

2 Q. Again, is that to the left or to the
3 right?

4 A. Okay. That was a swerve to the left.

5 Q. And that would be towards the center of
6 the roadway?

7 A. Correct.

8 Q. He swerves and is it one one thousand,
9 one one thousand, two one thousand, thud? Or is
10 it he swerves and at the moment you perceived him
11 swerving, you hear a thud?

12 A. It was almost, in my opinion,
13 instantaneous. It was very quick. The bus driver
14 did not have a lot of time to respond once that
15 cyclist pulled into that lane.

16 Q. Okay. So when you -- at that last
17 moment when you looked down and you saw him --

18 A. Yes.

19 Q. -- the position he was in, can you
20 describe --

21 A. He was in an upward position.

22 Q. And -- I know he took his -- a hand off
23 the handlebars, but at the first moment you saw
24 him, were both hands on the handlebar?

25 A. Yes.

009219

1 Q. And do you know if they were affixed to
2 the brakes? You know, the hand brakes?

3 A. No. They were on the -- they were down
4 here. So he was down here. He was holding down
5 here.

6 Q. Okay. And --

7 A. So on the hand bar, lower down.

8 Q. Essentially, if we were describing this
9 to somebody that's not able to see the picture
10 right now, are you saying that it's at the lower
11 extremity of the handlebars?

12 A. Lower extremity. I mean, could he grab
13 the brakes? Yes. I mean, I don't recall him
14 having his hands on the brakes at the time, no.

15 Q. When you first noticed Dr. Khiabani just
16 before the accident, I think you testified earlier
17 he was in the bicycle lane; correct?

18 A. Correct.

19 Q. Okay. How was he positioned at that
20 point in time when you first saw him? Was he
21 sitting up? Was he leaning over? I know you say
22 he never got into a full crouch.

23 A. I would put him in a -- like here. Not
24 in a full crouch but not fully up. Slight crouch,
25 not fully up.

009220

1 Q. And his hands were both on the
2 handlebars at that point; right?

3 A. Yes.

4 Q. And I believe you testified, but can you
5 just say they were on the part that curves --

6 A. Yes.

7 Q. -- on the front of the handlebars?

8 A. Yes.

9 Q. Okay. And where was he looking when you
10 first saw him in the bicycle lane just before the
11 accident? Was he looking straight ahead? down? to
12 the side? Do you recall?

13 A. Just before the accident?

14 Q. No. When you first notice him again and
15 he was in the bicycle lane, you were about
16 50 feet --

17 A. He's looking straight ahead.

18 Q. Okay. And then at some point, he starts
19 to come to the left, correct, towards the bus?

20 A. Correct.

21 Q. And when in that time does he lift his
22 hand off the handlebar?

23 A. So it's almost -- it's very quick.
24 You -- he pulls out of the bicycle lane into the
25 through lane. And as he does, he looks over his

009221

1 shoulder and takes his hand off the handlebar and
2 very quickly loses control.

3 Q. Does his head turn first or his hand
4 come off the handlebar first or do they do it at
5 the same time, if you recall?

6 A. As I recall, his head turned first.

7 Q. Okay. And does he start to move from
8 the bicycle lane to the left before he turns his
9 head or as he's turning his head or does he turn
10 his head first?

11 A. I recall that he pulled into the lane
12 first and then looked.

13 Q. Okay. So as he's moving from the
14 bicycle lane to the left into the travel lane, his
15 head is straightforward?

16 A. Correct.

17 Q. And then as he crosses over the line
18 between the bicycle lane and the travel lane, he
19 then turns his head?

20 A. He turns his head.

21 Q. Do you know whether he turned his head
22 before he crossed the lane demarking the bicycle
23 lane and the travel lane or was it after he'd
24 crossed the line?

25 A. I couldn't tell you for sure exact point

009222

1 to when he --

2 Q. Anyway, this happens within a matter
3 of --

4 A. It happened so quickly. I mean, my
5 impression was he had crossed the line before he
6 looked.

7 Q. Okay. But you're pretty clear that he
8 starred to move to the left before he turned his
9 head?

10 A. Yes.

11 Q. Okay. And you believe he turned his
12 head before he lifted his hand?

13 A. Yes.

14 Q. Okay. And when you saw him turn his
15 head, was he directly next to you? Was he a
16 little bit in front of you? Was he past you? a
17 little bit behind you, if you recall?

18 A. So when he starts to turn his head, he's
19 slightly in front. And so when he has his head
20 turned, I am looking, able to see his face.

21 Q. So you were looking directly at him as
22 he's looking towards the bus?

23 A. Yes.

24 Q. Is he looking up at you? Is he looking
25 straight at the bus?

009223

1 A. No, he's looking straight at the bus.

2 Q. Okay. And so you said he looked
3 surprised or shocked. Can you just describe what
4 you saw in his face that made you think that?

5 A. I don't know how to describe it. I
6 mean, there's like -- almost like a grimace. The
7 face -- I mean, tightening of the face, whatever.
8 Just that look of, you know, while I couldn't see
9 his eyes, there was just -- it was just my
10 impression because he was very close to the bus at
11 that time.

12 Q. Did his head snap at any point? You
13 know he starts to look to his left. Is it just a
14 one motion or does he, you know, snap at
15 something? I'm just trying to get an
16 understanding of why you believe he was shocked or
17 surprised.

18 A. It was more the sudden change in the
19 facial expressions and -- like I said, and then it
20 happened quickly that, you know, he -- there was
21 no snapping of the head, no -- once he lost
22 control, he fell head forward towards the bus.

23 Q. Okay. Did you see either the bicycle or
24 Dr. Khiabani actually hit the bus, or did you just
25 hear it?

009224

1 A. I heard it. As I said, part of me --
2 that part blacked out, but I know he hit towards
3 the bus. And I know that part, whether it's
4 deliberate or not, my brain kind of -- it blacks
5 out. And I spent the next two nights awake
6 constantly dreaming and reliving it and kept
7 blacking out of, like, what happened, what
8 happened next. And part of me figured that he hit
9 the tire.

10 Q. Right.

11 A. And is that why my brain just doesn't
12 want to recall it?

13 Q. Yeah. And I'm just talking about the
14 initial impact with the bus. Did that occur
15 directly beneath you? Was it a little --

16 A. No, that was behind, more behind.

17 Q. Okay. And so could you see what part of
18 either the bicycle or Dr. Khiabani actually hit
19 the bus, the initial impact? Did you see it?

20 A. So that's the part that blacks out. But
21 he went head first. That much I can tell you. He
22 went head first.

23 Q. Okay. So did you see his head hit the
24 bus?

25 A. No. Again, that's part -- blacks out.

009225

1 Q. Okay. But he fell to the left, so his
2 head was going towards the bus?

3 A. Yes.

4 Q. Okay. Do you know whether the helmet
5 impacted the bus?

6 A. No.

7 Q. Okay. As Dr. Khiabani is falling, what
8 part of him can you see? You see the top of his
9 head?

10 A. I see the top of his head fall like
11 that.

12 Q. Okay. And you see the bike going down
13 with him?

14 A. Yes.

15 Q. At any point, did you see him separate
16 from the bicycle?

17 A. No.

18 Q. You did not see Dr. Khiabani impact the
19 ground, did you?

20 A. No.

21 Q. Okay. And you have no idea what part of
22 his body hit the ground first?

23 A. No.

24 (Video stopped.)

25 MR. BARGER: Judge, he referenced about

009226

1 four or five exhibits. I'm going to get them
2 marked and offer them. I've given copies to
3 counsel.

4 THE COURT: Okay.

5 MR. BARGER: I don't know the next
6 number.

7 THE CLERK: These have already been
8 marked?

9 MR. BARGER: No, these are depo
10 exhibits.

11 THE CLERK: First one will be 585, 586,
12 587, 588, 589, 590, 591.

13 MR. BARGER: Your Honor, for the record,
14 Defendants' Exhibit 585 is Exhibit 2 in Mr. Pears'
15 deposition.

16 Exhibit 586 is Exhibit 3 in Mr. Pears'
17 deposition.

18 Exhibit 587 is Exhibit 6 in Mr. Pears'
19 deposition.

20 Exhibit 588 is Exhibit 7 in Mr. Pears'
21 deposition.

22 Exhibit 589 is Exhibit 12 in Mr. Pears'
23 deposition.

24 590 is Exhibit 14 in Mr. Pears'
25 deposition.

1 And Exhibit 591 is Exhibit 19 in
2 Mr. Pears' deposition.

3 And I offer all of those exhibits.

4 MS. WORKS: No objection, Your Honor.

5 THE COURT: Very good. They are
6 admitted.

7 (Whereupon, Exhibits 585-591 were
8 admitted into evidence.)

9 MR. BARGER: May I just display them
10 real quick?

11 THE COURT: Yes.

12 MR. BARGER: Thank you.

13 This is 585, 586, 587, 588, 589, 590,
14 and 591. That's at the 50-foot mark. And that
15 completes that deposition, Your Honor.

16 THE COURT: Okay. Very good. I'd like
17 to see counsel at the bench, please.

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

20 THE COURT: Ladies and gentlemen, I'm
21 going to admonish you for the evening. Tomorrow
22 we're going to get a little bit earlier start at
23 9:00 a.m. So let me give you your evening or your
24 admonishment.

25 You're instructed not to talk with each

009228

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

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

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

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

24 Have a great evening. Let's see you
25 tomorrow at 9 o'clock, 9:00 a.m. Thank you.

009229

1 THE MARSHAL: All rise.

2 (Jury excused.)

3 THE COURT: Would this be a good time to
4 review jury instructions?

5 MR. BARGER: There's a couple of things
6 we want to talk about in addition to that.

7 THE COURT: All right. Let's talk about
8 those, and then we'll move on and go forward with
9 the jury instructions.

10 MR. ROBERTS: Mr. Barger may need to
11 remind me. I'm aware of one thing I need to talk
12 about. But let me talk about that first
13 and then he can give me the other issue -- remind
14 me of it.

15 Your Honor, we received a report dated
16 March 18th, which I believe was Sunday, from
17 economist Larry Stokes. And this is a brand-new
18 opinion. Although it is a similar opinion that he
19 previously offered, it's a brand-new opinion.

20 The Court may remember that there was
21 some discussion in regard to a protective order
22 filed by New Flyer Industries because plaintiffs
23 were trying to get evidence and deposition
24 testimony from New Flyer regarding their financial
25 condition, and we objected to that as well as New

009230

1 Flyer.

2 We objected to it on the basis it was
3 not likely to lead to admissible evidence because
4 the net worth of our parent company, who didn't
5 even own us at the time of the accident, was
6 obviously irrelevant to the amount of punitive
7 damages that would annihilate the subsidiary, the
8 only party being sued here.

9 And there was some discussion to attempt
10 to distinguish this situation from Dillard, where
11 the parent company was actually a party to that
12 case.

13 During the course of litigation, based
14 on publicly available financial statements, they
15 had Dr. Stokes write a letter as to the maximum
16 amount which Dr. Stokes believed that New Flyer
17 Industries could pay without financial
18 annihilation. We did not respond to that in any
19 way because we were comfortable that that was
20 irrelevant and would never get in.

21 The new report dated March 18th opines
22 on the amount that MCI could pay without financial
23 annihilation. And the amount is alleged to be at
24 the \$625 million. And, notably, he completely
25 changes his methodology to take less cash flows in

009231

1 order to generate a similarly high number to the
2 New Flyer Industries, which was a little over
3 700 million.

4 So I guess we just need some guidance on
5 this. After we got this, I did speak to our
6 economist, Dr. Stan Smith, who addressed the other
7 issues in the case with regard to economic loss.
8 And he did indicate that he would be able, in the
9 event we went to a punitive phase next week, to
10 get something done.

11 So I guess I'm just asking for guidance.
12 Is this something the Court is inclined to
13 exclude? If the Court is not inclined to exclude
14 it, then we would ask leave to at least have an
15 expert rebut it if we get to a punitive phase.

16 MR. KEMP: Your Honor, their reports
17 were due October 20th.

18 MR. ROBERTS: Then we'll just exclude
19 it, Your Honor.

20 MR. KEMP: October 20th, that's when
21 their reports were due.

22 With regards to this opinion, this is a
23 direct result of them violating the special
24 master's order and then refusing to produce
25 Mr. Asham over and over and over again. We filed

009232

1 a motion -- well, we noticed the deposition of
2 Mr. Asham. Mr. Asham is the --

3 THE COURT: I know who he is.

4 MR. KEMP: Okay. So we tried to take
5 his deposition back in August. They refused to
6 produce him for deposition. We filed a motion to
7 compel. Special Master Hale granted that motion
8 to compel. They wouldn't live with that. They
9 kept challenging that.

10 And then when it was clear that they had
11 to produce Mr. Asham, they refused to produce him.
12 And finally we cut a deal where they produced
13 Morison. And Morison appeared for her deposition,
14 I think it was on March 6th.

15 Morison was the first source -- the
16 first information we had as to the financial
17 information for MCI through the third quarter of
18 2017, last year.

19 As you know, New Flyer purchased MCI,
20 and there were no longer separate financials for
21 MCI. Previously, they had been contained on the
22 New Flyer financials, I think through 2015.

23 So Dr. Stokes, in compliance with the
24 Dillard's case -- and we still maintain that the
25 appropriate remedy to use here is the New Flyer

009233

1 revenue because Dillard's, I think, is pretty
2 clear on this. But the Court has already ruled on
3 that. I'm not going to argue it again.

4 But because the Court limited us to the
5 MCI revenue, they produced new schedules the day
6 before Mrs. Morison's deposition, new schedules
7 that have breakout of the MCI through 2017. I
8 ordered an expedited transcript of that
9 deposition. I got an expedited transcript. It
10 took about four days. We gave it to Mr. Stokes.
11 His report is timely find.

12 Mr. Stokes filed a report timely in
13 this -- in fact, I gave them the Stokes report
14 back in August. I gave them Mr. Stokes' initial
15 report two months before I was required to do so
16 under the scheduling order. Under the scheduling
17 order, I was required to give it in October.

18 I gave it to them two months early
19 because this is the type of shenanigans you always
20 get, the Terrible Herbst problem you always get in
21 these kinds of cases.

22 So we gave them the report early. They
23 produced Morison after this big stall job on
24 Asham. They should have produced Asham in August.
25 We could have taken the deposition then, and we

009234

1 could have been to the bottom of this. And now
2 for him to --

3 THE COURT: What happened to Asham?

4 MR. KEMP: Asham. Glenn Asham is the --

5 THE COURT: I know who he is. Why
6 wasn't he produced? That was --

7 MR. KEMP: They refused to produce him,
8 and then we had to go to the special master. We
9 got an order compelling the production. And
10 even then -- I can't remember if they appealed it
11 to Your Honor or not; I think they did. But, at
12 the last minute, they came to us, and they said,
13 "Well, will you take Morison instead of Asham?"
14 And this would have been earlier this month. We
15 agreed to take Morison, Your Honor, instead of
16 Asham. So they provided the deposition.

17 But that was the first time they gave us
18 these new financials that go through October 2017.
19 And Mr. Roberts stands up and says, "Oh, well, the
20 number was 700 million with New Flyer, now it's
21 625 million."

22 Well, Your Honor, he forgets that
23 there's a new tax law in effect, and that has
24 dramatically changed the cash flow available with
25 the company.

1 When I took Mrs. Morison's deposition,
2 in response to my hypothetical, she said that
3 based upon their free cash flow at their 4 percent
4 rate that they use, they could actually borrow
5 750 million. This is just MCI.

6 So what Mr. Stokes did is he did a very
7 conservative estimate. He applied a 17 percent
8 capitalization deduction to that. Mrs. Morison
9 didn't know what their capitalization was, didn't
10 have any idea what an appropriate deduction was.

11 So, anyway, when it got to Mr. Stokes,
12 he took 17 percent off the top. And that's how he
13 got to 625 as opposed to the 750 on hypothetical
14 with her.

15 But, in any event, Your Honor, they did
16 not designate a witness on punitive damages,
17 period. Back when the punitive damages were even
18 bigger in August, the \$700 million figure, they
19 did not designate a witness. Technically, that
20 report wasn't due in August. I'm just emphasizing
21 I gave it to the -- I gave them the Stokes report
22 earlier because I know what kind of shenanigans
23 you have when it comes to a punitive phase.

24 So to allow them -- I mean, what an
25 outrageous request. The day before the last day

009236

1 of trial, they want Dr. Smith to come for the very
2 first time to do -- you know, this is becoming
3 common. Every witness, they want a new opinion.
4 They want Dr. Smith to come up with some sort of
5 punitive opinion. That would be totally
6 inappropriate, Your Honor.

7 And with regards to Dr. -- Mr. Stokes'
8 opinion, it was their refusal to produce the
9 witness until they finally produced Morison. It
10 was their refusal to give us these MCI-only
11 financials until about two weeks ago that caused
12 the revision of the Stokes report to be made.

13 So, Your Honor, that's the record. And,
14 you know, for Mr. Roberts to stand up and say,
15 "Oh, as a result of all our delay and
16 procrastination and violation of Special Master
17 Hale's order, we should be allowed to do an expert
18 report five months after it was due," that is just
19 outrageous, Your Honor, and I would oppose that.

20 MR. ROBERTS: Thank you, Your Honor. We
21 did refuse to produce Mr. Asham --

22 THE COURT: Why?

23 MR. ROBERTS: -- because he was
24 requesting --

25 THE COURT: I ordered it because --

009237

1 MR. ROBERTS: No, Your Honor. This is
2 back before your order.

3 THE COURT: Okay.

4 MR. ROBERTS: Back before your order.

5 THE COURT: And what about after?

6 MR. ROBERTS: Back before Floyd Hale.

7 THE COURT: What about afterwards?

8 MR. ROBERTS: Afterwards, we said
9 Mr. Asham doesn't have the personal knowledge that
10 you want of MCI. The best person would be vice
11 president of finance of MCI. Is that okay? And
12 Mr. Kemp said yes. So that's why we produced
13 Sandra Morison instead of Glenn Asham, because
14 they agreed.

15 And he said, "Look, I'll try it with
16 her. If she doesn't have what I need, then I'll
17 ask for Asham."

18 And I said, "That's fine." We wanted to
19 produce the person most knowledgeable with the
20 information he was seeking at the time, which we
21 did, and she testified to the personal knowledge.

22 Now, let's go back to our refusal to
23 produce Asham. He's talking about during the
24 discovery period before they filed the motion to
25 compel.

009238

1 The only thing they ever asked for is
2 "we want Glenn Asham to testify to the financials
3 of the parent corporation New Flyer." They never
4 asked for Mr. Asham, or anyone else, to testify to
5 the assets of MCI.

6 And I would challenge them to come up
7 with a single email or interrogatory request or
8 deposition request seeking the financials of MCI
9 within the discovery period. It didn't happen.
10 Because Mr. Kemp had this idea he was going to
11 blow up the financials by using our parent
12 corporation.

13 So this is a strategy decision on his
14 part to only ask for something the Court
15 ultimately found they weren't entitled to: the
16 financials of our parent company. We timely
17 disclosed and produced someone on the MCI
18 financials. They've got them, and that's why they
19 now have this new report from Dr. Stokes.

20 And, you know, Your Honor, I understand
21 that people deal with the punitive stuff late and
22 that the Court may be inclined to allow their
23 expert to issue this new opinion now that the
24 Court has said the financials of the parent aren't
25 relevant.

1 But, in fairness, if the Court allows
2 them a new opinion which we just got yesterday and
3 was written on Sunday, we ought to be able to have
4 someone address it, have our own expert.

5 But I will say so the Court knows it's
6 coming, now that we've gotten this, the Court
7 needs to be aware that this is nothing based on
8 case law. We've produced financials. They now
9 know our net worth. They know our net profits.
10 What this report is is how much can we borrow.

11 The idea that a bank is going to -- or
12 you can do a bond issue at 30 years interest-only
13 at 5 percent to pay off a punitive damage award,
14 this type of thing has never been allowed in any
15 case that I'm aware of. This is Mr. Kemp's
16 brainchild of how to inflate the number that it
17 would take to annihilate a company by saying even
18 if it exceeds net worth, even if it exceeds net
19 profits, oh, they can borrow it just like a person
20 would borrow to buy a house.

21 Well, there's a market to get mortgages
22 to buy a house. There's no market to pay off
23 punitive damage awards of \$600 million. A
24 mortgage is secured by a house that can be
25 foreclosed on. There's no asset. The asset would

009240

1 go to him and his client, not MCI. There's no
2 secured asset. It's a ridiculous idea.

3 The idea of annihilation, as far as I
4 can find, goes back to Miller v. Schnitzer, a 1962
5 case, where you had a 45,000 -- excuse me, Your
6 Honor. I know the Court likes a cite. 371 P.2d
7 824. And if we get to this, we'll file a trial
8 brief on it.

9 But in that case, there was a
10 compensatory award against an individual of
11 \$45,000. There was a punitive award of \$50,000.
12 The jury then awarded -- I mean, the jury heard
13 evidence that the net worth of the individual was
14 \$51,000. So the Court said, "If you've got net
15 worth of \$51,000, out of that comes 45,000 for
16 compensatories, the award exceeds his net worth.
17 That would annihilate him. That's improper.
18 We're not going to allow that. It doesn't serve
19 public policy to allow punitive damages to
20 annihilate someone." And this has made its way
21 into our standard jury instructions.

22 The case law on this, almost every
23 decision that you read has been abrogated by some
24 following decision. But this general principle,
25 as far as I can tell, has never been abrogated and

009241

1 is still in our instructions. And if the Court
2 will follow the trail of all the decisions that
3 discuss annihilation, you'll see that it's based
4 on net worth, net profits, net growth, all of
5 these things that are logical.

6 So the idea an economist should be able
7 to come in and tell the jury that we can borrow
8 \$600 million, even though that's 20 times or 10
9 times our net profits, even though that grossly
10 exceeds our net worth, that would just result in a
11 passionate jury verdict that would inflame them in
12 order to come up with a number so big it would
13 annihilate us.

14 But, as I said, I will file a trial
15 brief. If we get to a punitive phase, we'll
16 address this issue. But, for now, the only
17 thing -- we obviously don't want to spend the
18 money on an economist to prepare a report if it's
19 not needed. So we're hoping that the Court could
20 give us some guidance as to whether it's inclined
21 to allow Mr. Kemp's report and, if so, we'll be
22 able to rebut it.

23 Thank you, Your Honor.

24 MR. KEMP: Judge, the standard in the
25 jury instructions is annihilation. That is the

009242

1 theoretic cap. Okay? That is in the case law.
2 If you look at the punitive damage cases like
3 Evans v. Dean Witter, there's about five cases.
4 Nevada Supreme Court cases. And they're not '65
5 cases; these are all cases in the '80s, '90s, and
6 more recently that use the annihilation standard.

7 So what are we trying to present
8 evidence of? We're trying to give the jury a
9 figure that is a theoretic cap. Okay? The
10 annihilation, we can't go above that.

11 Contrary to what Mr. Roberts is saying
12 to you, he knows that this is at least the fourth
13 time Dr. Stokes has prepared this type of report.
14 He prepared it in both the Actos cases and he
15 prepared it in a previous case, one of which
16 Mr. Roberts deposed him on. So he knew this was
17 coming.

18 And that's why I gave him the report
19 back in August, two months early, so we wouldn't
20 hear this last-minute argument that, "Oh, judge,
21 I'm surprised. I need to do something."

22 But the theoretic figure is
23 annihilation. And we know that's theoretic
24 because in this case, you know, the insurance
25 company is the one that's going to pay for all

009243

1 this. All right? I don't want to get into it,
2 but it's a theoretic number that we're giving to
3 the jury. Okay? And we're trying to put a cap, a
4 cap.

5 And, by that, I mean they can't award
6 more than what would theoretically annihilate the
7 company. And so the cap here is the \$625 million.
8 That's what Dr. Stokes. They can cross-examine
9 him all they want to on why he came to that
10 number.

11 You know, given the fact that
12 Mrs. Morison, under my hypothetical, gave me
13 \$750 million, I don't really see the big problem.
14 You know, if anything, they should be arguing I'm
15 too low.

16 But this is not a new opinion. It's a
17 revised opinion based on the information that they
18 finally gave us. The Court ordered it. Special
19 Master Hale ordered it. And for Mr. Roberts to
20 stand up and say that I would be so negligent
21 that, if I had deposed Mr. Asham in August, that I
22 would have asked for a breakdown between New Flyer
23 and MCI stand-alone, I mean, that's just an
24 outrageous allegation, Your Honor. I would have
25 broke it down then.

009244

1 They didn't want it broken down. They
2 wanted to play hide the ball on their financials.
3 That's why we had to file the motion to compel,
4 that's why I came to Your Honor, and that's why
5 the Morison motion was filed so late, all because
6 of their decision-making.

7 So, Your Honor, this is not a new
8 opinion by Mr. Stokes. This request to strike the
9 expert opinion, that is basically what he's
10 making, is inappropriate. There should be no
11 reason that he can get an expert at this late
12 date, the day before the last day of trial. And I
13 don't see what there is to rule on for the Court.

14 THE COURT: I'm going to have to make
15 these rulings very quickly, but I'd like to review
16 the ones I'm ready to sit down and discuss with
17 you first and defer this one a little while so I
18 can take a look at it. Okay?

19 MR. ROBERTS: I understand. We don't
20 need a ruling now. I just didn't want to spring
21 this on the Court at the last moment.

22 THE COURT: No. Good. I'm glad. I'll
23 start reviewing this as soon as I'm -- I've caught
24 up with the other ones, which I pretty much have.

25 So are you ready to go over the jury

1 instructions?

2 MR. ROBERTS: Well, Mr. Henriod is the
3 person to ask that question to. But before I move
4 on to that, maybe the other issue that Darrell
5 thought I had to raise was that -- and the Court
6 has already mentioned it -- before we close our
7 case, we need to know whether or not we can play
8 the clip of Dr. Stokes regarding the tax issue.
9 Don't need a decision now, but somewhere tomorrow
10 or Thursday, we'll be ready to play that.

11 THE COURT: That can be resolved. I'm
12 just going to jump off the bench for a second.
13 Take a five-minute break.

14 THE MARSHAL: Please remain seated.
15 Court is in recess.

16 (Whereupon, a recess was taken.)

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

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

21 THE COURT: All right. One thing that
22 we need to do is make a record of what's been
23 agreed upon and what has not.

24 MR. ROBERTS: Your Honor, in case you
25 don't have enough paper --

009246

1 THE COURT: No, I don't have enough.
2 Thank you.

3 MR. ROBERTS: -- would it be helpful to
4 have a copy of the new Stokes report, a copy of
5 his original report, and a copy of his deposition,
6 of Mr. Stokes, their economist? Going back to
7 that issue. I'm not asking you to rule now on,
8 but so you don't have to dig it up.

9 THE COURT: Actually, that would be
10 good. That would be very nice. Thank you.

11 MR. ROBERTS: You probably have all of
12 it but the new report and the motion to compel.
13 This way you won't have to dig for it.

14 I'm asking the Court to take a look at
15 page 36, lines 5 through 15.

16 THE COURT: Okay. Very good. All
17 right.

18 MR. HENRIOD: Your Honor, may I suggest
19 on the jury instructions, to keep it efficient so
20 we don't have to do things twice --

21 THE COURT: Absolutely.

22 MR. HENRIOD: -- is if -- I think it
23 would be best if we could get the Court's rulings
24 on causation --

25 THE COURT: We have causation,

1 disfigurement, and Stahlmeyer or Stackiewicz?

2 MR. HENRIOD: And a couple others.

3 THE COURT: A couple of others? Okay.

4 MR. HENRIOD: No. I think that's right.
5 That allows us to fill in a lot of blanks.

6 THE COURT: Okay. Very good.

7 MR. HENRIOD: Then what we can do is we
8 can go, we can get the final set, because once
9 that's done, that's when we'll have to do all of
10 the formal rulings again and we'll have to give
11 the rationale again, we'll have to object. And we
12 can do all that once, maybe even tomorrow at lunch
13 or something.

14 MR. KEMP: Or in writing.

15 THE COURT: I'm ready to do these now.

16 I show -- oh, the taxation. I wanted
17 some feedback a little bit -- even though you've
18 both written briefs, I wanted a little bit of a
19 feedback on that.

20 Here we go. Okay. All right. Let's
21 start with the substantial factor versus the
22 but-for test, because I think that will clear up a
23 few of the other instructions. Correct?

24 All right. I can't tell you how many
25 times I've reviewed these cases. Okay. And so I

1 have this in writing so if you'll really
2 understand. If you want, I'll give you copies.

3 So looking at everything that I've seen,
4 this goes to the causation element, okay, of the
5 product liability. So the substantial factor test
6 for proximate cause is the standard test in a
7 product defect strict liability case pursuant to
8 Price v. Blaine Kern Artista.

9 However, if the parties present mutual
10 exclusive theories of causation and the injuries
11 could only be the result of one theory but not
12 both, a but-for causation should be used, pursuant
13 to Wyeth v. Rowatt.

14 Okay? All right. So here plaintiffs
15 have four separate theories of liability, but the
16 necessity for a substantial factor test is
17 apparent. From the first so-called -- from the
18 air blast theory. Examining this alleged defect,
19 plaintiffs allege that the design of the coach
20 caused it to displace air in such a fashion and
21 strength as to push Dr. Khiabani off balance
22 and then pull him under the coach, resulting in
23 Dr. Khiabani's being run over by the rear tire --
24 the rear front tire.

25 Defendant has presented their own theory

1 of liability as to this defect, which is that the
2 design of the coach did cause air to be displaced,
3 but that it was not sufficient to cause
4 Dr. Khiabani to lose control and, rather, that
5 Dr. Khiabani's own intentional acts caused him to
6 run into the bus which caused his injuries.

7 Here's my thought on this. These
8 theories are not mutually exclusive because both
9 could be partially true. For example, it could be
10 true that the air displacement partially pushed
11 Dr. Khiabani off balance, but that the strength of
12 the air would not have been sufficient to cause
13 Dr. Khiabani to run into the coach except that
14 Dr. Khiabani made some intentional act, such as an
15 attempt to turn, or had a simple lack of awareness
16 that put him in a precarious position such that he
17 was unable to recover from the slightest push and
18 pull of air.

19 Thus, in my view, the two theories are
20 not mutually exclusive, and, therefore, a but-for
21 causation test is inappropriate.

22 MR. HENRIOD: I think we can integrate
23 that --

24 THE COURT: That's pretty
25 straightforward --