

Case No. 78701

**In the Supreme Court of Nevada**

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

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

Respondents.

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**APPEAL**

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

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

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

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

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

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

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

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



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

1 constitutes negligence. You also should consider all  
2 of the evidence to determine if there was a defect and,  
3 if so, whether the defect caused (inaudible) the  
4 collision."

5 I don't think this changes any of the  
6 substance, but I think that it does make important  
7 distinctions, and that's why we propose this.

8 MR. KEMP: Judge, it's already been read to  
9 the jury. I -- I don't think we should be changing  
10 instructions that we've already read to the jury. And,  
11 you know, most of these considerations he's raising  
12 appear to be stylistic, you know.

13 I would point out that this was not done on  
14 the fly. We -- we spent some time on this. And this  
15 is the language that they came up with, at least  
16 through the -- the last sentence. So I would rather  
17 stick with what the jury's already been told. If you  
18 change the language, it's just -- it's just asking for  
19 confusion, I think. I -- I don't see any good reason  
20 to change the language.

21 And if you recall, the only reason we gave  
22 the instruction during the trial is because the defense  
23 was getting too close to the flame with regards to  
24 Mr. Krauss and I can't remember what other witness it  
25 was, but that's why we had to have a curative

1 instruction in the first place.

2 MR. HENRIOD: I think they're pretty  
3 important distinctions. So if plaintiffs think they're  
4 merely stylistic, then I think that we ought to give  
5 them.

6 MR. KEMP: Well, Your Honor, the first  
7 sentence is identical.

8 The second sentence says "so," and their new  
9 one says "accordingly." Then it says, "you are not to  
10 consider whether any conduct on the part of the driver  
11 constituted negligence." And it says, "so you are not  
12 to consider any alleged negligence on the part of the  
13 driver." I don't really see a big difference. And  
14 we've already given the first instruction, so I don't  
15 think we should change it.

16 And then the -- the one they want to change,  
17 "however," is their language. They've already --  
18 they've already given us this particular language. So  
19 I would stick with what we've already proved as opposed  
20 to the new one.

21 MR. HENRIOD: I agree the most important  
22 distinction, right, is in the second sentence and the  
23 tweak between "any alleged negligence on the part of  
24 the driver" and "whether any conduct on the part of the  
25 driver constitutes negligence." That way, they're not

1 confused as to what actions are important but, rather,  
2 only the legal significance of those action.

3 MR. KEMP: Judge, the reason we gave the  
4 instruction in the first place is there was a motion  
5 for summary judgment on this that was granted. So, I  
6 mean, you know, "you are not to consider any alleged  
7 negligence on the part of the bus driver." I think  
8 that's perfectly appropriate. That's what the jury's  
9 already been told, and to try to water it down --

10 THE COURT: No. Let's go with -- I've  
11 already read this to the jury. I think we should stay  
12 with -- stay -- we should -- I'm going to continue to  
13 read this.

14 MR. HENRIOD: Okay. Very well, Your Honor.  
15 You have our objection. And then let me mark this as  
16 proposed, not given No. --

17 MS. BONNEY: U.

18 THE COURT: Number what?

19 MS. BONNEY: U.

20 MR. HENRIOD: U.

21 And then I've got three others that I need to  
22 offer now. One --

23 THE COURT: Mr. Henriod, if you --

24 MR. HENRIOD: -- was 13 in our set.

25 THE COURT: Do you have the copy?

1 MR. HENRIOD: I do. I do. Yep.

2 THE COURT: Thank you.

3 MR. HENRIOD: It was just the first two  
4 sentences on Sunday, and then Mr. Kemp suggested that I  
5 include the relevant statutory language that I was  
6 alluding to, which was a great idea.

7 So this reads, "Everyone is presumed to know  
8 the law. This includes professional drivers who are  
9 presumed to know the traffic laws that apply to them."  
10 And then it goes forward to "There was in force at the  
11 time of the occurrence in question a law which read as  
12 follows," and it then quotes the statute that requires  
13 drivers to stay 3 feet away from bicyclists.

14 This is important because it goes directly to  
15 causation. The idea that a proximity sensor would not  
16 have told the driver anything more than the driver  
17 already knew to do as a matter of course, and that's  
18 why we've proposed that.

19 MR. KEMP: Judge, we argued this exact issue  
20 in connection with Mr. Krauss's testimony. This was  
21 the one that Mr. Roberts wanted to offer this 3-foot  
22 law in, and the Court said can't do that. This  
23 instruction is just the same effort to get the same --  
24 same issues in front of the jury.

25 THE COURT: The -- the law in Nevada?

1 MR. KEMP: Yeah, right, the law in Nevada.  
2 And so the negligence per se, you remember they wanted  
3 to -- same thing. I mean, we talked about this for  
4 hours.

5 THE COURT: We've already -- we've discussed  
6 this in a different format.

7 MR. KEMP: Different context.

8 THE COURT: Different context, yes.

9 So no -- so the answer -- so the -- the  
10 decision is this discusses the traffic laws in Nevada,  
11 and we've discussed this in a different context, and  
12 I -- I don't -- this is not going to come in.

13 MR. HENRIOD: Okay. And I think I have made  
14 enough of a record on that.

15 This is what?

16 MS. BONNEY: V.

17 MR. HENRIOD: V. Proposed, not given V.

18 THE COURT: All right. Let's go to -- oh,  
19 you have another one? Okay.

20 MR. HENRIOD: Along the same lines, just  
21 preserving records on issues that essentially were  
22 dealt with before the trial. One is the assumption of  
23 risk instruction. We think that there is enough of an  
24 evidentiary basis to support a finding from the jury  
25 that -- that the cyclist assumed the risk by -- by

1 making the choices that he did in this congested  
2 traffic area.

3           Among the other reasons that were raised in  
4 the pretrial briefing, the other instruction is one  
5 that charges the jury to consider the acts of all of  
6 the different participants in the event and people who,  
7 frankly, are still parties to the action. Not because  
8 comparative negligence in a product defect case is  
9 appropriate, but rather because sole proximate cause  
10 doesn't mean the cause of just one person. It means  
11 one other person and not me, or many other people, but  
12 not me.

13           And -- and so sole proximate cause means that  
14 the defendant is not at fault, the defendant did not  
15 cause the injury. And whether or not one other party  
16 is the sole proximate cause or the acts of several  
17 other actors combined to be the sole proximate cause,  
18 that needs to be considered. Here, we have all of  
19 these -- these parties to the action. All bear some  
20 causation and fault, and so we think that it is  
21 appropriate for the jury to consider their concurrent  
22 causation roles in bringing these injuries about  
23 because, collectively, if not individually, they  
24 constitute the sole proximate cause.

25           MR. KEMP: Your Honor, on the assumption of

1 risk, we filed Motion in Limine No. 3 to preclude -- is  
2 it 3?

3 THE COURT: Assumption of risk is not a  
4 defense --

5 MR. KEMP: It's not a defense.

6 THE COURT: -- to a product liability case.

7 MR. KEMP: Right, Your Honor. So that's our  
8 response to the first one.

9 The second one, the comparative negligence,  
10 this is a products liability case. This is not a  
11 negligence case, No. 1. And No. 2, with regards to his  
12 argument that there were actions on the part of these  
13 other entities that can be considered with regards to  
14 proximate cause, first of all, there's been no evidence  
15 whatsoever introduced that the helmet manufacturer or  
16 the bike manufacturer in this case did anything wrong.  
17 In fact, the evidence is exactly the contrary. All the  
18 experts praised them. But with regards to Michelangelo  
19 and Hubbard, the Court's already ruled that that's  
20 foreseeable as a matter of law.

21 So even if this was a comparative negligence  
22 case, this wouldn't be proximate cause in a comparative  
23 negligence context. So for that reason, this  
24 instruction is not appropriate. For those reasons.  
25 Excuse me.



1           THE COURT: I -- I agree -- I agree with the  
2 plaintiffs' argument on both the assumption of risk  
3 that was held by the Court. I held this early in the  
4 case. It's not a defense in -- in a case like this.  
5 And I agree with the -- what you've just stated with  
6 respect to the comparative negligence or the  
7 instruction offered by defense that involves various  
8 parties.

9           MR. HENRIOD: Very good. Let me mark this,  
10 then, as proposed, not given W.

11          MR. KEMP: Assumption of the risk is W.

12          MR. HENRIOD: Assumption of the risk was --

13          THE COURT: It's -- it's W. And the next 1  
14 is X.

15          MR. HENRIOD: So this one is X.

16          MR. KEMP: Okay.

17          THE COURT: Mr. Jayne is keeping track of  
18 your exhibits too.

19          MR. KEMP: Six letters left.

20          THE COURT: Mr. Henriod.

21          MR. HENRIOD: Okay. I'm sorry, Your Honor.  
22 We have --

23          THE COURT: One is W, one is X. We are all  
24 keeping track of your exhibits for you, Mr. Henriod.

25          MR. HENRIOD: Thank you.

1 THE COURT: Especially Mr. Jayne. All right.  
2 Let's go on.

3 MR. KEMP: Judge, I think we left off on 45.

4 THE COURT: Which is now 48.

5 MR. KEMP: Which is now 48, but I do think it  
6 needs to be reshuffled, like Mr. Henriod indicated.

7 THE COURT: Okay. Forty-eight, where would  
8 you like this placed?

9 MR. KEMP: I think the parties can do that,  
10 Your Honor. I think we should get them all in, and  
11 then take -- it won't take long. I would put it right  
12 after the other negligence, the driver negligence one.

13 But in any event, 48 is the negligence of  
14 Dr. Khiabani. That's not a defense. That's the  
15 Young's Machine decision.

16 And then the second sentence is the one that  
17 they drafted.

18 MR. HENRIOD: And I -- I would offer the same  
19 revisions for sake -- may I approach?

20 THE COURT: Yes, of course.

21 MR. HENRIOD: For the sake of accuracy that  
22 we did on the -- a similar instruction regarding the  
23 driver. So we would propose that the language be  
24 instead, "Any alleged negligence by Dr. Khiabani is not  
25 a defense to plaintiffs' product defect claims, so you

1 are not to consider whether Dr. Khiabani's conduct  
2 constitutes negligence. However, you may consider  
3 whether his conduct was the sole cause of his injuries.  
4 You also should consider all of the evidence to  
5 determine if there was a defect and, if so, whether the  
6 defect caused the collision."

7 I think that the language is in harmony with  
8 all of the rulings that the Court has made. I think it  
9 is clearer than the one that was -- I'm sorry. I  
10 believe that the language is clearer than that which  
11 was constructed on a break during trial, and that now  
12 that we are giving a more polished set of instructions  
13 to the jury, that the opportunity affords us the  
14 ability to revise this language, to make it, one, more  
15 clear and just slightly more accurate.

16 MR. KEMP: Your Honor, first of all, this is  
17 their language that we already have. They went out on  
18 a break and came back with this, and it was a long  
19 break. So now they don't like the language that they  
20 drafted? I think we -- and, you know, I think they're  
21 kind of stuck with what they drafted.

22 And second of all, what they're really trying  
23 to do is sneak in this sole cause argument and tie it  
24 into contributory negligence. So they're trying to  
25 water down the instruction. So I -- I say we go with

1 the instruction that we discussed at trial, and on  
2 Sunday, which is 45.

3 MR. HENRIOD: I think the line that we're  
4 drawing is precisely the line that the Court drew  
5 pretrial and has had to reiterate a few times during  
6 the trial, which is why that I -- why I think it is an  
7 important distinction and why now is a good  
8 opportunity, as we are instructing the jury in this  
9 set, to make that distinction crystal clear.

10 MR. KEMP: Well, it wasn't so important when  
11 they drafted the language, Your Honor. And it wasn't  
12 so important on Sunday when we agreed to this  
13 instruction. And this is their language. You know,  
14 they get one thing, they want more, Your Honor. I just  
15 think that we should go with what we've already done.  
16 And you throw sole cause in there, and basically you're  
17 trying to gut the instruction that negligence is not a  
18 defense. That's what they're trying to do.

19 MR. HENRIOD: I think if the gravamen of the  
20 objection is, well, hey, on a previous break, you guys  
21 are the ones who wrote this, and in a \$600 billion  
22 case, we are passing on the opportunity to clarify it  
23 now, I don't think that's a good reason to not give it.

24 And with that, I will submit.

25 MS. WORKS: Your Honor, I would just add from

1 the Court's most recent findings of fact and  
2 conclusions of law, that the second of findings of fact  
3 and conclusions of law with respect to the summary  
4 judgment order, which I believe the Court signed off on  
5 February 22nd, the Court still specifically says,  
6 "Defendant will still be precluded from arguing to the  
7 jury that Dr. Khiabani's negligence could absolve  
8 defendant of liability, even if the product is found to  
9 be defective and the defect found to have caused the  
10 injury."

11 And so that language and the -- the sole  
12 cause in the proposed language -- the proposed  
13 instruction we're talking about right now unnecessarily  
14 confuses those issues and confuses the causation  
15 instruction that the Court has already decided to give  
16 with respect to substantial factors.

17 THE COURT: And I agree. I think -- well, I  
18 know that this 48 was proposed by -- by -- I think by  
19 the defense on Sunday. I understand, Mr. Henriod, that  
20 you are trying to define or alter it up, but I think  
21 that being consistent is important. And I am concerned  
22 about adding anything to the one with respect to any  
23 type of negligence or anything else. That's  
24 concerning. So I'm going to stay with the one that  
25 we've already gone with.

1           MR. HENRIOD: I mean, Your Honor, I don't --  
2 I don't mean to press, if there's -- I'm trying to see  
3 what's inappropriate. I understand uniformity. I  
4 understand that -- that it's what we discussed in a  
5 prior version. I'm trying figure out what is  
6 inaccurate. And the only reason I ask is that I'm  
7 happy to suggest an alternative instead if there's  
8 something in here that's actually inaccurate or  
9 confusing.

10           MR. KEMP: Well, Your Honor, the problem with  
11 this instruction is if you tell the jury right after  
12 you say contributory negligence; however, you may  
13 consider his conduct was the sole cause of his  
14 injuries, then Mr. Roberts or whoever gives the closing  
15 argument is going to jump on this, and they're going to  
16 completely gut the Court's instruction on contributory  
17 negligence. They're going to completely gut the  
18 substantial factor instruction. And they're going to  
19 argue sole cause, sole cause, negligence, negligence,  
20 negligence. That's what they're trying to do.

21           Given what they've done throughout the trial,  
22 I think that -- I'm not throwing out an idle scenario  
23 there. I think that's a scenario that's -- that's  
24 dangerous. And that's the only reason I think they  
25 want this instruction. So I think we should go with

1 what we've done, and by -- by saying sole cause right  
2 after you're saying negligence is not a defense,  
3 you're -- you're basically gutting -- gutting the first  
4 part of it.

5 MR. HENRIOD: Okay. I would be happy  
6 to -- to leave out "sole" and just say "whether his  
7 conduct was the cause of his injuries."

8 But with that, Your Honor, I don't -- I don't  
9 want to push it -- I don't want to belabor the point.  
10 And so if that does not change your ruling, then let me  
11 just volunteer that I would be willing to suggest the  
12 instruction that sole, if that makes a difference, and  
13 propose it be marked as proposed, not given Y.

14 MR. KEMP: Is it Y or X?

15 MR. HENRIOD: It is Y.

16 THE COURT: Okay. All right. Let's move on  
17 to No. 49. It starts off with, it's one paragraph, "If  
18 you find," and the last line "is this case."

19 MR. HENRIOD: No objection.

20 MR. KEMP: No objection, Your Honor.

21 THE COURT: All right. Let's go on to  
22 No. 50, "The mere fact that an accident" is the  
23 beginning of the paragraph, and at the end it says  
24 "preponderance of the evidence."

25 MR. KEMP: No objection, Your Honor.

1 MR. HENRIOD: No objection.

2 THE COURT: Okay. Great. Let's go on to the  
3 new 51, "For the purposes of determining," and it ends  
4 with "are not relevant." This is the bystander.

5 MR. KEMP: No objection, Your Honor.

6 MR. HENRIOD: No objection.

7 THE COURT: The new 52, "You may only award  
8 punitive damages" at the beginning, and the last three  
9 words are "any other conduct."

10 MR. KEMP: I thought this was one of the  
11 Phillips, is it not?

12 MR. HENRIOD: It is. So it's one --

13 MR. KEMP: One of the Phillips instructions,  
14 Your Honor.

15 MR. HENRIOD: I think that this is -- no, no.  
16 This is 49, so this is close.

17 MR. KEMP: Oh.

18 MR. HENRIOD: This is close, and -- and it  
19 will need to go both -- in both phases.

20 MR. KEMP: Wait a second. We have two  
21 Phillips instructions.

22 MR. HENRIOD: Right.

23 MR. KEMP: (Inaudible.)

24 MR. HENRIOD: We talked about -- no, no.

25 MR. KEMP: This is the second phase.



1 MR. HENRIOD: That is the same.

2 THE COURT: Take a look at 39.

3 MR. KEMP: It looks the same.

4 THE COURT: Thank you, Mr. Jayne. It's the  
5 same instruction as 39.

6 MR. HENRIOD: That's right. That's right.  
7 It was 61, 38.

8 THE COURT: Okay. So we're going -- we're  
9 going to pull this one?

10 MR. HENRIOD: Yes, Your Honor.

11 THE COURT: Okay. So -- all right. Then the  
12 next one will be the new 52; correct? Fifty-two. It  
13 starts with "The fact that I am," and then it ends with  
14 "- to decide."

15 MR. HENRIOD: No objection.

16 MR. KEMP: No objection, Your Honor.

17 THE COURT: Very good. Let's go to the new  
18 53, "You may not allow" is the beginning of the  
19 paragraph, and it -- the end is -- last few words are  
20 "to pay punitive damages."

21 MR. HENRIOD: Yes. And could we just change  
22 "corporation" to "company" to make it uniform?

23 MR. KEMP: I have no objection, Your Honor.  
24 And then three times?

25 THE COURT: No objection?

1 MR. KEMP: No objection.

2 THE COURT: We're changing in 53 the word  
3 "corporation" to "company."

4 MR. KEMP: Can we use "conglomerate"?

5 THE COURT: All right. Let's go to the new  
6 54, "The manufacturer cannot delegate," and it ends  
7 with -- with "all proper warnings."

8 MR. KEMP: That's the one we already  
9 discussed, the delegation one.

10 MR. HENRIOD: And -- and you've withdrawn;  
11 right?

12 MR. KEMP: Well, we got one -- no, I -- no.  
13 Is this the -- is this different? There were -- there  
14 were two that were substantially similar.

15 MR. HENRIOD: Yeah.

16 MR. KEMP: Is the -- hang on a second. Let  
17 me find. Can't remember which is -- we approved one.  
18 Yeah.

19 Do you remember what one it is?

20 THE COURT: This is the warnings.

21 MR. HENRIOD: It's one of the two that we  
22 discussed.

23 MR. KEMP: Is it one -- is the second one --

24 MS. WORKS: You know what, I think, Your  
25 Honor, the issue is this was always previously No. 52,

1 but we did discuss it earlier because Mr. Kemp  
2 suggested discussing plaintiffs' proposed specials  
3 prior to us getting started. So we did see this once  
4 before, but it was always at this number. And I'm  
5 searching a word search, and it's not appearing  
6 anyplace else in the document.

7 MR. KEMP: Yeah. This is the one we  
8 discussed with -- is this the Couch one? Is this the  
9 Couch one?

10 MS. WORKS: Yes.

11 MR. KEMP: Okay. Right. This is the one we  
12 discussed earlier --

13 THE COURT: Right.

14 MR. KEMP: -- tonight.

15 MR. HENRIOD: And you withdrew; right?

16 MR. KEMP: No. She ruled that we could give  
17 it.

18 MR. HENRIOD: Did you?

19 THE COURT: Yes.

20 MR. HENRIOD: Oh, pardon me. Okay. We made  
21 our record on that.

22 THE COURT: Okay. Then let's go to the new  
23 55. That's already a no. Thank you.

24 MR. KEMP: Yeah, this is a no.

25 THE COURT: This is a no.

1 MR. KEMP: This is the design one we talked  
2 about.

3 THE COURT: Fifty-four becomes the new 55 for  
4 the moment.

5 MR. KEMP: Fifty-four is the Stackiewicz one  
6 that we've already discussed.

7 THE COURT: Right. That comes in.

8 MR. KEMP: Fifty-five.

9 THE COURT: Oh, it doesn't come in.

10 MR. KEMP: Does not come in.

11 THE COURT: That's the --

12 MR. KEMP: Stackiewicz.

13 THE COURT: Right, the manufacturer defect.

14 MR. KEMP: Right. Fifty-five, did we  
15 withdraw this one?

16 MR. HENRIOD: Which one?

17 MR. KEMP: Didn't we discuss these?

18 MS. WORKS: This is the design of the  
19 automobile?

20 THE COURT: The (inaudible) bystander.

21 MR. KEMP: We discussed these already  
22 tonight.

23 THE COURT: Right.

24 MR. KEMP: And the Court rejected both of  
25 them.

1 THE COURT: Right.

2 MR. KEMP: And then 56 we discussed a minute  
3 ago. That was a no.

4 Fifty-seven is the but for one, which was a  
5 no.

6 MR. HENRIOD: Oh.

7 MR. KEMP: That's the substantial factor  
8 issue.

9 THE COURT: Fifty-seven. Causation  
10 (inaudible).

11 MR. HENRIOD: I'm lost.

12 THE COURT: All right. So let's go back to,  
13 Mr. Henriod, where did you leave off?

14 MR. HENRIOD: Yeah. So the last place where  
15 I had any idea what we were doing --

16 THE COURT: That's okay.

17 MR. KEMP: Stackiewicz?

18 THE COURT: It's been a long trial. That's  
19 okay. Just use page numbers, shall we?

20 MR. HENRIOD: Thank you for your patience,  
21 Your Honor.

22 Yes. These are the ones that we --

23 THE COURT: Shall we go back to a page  
24 number, please?

25 MR. HENRIOD: Fifty-four.

1 MR. KEMP: I believe it was the Stackiewicz  
2 one -- or no -- yes, 54 was the Stackiewicz one which I  
3 put no on.

4 THE COURT: Wait one moment. "A manufacturer  
5 cannot delegate" --

6 MR. KEMP: Right.

7 THE COURT: -- "responsibility for assuring  
8 that its product is dispensed with all proper  
9 warnings."

10 MS. WORKS: That one is to be given.

11 MR. KEMP: Wait, wait, wait.

12 MS. WORKS: Allison Merke, page 52.

13 MR. KEMP: No, 54. Where you at?

14 THE COURT: Oh, wait. Okay. So --

15 MR. KEMP: Fifty-four is --

16 THE COURT: That was 52. It's now 54.

17 MS. WORKS: Correct.

18 THE COURT: Right?

19 MR. KEMP: I'm just looking at what's still  
20 on the bottom of my page, Your Honor. When it's  
21 rejected, I haven't changed numbers. I just kept the  
22 page.

23 THE COURT: Mr. Jayne is on top of everything  
24 over here.

25 MS. WORKS: Thank you.

1 MR. KEMP: All right. So 54 is no.

2 Fifty-five, "The design of an automobile," we  
3 already discussed that. That was a no.

4 THE COURT: That was a no.

5 Mr. Henriod, are you with us?

6 MR. HENRIOD: I am, yes. This is one that I  
7 proposed with a set out of order.

8 THE COURT: Yes.

9 MR. KEMP: "Everyone to assume no" -- "no  
10 law," that was a no.

11 THE COURT: Wait. Wait. Which one?

12 MR. KEMP: That was 56 on the bottom.

13 MS. WORKS: Previously.

14 THE COURT: Okay. Wait. What I'm -- just  
15 one moment. Okay. Everyone is -- yes, hold on. Okay.  
16 That's -- that's a no.

17 Next one?

18 MR. KEMP: Is --

19 THE COURT: But for, no because --

20 MR. KEMP: Right.

21 MR. HENRIOD: Fifty-seven we will withdraw.

22 THE COURT: Okay. We're -- we've gone with  
23 substantial factor test. So this is withdrawn? Okay.  
24 By defense.

25 Fifty-eight?

1 MR. HENRIOD: Fifty-eight, I -- I don't  
2 recall whether or not Your Honor has -- has ruled on  
3 it. I don't recall if it was taken under advisement.

4 MR. KEMP: This is the one that we argued  
5 yesterday, I believe, where they were arguing that  
6 compensatory damages can substitute for punitive  
7 damages.

8 THE COURT: All right.

9 MR. KEMP: Yeah. You --

10 THE COURT: No, I ruled on this.

11 MR. KEMP: I thought you did rule on this,  
12 Your Honor.

13 MR. HENRIOD: No. I mean, I've got a set  
14 here. Some of them have some of them.

15 THE COURT: Right. No. I understand. I  
16 understand.

17 MR. HENRIOD: Okay. Very well. Let me then  
18 propose it for the record. It's not that compensatory  
19 damages substitute for punitive. It is the -- just  
20 what has been recognized by many courts, including the  
21 U.S. Supreme Court, in *State Farm Mutual Auto Insurance*  
22 *Company versus Campbell*, "Compensatory damages,  
23 however, already contain" this -- "a punitive element."  
24 Sometimes natural consequences are punishment. They  
25 are deterrent. They are exemplary. (Inaudible.) And



1 the jury should know that under the law, they can  
2 consider that when they are looking at an additional  
3 punitive award, just to award a bucket load of money to  
4 punish when, if there is a massive judgment already  
5 that affects the company's bottom line, that it's an  
6 example to everybody else on the market, that it isn't  
7 any less an example merely because it is also  
8 compensatory. That's why we propose the instruction.

9 THE COURT: Do you have -- do we have a jury  
10 instruction that says that -- that you can't  
11 annihilate --

12 MR. HENRIOD: Annihilate, yes. Yes. And --  
13 and that is a different concept, but it is covered in  
14 the stock -- in the Phase 2 stock instruction.

15 THE COURT: Okay.

16 MR. KEMP: That's correct, Your Honor.

17 THE COURT: Thank you. That --

18 MR. KEMP: That's covered in the Phase 2;  
19 right.

20 And with regards to this instruction, I mean,  
21 first of all, factually it's not true because they have  
22 \$300 million worth of insurance. I don't believe that  
23 the compensatory verdict in this case is going to  
24 exceed 300 million. So the company is not going to pay  
25 anything. You know, they're not going to pay anything.

1 The insurance company is. So factually it's wrong.

2 But more importantly compensatory damages are  
3 to compensate. Punitive damages are to punish. You  
4 don't take one and use it for the other. That's just  
5 not the way you do it, Your Honor. The Court's already  
6 ruled upon this, I thought, two days ago or yesterday.

7 THE COURT: I thought so. I think I -- I --  
8 I'm almost positive I did, but I'm -- I'm --

9 MR. HENRIOD: I don't mean to press. I just  
10 want to make sure that -- that it's out there, and  
11 because I can't recall exactly when we did, I want to  
12 make it official now. I disagree with almost  
13 everything Mr. Kemp just said, but I'll leave it there,  
14 and -- and propose that this be marked as proposed, not  
15 given Z.

16 MR. KEMP: What number? G?

17 MR. HENRIOD: Z.

18 THE COURT: You know what, I -- I want to  
19 take a quick break and think about this one. Okay?  
20 I'm sorry. I'm not going to take a very long break. I  
21 promise. I mean (inaudible).

22 MR. HENRIOD: It's important, Your Honor.

23 (Whereupon a short recess was taken.)

24 THE COURT: Excuse me just one moment.

25 THE COURT RECORDER: We are on the record.

1 THE COURT: Just one moment. Okay. All  
2 right.

3 Okay. I -- I -- I have taken a look at this  
4 before, and -- and this -- this will not come in.  
5 This -- the policy is compensatory damages are to  
6 compensate and punitive damages are to educate or  
7 punish, and they're -- they're in different categories.  
8 So -- so this is out.

9 Is this Z?

10 MR. HENRIOD: It is.

11 THE COURT: Z?

12 MR. HENRIOD: Z, right.

13 THE COURT: Fifty-nine.

14 MR. KEMP: Z 9? Proposed Z. Okay. Got it.

15 THE COURT: All right. These are for  
16 Phase 2; correct?

17 MR. KEMP: Yes, Your Honor.

18 THE COURT: All right. So do we need -- do  
19 we need to review these now or --

20 MR. HENRIOD: I think there may -- we're  
21 almost done.

22 MR. KEMP: Yeah, I think we are done.

23 MR. HENRIOD: And this one makes it --

24 MR. KEMP: I think -- I'm almost 90 percent  
25 sure this is one of the Case Phillips instructions

1 which I think is 49 and 42. I think it's a slight --

2 THE COURT: Let me tell you what I think  
3 about this. I haven't had a chance to look at this  
4 instruction.

5 MR. KEMP: It's already --

6 THE COURT: And it's getting a little bit  
7 late.

8 MR. KEMP: It's in, Your Honor. It's in.

9 THE COURT: And it's for the second phase,  
10 and I'd -- I'd rather study it.

11 MR. HENRIOD: Okay. Very well.

12 THE COURT: Doesn't mean it's not coming in  
13 or not. I just -- I just want to give it more time.

14 MR. HENRIOD: Great deal.

15 MR. KEMP: Fine, Your Honor.

16 MR. HENRIOD: And then I need to propose for  
17 the record the consideration of probable taxes. And  
18 may I just incorporate all of the arguments that  
19 Mr. Roberts made?

20 THE COURT: Yes, you may.

21 MR. KEMP: I have no objection to that.

22 MS. WORKS: I'll incorporate my earlier  
23 objections as well.

24 MR. HENRIOD: We will mark this as AA?

25 THE COURT: Yes. And for the same reasons

1 that I discussed earlier, I am not going to read the  
2 instruction to the jury.

3 MR. HENRIOD: Very good.

4 THE COURT: Then we will defer the proposed  
5 instruction on punitive damages for Phase 2 of the  
6 trial. All right?

7 MR. HENRIOD: Very good. Thank you, Your  
8 Honor.

9 THE COURT: All right. Oh, my gosh, the  
10 verdict form.

11 MR. KEMP: Well, Your Honor, the first I  
12 think we should do is insert the instructions that --

13 THE COURT: You're right. That's a good  
14 idea.

15 MR. KEMP: So -- so we've got -- the first  
16 one I have is Mr. --

17 THE COURT: Just tell me the page number that  
18 you have.

19 MR. KEMP: Okay. The -- we have 46,  
20 Hoogestraat. I would think you would want to do that  
21 before you get into specific defects.

22 MR. SMITH: So -- did you guys already have  
23 the verdict form? I will try to put it in some logical  
24 order.

25 MR. KEMP: That's fair. There you go.

1 MR. HENRIOD: And -- and Mr. Smith reminds me  
2 that we object on the caption to the jury instructions  
3 not including all of the parties to the action that  
4 remain.

5 Our problem here is that we think they have  
6 kept them in this whole time to prevent removal, and  
7 now they're trying to have their cake and eat it too.  
8 I think it's appropriate for the caption to reflect  
9 current circumstances of the case.

10 THE COURT: Do you have any thoughts on this?

11 MR. KEMP: Yes, Your Honor. First of all, in  
12 the removal point, and this was briefed to  
13 Judge Boulware, there are -- there's a line of case law  
14 that says if you are a stateless citizen, in other  
15 words, you're not a citizen of a state, and in this  
16 case, both the Khiabani boys are no longer citizens of  
17 Nevada. They both moved to Canada. So they are  
18 stateless citizens. There's a ruling by Judge Mahan  
19 right on point, the Ninth Circuit cases. This was  
20 fully briefed to the federal district court.  
21 Judge Boulware did not decide to remand on that ground.  
22 But it was fully briefed. So counsel knows that he  
23 can't remove -- I mean, they shouldn't be able to  
24 remove the case.

25 Second, the only reason that there hasn't

1 been a voluntary dismissal is we're still getting the  
2 minors' compromise and the estate compromise. We've  
3 got two minors' compromises, two estates, and we've got  
4 two different countries involved. Now we have Canada,  
5 now we have the United States. So that is the reason.

6 Third, though, on the caption, what they're  
7 really trying to do is Mr. Roberts is going to put the  
8 caption up in front of the jury on a big screen, and  
9 he's going to read the defendants and he's going to  
10 circle Mr. Hubbard and he's going to circle  
11 Michelangelo, and so he's going to argue to the jury  
12 indirectly, that, oh, gee, these people were sued, so  
13 you should consider the fact that since plaintiff sued  
14 them, that must mean they're negligent. So what that  
15 is, is that's a plea -- that's going to be a plea for  
16 jury nullification, because what they're really doing  
17 is they're asking the jury to disregard the  
18 instructions you've given that contributory negligence  
19 is not a defense, that it was foreseeable as matter of  
20 law that the driver's not a perfect driver. So that's  
21 why it should be on the caption because it's going to  
22 be misused.

23 If I thought they were just going to send the  
24 caption back in, that would be one thing. But I know  
25 exactly what's going to happen, and I think you've seen

1 through the course of the trial that some of these  
2 things get done that have been predicted to be done.  
3 So -- so that's -- that's the real reason they're  
4 trying to get this in.

5 And it is very common in all jurisdictions to  
6 put et al., you know. Instead of referring to all the  
7 defendants to put et al. on the caption. That solves  
8 the problem. They're given a caption it says et al,  
9 you know.

10 MS. WORKS: And, Your Honor, just one quick  
11 point to add to that. It simply invites speculation as  
12 to settlement. What happened to these defendants who  
13 are still listed on this caption but not sitting here  
14 before the jury today. So it's simply going to invite  
15 the jury to speculate, did they pay money, they must  
16 have paid money or they'd still be sitting here, which  
17 the Court has expressly precluded already long ago in  
18 this case.

19 MR. KEMP: Or they may think Mr. Hubbard  
20 didn't look like he had much money when he came to  
21 court. They didn't get any money. You know, there's  
22 speculation that goes both ways. It just creates a  
23 bad -- bad ...

24 THE COURT: I would consider something in  
25 lines with et al., because that's something that --



1 that's regularly used in the law, instead of --

2 MR. KEMP: Yeah, I have no --

3 THE COURT: Instead of not having anything  
4 there.

5 MR. KEMP: I have no problem saying et al.

6 THE COURT: I'm going to go with that because  
7 that's something we do as lawyers, and -- but -- but I  
8 am not comfortable with -- with just having Motor Coach  
9 Industries, Inc.

10 MR. KEMP: And then the verdict form, Your  
11 Honor, we -- we highlighted our differences --

12 You want to -- I'm sorry. You want to do the  
13 et al.? Go ahead.

14 MR. HENRIOD: Well, I -- I don't think that  
15 that solves the problem, although I -- I understand  
16 where the Court is -- is going.

17 THE COURT: Yes.

18 MR. HENRIOD: But I -- I feel like I can't  
19 let some of the things that were said go unaddressed,  
20 especially when there's a snarky allegation about our  
21 intentions all the time.

22 Mr. Kemp represented back in January that  
23 they would move to amend the caption. They never did.  
24 It's frequent in cases that juries know that plaintiffs  
25 thought others were to blame at some point or another.

1 It's not that that needs to come in now. Again, I just  
2 don't think that they can have it both ways. We  
3 haven't seen formal documentation on the residency. At  
4 least as far as I've seen that was not one of the  
5 issues in front of Boulware. Although, the idea that  
6 it would be forth coming I think was before Boulware or  
7 at least that he heard that. I don't know that that is  
8 here nor there. I'm just afraid of letting some things  
9 go unaddressed.

10 THE COURT: Understood.

11 MR. KEMP: Oral documentation. We had Aria  
12 testify where he lives. We played Keon's deposition as  
13 where he lives. We had Babak's deposition on where  
14 they live. We had MC's deposition on where they live.  
15 They -- when they took those depositions, they didn't  
16 ask any questions about where do you really live.

17 MR. HENRIOD: Which I think proves my point  
18 about there not being documentation of that formality  
19 such that it would preclude removal.

20 MR. KEMP: What kind of documentation do you  
21 need? They've been adopted. We gave you the adoption  
22 papers. We gave you the guardianships. They -- they  
23 were discussed during the testimony by Marie-Claude.

24 THE COURT: I'm not -- I'm not concerned  
25 about the issue of whether the -- the Khiabani children

1 are residents of another country. I think I've seen  
2 more than sufficient evidence, including their -- the  
3 fact they've -- they now have bedrooms that have been  
4 created for them, they're in schools that only speak  
5 English, they have ski passes with their family. I --  
6 I mean, I think that all of those are indicative of  
7 their residence, and they test -- one of them, I can't  
8 remember his name right now.

9 MR. KEMP: Aria.

10 THE COURT: He testified to -- in fact, they  
11 couldn't be here the entire time because they couldn't  
12 miss school because they couldn't miss school. And so  
13 I believe that legally, we -- I think there's enough  
14 evidence to suggest that legally they're residing and  
15 they -- they live in Canada.

16 MR. KEMP: Your Honor, then --

17 THE COURT: From the evidence that I've seen  
18 in this trial.

19 MR. KEMP: I think et al. is the perfect  
20 solution here.

21 MR. HENRIOD: I see why the Court would think  
22 that's true.

23 THE COURT: Okay. All right. Very good.  
24 Let's go with et al., then.

25 MR. KEMP: Okay. Your Honor, on the special

1 verdict form, we -- we argued this yesterday --

2 THE COURT: Before -- before -- are we moving  
3 anything else?

4 MR. KEMP: Well, Mr. Pepperman had a good  
5 idea that -- that Joel and I agreed to, which was let  
6 him go through and try to get some kind of order, so --

7 THE COURT: Okay. So we're going to move on  
8 to the verdict?

9 MR. KEMP: Right, we'll -- we'll come back to  
10 this.

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

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KRISTY L. CLARK, CCR #708

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1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 \* \* \* \* \*

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

17 Plaintiffs, )

18 vs. )

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

Defendants. )

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR

DEPARTMENT XIV

DATED WEDNESDAY, MARCH 21, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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24 \* \* \* \* \*

25

1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 21, 2018;

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

4 \* \* \* \* \*

5  
6 THE COURT: Excuse me just one moment.

7 THE COURT RECORDER: We are on the record.

8 THE COURT: Just one moment.

9 Okay. All right. Okay. I -- I -- I have  
10 taken a look at this before, and -- and this will not  
11 come in. This -- the policy is -- compensatory damages  
12 are to compensate and punitive damages are to educate  
13 or punish, and they're -- they're in different  
14 categories. So -- so this is out.

15 Is this Z?

16 MR. HENRIOD: It is.

17 THE COURT: Z. We'll come back to this.

18 Okay. Hold on. Let me grab the verdict  
19 forms. All right. Okay. All right. So I have, for  
20 the record, three copies or three -- three -- I have  
21 a -- a special verdict, which I believe it's  
22 plaintiffs' because it has Motor Coach Industries,  
23 Inc., as defendant. That is a three-page -- no  
24 four-page verdict form. Then I have a general defense  
25 verdict form, one page.

1           And then I have another. I believe it's  
2 offered by the defense, which includes all the parties  
3 right now. And it says -- and that is a four --  
4 four-page document; is that correct?

5           MR. KEMP: That's correct, Your Honor.

6           THE COURT: That's what we're -- we're  
7 talking about these; right?

8           MR. HENRIOD: Yes, Your Honor.

9           MR. KEMP: Yes, Your Honor.

10          THE COURT: Very good.

11          Which one would you like to discuss first?

12          MR. KEMP: First of all, the compensatory  
13 damages sections are identical in both of them because  
14 we agreed to use their compensatory. And so the  
15 Courts -- I don't know -- I hope that the Court has the  
16 more recent copy --

17          THE COURT: I don't know. I don't see  
18 identical forms.

19          MR. KEMP: Okay. Well --

20          THE COURT: I see different.

21          MR. KEMP: The damages should be the same on  
22 both of them.

23          When you say compensatory damages, we have  
24 Keon Khiabani. Then we have past grief --

25          THE COURT: Oh.

1 MR. KEMP: -- future grief, loss of probably  
2 support, and there's -- theirs is exactly the same.

3 THE COURT: Okay. Hold on. Let me go to  
4 compensatory damages. Sorry.

5 MR. KEMP: Okay.

6 THE COURT: Okay. So I have compensatory  
7 damages.

8 MR. KEMP: Well, there's a little difference  
9 in the numbering but if you take a look at Keon's  
10 damages --

11 THE COURT: One says, Fill in the amount of  
12 the -- of compensation that you deem appropriate for  
13 each of the plaintiffs. Compensatory damages arising  
14 from the deaths of Kayvan Khiabani. The other doesn't  
15 say that. It says Keon Khiabani damages as an  
16 introductory.

17 MS. WORKS: I think it says it right up --  
18 does your copy not say right above in the MCI 12, fill  
19 in the amount?

20 THE COURT: Yes, that's -- that's --

21 MR. KEMP: Yeah. And -- and ours says fill  
22 in the amount too.

23 MS. WORKS: It -- it just says if answered  
24 yes to any of the above, because I think we have ours  
25 in a different order.



1 MR. KEMP: Yeah. The -- the only --

2 THE COURT: Okay.

3 MR. KEMP: -- difference is right before that  
4 they have the -- the two-part test.

5 THE COURT: Right.

6 MR. KEMP: So they say if you did not answer  
7 yes to both, and we just say if you answered yes. So  
8 that's -- that's -- but that's not really a difference  
9 of the compensatory.

10 THE COURT: Okay. I see.

11 MR. KEMP: So the compensatory is word for  
12 word identical to theirs.

13 THE COURT: All right.

14 MR. KEMP: So I think we're under agreement  
15 on that.

16 MR. HENRIOD: Yes, as far as the breakdown  
17 and the order of the breakdown.

18 THE COURT: So that goes from the plaintiffs'  
19 as page 3 and the bottom half of defense page 2 through  
20 plaintiffs' page 4?

21 MR. KEMP: Right, so...

22 THE COURT: And the bottom of the defense  
23 proffered page 3?

24 MR. KEMP: Right.

25 THE COURT: Okay.

1           MR. KEMP: So now, going to the differences.  
2 The differences are what we talked about yesterday, and  
3 they changed their form a little bit, but it's still  
4 the same point.

5           THE COURT: What -- where -- please point out  
6 the differences.

7           MR. KEMP: Okay. Well, why don't we start  
8 with our form.

9           MR. HENRIOD: Did I give -- Your Honor, let  
10 me make sure you have this. The one that I gave you  
11 yesterday is my green writing --

12           THE COURT: I don't -- I don't have any green  
13 writing.

14           MR. HENRIOD: Okay. So one has over the  
15 check boxes on page 2, at the top --

16           THE COURT: Yes.

17           MR. HENRIOD: -- it -- it has column headers.  
18 Is that what yours has, ma'am?

19           THE COURT: Mine looks like this.

20           MR. HENRIOD: That's the one. Okay. Good.

21           MR. KEMP: Okay. (Inaudible.)

22           So the primary disagreement here -- we need  
23 to take a break or -- do we need a -- oh.

24           The primary disagreement here is we say are  
25 they liable for defective design, and that's it. And

1 then we emphasize the point.

2           What theirs does is it incorporates different  
3 portions of the elements of proof that you have to  
4 establish to get a liability verdict. And apparently  
5 it's the ones that they -- they like and they want to  
6 highlight.

7           So -- so -- so in the previous draft, their  
8 yes and no was not unreasonably dangerous. It was -- I  
9 think it said defect or something. And then -- yeah,  
10 and then they've changed that to -- to today's version.  
11 And the other one said proximate cause and now it's  
12 legal cause, of course.

13           But our problem with this is what we said  
14 yesterday. We basically have 5 combinations here, 5  
15 combinations there, so that's 5 times 5. So that's 25  
16 different variations we can have. Then when you add  
17 what they've done to the punitives, you have another 5  
18 variations. So -- so it is yes or no, but there's  
19 still 5 variations. So 5 times 5 times 5, there's 125  
20 different combinations that the jury would have to --  
21 and -- and -- and some juries could get that right,  
22 Your Honor. But why should we challenge the jury and  
23 risk a potential inconsistent verdict.

24           What they are assuming is that the jury will  
25 either not understand or will disregard the

1 instructions. So they want to repeat the elements on  
2 the verdict form rather than just say if you're liable  
3 or not. And I -- I think it's much better just to do  
4 it the easy way. I gave the example yesterday of  
5 ordering sushi. You know, check the box, away we go.  
6 So that is the primary difference in the two verdict  
7 forms.

8 The other difference is the placement of the  
9 punitive question.

10 MR. HENRIOD: Could we take one at a time?

11 MR. KEMP: Okay. I don't mind doing it one  
12 at a time.

13 MR. HENRIOD: All right. And what they want  
14 to do is hope that the jury looks at this like an  
15 Impressionist painting and just finds liability without  
16 actually walking through the steps that the  
17 instructions require them to do. There are boxes, but  
18 it's not because we made this a complicated case.  
19 They've made it a complicated case, relatively  
20 speaking, by throwing out all of these different  
21 theories, some of which may work together, some -- some  
22 less so. And there are different theories, there are  
23 different alleged defects that the jury could find.  
24 And there may be circumstances where they agree that  
25 some aspect of the coach is defective, and you can call

1 it unreasonably dangerous, which is the term used from  
2 the instructions or we can say it is defective.

3 But the jury can find that an aspect of the  
4 coach is defective as (inaudible) and yet still not a  
5 cause. If the Court looks at the proposed stock  
6 verdict forms in either the new book or the old book,  
7 you'll find that liability or a breach of duty or in a  
8 liability -- in product defect cases, that defect is  
9 followed by causation. Causation is usually broken out  
10 for the jury to walk through those steps. There's  
11 nothing unusual about this, except for the fact that it  
12 accounts for a case that is complicated by how many  
13 different defects they have thrown against the wall.

14 And I understand that because of the  
15 complications in this case, when the jury comes back,  
16 we may have to examine them -- or examine this form  
17 before we discharge the jury. If there is any  
18 inconsistency, it can be dealt with under the procedure  
19 that exists -- exists for exactly that purpose for  
20 trying to resolve any inconsistency before they are  
21 dismissed. But in a case where they're seeking  
22 \$625 million, to assume that the jury will be sloppy  
23 and that's why we want it, I think that's really  
24 misdirected. My concern here is that they are hoping  
25 that the jury will not do the necessary analytical

1 thinking they need do.

2 But even more importantly -- well, nothing is  
3 more important than that.

4 But another issue here is that from our  
5 experience, the supreme court prefers verdict forms  
6 that provide more information not less. Because then  
7 as issues arise, there are different arguments for  
8 judgment as a matter of law on the different defects,  
9 both in terms of duty and causation. Those may arise,  
10 and if there are details in the form, that would make a  
11 new trial unnecessary because they're provided that  
12 detail.

13 So if we have a judgment as a matter of law  
14 issue on one of the defects and we have a sufficient  
15 answer on causation and defect, then we would know that  
16 there is no issue. Or we would know that it can be  
17 pinpointed in terms of its impact on the trial. So the  
18 more information they have, the easier it is to avoid a  
19 new trial if necessary.

20 I know you're not threatened by that; right?  
21 We've had to make tough calls on whether or not there's  
22 a duty --

23 THE COURT: I know.

24 MR. HENRIOD: -- whether or not they're  
25 sufficient --

1 THE COURT: No, that's --

2 MR. HENRIOD: -- all of that is --

3 THE COURT: I understand that you're not --  
4 don't worry. I -- I -- I'm not misunderstanding that,  
5 or at least that's not an issue.

6 MR. HENRIOD: So this will make the impact on  
7 whether or not a new trial is necessary easier for the  
8 Court if they have more information not less.

9 But in the end, we are not asking for  
10 anything more in this breakdown then you typically get  
11 with special verdict forms. And the only complexity  
12 here is created by the number of theories that they  
13 raise.

14 THE COURT: You know what, can we survive a  
15 few more minutes? Okay. I -- I'm going to go do a  
16 little bit of research on the special verdict forms.

17 MR. KEMP: Your Honor, I would read the case  
18 of *Allstate versus Miller*. We both agree that that is  
19 the leading case on point.

20 THE COURT: All right.

21 MR. KEMP: And in that case, the supreme  
22 court said you should break down, I think it was three  
23 or four causes of action. I can't remember. It said  
24 you should break down -- if the plaintiff has more than  
25 one cause of action, we need to know which cause of

1 action they won on. So in that case, the -- the  
2 verdict form just said, We find in favor of plaintiff.  
3 You know, it didn't say which of the three theories,  
4 and I can't remember what the three -- one was  
5 fraudulent concealment. There were three different --

6 THE COURT: *Allstate v. Miller?*

7 MR. KEMP: *Allstate versus Miller.* It's  
8 about five years old.

9 THE COURT: Okay.

10 MR. KEMP: But if you -- if you take a look  
11 at that case, you'll see it just says break the claims  
12 down.

13 THE COURT: I just want to go take a look at  
14 that and special --

15 MR. HENRIOD: Yeah, and -- and that does -- I  
16 don't think it answers this issue about whether or not  
17 causation is also broken down, but -- but it is why the  
18 theories are broken down in plaintiffs' verdict form to  
19 the extent that they are --

20 THE COURT: Okay.

21 MR. HENRIOD: -- (inaudible).

22 THE COURT: And -- and one other thing, I'm  
23 going to take a look at special jury instructions.

24 MR. HENRIOD: Okay.

25 THE COURT: Okay? All right.



1 MR. KEMP: Thank you, Your Honor.

2 THE MARSHAL: Court's in recess.

3 (Whereupon a short recess was taken.)

4 THE COURT: Okay. They're getting the order  
5 prepared.

6 MR. KEMP: Yeah. I think we're close to  
7 agreement on that, Your Honor.

8 (Discussion was held off the record.)

9 THE COURT: Okay. Not a problem.

10 MR. KEMP: Judge, can we just give the  
11 instructions in the order and have her print a set for  
12 everybody rather than try to figure out the order  
13 ourselves?

14 THE COURT: Sure.

15 MR. KEMP: Then we have a nice clean set.

16 (Inaudible.)

17 (Whereupon a short recess was taken.)

18 THE COURT: Okay. All right. We're on the  
19 record. In the meantime, we're going to go back to the  
20 verdict form.

21 MR. KEMP: Your Honor, did you have a chance  
22 to read the *Allstate versus Miller* case?

23 THE COURT: I reviewed it. I didn't read it  
24 in depth.

25 MR. KEMP: So what happened in that case is

1 it was kind of a weird little case, but what -- it was  
2 a big case.

3 MR. HENRIOD: He'll give you more details  
4 than we want to know.

5 MR. KEMP: Yeah. But in any event, in -- in  
6 that case they had some rather unique claims, I would  
7 say, and the -- the supreme court was reviewing the  
8 claims, and they said, oh, we can't tell whether they  
9 found for this person on fraudulent concealment or  
10 negligence or -- what was it not -- not offering the --  
11 they were strange claims, Your Honor. So what the  
12 Court said is when the defendants requested -- has to  
13 be at the defendant's request, you should break down  
14 the claims so you can see what the jury gave the money  
15 for. Okay?

16 When they approached us on the verdict form  
17 and said we want to break down the claims pursuant to  
18 Allstate and Miller, we said sure. And so we broke  
19 down the claims into -- you know, just the five  
20 different claims. That's all that *Allstate versus*  
21 *Miller* requires.

22 Now, their argument is that in addition to  
23 what *Allstate versus Miller* requires, they should have  
24 what is basically a -- basically they're special  
25 interrogatories to the jury by checking boxes. And my

1 objection to it is that what they've done is they've  
2 chosen words or terms that they think the jury will be  
3 hard pressed to find in favor of plaintiff, and they  
4 put them up there, the unreasonably dangerous and the  
5 legal cause. So what they're really trying to do is  
6 kind of really make us win the case more than one time.  
7 So if the jury says on our form, Are they liable for  
8 defective design? Yes or no? You know, we won the  
9 case, right, because we have to assume that the jury  
10 when they get the instructions, first of all, the  
11 Court's going to read them; second of all, they're  
12 going to have their own set of instructions; third of  
13 all, there's not really that many instructions compared  
14 to -- to a lot of cases. So what their argument is, is  
15 that the jury is either going to ignore the  
16 instructions or not understand the instructions or  
17 something, and so we have to put unreasonably dangerous  
18 and legal cause of defect again on the verdict form.

19           The only reason they want to do that is to  
20 get another bite at the jury on both of these things  
21 and emphasize them. Both of those are incorporated in  
22 the definition of what you have to show to -- to hold  
23 them liable. And if you just have these in here, you  
24 know, we could have the ones we like too, you know. Do  
25 you find that Dr. Khiabani was contributory negligent?

1 Yes or no? You know, if they found that he was  
2 contributory negligent, we'd know that we had a problem  
3 because that's not a defense.

4 So see, I could come up with ideas that  
5 would -- would make the verdict form slanted our way.  
6 That wouldn't be hard to do.

7 MR. HENRIOD: Should we just do a subset for  
8 causation under each of yours? Because really --

9 MR. KEMP: Well, causation --

10 MR. HENRIOD: Hold on. Hold on. Causation  
11 is causation --

12 MR. KEMP: So you don't want unreasonably  
13 dangerous? You want --

14 MR. HENRIOD: We can just say defective  
15 there. I mean, I don't care about unreasonably  
16 dangerous necessarily. It's -- it's the language --

17 MR. KEMP: It was defective yesterday and  
18 today it's unreasonably dangerous so -- it was  
19 defective yesterday.

20 MR. HENRIOD: And I said I'm willing to go  
21 back to that. If -- if you're concerned with it,  
22 especially as to my motives, I'm not going to --

23 MR. KEMP: I'm not concerned with your  
24 motives. Your not whose motives I'm concerned with.

25 MR. HENRIOD: Is -- is unreasonably

1 dangerous, we can say defective there.

2 MR. KEMP: Yeah, but that's the fundamental  
3 problem, Your Honor --

4 MR. HENRIOD: But I don't think --

5 MR. KEMP: -- is we are -- yeah, that's not  
6 my problem.

7 MR. HENRIOD: Okay.

8 MR. KEMP: My problem is your suggestion  
9 assumes that the jury is not listening to the jury  
10 instructions because there's different -- to -- to win  
11 the case, we have to -- there's other things in the  
12 jury instructions. We're not putting all of them  
13 unreasonably dangerous, legal cause, the -- you know,  
14 the other elements you read in the court. We're just  
15 putting the two they like, Your Honor. So that's my  
16 objection.

17 MR. HENRIOD: All I want is to break out  
18 causation and defect as is typically done. And we can  
19 on theirs as a subset to their 1, 2, 3, we can break  
20 out whether or not they -- they find causation there.  
21 I mean, I don't -- I don't love check boxes in  
22 particular. I just thought that that was the simplest  
23 way to do it.

24 What I really care about is just making sure  
25 that they are clear about finding causation as well as

1 just saying repeatedly in so many special verdict  
2 forms.

3 MR. KEMP: Your Honor, they have so many  
4 instructions on causation already, and -- and to  
5 suggest that this is the way we traditionally do it,  
6 this verdict form of ours is patterned after the one we  
7 used in 2010 in the Teva case, patterned after the one  
8 we gave to Judge Israel in another Teva case.  
9 Pattern -- it's -- it's the same form that's what --

10 MR. HENRIOD: We objected to that one in the  
11 Teva.

12 MR. KEMP: Judge -- Judge Walsh gave it.  
13 Judge Israel gave it. We -- we settled the case in the  
14 middle of the third trial. Then we did the Actos case.  
15 We had the same kind of jury verdict form in the Actos  
16 case.

17 MR. HENRIOD: Judge Walsh didn't give it.

18 MR. KEMP: And in the Actos case, we used the  
19 same form. In the first Actos case, they won. They  
20 actually won using this form. There's a defense  
21 verdict. So to say that it was slanted in favor of  
22 plaintiff, they won using this form.

23 MR. HENRIOD: Certainly there's no  
24 trickery --

25 MR. KEMP: Right. We used the same form in

1 the HMO case with Judge Williams. So this -- this  
2 is -- this is the form used.

3 And to suggest that, oh, if the jury comes  
4 back with an inconsistent verdict, everyone's going to  
5 hold hands and send them back in, that's not what's  
6 going to happen, Your Honor. You're going to hear  
7 immediate motions for -- for a mistrial from this side  
8 saying that the inconsistency can't be cured.

9 So why create a potential inconsistency in  
10 the first place? Why make it so the jury's got to have  
11 a 20 -- 125 to 1 shot in coming up with a harmonious  
12 decision? I mean, that's -- that's the real risk here?

13 And -- and so that's why I would submit that  
14 we use our form, Your Honor. It's simple. It  
15 satisfies *Allstate versus Miller*. It's been used by at  
16 least eight different judges in -- in the more recent  
17 cases I've given to you. You know, counsel's candid.  
18 He admits it's been used. This is -- this is the --

19 MR. HENRIOD: Not over objection.

20 MR. KEMP: Well, okay. I'm not saying --

21 MR. HENRIOD: Over objection.

22 MR. KEMP: Yeah, and -- and you won one of  
23 the cases. He actually won one of the cases. He got a  
24 defense verdict. So to suggest that it's a pro  
25 plaintiffs' verdict form, I don't think you can make

1 that suggestion.

2 So in any event, Your Honor, that's why we  
3 want the form in the fashion --

4 THE COURT: I understand. I -- I am -- I --  
5 I am concerned that I -- I understand that other judges  
6 have used this, Mr. Kemp. But I am concerned that it  
7 may be too -- a bit too simple. Like, it -- there's  
8 not that much information, so I would like to see maybe  
9 some sort of a hybrid of this.

10 MR. KEMP: Your Honor, the way to do that --

11 THE COURT: You can both -- that you can both  
12 agree to with the right language. Because this --  
13 this --

14 MR. KEMP: Your Honor, I don't see -- I don't  
15 see how you can say are they liable, and then you have  
16 proximate cause when proximate cause is already part of  
17 the liability. The only possible hybrid I can think of  
18 is if you say, is MCI liable, unreasonably dangerous,  
19 and legal cause, in parens, for defective design, or  
20 something like that. You know, add it in the question.

21 That's the same thing where the bus is  
22 defective or MCI.

23 Change the MCI to bus, you wouldn't agree to  
24 that; right?

25 (Discussion was held off the record.)



1 MR. KEMP: That's my motor coach joke. No --  
2 no one thinks it's funny but me. Motor coach  
3 (inaudible). Motor sports. I think it's funny. No?

4 THE COURT: Never heard the song.

5 MR. KEMP: It was a No. 1 song last year by  
6 far.

7 MR. HENRIOD: Stan joked on Sunday, we don't  
8 all own radio stations.

9 MR. KEMP: Okay. All right.

10 THE COURT: I didn't hear it.

11 (Discussion was held off the record.)

12 THE COURT: Is anything changing on your  
13 computers? Mine says it's shutting down and going to  
14 restart.

15 (Discussion was held off the record.)

16 MR. HENRIOD: I still object, but not meanly.

17 THE COURT: Okay. We're -- we're making  
18 progress. We're making progress.

19 MR. KEMP: Your Honor, the change I made was  
20 where it says, Is MCI liable for defective?" And we  
21 just had right-side blind spot in parentheticals. I've  
22 added to the parenthetical, Did a right-side blind spot  
23 make the coach unreasonably dangerous and legally cause  
24 Dr. Khiabani's death? So I have expanded the  
25 parenthetical to incorporate the two things he wanted,

1     unreasonably dangerous and --

2             MS. WORKS:   And a legal cause of  
3     Dr. Khiabani.

4             MR. KEMP:    Yeah, a legal cause; right.

5             MS. WORKS:   We would actually submit "and a  
6     legal cause of Dr. Khiabani's death," not legally  
7     caused just so we account for the substantial factor.

8             MR. HENRIOD:  I still think we're entitled to  
9     have a breakdown of specific questions, but this is  
10    much closer.

11                         (Discussion was held off the record.)

12             THE COURT:   Counsel, just so you know, my  
13     computer is shutting down by itself.

14             MS. WORKS:   Is that a sign?

15                         (Discussion was held off the record.)

16             THE COURT:   After we are done with this  
17     trial, we are going to have to go out and celebrate.

18                         (Discussion was held off the record.)

19             MR. KEMP:    Basically what we are doing -- you  
20     asked me if I was ready.

21             THE COURT:   Are we on now?  No?  Okay.

22             MR. HENRIOD:  So anyway in Cafe Moda, we go  
23     and we ask the jury what's the portion --

24             THE COURT:   We're ready.  Sorry.

25             MR. KEMP:    Your Honor, what we've done is

1 we've taken the unreasonably dangerous and legal cause  
2 boxes and we have put them in a parenthetical next to  
3 each one of the questions. So, for example, just using  
4 proximity sensors because it's on the screen, Is MCI  
5 liable for defective design? (Did the lack of  
6 proximity sensors make the coach unreasonably dangerous  
7 and a legal cause of Dr. Khiabani's death?) So we've  
8 got both his unreasonably dangerous and legal cause,  
9 and we're putting that on the first four.

10 And then the warning thing is really a  
11 heeding thing. It's not a legal cause thing. So we  
12 can change the wording on that to say, Is MCI liable  
13 for failure to warn? And then a parenthetical saying  
14 (Did MCI fail to provide an adequate warning that would  
15 have been acted upon?) And if they didn't want -- I --  
16 I rather have heeded personally.

17 THE COURT: Wasn't heeded.

18 MR. KEMP: Well, what happened, if you  
19 recall, is heeded was the term that was used in the --  
20 I can't think.

21 MR. HENRIOD: In Ribeiro.

22 MR. KEMP: Ribeiro. In Riviera versus Philip  
23 Morris the term "heeded" was used.

24 THE COURT: Yes.

25 MR. KEMP: So Mr. Polsenberg on Sunday said

1 he didn't like the word heeded. He wanted to change to  
2 acted in accordance or whatever.

3 MR. HENRIOD: So esoteric.

4 MR. KEMP: Yeah, it's a little esoteric,  
5 so --

6 THE COURT: Although Mr. Hubbard said he  
7 would have heeded it.

8 MR. KEMP: Yeah.

9 THE COURT: On the -- on the stand; right?

10 MR. KEMP: Maybe that's why Mr. Polsenberg --  
11 anyway, so they say, Did MCI fail to provide an  
12 adequate warning that would have been acted upon? I'm  
13 fine with that. You know, I think heeded would be  
14 better, but I'm fine with that.

15 MR. HENRIOD: I think we still need a  
16 separate question, but I think that this gets us much  
17 closer. My -- my big remaining problem with this,  
18 though, is --

19 Do we know now agree on placement?

20 MR. KEMP: Yeah, placement of the punitive  
21 damages instruction, I've agreed to -- and -- and --  
22 and I told him before, and I'll say it one more time,  
23 that I think having the punitive damages at the end  
24 creates a risk that the jury's going to pack the  
25 compensatory with punitives not thinking that, oh, you

1 know -- you know, I've seen that done before. All  
2 right? So that's why I think the preferred method is  
3 to have the punitive before the compensatory. But they  
4 want it at the end, they want it at the end. They're  
5 the ones that -- that I think are adversely affected by  
6 it.

7 MR. HENRIOD: And I do not question  
8 Mr. Kemp's good faith in the suggestion. But yes, we  
9 prefer to have it at the end.

10 But the wording we -- we have a problem with,  
11 Are they liable for punitive damages? I think like all  
12 of the other sections, it ought to track the language  
13 from the jury instructions which is why we propose in  
14 our verdict form, the interrogatory, Do you find by  
15 clear and convincing evidence that the defendant acted  
16 with malice in its conduct relating to the defect that  
17 caused Kayvan Khiabani's death? I think it should  
18 include clear and convincing evidence. It should  
19 include malice. If -- if that's not enough -- if -- if  
20 that is too high of a hurdle for this jury to get over,  
21 then it's improper to award punitive damages.

22 I also think that we ought to have the jury  
23 specify what defect the malicious conduct related to  
24 because, otherwise, if they are finding that we are a  
25 bad company for our handling of a defect that wasn't

1 even a cause of the injury, then we're into a classic  
2 State Farm, BMW type issue where they would be awarding  
3 punitive damages for something unrelated to the harm.  
4 So I think it needs to include malice, it needs to  
5 include clear and convincing evidence, and it ought to  
6 have them tell us what defect the bad conduct relates  
7 to.

8 MR. KEMP: Your Honor, the malice, we talked  
9 this yesterday. They like malice. We like conscious  
10 disregard. So the jury instruction has both in there.  
11 I don't -- I don't think the defendant should be able  
12 to pick out the word they like when we can't pick out  
13 the word we like. So I would object to that.

14 On his second point that it should specify  
15 which defect, if he wants four questions that say,  
16 Question No. 1: Is MCI liable for punitive damages  
17 (right-side blind spot); 2: Is MCI liable for punitive  
18 damages (lack of proximity sensor); 3: Is MCI liable  
19 for punitive damages (lack of rear wheel protective  
20 barrier); and 4: Is MCI liable for punitive damages  
21 (aerodynamic design), I have no objection to that. I  
22 have no objection to four punitive questions like that.

23 MR. HENRIOD: We need them as separate  
24 questions.

25 MR. KEMP: I -- I have no objection, Your

1 Honor. If they want to raise them that way, that's  
2 fine with me. So we have four punitive questions read.

3 MR. HENRIOD: But then we would -- we would  
4 need to specify for conduct relating to. I mean, it  
5 would need to be -- the point of the question would  
6 need to be more express. They would have to understand  
7 what's being asked. They would have to understand that  
8 they're being asked about conduct in relation to the  
9 way that a certain aspect was handled.

10 MR. KEMP: Well, if you put right-side blind  
11 spot --

12 MR. HENRIOD: And I don't think that's clear,  
13 Are you liable for (blind spot).

14 MR. KEMP: You did it on -- that's exactly  
15 what your current form says. Your current form says  
16 that. You say right-side blind spot? Yes or no?  
17 That's what you say in the current form.

18 MR. HENRIOD: Hold on. Hold on. Please  
19 indicate for what defects you find by clear and  
20 convincing evidence that the defendant acted with  
21 malice.

22 MR. KEMP: I'm not talking about the malice.  
23 I'm asking -- I'm -- I'm talking the way you  
24 described --

25 MR. HENRIOD: Okay. Well, here's the thing:

1 There's a question above those boxes. (Inaudible.)

2 MR. KEMP: There's a jury instruction that  
3 defines malice and clear and conscious disregard too.

4 Judge, if he wants -- if he wants each one of  
5 them separated for separate punitive damages finding,  
6 I'm fine with that. That's what he's asked for.

7 MR. HENRIOD: As long -- it has to be crystal  
8 clear what the question is. And if the question is  
9 similar to, indicate it -- each one would have to  
10 specify -- so what we're talking about conduct --

11 MR. KEMP: Judge, he doesn't have all this  
12 conduct stuff in his current form. He has right-side  
13 blind spot. So -- so his current form was fine.

14 MR. HENRIOD: What's wrong with the  
15 simplicity of what I have here in 3?

16 THE COURT: I -- I don't -- I don't think we  
17 have to talk about anything in punitive (inaudible).

18 MR. KEMP: Have to do what? Just leave --  
19 leave it as punitives?

20 THE COURT: I mean, I -- I -- I don't -- I  
21 don't understand, Mr. Henriod, why -- why we're -- I  
22 need to understand why you're -- you're adding to the  
23 punitive damages that you have already offered.

24 MR. HENRIOD: No, I -- I'm fine with giving  
25 the one that I've offered.



1 THE COURT: Okay. But --

2 MR. KEMP: Well, the one he's offered has the  
3 malice question, too, on it.

4 THE COURT: Right.

5 MR. KEMP: That's the problem. I've given  
6 him everything he's asking for in terms of  
7 (inaudible) --

8 MR. HENRIOD: If you're okay with the check  
9 box and we just do conscious disregard instead of  
10 malice, you okay with that? If we use --

11 MR. KEMP: No, because we have one, two --  
12 we -- we multiply the potential for inconsistent  
13 verdict. That's what -- you have one, two, one, two  
14 one, two.

15 MR. HENRIOD: I'm not even asking causation  
16 here. Down here I'm just saying, was -- was this  
17 defect related to malicious conduct? But if you want,  
18 we can even say conscious disregard.

19 MR. KEMP: Here's -- here's what --

20 MR. HENRIOD: I mean, I do think that the  
21 boxes there work very well.

22 MR. KEMP: Is MCI liable for punitive  
23 damages -- one, two, three, four -- I guess there's  
24 five, five of them. Just say yes or no. That way  
25 we'll have a breakdown on each one. See?

1 MR. HENRIOD: Is that not what we're doing?  
2 What do you think?

3 MR. KEMP: Well, it is what you're doing  
4 here, but where we have the yes or no, they're not in  
5 the boxes. The only difference is you don't have the  
6 malice.

7 See what I'm saying?

8 MR. HENRIOD: Oh, okay. What if we were to  
9 say, Do you find by -- because I think this -- this  
10 tracks (inaudible) you edit the proposed verdict forms.  
11 Do you find by clear and convincing evidence --

12 MR. KEMP: That's incorporated in the part of  
13 the jury instruction. That's -- that's what you are  
14 doing.

15 MR. HENRIOD: Well, no, because you're  
16 frequently asking do you find by a preponderance of the  
17 evidence. Now, if -- if malice is the problem, then it  
18 seems like the only thing we -- we would need to  
19 change, Will, is from malice to get a little bit more  
20 specific to conscious disregard.

21 (Discussion was held off the record.)

22 MR. HENRIOD: Do you want to assess punitive  
23 damages --

24 MR. KEMP: Yeah, okay.

25 MR. HENRIOD: Yeah, with a little more

1 precision, then --

2 MR. KEMP: What's your proposal?

3 MR. HENRIOD: So this.

4 MR. KEMP: Mm-hmm.

5 MR. HENRIOD: And if you don't like malice,  
6 you want to go with the test for implied malice, if you  
7 want to say conscious disregard there?

8 MR. KEMP: Conscious disregard -- what about  
9 conscious disregard regarding -- where we at?  
10 Conscious disregard regarding right-side blind spot.  
11 Conscious disregard --

12 MR. HENRIOD: Right. In its handling of.

13 MR. KEMP: Clear and convincing I believe is  
14 conscious disregard.

15 MR. HENRIOD: In its handling of?

16 (Discussion was held off the record.)

17 THE COURT: Counsel, excuse me. I don't use  
18 the gavel, but are we ready to go on the record or no?

19 MR. KEMP: Yes, Your Honor.

20 THE COURT: You close?

21 MR. KEMP: Yes, we can email them now.

22 THE COURT: Okay. All right. All right.

23 (Discussion was held off the record.)

24 THE COURT: I can't go on my computer.

25 Going back on the record. We're back on. We

1 have further arguments?

2 MR. KEMP: Yeah, we have our arguments  
3 structured. So I'm doing the liability argument for  
4 the compensatory. I'm doing the liability argument for  
5 the punitives, which, you know, interrelated issues.  
6 Same evidence for both issues. And then I'm doing the  
7 damages argument for Keon and the estate of  
8 Dr. Khiabani. All Mr. Christiansen's doing is the  
9 damages argument for his two clients. That's all he's  
10 doing. Okay? So to suggest that they should have two  
11 attorneys -- they have one defendant, and they want two  
12 attorneys for the liability phase when we have two  
13 clients and we're only having one attorney for the  
14 liability phase.

15 Where is that an unlevel playing field? I  
16 don't see it.

17 MR. HENRIOD: When we go back through all of  
18 the arguments that you heard from Mr. Roberts, that you  
19 heard from Mr. Barger, so we -- we can go through that  
20 again. I understood that Your Honor had taken it under  
21 advisement and was going to issue a ruling. If you  
22 want to entertain argument all over again, we can go  
23 through that.

24 MR. KEMP: Your Honor --

25 MR. HENRIOD: I don't know if you want to.

1           MR. KEMP: If it's equal, let Mr. Roberts  
2 address the same damage issues that Mr. Christiansen is  
3 going to address. That would be equal. What they want  
4 is they want Mr. Roberts and Mr. Barger both to address  
5 the issues I'm addressing, one person.

6           So how is that equal? That's --

7           THE COURT: See, I think -- I -- I think that  
8 the disparity comes with the jury seeing two attorneys  
9 versus one attorney, and that that may -- that may  
10 somehow subconsciously affect them, and that concerns  
11 me.

12           However, I do agree about the topics. I  
13 think that's reasonable. So I'm -- I'm all right with  
14 having two lawyers, to be fair, like in -- in opening,  
15 just so that it doesn't look -- look too heavy,  
16 understanding that the reason why they have two is  
17 because they have different clients. Okay? But I do  
18 agree with Mr. Kemp that it -- it should be divided the  
19 same way that they're dividing it.

20           MR. KEMP: That's the fair way to do it.

21           THE COURT: That's reasonable. I do. I -- I  
22 think that's a fair way because, truly, it is a  
23 concession to have two attorneys argue -- no matter  
24 what they do in this courthouse, what the other judges  
25 do or don't do, I -- I do think that generally, I would

1 only have one arguing. Given the nature of this case,  
2 I don't want that to take you off balance in closing.  
3 But do I agree that the arguments should be as Mr. Kemp  
4 suggests. I think that's fair.

5 MR. HENRIOD: Yeah. And -- and it -- it --  
6 it will just be damages and -- including punitive  
7 damages. I mean, I understand that that is -- that is  
8 the allocation.

9 THE COURT: What is your suggestion?

10 MR. HENRIOD: I -- I understand Mr. Roberts  
11 is going to speak to -- to damages and then to -- to  
12 the propriety of punitive damages.

13 MR. KEMP: Well, Your Honor, that's the whole  
14 problem.

15 THE COURT: Right.

16 MR. KEMP: Yeah, that's --

17 THE COURT: Right.

18 MR. KEMP: -- that's --

19 MR. HENRIOD: Well, no. As we keep saying in  
20 all of these instructions, right, when it comes to  
21 whether or not the product is defective and whether or  
22 not there's strict liability, who knew what and when is  
23 actually not at issue. I mean, they are pretty  
24 distinct issues. The compensatory liability for  
25 compensatory damages in a product defect claim doesn't

1 have anything to do with the intentions of the  
2 manufacturer or seller or with whether or not they  
3 acted negligently or in good faith. It's just about  
4 whether or not the product is defective. Whether or  
5 not the company acted appropriately had nothing to do  
6 with the strict liability claim. Who, what, and when  
7 is just punitive damages. If there were punitive  
8 damages, none of that body of evidence would come into  
9 the case. They don't overlap here.

10 MR. KEMP: Your Honor, it's the same issue.  
11 It's Mr. -- and I'm going to argue both -- both of it.  
12 I'm doing both of it. So why can they have someone  
13 come in and say, oh, it's a different issue, but yes,  
14 they're using one attorney, and we get two?

15 MR. HENRIOD: It doesn't make it any less  
16 distinct an issue. In a product defect case, those are  
17 totally distinct issues.

18 MR. KEMP: Your Honor, one defendant does not  
19 get two attorneys just because there are two issues, or  
20 if there's five issues, they get five attorneys. The  
21 reason they are -- they're arguing for a level playing  
22 field is that they're saying that we're both arguing  
23 the same subject matter. That was their argument.  
24 Okay? We're not going to argue the same subject  
25 matter. If you let them have two attorneys for the

1 same subject matter, that is allowing a -- a tilted  
2 playing field their way.

3 THE COURT: No.

4 MR. HENRIOD: If Pete wants to do punies,  
5 that's fine.

6 MR. KEMP: Well, Your Honor, come on.

7 THE COURT: No, no, no. No. I -- I -- I  
8 know it's getting -- I know it's very late. Not  
9 getting late. I know it's very late, and -- but I --  
10 I -- I agree with what Mr. Kemp is saying. I -- I  
11 don't think it's reasonable that my effort to provide a  
12 level playing field allow for argument that's going to  
13 not balance things out.

14 MR. KEMP: Judge, can I approach with the  
15 special verdict form?

16 THE COURT: Yes. Thank you.

17 MR. HENRIOD: So then practically speaking,  
18 where does that leave us? What can -- what can I tell  
19 them? That Mr. Roberts is limited just to the amount  
20 of compensatory damages?

21 MR. KEMP: For the two plaintiffs that  
22 Mr. Christiansen has.

23 MR. HENRIOD: Or just those two plaintiffs?

24 MR. KEMP: That's all Mr. Christiansen is  
25 going to argue.



1           MR. HENRIOD: All right. So now he can't  
2 even address all compensatory damages?

3           MR. KEMP: Is --

4           MS. WORKS: Mr. Christiansen wasn't allowed  
5 to address all compensatory damages in the opening, so  
6 to keep it fair, that would be correct.

7           MR. KEMP: You objected to it.

8           MS. WORKS: And he was informed of that the  
9 day before his opening, so ...

10          MR. KEMP: So fairness is fairness.

11          MR. HENRIOD: Is that a yes?

12          THE COURT: Yes.

13          MR. KEMP: Okay. Your Honor, trying to get  
14 out of here --

15          THE COURT: Yes.

16          MR. KEMP: -- in the near future. Okay.

17          So we take -- this is the special verdict  
18 form we add.

19          THE COURT: I'm sorry?

20          MR. KEMP: Do you have -- do you have it?  
21 Okay.

22          So 1, 2, 3, 4, and 5 we have changed the  
23 language to accommodate their suggestions.

24 Compensatory damages is exactly the same. We have  
25 moved the punitive questions to the back, and we have

1 added their request to have the punitives tied  
2 specifically to a defect. So we've got punitive  
3 questions for each one of the five defects. So I  
4 think -- you know, like I said before, they don't love  
5 it, but, you know, he can hold his nose with less  
6 vigor.

7 And we have the -- the form and signature on  
8 the next page. We're going to try to get it up.

9 THE COURT: I think that's a good idea.

10 MS. WORKS: Just waiting to make sure Your  
11 Honor didn't have additional changes.

12 THE COURT: All right. I think this -- this  
13 looks pretty good.

14 MR. HENRIOD: I'm still reviewing, Your  
15 Honor.

16 THE COURT: Okay.

17 (Discussion was held off the record.)

18 THE COURT: We're off.

19 (Whereupon a short recess was taken.)

20 MR. KEMP: Judge, I started out -- oh, sorry.

21 MR. HENRIOD: It's not a car dealership. I  
22 mean, I appreciate that -- that Mr. Kemp is suggesting  
23 changes.

24 THE COURT RECORDER: We are on the record.

25 THE COURT: We on now? Great. Back on the

1 record.

2 MR. HENRIOD: I understand that he's offered  
3 to change it, but a change that actually makes it worse  
4 doesn't help me. And asking them five times if they  
5 want to the award punitive damages makes this worse not  
6 better.

7 We do need specificity to make the jury  
8 take -- to instruct the jury to -- to prompt them to  
9 give us some specificity as to which of the defects  
10 they have in mind when they are saying that our conduct  
11 was in conscious disregard, that it was malicious, that  
12 it was any of the different nasty things that would  
13 make us liable for punitive damages. But merely asking  
14 for that specificity doesn't require us asking them  
15 five times if we're liable for punitive damages.

16 I think that our question here, the one that  
17 we propose in No. 4, our Question 3 on page 4 handles  
18 it efficiently. I think that it is sleek. I think  
19 that it is asking for no more information than we need.  
20 I think that it is simple, and I think that it is not  
21 prejudicial. It does not ask five different times are  
22 we liable for punitive damages.

23 MR. KEMP: Your Honor, I'm trying to be  
24 reasonable. Okay? I started out with, Is MCI liable  
25 for punitive damages? That's where we started. And

1 then they said that they wanted to add the five  
2 categories to it. And I said, okay, can we have five  
3 questions? And they said, Good, good idea. We drafted  
4 it up, and now here it is --

5 MR. HENRIOD: No.

6 MR. KEMP: That's -- that's exactly what  
7 happened. The record will reflect what happened.

8 So in any event, Your Honor, I think either  
9 we should go back to the original proposal, Is MCI  
10 liable for punitive damages, stick with the -- the five  
11 questions that they -- they were really the originator  
12 of that. But either we should do it, Is MCI liable for  
13 punitive damages, yes or no, and be done with it, or we  
14 should break it down into these five areas.

15 To suggest we go back to the original place  
16 we started, which was having ten boxes, it'd just be  
17 confusing, Your Honor. We've got the analysis thing  
18 still there. I mean, I thought we were done.

19 MR. HENRIOD: Yeah, and I feel like no good  
20 deed goes unpunished.

21 MR. KEMP: I feel that way.

22 MR. HENRIOD: I'm willing to look at  
23 alternatives. And now this is being treated as if  
24 I've -- I've been in some deal, I don't like the  
25 outcome, so I've gone back on a deal. I was -- I was

1 open to how this might look. Now that I see it; it  
2 does not work. So no, I -- I -- I cannot agree to ask  
3 them five times if punitive damages should be awarded.

4 MR. KEMP: Well, let's just one it one time,  
5 Your Honor.

6 MR. HENRIOD: I don't think it's too much --  
7 what's that?

8 MR. KEMP: Let's just do it one time.

9 MR. HENRIOD: I think we ought to do it one  
10 time. And I don't think that it would be too much to  
11 add in the subquestion, or the subdirection asking them  
12 to specify, very briefly, which defect they have in  
13 mind. I don't see what is so cumbersome about that.  
14 I -- I really don't see what the problem with that is  
15 at all. I have not heard what the problem with that  
16 is.

17 MR. KEMP: The first problem is you have  
18 malice here not conscious disregard. You have clear  
19 and convincing evidence again. You're trying to  
20 incorporate the jury instructions.

21 The second problem is you create the risk of  
22 an inconsistent verdict with five, five. And so I'm  
23 willing to ask five questions, Your Honor. I said I  
24 am. I would rather ask just the one, but it should be  
25 one way or another.

1 MR. HENRIOD: I don't see what the danger is  
2 for an inconsistent verdict, that it -- is it the  
3 yes/no that's too complicated for them? Should we just  
4 leave those blank spaces?

5 Malice is -- is the standard they have to  
6 meet. And it is from the instructions, just like legal  
7 cause is, just like unreasonably dangerous is, just  
8 like all of these terms that we're instructing them on  
9 that we're then trying to correlate to the questions  
10 they're going to have to answer.

11 MS. WORKS: Then, Judge, we should be  
12 instructing them with respect to the compensatory  
13 damages that did plaintiffs prove more likely than not,  
14 because I like that standard better --

15 MR. HENRIOD: They were (inaudible) by a  
16 preponderance of the evidence, that's fine.

17 MR. KEMP: Judge, this is a verdict form.  
18 It's not a --

19 MS. WORKS: And it just unnecessarily  
20 complicates things.

21 MR. KEMP: -- reiteration of the  
22 instructions.

23 MR. HENRIOD: If you want to put in  
24 preponderance of the evidence, that actually makes  
25 perfect sense, and I'm happy to do it.

1           MR. KEMP: Just a verdict form. Okay? I  
2 don't care which way they do it, very simple one  
3 question or the five that -- that was a compromise  
4 proposal. But it should be one or the other and we  
5 should get out of here.

6           MR. HENRIOD: It's a verdict form in a  
7 \$625 million case.

8                     (Discussion was held off the record.)

9           MR. KEMP: And, Your Honor, if you'd like to  
10 take five, I have to use the restroom.

11          THE COURT: All right. Take five. Then  
12 we're going to wrap it up.

13                     (Whereupon a short recess was taken.)

14          THE COURT: It's time to wrap this up.  
15 Before we're on, do you remember what time we're  
16 supposed to be here tomorrow?

17          MR. KEMP: You said 8:00, but I don't see the  
18 need to be here at 8:00 now because this is what we  
19 were going to do at 8:00. So I think we can come at  
20 9:00.

21          MS. WORKS: I think we told the jury 9:30.

22          MR. KEMP: 9:30.

23          MS. WORKS: So we can be here at 9:00.

24          MR. KEMP: I'm here probably 8:30, and we  
25 send it out, Your Honor.

1           MR. HENRIOD: And I'm not just saying this to  
2 make a record. I'm really not. We just let them know  
3 at 11:00 o'clock who was allowed to argue this in a  
4 \$625 million case. They need the time to prepare. I  
5 think we need to do this on Friday. I don't think -- I  
6 don't think in this -- spare me. I don't think in a  
7 case where this much is at stake, where punitive  
8 damages really have a quasi-criminal aspect to them,  
9 we're talking about a half a billion dollars after a  
10 six-week trial. We appreciate how long we have worked  
11 here. I appreciate that Your Honor has worked hard to  
12 figure out where that line is, but time is needed.

13           And I think that the prejudice in forcing  
14 this through now without what ought to be more than  
15 sufficient -- which ought to be sufficient time for  
16 them to prepare, I really think is unfair this late in  
17 the game. I think with this amount at stake with  
18 punitive damages in general, I think it does restrict  
19 the Court's discretion on this. If -- if the ruling is  
20 that Mr. Roberts can only talk about compensatory  
21 damages as to one client -- or, I'm sorry, as to two,  
22 but not even to every -- not even to all of those  
23 elements of compensatory damages, we are trying to  
24 shoehorn into a small amount of time something that is  
25 really, really important.



1           We have that heightened standard that I still  
2 am not quite sure what Lee can argue. Pete's client is  
3 what, the estate of Aria and the estate -- the estate  
4 of one --

5           MS. WORKS: The estate --

6           MR. HENRIOD: -- one of the heirs.

7           MS. WORKS: The estate of Katy Barin and Aria  
8 Khiabani.

9           MR. HENRIOD: Okay. So you have one of the  
10 heirs and you have the estate. You have an heir with  
11 the compensatory damages and you have the estate with  
12 punitive damages. Your Honor, I think we slow down one  
13 judicial day. \$625 million punitive damages after a  
14 six-week trial.

15           Again, I don't mean to disrespect how hard  
16 the Court has worked. But the stakes here are massive.  
17 We're talking about a day and we're talking about  
18 adequate time to prepare --

19           MR. KEMP: Your Honor --

20           MR. HENRIOD: -- not just making a record. I  
21 think this is really big.

22           MR. KEMP: Your Honor, Mr. Barger did not  
23 make that request until 6:00 o'clock today.  
24 6:00 o'clock today, he made this request that they can  
25 have two attorneys. We were supposed to do the closing

1 argument yesterday. That was the original plan. So  
2 for them to suggest that they haven't had adequate time  
3 to prepare their closing argument, when I've been here,  
4 from 5:00 to 11:00 while they've been working on their  
5 closing, I haven't been able to work on mine. I'm not  
6 complaining about it.

7 Your Honor, I think the real problem is the  
8 problem of a potential jury. The one juror's got to  
9 leave. I don't know what the situation is of the other  
10 jurors, but to suggest that we should all of a sudden  
11 continue the trial another day because they, at  
12 6:00 o'clock tonight for the first time, raised this  
13 two-attorney argument, that's just not appropriate,  
14 Your Honor. That's not appropriate.

15 Why do we stay here till 11:00 o'clock  
16 tonight to get this done? I mean, that's why I stayed.  
17 That's why I'm not practicing my closing statement. It  
18 could use some practice. You know, it could use some  
19 practice. But I'm ready to go because I know we've had  
20 the jury here longer than we told them.

21 THE COURT: Yes.

22 MR. KEMP: We have a couple jurors, or at  
23 least one I know of that has some spring break plan.  
24 So I think it's time to roll.

25 And, you know, to suggest that Mr. Roberts

1 and Mr. Barger need another day to prepare. I -- I,  
2 you know --

3 MR. HENRIOD: They were under the  
4 impression -- they were under the impression that this  
5 would be allowed for a while. I was at the bench last  
6 week where we were talking about what we should tell  
7 the jury in terms of how long, and we didn't tell them  
8 Wednesday. We said through the end of next week, to be  
9 safe. This is not a trial continuance. This is still  
10 within that --

11 THE COURT: I told them Wednesday.

12 MR. HENRIOD: And that was an ambition,  
13 although we prepared them for --

14 THE COURT: I was told Wednesday --

15 MR. HENRIOD: -- it being through the end of  
16 this week.

17 THE COURT: -- and I know I said Wednesday  
18 because I said it with concern.

19 MR. KEMP: And the only reason we lost a lot  
20 of time is we've had the issues with -- with  
21 Dr. Krauss, who -- was created by the defense.

22 MR. HENRIOD: No.

23 MR. KEMP: Then we had the issues --

24 MR. HENRIOD: No.

25 MR. KEMP: -- issues with Mr. Hoogestraat

1 created by the defense. That's why we lost two days  
2 this week, Your Honor.

3 MR. HENRIOD: No. No. The issue is not  
4 created by the defense --

5 THE COURT: We're not going to argue.

6 MR. HENRIOD: -- because we had a ruling --

7 THE COURT: We're not -- wait. I'm sorry to  
8 cut you off. I don't want to be disrespectful because  
9 you know I always treat the parties with respect. I  
10 really try to. And that's just who I am. But I -- I  
11 am going to cut you off because it's 11:15 in the  
12 evening. Okay?

13 And so I understand your point, Mr. Henriod.  
14 My thought is perhaps we should go back to one --  
15 one -- one attorney, then. Because I'm not going to  
16 skip a day. I think it -- I think it would be  
17 inappropriate to do that. With this jury, we told them  
18 maximum five weeks. We're on Week 6. And we -- we've  
19 had so many other issues come up.

20 So we start tomorrow. And I do see what --  
21 your point, but I -- I think it's imperative that we  
22 start tomorrow. And I think it's inappropriate to keep  
23 this jury waiting any longer. And I'd rather go back  
24 to one lawyer as Mr. Barger I think understood he was  
25 going to have to do that. Until he spoke this evening,

1 I was under the impression --

2 MR. KEMP: Why didn't he ask? He could have  
3 asked, you know, Monday.

4 THE COURT: So either -- either we go  
5 tomorrow or -- either way. Okay? That's a decision  
6 that -- that counsel's going to have to make. I will  
7 allow two the way that I've said or we go back to one.  
8 But we start tomorrow, and I want to finish this now  
9 because it's time. All right?

10 So with respect to the punitive damages,  
11 frankly, I'm looking at the defense verdict, and it  
12 looks to me like it's imposing -- the way that it's --  
13 the way that it's set up, it seems like it's imposing  
14 different tests. It -- it looks like it's -- it's --  
15 it's extremely complicated, in my view. And I -- I  
16 understand Mr. Henriod's issue with respect to the five  
17 times question -- the five times asking liable for  
18 punitives. So I think we go back to a more simple is  
19 MCI liable for punitive damages like the plaintiffs  
20 proposed at first. And then yes or no. And then  
21 perhaps -- I think this should be all right -- if so,  
22 on what theory?

23 MR. KEMP: Or theories?

24 THE COURT: Or theories.

25 MR. HENRIOD: And then -- and then break

1 it -- break down the -- the list with (inaudible)  
2 or -- or -- or --

3 THE COURT: No. No, I --

4 MR. HENRIOD: Just the line, kind of an  
5 interrogatory line?

6 MR. KEMP: I'm willing to give him his  
7 choice. He can either have the one or he can have the  
8 five. I mean, let him make the call.

9 MR. HENRIOD: I'm just asking for the format  
10 of -- of the response that is being elicited. If so,  
11 what theory? Is it then a line where we ask them to  
12 write it out, or is it a list? That's -- that's my  
13 question.

14 MR. KEMP: If you want a list, here's a list  
15 right here.

16 THE COURT: It could just be what theory  
17 with -- with the five different theories written  
18 down --

19 MR. KEMP: Judge, you're better --

20 THE COURT: -- or -- or not.

21 MR. KEMP: You're better off having them do  
22 it the way we were having before, having the five  
23 questions, because then you have a clear yes or no. I  
24 mean, that's --

25 THE COURT: No. I think -- I think that's

1 what it should say, yes or no. I -- I do. On  
2 punitives, I think it's different than the other  
3 damages. I do.

4 MR. KEMP: Then we should just go back to  
5 this --

6 MR. HENRIOD: We should ask them five times  
7 if they want to award punitives.

8 THE COURT: No. Once, like the original.

9 MR. KEMP: I'm fine with that, Your Honor.  
10 How about we add, On which theories did you  
11 award punitive damages, and just have your five boxes?

12 MR. HENRIOD: I think that's what she's  
13 talking about.

14 MR. KEMP: Is that okay?

15 MR. HENRIOD: I think that's what she's  
16 saying.

17 MR. KEMP: If it's okay with you, it's okay  
18 with me.

19 MR. HENRIOD: I -- I'm not waiving my  
20 objection that it ought to include -- and -- and here's  
21 the thing, right, because I feel like I'm -- I'm being  
22 punished for -- for even working toward an agreement.

23 THE COURT: Okay. No, no, no. We're -- I  
24 understand that there's frustration, and -- and  
25 we're -- everyone's tired and hungry and probably low

1 blood sugar and everything else. Okay? But we're  
2 going to get this done right now. I understand your  
3 objections, Mr. Henriod. I understand what Mr. Kemp's  
4 saying. Let's figure it out right now, and I think  
5 we've been over this a lot. I'm not rushing you,  
6 really. I'm not unreasonable.

7 MR. HENRIOD: Totally understand.

8 THE COURT: Okay.

9 MR. HENRIOD: And -- and I -- I want to work  
10 toward what the evolving concept is of the Court. I  
11 want to --

12 THE COURT: Right.

13 MR. HENRIOD: I want --

14 THE COURT: My concept --

15 MR. HENRIOD: -- close to something is done,  
16 but that doesn't mean that I'm going to --

17 THE COURT: I understand.

18 MR. HENRIOD: -- waive all of my objections.

19 THE COURT: I -- I'm not asking you to waive  
20 your objections. If you have objections, you have  
21 objections.

22 MR. HENRIOD: Thank you.

23 THE COURT: I understand that.

24 MR. KEMP: Okay, Judge, I think I know what  
25 you want. We tried.



1 THE COURT: Okay. Very good.

2 MR. KEMP: You got it already?

3 (Discussion was held off the record.)

4 (Whereupon a short recess was taken.)

5 MR. KEMP: Do you have the draft, Your Honor?

6 THE COURT: Do I?

7 MS. WORKS: I'm sending it right now.

8 MR. KEMP: Yeah. You're sending it.

9 THE COURT: No.

10 MS. WORKS: I just sent it, Your Honor, to  
11 Mr. Jayne and Audra.

12 THE COURT: Okay. Audra, how you holding up  
13 over there? You okay?

14 MS. BONNEY: I'm done. I'm done. I'm happy.

15 THE COURT: We're on. Okay. Great. Let's  
16 do it. I just don't have a copy. Let's see.

17 (Discussion was held off the record.)

18 THE COURT: Oh, thank you. Okay. Very good.  
19 We're back on the record. And we're looking at the  
20 special verdict form, and it's, We the jury return the  
21 following verdict on liability. Okay.

22 All right. I'm looking at the punitive  
23 damages which is the one that we haven't finalized.  
24 And just want to hear from the parties.

25 MR. KEMP: Your Honor, I have been caving in

1 left and right, so this is okay with me.

2 THE COURT: Okay.

3 (Discussion was held off the record.)

4 MR. HENRIOD: That's fine. That works.

5 THE COURT: Mr. Henriod.

6 MR. HENRIOD: Yes, Your Honor. I -- I still  
7 have a problem with the phrasing of the question on  
8 punitive damages. I don't think that it is too much to  
9 remind them that the -- that the standard is clear and  
10 convincing evidence as opposed to the standard for all  
11 of the other claims and damages, and that malice is  
12 what they're looking for. I think that it is  
13 appropriate, even necessary. So I still object to the  
14 simple question, Is MCI liable for punitive damages?

15 I appreciate that we are now breaking down  
16 the theories to get them to specify the theory that  
17 they find warrant to punitive damages. And I  
18 appreciate that we are not asking five different times  
19 if they want to award punitive damages.

20 So at this point, my only objection is with  
21 the phrasing of the original (inaudible).

22 MR. KEMP: And, Judge, the issue is whether  
23 or not we repeat certain portions of the jury  
24 instructions in the punitive question. And I think  
25 we've argued that ad nauseam tonight. We're not doing

1 it with the -- you know, the other one. Why should we  
2 do it with this one just because they want malice and  
3 clear and convincing repeated yet again when they  
4 already have jury instructions.

5 Remember, they proposed the jury instructions  
6 on clear and convincing. I accepted theirs as written.  
7 I didn't make any additions, subtractions, or  
8 modifications. They proposed the punitive. I said  
9 fine. So they got the jury instruction exactly the way  
10 they want it, Your Honor. I don't see any reason to  
11 repeat that jury instruction here.

12 MR. HENRIOD: I am more than happy to include  
13 preponderance of the evidence in all of the preceding  
14 questions. We can -- we can specify there as  
15 appropriate too. So I -- I would not hold back on  
16 making those more detailed. If that is the concern  
17 inconsistency, I -- I still think that we ought to  
18 break out into separate questions even on liability,  
19 whether or not there's a defect and whether or not  
20 there is causation. I appreciate that this is closer.

21 I still think it's necessary, though, for  
22 there to be a separate questions, defect, and then  
23 causation. If they want to put in the causation  
24 question there that it's merely preponderance of the  
25 evidence, I don't object to that. But I do think that

1 it should be broken out. And certainly with punitive  
2 damages, it is not too much to remind them of the  
3 standard.

4 And with that, Your Honor, I don't think I  
5 have any other objection.

6 MR. KEMP: And I assume he's making his  
7 record. I have no response, Your Honor.

8 MR. HENRIOD: Well, it's not just that. I'm  
9 actually hoping to persuade the Court, but I don't have  
10 anything else.

11 THE COURT: Well, I think -- I think this  
12 should do it. I -- I -- I think with the jury  
13 instruction that we have, and that's something that can  
14 be argued as well if counsel chooses to do that, I  
15 think this is direct with respect to the punitives and  
16 the theories. So I'm -- I'm going to go ahead and go  
17 with this.

18 MR. HENRIOD: Very good.

19 Your Honor, on the -- on the breakdown, I  
20 want to make sure that I -- that I know what I'm  
21 telling them.

22 Is it -- is it at least all right for  
23 Mr. Roberts to do just compensatory damages but without  
24 having to try and break it down by the different  
25 plaintiffs? I mean, punitives to Mr. Barger, but to

1 just have Mr. Roberts do compensatories across the  
2 board? I mean, that one, I don't think that's asking  
3 for too much to try to keep it at least that  
4 streamlined.

5 MR. KEMP: Your Honor, how many times do we  
6 have to go through this? You know, I --

7 MR. HENRIOD: I'm just trying to get some  
8 clarity in what I think is reasonably fair.

9 MR. KEMP: Even is even, and it's even now.  
10 It's --

11 MR. HENRIOD: I don't think it is. But I  
12 don't think that it's too much to ask that Mr. Roberts  
13 at least be able to do compensatories across the board.  
14 To break it out, as to one of the boys versus the  
15 other, that just makes it messier.

16 MR. KEMP: Judge, if you recall, they made  
17 this objection -- they made the objection during --  
18 during the opening statements, and that's where we  
19 started. They made the exact objection that they're  
20 trying to get on the other side of now. So fair is  
21 fair. Mr. Roberts should be able to respond to  
22 Mr. Christiansen, and -- and that's just fair.

23 MR. HENRIOD: I don't see the prejudice. I  
24 don't see the harm. The stakes could not be higher.

25 MR. KEMP: Well --

1           MR. HENRIOD: And this is pretty reasonable,  
2 especially when I think that it was reasonable of them  
3 to assume that there would be a breakdown along these  
4 lines at least. To -- to -- to now say that they're  
5 going to have to divide up even the way that they talk  
6 about the boys and the lost income, well, can they at  
7 least talk about lost income as to all of them, or does  
8 there have to be some artificial barrier there? Does  
9 he talk about income as if they're different to both,  
10 but they're just talking about loss of -- of society  
11 and companionship as to the boys separately? There  
12 really is not even a clean way to -- to draw the line.  
13 This doesn't make any sense. It just makes it messier.

14           MR. KEMP: If it doesn't make any sense, why  
15 did they make me and Mr. Christiansen do it during the  
16 opening, and now they're making us do it again, and  
17 we're planning to do it tomorrow. You know, if it  
18 doesn't make any sense, why they insist it be done this  
19 way, Your Honor?

20           MS. WORKS: Your Honor, there was no  
21 reason --

22           MR. HENRIOD: The whole time it was a ruse.  
23 And then what we tried to do, as I understand, is to  
24 try to get past that legal fiction to make it a little  
25 fairer. And so we understood there would be some

1 breakdown. Now, okay, so Mr. Roberts is doing  
2 compensatory damages. But where, really, is the line  
3 there? Are -- are we really just talking about the --  
4 the -- I mean, are they supposed to -- to break out the  
5 economics between them?

6 MR. KEMP: Judge, they should just go back  
7 down to one attorney if they're having a problem seeing  
8 the line.

9 MR. HENRIOD: Your Honor.

10 MS. WORKS: Your Honor, here's the issue.  
11 The Court says you may entertain two closings on the  
12 part of the defense. Not that you would, not that you  
13 were willing to. And if, in fact, they believed that  
14 you were going to do that, one thing the defense had  
15 every opportunity to clarify prior to 6:00 p.m. today.  
16 But two, the assumption, if they did believe mistakenly  
17 that you were absolutely deciding to do that, should  
18 have been that it would have been broken out in the  
19 exact same manner that the opening statement was  
20 required to be broken out for the plaintiffs.

21 And so what's fair is fair on both sides. If  
22 they -- their brief was entitled "Level the Playing  
23 Field," and so they made that request, and that's  
24 exactly what the Court imposed in opening, and it would  
25 only be reasonable it be imposed today.

1 MR. HENRIOD: Leveling the playing field does  
2 not require this kind of Byzantine line.

3 THE COURT: You know, what my concern is,  
4 though, Mr. Henriod, my concern is that there's going  
5 to be a compound argument on the defense side. It's  
6 going to end up being that way, and I don't think  
7 that's reasonable.

8 MR. HENRIOD: Well, I think that we can  
9 avoid --

10 THE COURT: No, no, because I don't want --  
11 let me tell you what I'm trying to avoid.

12 MR. HENRIOD: Yes.

13 THE COURT: You know how straightforward I  
14 am, very straightforward like (inaudible). So I don't  
15 want tomorrow for me to have to -- after the first  
16 person speaks, shut the other person down, because I  
17 feel that it's not right. And then we're going to have  
18 a mistrial because I didn't level the playing field.  
19 Because it's such a fine line. Look what happened with  
20 this other witness. You remember the witness and  
21 the -- how close that was and how long it took us, and  
22 I -- I had to go one by one and try to -- like a  
23 surgeon, try to make sure that I was being fair but  
24 that it wouldn't go over and violate or -- I have tried  
25 to do this so surgically and -- to be fair. But I



1 think that tomorrow, if anyone crosses that line, I'm  
2 going to shut them down. And I don't want to have to  
3 do that. It's a very easy -- it -- it's not something  
4 where everyone can just come in, gets objection time,  
5 and we can have another sidebar. It's closing argument  
6 on this significant case; right?

7           So I'm telling you that if I feel that's  
8 happening, I'm going to shut them down because it's my  
9 responsibility. And at the same time, I'm going to be  
10 looking at a mistrial or whatever it is that you're  
11 going to -- and I'm not afraid of that. Believe me,  
12 I'm not one of those judges that lives in fear. I'm --  
13 I'm telling you the truth. That's not the way I --  
14 I -- thank God, I don't have to live that way. Okay?  
15 And nor will I ever live that way.

16           However, after all of the work that we have  
17 put in, hours that have gone into by -- by the troops  
18 at both law firms, by our -- by the people -- look,  
19 it's almost midnight and these -- everyone's here.  
20 Everyone's here.

21           MR. HENRIOD: Nobody wants to throw this  
22 away.

23           THE COURT: No, exactly. It's not fear of  
24 being reversed or whatever it is --

25           MR. HENRIOD: Right.

1           THE COURT:  -- it's fear of all of this  
2 investment and this jury's time.  Okay?  I am being  
3 very honest with you.  And I will shut them down.  And  
4 they may not even realize that they're doing it,  
5 because these things are so --

6           Do you understand what I'm saying?

7           MR. HENRIOD:  I -- I --

8           THE COURT:  I'm worried, actually, about --  
9 because I will shut them down.  Do you see my problem?

10          MR. HENRIOD:  I'm almost certain I do.  And  
11 I -- and I think -- and I think that -- I think that  
12 that problem is even more likely to occur if -- if  
13 we're trying to break a line down who's compensatory  
14 damages we argue.  I think it would be very extreme,  
15 but I do think that it is fair to still try to  
16 accommodate.

17          THE COURT:  I don't want --

18          MR. HENRIOD:  And I think it would be  
19 streamlined if we can say Mr. Christiansen does  
20 compensatory damages.  I think that there is less  
21 likely to be that overlap.

22          MR. KEMP:  Judge, we have --

23          MR. HENRIOD:  We can at least break it down  
24 that way.

25          MR. KEMP:  We've already set up our closing

1 argument in compliance with the previous rulings of the  
2 Court --

3 THE COURT: Right.

4 MR. KEMP: -- and the previous objections of  
5 MCI. So now after keeping me here till -- till  
6 midnight while they're both preparing they're closing  
7 argument, and to suggest that I have to either pick --  
8 call off the compensatory or give it to  
9 Mr. Christiansen when we've got to start tomorrow at  
10 whatever time it is, Your Honor, that's just not fair.  
11 That's not a valid suggestion and --

12 THE COURT: Okay.

13 MR. KEMP: It should either be one --

14 THE COURT: It's an uncomfortable situation.  
15 It -- it's -- it's not ideal. I'm -- I'm -- it's not a  
16 surprise to me. I mean, it feels uncomfortable.  
17 However, it is a reasonable -- it is a fair -- it is  
18 fair. And -- or we go back to one attorney. That's  
19 it.

20 MR. HENRIOD: Okay. So can he do all  
21 economic damages or they have to try to do that lawyer  
22 by lawyer?

23 THE COURT: You can do what they're doing,  
24 what the plaintiffs are --

25 MR. HENRIOD: So are you guys doing all -- I

1 mean, are you going to --

2 MR. KEMP: I don't know what you mean by  
3 economic damages.

4 (Multiple speakers.)

5 MS. WORKS: They are. Mr. Kemp will address  
6 the damages of the estate of Kayvan Khiabani and Keon  
7 Khiabani, and that is exactly how they did it in  
8 opening. And we didn't like it then either. I mean,  
9 I -- I would have agreed with you -- if we could have  
10 gone back, we would have suggested an alternative, but  
11 at this late hour --

12 MR. HENRIOD: So then the -- the -- so he  
13 lost earning capacity, that -- that's going to be --

14 MR. KEMP: Judge --

15 MR. HENRIOD: -- taken up (inaudible).

16 MR. KEMP: Judge, come on, you know...

17 THE COURT: All right. Here's the thing:  
18 Mr. Henriod, if they're going to -- if you want them to  
19 split it the other way and they're repetitive or  
20 they're -- or they're risking it like how close we came  
21 with that other witness, then I'm going to stop the  
22 person from arguing.

23 Do you understand what I'm saying?

24 MR. HENRIOD: But it is -- if we avoid that,  
25 it is okay for Mr. Roberts to do the compensatory

1 damages?

2 MR. KEMP: Judge, come on. How many times --

3 MR. HENRIOD: I'm just trying to figure out  
4 what I'm telling them.

5 MR. KEMP: You're making the same request  
6 over and over and over again.

7 MR. HENRIOD: Give me a break. I am trying  
8 to get clarity.

9 THE COURT: I -- I think we should go back to  
10 one attorney.

11 MR. KEMP: I'm fine with that, Your Honor.

12 THE COURT: I really do. I believe that's  
13 going to take a lot of concern away. That's it.

14 MR. KEMP: What time do you want us here  
15 tomorrow?

16 THE COURT: Nine.

17 MR. KEMP: Nine. And remember, they haven't  
18 rested their case yet. So they have to rest their  
19 case, then we rest our case, and then I understand they  
20 want to argue a directed verdict motion again or --

21 MR. HENRIOD: No.

22 MR. KEMP: -- something.

23 THE COURT: Okay.

24 MR. KEMP: Okay. So maybe we should be here  
25 a little earlier than 9:00. Maybe we should be here

1 8:30.

2 MR. HENRIOD: 8:30? That's fine.

3 MR. KEMP: Not that I want to, but ...

4 THE COURT: Goodnight.

5 (Thereupon, the proceedings  
6 concluded at 11:45 p.m.)

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12 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF

13 PROCEEDINGS.

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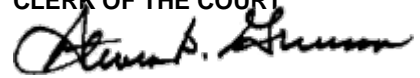
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Steven D. Grierson  
CLERK OF THE COURT

1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 \* \* \* \* \*

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

17 Plaintiffs, )

18 vs. )

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

Defendants. )

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21 **REPORTER'S TRANSCRIPTION OF PROCEEDINGS**22 BEFORE THE HONORABLE ADRIANA ESCOBAR  
23 DEPARTMENT XIV

24 DATED THURSDAY, MARCH 22, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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1 LAS VEGAS, NEVADA, THURSDAY, MARCH 22, 2018;

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

4 \* \* \* \* \*

5  
6 THE COURT: Good morning. Please be seated.  
7 We still have half the jurors missing, for your  
8 edification.

9 Are we on the record?

10 THE COURT RECORDER: No. Should we go on?

11 THE COURT: Yes, please.

12 I have a few housekeeping items I would like  
13 to discuss with the parties before we begin.

14 First -- first, I'd like to say that last  
15 night Mr. Henriod asked several times whether or not  
16 the defendants could have two attorneys, and I  
17 suggested a division that was perhaps difficult. So  
18 it's 9:30 right now, for the record, and even though I  
19 know I'm going to have objections from the defendants,  
20 I would consider -- and you would have about as much  
21 time to prepare as Mr. Kemp did because he was here  
22 until midnight. Okay?

23 I would consider, because of the complexity  
24 of the case, one attorney -- and, by the way, this is  
25 if you -- if you wish. This is not a directive. It's

1 an option. One attorney could argue compensatory  
2 damages and the other liability and punitives because,  
3 in my mind, they go hand in hand.

4 So if you don't want to do that, that's fine.

5 MR. ROBERTS: No. We would be pleased to  
6 accept that and make no further argument on it.

7 THE COURT: Okay. As long as you don't --  
8 it's not cumulative. I don't want cumulative.

9 MR. ROBERTS: I understand.

10 MR. BARGER: I will talk only about  
11 liability.

12 THE COURT: Okay.

13 MR. ROBERTS: And --

14 THE COURT: Those -- that's how I see a -- a  
15 division that's reasonable.

16 MR. ROBERTS: And by way of explanation, not  
17 argument, Mr. Barger has been representing the company  
18 for years --

19 THE COURT: Understood.

20 MR. ROBERTS: -- is familiar with the  
21 product, but the client felt that both punitive damages  
22 and compensatory were uniquely Nevada law and wanted a  
23 Nevada lawyer to deal with them.

24 THE COURT: I understand --

25 MR. ROBERTS: And that was the basis of the

1 division. But I'm not arguing. We're happy to accept  
2 the Court's offer, and we appreciate --

3 THE COURT: Just so you know --

4 MR. ROBERTS: -- your discretion.

5 THE COURT: -- I probably slept less than any  
6 of you thinking about these issues because I want to  
7 make sure that I am fair. And, for the record, the  
8 plaintiffs are following through on a pretty tough  
9 requirement for their clients because of defense  
10 objections. I just -- you know, that's how it started.

11 So I -- I just want to say that, you know,  
12 we're not going to have repetition over here too, but  
13 they have to represent their clients however they need  
14 to. So I'm going to give them a little bit more leeway  
15 as well because that's reasonable. Okay?

16 MR. BARGER: Thank you, Your Honor.

17 MR. TERRY: Thank you, Your Honor.

18 MR. BARGER: We appreciate that, Judge.

19 THE COURT: So I realize you were here until  
20 midnight, Mr. Kemp, but just want you to know that I'm  
21 sure -- you can make your objection.

22 MR. KEMP: I'm adaptable, Your Honor.

23 THE COURT: So they will have a little bit  
24 more leeway too because that's fair. All right?

25 Now, I do want to put on the record and

1 there's -- this is no offense, Mr. Henriod, personally.  
2 Okay? But I didn't have a record on Sunday, and I want  
3 to know how many hours were we together on Sunday?  
4 Approximately. This is just for my record.

5 MR. KEMP: I think it was five, Your Honor.

6 THE COURT: So we were -- for the record,  
7 when this goes on appeal, if it does, we were together,  
8 all parties, for five hours on Sunday, and we were  
9 discussing jury instructions and -- with the  
10 understanding that we had to have these instructions  
11 done pretty quickly.

12 And I understand that Mr. Henriod is doing  
13 his job -- this is nothing personal -- but last night,  
14 I don't know which ones were there on Sunday, but I  
15 know that I had an offering from A through Z of new  
16 instructions or what I considered to be special  
17 instructions that I hadn't seen for the most part on  
18 Sunday, and then I think we had a AA; right? So that  
19 would be 37 instructions.

20 MR. HENRIOD: 27.

21 THE COURT: How many letters are in the  
22 alphabet? I can't remember. Been too long.

23 MR. HENRIOD: And I don't mean to cut you  
24 off. So there were a few that were really new, and  
25 then there were alternatives with slight wording, which

1 is why, on a few of them, I just --

2 THE COURT: Understood. Understood. And you  
3 were preserving your record, but --

4 MR. HENRIOD: And I tried to keep it short by  
5 not going into details.

6 THE COURT: You did. Understood. But I just  
7 want to mention that those were not presented on  
8 Sunday, for the most part. And, you know, I thought  
9 that really we were just going to be wrapping up the  
10 deferred ones.

11 And, Mr. Henriod, I respect you for doing  
12 your job. You do it very well. But I just want to  
13 make a record that that's something that I noticed.  
14 Okay?

15 Now, with respect to the possibility, I don't  
16 want to make a situation that's artificial. I don't  
17 want to interject myself in this and have anything --  
18 put this -- this situation out of whack or -- in any  
19 way, but we -- let's not pretend like we don't have an  
20 issue with Juror No. --

21 MR. KEMP: 7.

22 THE COURT: 7. Thank you. Okay. Mr. --  
23 he's in Reno right now.

24 MR. HENRIOD: Polsenberg.

25 THE COURT: Thank you. Mr. Polsenberg last

1 night made a record that, if one of the jurors who  
2 started the initial phase of the deliberation was not  
3 present in the punitive phase, that that would be an  
4 irregularity.

5 And so I -- I think that this -- I think  
6 that, you know, we should take her out of the presence  
7 of the jury and see what her schedule really is.

8 MR. KEMP: Judge, I think it's a hypothetical  
9 problem now. We have Mr. Stokes prepared to take the  
10 witness stand Friday afternoon if we get to that point.  
11 So until we get to a point where it is a problem, I  
12 think it's a hypothetical problem and focusing on it is  
13 just going to waste more time.

14 THE COURT: I just wanted to make sure that's  
15 one issue that we covered.

16 Now, do you have anything that we need to  
17 cover?

18 MR. KEMP: Your Honor, they need to rest  
19 their case; we need to rest.

20 MR. ROBERTS: I believe we need to do that in  
21 front of the jury, don't we, Your Honor?

22 THE COURT: Yes, but we don't have a jury  
23 yet.

24 MR. ROBERTS: I was just confirming that you  
25 didn't want us to do it now.

1 MR. KEMP: Judge, can we argue the other?

2 MR. HENRIOD: We are resting? Done, done?

3 MR. KEMP: Yeah. Well, you have to rest  
4 first, then we are resting.

5 THE COURT: Does it have to be in front of  
6 the jury?

7 MR. KEMP: Well, Your Honor, I think we can  
8 stipulate that we can do it now and then repeat it in  
9 front of the jury.

10 MR. ROBERTS: That's fine, Your Honor. Yes.  
11 Absolutely.

12 And, Your Honor, before we move on to that,  
13 just in hearing you, in fairness, you want to give the  
14 other side more leeway than in opening, I just want to  
15 go ahead so that they can plan. If Mr. Christiansen  
16 wants to address damages for all of the plaintiffs,  
17 including Mr. Kemp's clients, I'm not going to object.

18 THE COURT: Right. I'm going to let that --  
19 you're all very capable attorneys, and I'm going to let  
20 you do that. I'm just giving you an opportunity to  
21 divide it this way if you wish. Otherwise, it's one.

22 MR. ROBERTS: Thank you, Your Honor.

23 THE COURT: All right. So are we going to --

24 MR. KEMP: Judge, I think they're going to --  
25 they have indicated that they're going to rest; we're

1 going to rest. So I think they have a Rule 50 motion  
2 or ...

3 MR. HENRIOD: We do. And I think we can be  
4 brief on it.

5 THE COURT: Okay.

6 MR. HENRIOD: So if we can -- yes, if we can  
7 stipulate that we are closed and that we will just  
8 reiterate that for the jury or make it formal, then I  
9 think we can proceed with our Rule 50(a) argument. We  
10 can do it briefly. I'm going to let my friend,  
11 Mr. Smith, do that. And, again, Your Honor, we don't  
12 need to draw things out.

13 MR. KEMP: We will stipulate to that, Your  
14 Honor.

15 THE COURT: Okay. So it's stipulated to.  
16 You have a stipulation from plaintiff.

17 MR. HENRIOD: So you want to close?

18 THE COURT: You're stipulating?

19 MR. HENRIOD: We close.

20 MR. KEMP: Are we stipulating to close?

21 THE COURT: Okay. Go on.

22 MR. SMITH: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. SMITH: Abe Smith for Motor Coach. I do  
25 appreciate your patience throughout the trial. This



1 is, at least from defendants' perspective -- I think  
2 everybody agrees that it's been -- there have been a  
3 lot of difficult issues presented to you, and we really  
4 admire your patience and especially the time you take  
5 to reflect. I think that's really important.

6 I do want to be expeditious, but I don't want  
7 to appear as a mere formality --

8 THE COURT: Understood.

9 MR. SMITH: -- because I do think that there  
10 are some issues that are entitled to Motor Coach to  
11 judgment as a matter of law.

12 So we're making this oral motion under  
13 Rule 50(a). The first point I want to make --

14 THE COURT: Go on.

15 MR. SMITH: -- is looking at the wrongful  
16 death statute itself, which is an NRS 41.085. It  
17 defines what kinds of actions can survive the death of  
18 the injured party. And it's important to put -- place  
19 this in context because at common law there was no  
20 survival action following death.

21 As one Nevada case puts it, *White v. Yup* back  
22 in 1969, "At common law, actions for death did not  
23 survive the death of the injured party. Consequently,  
24 there was no right of action for an injury which  
25 resulted in death."

1           So the only basis that we have for sitting  
2 here today is a statute that creates a right that did  
3 not exist at the common law. And that statute defines  
4 who can recover -- or what sort of acts give rise to  
5 wrongful death action.

6           And it's pretty clear, in Subsection 2, when  
7 the death of any person, whether or not a minor, is  
8 caused by -- here's the key language -- the wrongful  
9 death -- I'm sorry -- the wrongful act or neglect of  
10 another.

11           So we need to construe what those words mean,  
12 "wrongful act or neglect." And because we're not in  
13 the common law anymore, we have a statute that  
14 abrogates the common law, statutes in derogation of the  
15 common law are strictly construed.

16           The legislature, of course, is free to -- you  
17 know, to broaden that. For example, the anti-SLAPP  
18 statute has a policy written into the legislation, we  
19 want this construed broadly.

20           There's none of that in the wrongful death  
21 statute. So we take the canon as is to construe  
22 narrowly.

23           Wrongful means blameworthy. It means more  
24 than neglect. Neglect is the lesser standard. And so  
25 to recover under wrongful death statute, there has to

1 be a claim of a culpable state of mind or at least  
2 negligence, wrongful -- a wrongful act or neglect.

3 And in case this seems sort of esoteric, a  
4 federal court in Georgia was confronting a case like  
5 this one where they were having to construe Georgia's  
6 wrongful death statute. This is, for reference,  
7 Higginbotham v. Ford Motor Company. This is 540 F 2d  
8 762, the Fifth Circuit, 1978, where they were  
9 confronting this issue.

10 So what is wrongful -- what does the wrongful  
11 death statute cover? And the majority said, well, it  
12 does not say it covers an action that's based purely on  
13 strict liability, so a finding of liability without  
14 fault.

15 There was a powerful dissent that said, no,  
16 no, no. Clearly, the purpose of the wrongful death  
17 statute is to let anybody recover that otherwise, you  
18 know, if the action would have not survived, that the  
19 common law purpose of wrongful death statute is just to  
20 resurrect those.

21 But Georgia -- the Georgia Supreme Court  
22 construing its own law, said no, actually, the federal  
23 court got it right. So this is now Ford Motor Company  
24 v. Carter, 238 S.E.2d 361, Georgia, 1977. And they  
25 agreed with the federal court saying, yes, the

1 legislature is certainly entitled to include strict  
2 liability actions within the wrongful death statute,  
3 but they haven't done so yet. And until they do that,  
4 we have to construe that statute narrowly in derogation  
5 of the common law. At common law there was no survival  
6 action for something that's based solely on strict  
7 liability. The legislature didn't create that action.

8           So I think that's something we need to take  
9 seriously. And not only that, but we have Nevada  
10 authority that talks about this same language in the  
11 context of the statute of limitations. So the statute  
12 of limitations -- this is now 11.190(4). This is the  
13 general statute of limitations. It says actions within  
14 two years, three years, four years, et cetera.

15           So the actions within two years, those are  
16 what we consider our normal tort actions. And that is  
17 an action to recover damages for injuries to a person  
18 or for the death of a person caused by -- and here's  
19 the key language again -- the wrongful act or neglect  
20 of another.

21           So you might think, okay, well, doesn't that  
22 include strict liability? No, it does not.

23           Judge Ellsworth in this district and  
24 Judge Villani in this court both concluded that that  
25 language does not refer to an action brought in strict

1 liability. That is an action not provided for that  
2 falls under the catchall statute of four years.

3 Federal district judge, Judge Pro, concluded  
4 the same thing in a case called Fisher v. Professional  
5 Compounding Centers of America, Inc., 311 F.Supp.2d  
6 1008. That was in 2004, District of Nevada.

7 So I do apologize that we are -- you know,  
8 we're bringing this issue to your attention, but I  
9 think this is something that deserves real reflection  
10 to see whether a wrongful death -- the wrongful death  
11 statute encompasses an action brought strictly under  
12 strict liability.

13 Also within Chapter 41 itself.

14 So you might be thinking, well, wrongful, you  
15 know, could wrongful mean just simply illegal? But, in  
16 fact, no, it does not.

17 Later in that same chapter -- this is  
18 NRS 41.775 (1)(c), this is talking now about  
19 employer -- liability of an employer who discloses  
20 information about employees. It's kind of an esoteric  
21 subject, but that defines the liability of the employer  
22 for, quote/unquote, an illegal or wrongful act.

23 So what the legislature understands is  
24 there's a difference between something that's illegal  
25 and something that's wrongful.

1           You know I'm remembering from law school,  
2 there's a distinction between what in Latin they say  
3 malum in se, which is something that is inherently  
4 wrong -- wrongful -- and malum prohibitum, which is  
5 something that is wrong only because the law prohibits  
6 it, something that's illegal versus something that's  
7 really wrongful.

8           So the legislature clearly drew that  
9 distinction even within the same chapter, talking about  
10 illegal or wrongful act. In the wrongful death  
11 statute, there is no liability simply for an illegal  
12 act; it's only for a wrongful act or neglect, something  
13 that's actually blameworthy or at least negligent.

14           I will be candid. There are -- there are  
15 states that go the other way, that allow an action  
16 standing only in strict liability to recover under  
17 wrongful death statute. The question has never been  
18 presented to the Nevada Supreme Court, so you're like  
19 in the -- you're the Georgia federal court having to  
20 guess what the Nevada Supreme Court would do.

21           And I will say that in Trejo, the case that  
22 establishes, you know, once and for all that Nevada is  
23 a consumer expectation state, that was a wrongful death  
24 case. But the problem there is the issue is just never  
25 addressed. The parties never raised it. So the

1 supreme court never had an opportunity to address  
2 whether, in fact, an action solely in strict liability  
3 can give rise to wrongful death action.

4 Now, this isn't to say that somebody who's  
5 injured by a product -- somebody who is killed as a  
6 result of a defective product can never recover.

7 MR. KEMP: Judge, I don't want to interrupt,  
8 but we do have a jury. I've never seen someone give an  
9 extensive legal argument right before -- you know --

10 THE COURT: Is the jury all here?

11 MR. KEMP: -- this is supposed to be a  
12 Rule 50 motion. I would suggest, if he's got his  
13 points, let's give him five minutes to make the points.

14 MR. SMITH: This was the longest part of my  
15 argument. I will be very quick.

16 MR. KEMP: If it's just another five, I don't  
17 have any more objection.

18 MR. SMITH: The point was only that it's not  
19 a per se prohibition on any action arising out of a  
20 product. The key is that the plaintiff just has to  
21 allege some cause of action that establishes fault, and  
22 negligence action would have sufficed.

23 Plaintiffs, for strategic reasons, decided  
24 not to bring a negligence claim against Motor Coach  
25 because it's easier for them to recover if they're only

1 asking for strict liability, which doesn't require a  
2 showing of fault. That was their strategic choice. So  
3 we do submit that this is not an appropriate action  
4 for -- for wrongful death.

5 Now turning quickly to the evidence that  
6 we've heard, we don't think that there is evidence, as  
7 a matter of law, to establish a product defect.

8 Blind spots and proximity sensors.

9 I think the key here -- and we had admissions  
10 from plaintiffs' expert, Mr. Sherlock, and as confirmed  
11 by our expert, Mr. Krauss, the key is the transition  
12 between when Dr. Khiabani's travel parallel to the bus,  
13 which is a non -- you know, not a hazardous condition  
14 in itself, became hazardous as a result of his  
15 convergence with the bus.

16 That time was so quick that, even had there  
17 been these proximity sensors or improved mirror  
18 placement, something like that the plaintiffs are  
19 asking for, it would not have made a difference given  
20 the time needed to react to something that happened  
21 that quickly.

22 Everybody admits that Dr. -- that Mr. Hubbard  
23 saw Dr. Khiabani when he was in the nonhazardous  
24 position. By the time he veered into the bus -- or, as  
25 plaintiffs would say, was sucked into the bus, the



1 coach -- it was too late at that point for Mr. Hubbard  
2 to make an evasive maneuver. Proximity sensor would  
3 have only told Mr. Hubbard what he already knew because  
4 he saw Dr. Khiabani or would have been useless because  
5 it would have come too late.

6 Air blast.

7 I think Dr. Breidenthal's testimony was  
8 helpful in this regard. He confirms he doesn't have an  
9 opinion whether an air blast actually had anything to  
10 do with Dr. Khiabani's injuries. He says it's  
11 consistent. Doesn't say more likely than not, just  
12 says it's consistent either with a suction theory or  
13 with simply Dr. Khiabani turning into the bus.

14 He confirms that the -- the main article on  
15 which plaintiffs relied, this article from Mr. Green  
16 from 2001, grossly misapplies the Bernoulli principle.  
17 And he concedes that, you know, beyond 3 feet, he  
18 couldn't say whether there would be any impact on a  
19 rider of Mr. -- Dr. Khiabani's size. He didn't do any  
20 testing to test that out. Our experts are the only  
21 ones that did that kind of rigorous testing.

22 So we don't think that there's any evidence  
23 that Dr. Khiabani was killed by some kind of air blast  
24 caused by the shape of the bus itself.

25 For the same reason, a warning about air

1 blasts would have done no good. It would have  
2 misleadingly applied -- implied that buses, you know,  
3 cannot pass a cyclist safely within the designated bike  
4 lane, which is not -- which is not the case.

5 And as there's no Keating presumption, we  
6 do -- and I know this is an argument. I'll just refer  
7 to the argument we made before about Mr. Hubbard having  
8 a law that would have told him to do exactly what the  
9 warning apparently would have told him to do.

10 I think it's also important that plaintiffs  
11 never proposed language for a warning. As you ruled in  
12 motions in limine, this is not a malfunction case, like  
13 Stackiewicz, where we can simply infer that there's a  
14 defect without them having to pinpoint what the exact  
15 issue is.

16 Since they haven't proposed how to fix our --  
17 the warning, they haven't given the jury any proposed  
18 language for warning, it would be just speculative to  
19 say, well, here's, you know, in the general problem,  
20 but we're giving you no guidance on how to fix it.

21 Finally, the S-1 Gard.

22 We believe it's clear from the evidence  
23 that -- that an S-1 Gard would not have saved  
24 Dr. Khiabani. But, more than that, there's no duty.  
25 And this one is different. There's no duty to cushion

1 an impact that is, because of other events unrelated to  
2 defect, inevitable.

3           So this is different from the bystander  
4 liability argument that we made and we understand this  
5 Court rejected. Where -- we're not saying that, at  
6 least at this point, that a bystander wouldn't be able  
7 to recover in any circumstance, but rather, when the --  
8 the hazards that a manufacturer is required to guard  
9 against are those that would affect the user as well as  
10 a bystander.

11           And here there's no question that the  
12 users -- that the people actually within the bus were  
13 protected by the design of Motor Coach. The only  
14 contention here is that Motor Coach should have  
15 designed a vehicle that would have saved those who,  
16 through no fault of Motor Coach's, come into contact  
17 with tires of the bus. We don't think that's the law.

18           We also have the only -- the only person who  
19 did any testing with regard to the S-1 Gard was our  
20 expert, Dr. Carhart, and who concluded that the  
21 S-1 Gard would not have saved Dr. Khiabani. Even the  
22 S-1 Gard's inventor, Mr. Barron, was unable to say, you  
23 know, whether -- whether it would have saved  
24 Dr. Khiabani. He just says, well, sometimes it  
25 mitigates.

1 But we gave him the specific scenario of this  
2 case: At 25 miles an hour, he's wearing a helmet,  
3 would he have survived?

4 He says I'm not able to -- he can't answer  
5 that question. So we don't have an expert able to tell  
6 us that the S-1 Gard would, in fact, have saved  
7 Dr. Khiabani's life.

8 Unless Your Honor has any questions, that's  
9 all I have. Thank you very much.

10 MR. KEMP: Your Honor, just briefly, there's  
11 been a lot of Nevada cases that have awarded punitive  
12 damages in a wrongful statute. There's one from Elko,  
13 that's Mr. Echeverria's case. It was a \$50 million  
14 punitive verdict. It was a product defect case. I  
15 can't remember if it was Ford or GM, but the name of  
16 the first plaintiff is White.

17 And then we have Trejo. Okay? So Trejo, his  
18 argument is Judge Stiglich wrote an extensive opinion  
19 at the beginning, and Judge Pickering wrote an  
20 extensive dissent, and they missed the issue that this  
21 was a product liability case involving death and that  
22 it shouldn't -- shouldn't be dismissed as a matter of  
23 course.

24 Frankly, I think they've waived this  
25 argument. This argument should have been made at the

1 motion to dismiss stage. If not then, they should have  
2 made it with the original Rule 50 motion. If not then,  
3 they should have made it when we closed our case. I  
4 don't think they can make it at this late point, this  
5 legal argument. Okay? The other arguments, I think  
6 they can make.

7           The other case they discussed is Fisher v.  
8 PCAA, that's Professional Compounding Association of  
9 America. That was my case. Wanda Fisher was the  
10 plaintiff in that case. That is not a wrongful death  
11 case. That was a Fen-Phen case. Mrs. Fisher suffered  
12 from primary pulmonary hypertension. And the decision  
13 he's referring to by Judge Pro did not involve whether  
14 or not there'd be no strict liability with the wrongful  
15 death statute.

16           So I don't know of any case law in Nevada  
17 that has ever held that. We have, you know, cases that  
18 have gone the other way. And so, for that reason, I  
19 don't think that's the law in Nevada, clearly.

20           Addressing the substantive arguments on  
21 evidence and causation, their right-side blind spot,  
22 their PMK, Mr. Hoogestraat, conceded during his  
23 30(b)(6) deposition that there's a right-side blind  
24 spot. Dr. Krauss testified that it's 40 inches wide  
25 and 50 inches deep. Again, he's their expert. He

1 testified that he did testing to determine that.

2           Plaintiffs' expert Cohen did a visual  
3 animation that showed the right-side blind spot. And  
4 with regards to causation linking it together,  
5 Mr. Sherlock testified that if there hadn't been a  
6 right-side blind spot, in his opinion, it was more  
7 likely than not that the bus driver would have taken  
8 successful evasive action rather than attempting to  
9 take evasive action.

10           Moving to proximity sensors, it's undisputed  
11 in this case that the Eaton sensor was available in  
12 2005. And, actually, the patent was filed in 1998.  
13 Mr. Hoogestraat testified three different times in his  
14 PMK deposition that he knew -- he referred to it as  
15 kit, that there was kit out there for proximity  
16 sensors. That's what the Eaton system is, it's a kit  
17 that the manufacturer can use.

18           They presented no testimony that proximity  
19 sensors were not available in 2005, 2006, 2007. In  
20 fact, to the contrary, in their tender that they made  
21 with Mr. Hoogestraat, he tried to discuss this  
22 situation with Greyhound in 1998. So they conceded  
23 that the system was available.

24           He testified he knew they were available.  
25 Again, he's the PMK. He didn't -- there was no

1 testimony in the entire case that the proximity sensor  
2 wouldn't have worked in this case.

3           Mr. Sherlock testified both that it was  
4 available in 2005, that it was on the BCI bus in 2007.  
5 And he described how it works. He says it goes out  
6 300 feet in the front, 20 feet on the side. And we  
7 have the BCI ad from the Motorcoach News that we talked  
8 about yesterday with Mr. Hoogestraat which is dated  
9 October 15th, 2007. So with regards to proximity  
10 sensors, there's really no argument today, weren't  
11 available, wouldn't have worked, and couldn't have been  
12 put on this bus.

13           Okay. His argument is that, oh, it would  
14 have been too quick. It couldn't have given any alert.  
15 Mr. Krauss testified that if there had been a proximity  
16 sensor, it would have given the driver 17 seconds of  
17 alert time -- 17 seconds of alert time.

18           And so their response to that was to bring  
19 Dr. Krauss and say, well, that doesn't matter because  
20 the driver -- you know, we shouldn't do that because  
21 it's too many warnings, the driver wouldn't pay  
22 attention. This is the same Dr. Krauss who has a  
23 proximity sensor for his wife to give him an alert --  
24 and he says it works good -- of bikes in the garage.

25           So -- so, in any event, 17 seconds, Your

1 Honor, I think that's more than ample time. So the  
2 proximity sensor case, you know, honestly, we should be  
3 filing the Rule 50 motion on it.

4 The S-1 Gard, their argument is that it would  
5 not have saved Dr. Khiabani. Well, that goes into  
6 the -- the placement. You know, was it -- was it 3 or  
7 4 inches within the tire or was it, you know, 1 or  
8 2 inches like they theorize. And that's the pinch  
9 theory basically.

10 Pinch theory has been repudiated by the Clark  
11 County coroner. We had Dr. Gavin come in. They didn't  
12 like her testimony, but she gave her testimony. And  
13 her testimony can't be refuted because she said to a  
14 reasonable degree of medical probability that this --  
15 this skull fracture was caused by a crush. Okay? By a  
16 crush, not a pinch.

17 And that was backed up by Dr. Stalnaker, the  
18 preeminent authority in the world on skull impacts.  
19 Dr. Stalnaker, if you recall, wrote the articles, did  
20 the monkey testing, blah blah blah. And he supported  
21 the opinion; the coroner gave his own opinion.

22 So with regards to whether or not they would  
23 have been saved -- and also Dr. Stalnaker expressly  
24 testified he would have been saved. You know, they  
25 criticized Dr. Stalnaker. He didn't do any testing.



1 Well, they didn't do any testing either. They didn't  
2 test this pinch theory. I thought that was established  
3 pretty clearly yesterday. You know, they could have  
4 tried to test the pinch theory, but they didn't do it.

5 Moving to the aerodynamics, testimony from  
6 Mrs. Bradley has established there was a wobble. She  
7 said it multiple times during her trial testimony. And  
8 we went over this with Mr. Rucoba, the accident  
9 reconstruction expert.

10 One, he testifies that they have no  
11 alternative cause for the wobble. They don't have  
12 another cause for the wobble. Okay?

13 Two, he says that there's no physical  
14 evidence that the doctor turned left, which was the  
15 speculative scenario that was laid out yesterday by  
16 Dr. Carhart. So there's four fact witnesses that all  
17 placed the bike by the bus at the sidewalk -- four fact  
18 witnesses. So they are saying ignore the fact  
19 witnesses, ignore all four of them, because we think  
20 the bike was really in front of the bus. That's their  
21 argument.

22 In addition, there's five pictures from the  
23 Red Rock still video showing that bike side by side  
24 with the bus. Okay? That bike was not in front of the  
25 bus like Dr. Carhart speculated.

1 But, in any event, since there's no  
2 alternative cause for the wobble, Dr. Breidenthal's  
3 testimony that there's a 10-pound push and a 20-pound  
4 pull -- which was not rebutted. They didn't call an  
5 aerodynamics engineer, Your Honor. He estimated that  
6 the wind force would be 40 miles an hour. They didn't  
7 even measure -- I can't believe they're running these  
8 buses up and down the desert in Phoenix for days and  
9 they didn't even put a simple device to measure the  
10 wind speed?

11 You know, you heard the witness yesterday.  
12 He called it longitudinal, latitudinal. He didn't know  
13 how much wind was coming off that bus. They didn't  
14 measure it. Here we have a case where you're trying to  
15 address whether or not an air blast caused the  
16 doctor's -- to wobble. And they didn't even address  
17 the amount of wind coming off the bus in their testing?

18 So I think there's plenty of evidence in the  
19 record with regards to the air blast, and especially  
20 when that is the only cause left. They eliminated the  
21 roadway impairment. They eliminated the bike  
22 impairment. They eliminated something wrong with the  
23 doctor, dehydration. All the other potential causes  
24 were eliminated.

25 So what is left, Your Honor? You know, like

1 I already said, they do not have an alternative cause.

2           So for those reasons, with regards to the  
3 evidence -- and then on the aerodynamics, before I  
4 forget, they -- they clearly designed a better,  
5 superior bus front. They -- to this day, they don't  
6 know whether or not the drag coefficient of this J4500  
7 is .6, .7, whatever.

8           But we do know that the Mercedes Setra is  
9 .33. We do know that in their aerodynamics testing  
10 they could have gotten their alternative front down to  
11 .32. And if you remember Dr. Breidenthal's testimony,  
12 he said that if they had gotten the alternative --  
13 the -- used the alternative front, the front push would  
14 have gone from 10 to 3, and there would be no pullback,  
15 no pullback whatsoever.

16           So he's got a 10 push, a 20 pullback. There  
17 would be no pullback if they had used the safer  
18 alternative front. In other words, there would have  
19 been nothing to pull the doctor into the bus, which is  
20 what happened.

21           They referred to Mr. Green's article.  
22 Mr. Green's article dealt with rear tire section --  
23 suction. It did not deal with the -- the front tire --  
24 the front part of the bus passing the bicycle.

25           So, for those reasons, Your Honor, we think

1 the motion should be denied.

2 MR. SMITH: Very briefly, Your Honor.

3 THE COURT: Certainly.

4 MR. SMITH: First, I think -- addressing the  
5 last point first, he talks about the numbers, you know,  
6 the .3, aerodynamic drag coefficient. I think the  
7 problem we have is that they're throwing out these  
8 numbers without any evaluation of how that would  
9 actually impact Dr. Khiabani sitting on the bicycle.  
10 Our -- our experts are the only ones that performed  
11 that evaluation and showed that it would not have --  
12 would not have caused him to -- to be sucked into the  
13 rear tire of the bus.

14 On the -- I don't have anything further on  
15 the actual -- on the substantive evidence.

16 On the point about the interpretation of the  
17 wrongful death statute, we do think it's important.  
18 It's a jurisdictional issue. It's not something  
19 that -- that we're -- that we've waived or can waive.

20 And -- and I think -- when he says, oh, well,  
21 the issue, you know, came up -- or the issue came up in  
22 Ford v. Trejo and these other cases, well, that's  
23 actually kind of the point. It did not come up in  
24 those other cases. Appellate courts only decide issues  
25 that are presented to them. In those cases, nobody

1 argued how to interpret the wrongful death statute in  
2 relation to a strict products liability case. So this  
3 would be where the issue is presented and where this  
4 court has an obligation to reflect and decide that  
5 issue.

6 Oh, my last point, just that on the -- the  
7 Judge Pro federal case that Mr. Kemp was involved in,  
8 yes, that did not involve the wrongful death statute.  
9 What it involved was the statute of limitations that  
10 used the exact same words as the wrongful death  
11 statute, wrongful act or neglect. And the court  
12 interpreted that to mean -- to -- to not include an  
13 action for strict liability.

14 So we believe that the same -- the  
15 legislature uses the same -- same words to mean the  
16 same thing in different parts of the law. If, in that  
17 part of the law, it did not include strict liability  
18 within the meaning of wrongful act or neglect, so too  
19 in the wrongful death statute. It doesn't -- those  
20 words do not include an action based solely on strict  
21 liability.

22 Thank you, Your Honor.

23 THE COURT: Very good. This is not going to  
24 be one of those days where I take hours and hours. I  
25 need a comfort break anyway before the jury comes in.

1 MR. CHRISTIANSEN: Are they all here, Your  
2 Honor?

3 THE COURT: Pardon?

4 MR. CHRISTIANSEN: Are they all here?

5 THE COURT: I think they're here now. So we  
6 are going to be starting pretty soon.

7 MR. KEMP: Your Honor, can we start setting  
8 up?

9 MR. CHRISTIANSEN: Judge, can we start  
10 setting up for the closings?

11 THE COURT: Yes.

12 MR. CHRISTIANSEN: Thank you.

13 (Whereupon a short recess was taken.)

14 THE MARSHAL: All rise. Department 14 is now  
15 in session with the Honorable Adriana Escobar  
16 presiding.

17 Please be seated. Come to order.

18 THE COURT: All right. Let me just -- are we  
19 on the record?

20 THE COURT RECORDER: Yes.

21 THE COURT: Okay. Very good.

22 All right. So after listening to Mr. Smith's  
23 argument, which was very thoughtful, concerning the  
24 50(a) motion, I am denying said motion as I find that  
25 there has been sufficient evidence for a reasonable

1 jury to find defendant liable for punitive damages.

2 Concerning the particular findings and  
3 conclusions of -- I will issue a minute -- a written  
4 order at a later date so that we can continue now.

5 MR. CHRISTIANSEN: Great.

6 MR. HENRIOD: Very well. Thank you, Your  
7 Honor.

8 THE COURT: Okay? So I will have a record  
9 for you.

10 All right. Now, let's bring the jury in and  
11 move forward.

12 MR. CHRISTIANSEN: Yes, Your Honor.

13 MR. KEMP: Yes, Your Honor.

14 THE COURT: All right. Very good.

15 THE MARSHAL: Ready, Your Honor?

16 THE COURT: We're ready.

17 THE MARSHAL: All rise.

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

20 THE MARSHAL: Your Honor, all the jurors are  
21 present.

22 THE COURT: Okay. Very good.

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

25 THE COURT: Thank you. Please call the roll.

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



1 THE CLERK: Glenn Krieger.

2 JUROR NO. 13: Here.

3 THE CLERK: Emilie Mosqueda.

4 JUROR NO. 14: Here.

5 THE COURT: Okay. Do the parties stipulate  
6 to the presence of the jury?

7 MR. KEMP: We do.

8 MR. SMITH: Yes, Your Honor.

9 THE COURT: Very good. Welcome back, ladies  
10 and gentlemen. We are now moving forward into our next  
11 phase.

12 Mr. Barger?

13 MR. BARGER: MCI rests, Your Honor.

14 THE COURT: Okay. So the defendant has --  
15 the defendant rested their case.

16 Mr. Kemp?

17 MR. KEMP: Your Honor, we would rest as well.

18 THE COURT: Okay. And now the plaintiffs  
19 have rested their case.

20 Okay. At this point, I'm going to read you  
21 the jury instructions that have been argued and  
22 researched and composed by all parties with the Court.

23 And these are the instructions that you need  
24 to follow, as I have indicated before. You are the --  
25 you are the fact finders. You are the ones that are

1 here to decide the facts. Okay?

2 So let me get started. Each one of you will  
3 have a packet to take with you when you deliberate, and  
4 there will also be a copy of the verdict form.

5 All right. Let's get started with the jury  
6 instructions.

7 THE MARSHAL: Does everyone have one?

8 THE COURT: Okay. Very good. Let's get  
9 going.

10 All right. This is Jury Instruction No. 1.

11 Ladies and gentlemen of the jury, it is my  
12 duty as judge to instruct you in the law that applies  
13 to this case. It is your duty as jurors to follow  
14 these instructions and to apply the rules of law to the  
15 facts as you find them from the evidence.

16 You must not be concerned with the wisdom of  
17 any rule of law stated in these instructions.

18 Regardless of any opinion you may have as to what the  
19 law ought to be, it would be a violation of your oath  
20 to base a verdict upon any other view of the law than  
21 that given in the -- in the instructions of the Court.

22 Jury Instruction No. 2. If, in these  
23 instructions, any rule, direction, or idea is repeated  
24 or stated in different ways, no emphasis thereon is  
25 intended by me and by none -- and -- and none may be

1   inferred by you.

2               For that reason, you are not to single out  
3   any certain sentence or any individual point of  
4   instruction and ignore the others, but you are to  
5   consider all the instructions as a whole and regard  
6   each in the light of all the others. The order in  
7   which the instructions are given has no significance as  
8   to their relative importance.

9               Jury Instruction No. 3. If, during this  
10   trial, I have said or done anything which has suggested  
11   to you that I am inclined to favor the claims or  
12   position of any party, you will not be influenced by  
13   any such suggestion. I have not expressed nor intended  
14   to express, nor have I intended to intimate any opinion  
15   as to which witnesses are or are not worthy of belief,  
16   what facts are or are not established, or what  
17   inferences should be drawn from evidence.

18              If any expression of mine has seemed to  
19   indicate any opinion relating to any of these matters,  
20   I instruct you to disregard it.

21              Jury Instruction No. 4. The purpose of trial  
22   is to ascertain the truth.

23              Jury Instruction No. 5. One of the parties  
24   in this case is a company. A company is entitled to  
25   the same fair and unprejudiced treatment as an

1 individual would be under like circumstances, and you  
2 should decide the case with the same impartiality you  
3 would use in deciding a case between individuals.

4 Jury Instruction No. 6. The masculine form  
5 as used in these instructions, if applicable as known  
6 by the text of the instruction -- excuse me -- as shown  
7 by the text of the instruction and the evidence,  
8 applies to a female person or a company.

9 Jury Instruction No. 7. The evidence which  
10 you are to consider in this case consists of the  
11 testimony of the witnesses, the exhibits, and any facts  
12 submitted or agreed to by counsel. Statements,  
13 arguments, and opinions of counsel are not evidence in  
14 this case. However, if the attorneys stipulate as to  
15 the existence of a fact, you must accept that  
16 stipulation as evidence and regard that fact as proved.

17 You must not speculate to be true any  
18 instruction suggested by a question asked a witness. A  
19 question is not evidence and may be considered only as  
20 it supplies meaning to the answer. You must disregard  
21 any evidence to which an objection was -- objection was  
22 sustained by the Court and any evidence ordered  
23 stricken by the record.

24 Anything may -- you may have seen or heard  
25 outside the courtroom is not evidence and must also be

1 disregarded. However, you may consider your view of  
2 the subject motor coach.

3 Instruction No. 8. There are two kinds of  
4 evidence: direct and circumstantial.

5 Direct evidence is direct proof of a fact,  
6 such as testimony of an eyewitness. Circumstantial  
7 evidence is indirect evidence; that is, proof of a  
8 chain of facts from which you could find that another  
9 fact exists even though it has not been proved  
10 directly.

11 You are entitled to consider both kinds of  
12 evidence. The law permits you to give equal weight to  
13 both, but it is for you to decide how much weight to  
14 give any -- to any evidence. It is for you to decide  
15 whether a fact has been proved by circumstantial  
16 evidence.

17 Jury Instruction No. 9. Although you are to  
18 consider only the evidence in the case in reaching a  
19 verdict, you must bring to the consideration of the  
20 evidence your everyday common sense and judgment as  
21 reasonable men and women.

22 Thus, you are not limited solely to what you  
23 see and hear as the witnesses testify. You may draw  
24 reasonable inferences from the evidence which you feel  
25 are justified in the light of common experience,

1 keeping in mind that such inferences should not be  
2 based on speculation or guess.

3 A verdict may never be influenced by  
4 sympathy, prejudice, or public opinion. Your decision  
5 should be the product of sincere judgment and sound  
6 discretion in accordance with these rules.

7 Jury Instruction No. 10. The credibility or  
8 believability of a witness should be determined by his  
9 or her manner upon the stand; his or her relationship  
10 to the parties; his or her fears, motives, interests,  
11 or feelings; his or her opportunity to have observed  
12 the matter to which he or she testified; the  
13 reasonableness of his or her statements; and the  
14 strength or weaknesses of his or her recollections.

15 If you believe that a witness has lied about  
16 any material fact in the case, you may disregard the  
17 entire testimony of that witness or any portion of his  
18 testimony which is not proved by other evidence.

19 Jury Instruction No. 11. Discrepancies in a  
20 witness's testimony or between his testimony and that  
21 of others, if there were any discrepancies, do not  
22 necessarily mean that the witness should be  
23 discredited. Failure of recollection is a common  
24 experience, and innocent misrecollection is not  
25 uncommon. It is a fact also that two persons

1 witnessing an incident or transaction after -- often  
2 will see or hear it differently. Whether a discrepancy  
3 pertains to a fact of importance or only to a trivial  
4 detail should be considered in weighing its  
5 significance.

6           Jury Instruction No. 12. Certain testimony  
7 has been either presented via videotape deposition or  
8 read into the evidence from a deposition. A deposition  
9 is testimony taken under oath before the trial and  
10 preserved in writing or in video. You are to consider  
11 that testimony as if it had been given in court.

12           Jury Instruction No. 13. A person who has  
13 special knowledge, skill, experience, training or  
14 education in particular -- in a particular science,  
15 profession, or occupation may give his or her opinion  
16 as an expert as to any matter in which he or she is  
17 skilled.

18           In determining the weight to be given such  
19 opinion, you should consider the qualifications and  
20 credibility of the expert and the reasons given for his  
21 or her opinion. You are not bound by such opinion.  
22 Give it the weight, if any, to which you deem it is --  
23 deem it entitled.

24           Jury Instruction No. 14. Expert witnesses  
25 have testified about their reliance on books,

1 treatises, articles, statements, and studies, some of  
2 which have not been admitted into evidence. Reference  
3 by the expert witness to unadmitted materials is  
4 allowed so that the expert witness may tell you what  
5 they relied upon to form their opinions. You may not  
6 consider -- yes -- the unadmitted materials as evidence  
7 in this case; rather, you may only consider the  
8 unadmitted material to determine what weight, if any,  
9 you will give the expert's opinions.

10           Jury Instruction No. 15. A question has been  
11 asked in which an expert witness was told to assume  
12 that certain facts were true and to give an opinion  
13 based upon that assumption. This is called a  
14 hypothetical question. If any fact assumed in the  
15 question has not been established by the evidence, you  
16 should determine the effect of that omission upon the  
17 value of the opinion.

18           Jury Instruction No. 16. You have heard  
19 testimony from witness Virgil Hoogestraat. Defendant  
20 MCI selected Mr. Hoogestraat to present its position on  
21 the following topics --

22           1. The general parameters of the design or  
23 engineering for right-side visibility of the time  
24 period 1997 to 2016, including but not limited to  
25 right-side visibility for the MCI J4500 in general and



1 the 2008 MCI J4500;

2           2. The general parameters of the design or  
3 engineering of any and all proximity sensors being  
4 designed or investigated from the time period 1997 to  
5 2016, including but not limited to proximity sensors  
6 being designed or investigated for the MCI J4500 in  
7 general and the 2008 MCI J4500; and

8           3. Whether it is feasible to place an  
9 S-1 Gard on a 2008 MCI J4500.

10           As a result you should regard  
11 Mr. Hoogestraat's testimony on the aforementioned areas  
12 as a knowledge of defendant MCI and not merely his own  
13 individual opinion or knowledge. Mr. Hoogestraat's  
14 answers to questions posed by counsel regarding the  
15 aforementioned issue are to be regarded as having been  
16 given on behalf of MCI and thus, those responses are  
17 binding upon MCI.

18           Jury Instruction No. 17. During the course  
19 of the trial, you've heard reference made to the word  
20 "interrogatory." An interrogatory is a written  
21 question asked by one party of another. You must  
22 answer it under oath in writing -- excuse me -- who  
23 must answer it under oath in writing. You are to  
24 consider interrogatories and the answers thereto the  
25 same as if the questions had been asked and answered

1 here in court.

2           Jury Instruction No. 18. An attorney has a  
3 right to interview a witness for the purpose of  
4 learning what testimony the witness will give. The  
5 fact that the witness has talked to an attorney and  
6 told him what he would testify to does not by itself  
7 reflect adversely on the truth of the testimony of the  
8 witness.

9           Jury Instruction No. 19. Whether in these  
10 instructions I state that the burden, or the burden of  
11 proof, rests upon a certain party to prove a certain  
12 allegation made by him, the meaning of such an  
13 instruction is this: That unless the truth of the  
14 allegation is proved by a preponderance of the  
15 evidence, you shall find the same not to be true.

16           The term "preponderance of the evidence"  
17 means such evidence as, when weighed with that opposed  
18 to it, has more convincing force and produces in your  
19 mind a belief that what is sought to be proved is more  
20 probably true than not true.

21           Jury Instruction No. 20. The preponderance  
22 or weight of evidence is not necessarily the greater  
23 number of witnesses.

24           The testimony of one witness worthy of belief  
25 is sufficient for the proof of any fact and would

1 justify a verdict in accordance with such testimony,  
2 even if a number of witnesses have testified to the  
3 contrary. If, from the whole case, considering the  
4 credibility of witnesses and after weighing the various  
5 factors of evidence, you believe that there is a  
6 balancing -- a balance of probability pointing to the  
7 accuracy and honesty of the one witness, you should  
8 accept his testimony.

9           Jury Instruction No. 21. In determining  
10 whether any proposition has been proved, you should  
11 consider all of the evidence bearing on the question  
12 without regard to which party produced it.

13           Jury Instruction No. 22. The plaintiffs seek  
14 to establish liability on one or both of two different  
15 legal bases: (1) defective product because of  
16 defective design and (2) defective product because of  
17 failure to warn. I will now instruct you on the law  
18 relating to the strict liability claim of defective  
19 product.

20           Jury Instruction No. 23. In order to  
21 establish a claim of strict liability for a defective  
22 product, the plaintiffs must prove the following  
23 elements by a preponderance of the evidence:

- 24           1. That the coach was defective;
- 25           2. That the defect existed when the coach

1 was sold; and

2 3. That the defect was the legal cause of  
3 the damage or injury to the plaintiffs and/or decedent.

4 Plaintiffs need not prove that the defendant  
5 was negligent.

6 Jury Instruction No. 24. A legal cause of  
7 injury, damage, loss, or harm is a cause which is a  
8 substantial factor in bringing about the injury,  
9 damages, loss, or harm.

10 Jury Instruction No. 25. A product is  
11 defective in its design if, as a result of its design,  
12 the product is unreasonably dangerous.

13 Jury Instruction 26. The product is  
14 unreasonably dangerous if it failed to perform in the  
15 manner reasonably to be expected in light of its nature  
16 and intended function and was more dangerous than would  
17 be contemplated by the ordinary user having the  
18 ordinary knowledge available in the community.

19 Jury Instruction No. 27. The mere fact that  
20 an accident occurred and that someone was injured does  
21 not of itself prove that the product was unreasonably  
22 dangerous. Liability is never presumed but must be  
23 established by a preponderance of the evidence.

24 Jury Instruction No. 28. In a product  
25 liability suit, the relevant time period for

1 determination of liability is the date a -- the product  
2 left the control of the seller rather than at any later  
3 time, such as date of injury.

4 Jury Instruction No. 29. For purposes of  
5 determining whether the motor coach is unreasonably  
6 dangerous, the expectations of bystanders, such as the  
7 decedent in this case, are not relevant.

8 Jury Instruction No. 30. A product, though  
9 faultlessly made, is defective for its failure to be  
10 accompanied by suitable and adequate warning concerning  
11 its safe and proper use if the absence of such warnings  
12 renders the product unreasonably dangerous.

13 Jury Instruction No. 31. If you find that  
14 warnings provided with the motor coach were inadequate,  
15 the defendant cannot be held liable unless plaintiffs  
16 prove by a preponderance of the evidence that the  
17 individual who might have acted on any warning would  
18 have acted in accordance with the warning and that  
19 doing so would have prevented the injury in this case.

20 Jury Instruction No. 32. A manufacturer  
21 cannot delegate its ultimate responsibility for  
22 assuring that its product is dispensed with all proper  
23 warnings.

24 Jury Instruction No. 33. As you have been  
25 previously instructed during this -- during the trial,

1 any negligence by the driver in this case is  
2 foreseeable as a matter of law and thus cannot insulate  
3 defendant from liability, if any. So you are not to  
4 consider any alleged negligence on the part of the bus  
5 driver. However, you should consider all of the  
6 evidence to determine if there was a defect and, if so,  
7 whether the defect caused the collision.

8 Jury Instruction No. 34. Any alleged  
9 negligence by Dr. Khiabani is not a defense to  
10 plaintiffs' product defense claims, so you are not --  
11 excuse me.

12 MR. KEMP: I think that should be "defect,"  
13 Your Honor.

14 THE COURT: Yes. I'm going to -- parties  
15 stipulate to that? Should be.

16 MR. KEMP: Mine says "defect," Your Honor.

17 THE COURT: It's the last word in the first  
18 sentence.

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

20 THE COURT: Okay. So it's defendant;  
21 correct?

22 MR. KEMP: No. It's -- Your Honor, can we  
23 approach?

24 THE COURT: Yes, please.

25 (A discussion was held at the bench,

1 not reported.)

2 THE COURT: Okay. I'm going to reread this  
3 as I wasn't certain how it should be read.

4 So Jury Instruction No. 34. Any alleged  
5 negligence by Dr. Khiabani is not a defense to  
6 plaintiffs' product defect claims, so you are not to  
7 consider any alleged negligence on the part of  
8 Dr. Khiabani. However, you should consider all of the  
9 evidence to determine if this was a defect and, if so,  
10 whether the defect caused the collision.

11 Jury Instruction No. 35. Plaintiffs Keon  
12 Khiabani and Aria Khiabani are the heirs of Dr. Kayvan  
13 Khiabani, deceased. Plaintiff, the estate of Katy  
14 Barin, DDS, was an heir of Dr. Khiabani from  
15 April 18th, 2017, until Dr. Barin's death on  
16 October 12th, 2017.

17 In determining the amount of losses, if any,  
18 suffered by one or more of the heirs as a legal result  
19 of the death of Dr. Khiabani, you will decide upon a  
20 sum of money sufficient to reasonably and fairly  
21 compensate each such heir for the items listed in the  
22 following two instructions.

23 Jury Instruction No. 36. The heir's loss of  
24 probable support, companionship, society, comfort, and  
25 consortium. In determining the loss, you may consider

1 the financial support, if any, which the heir would  
2 have received from the decedent -- the deceased except  
3 for his death and the right to receive support, which  
4 the heir has lost by reason of his death.

5 The right of one person to receive support  
6 from another is not destroyed -- is not destroyed by  
7 the fact that the former does not need the support nor  
8 by the fact that the latter has not provided it.

9 You may also consider:

10 1. The age of the deceased and of the heir;  
11 2. The health of the deceased and of the  
12 heir;

13 3. The respective life expectancies of the  
14 deceased and of the heir;

15 4. Whether the deceased was kindly,  
16 affectionate, affectionate or otherwise;

17 5. The disposition of the deceased to  
18 contribute financially to support the heir;

19 6. The earning capacity of the deceased;

20 7. The habits of industry and thrift; and

21 8. Any other factors shown by the evidence  
22 indication what benefits the heir might reasonably have  
23 been expected to receive from the deceased had he  
24 lived.

25 With respect to life expectancies, you will



1 only be concerned with the shorter of two, that of the  
2 heir whose damages you are evaluating or that of the  
3 decedent, as one can derive a benefit from the life of  
4 another only so long as both are alive.

5 Jury Instruction No. 37. Any grief or sorrow  
6 suffered by the heir and any grief or sorrow reasonably  
7 certain to be experienced by the heir in the future.

8 Jury Instruction No. 38. According to the  
9 U.S. Department of Health and Human Services standard  
10 mortality table, the life expectancy of a person aged  
11 51 is 31 years.

12 This fact should be considered by you in  
13 arriving at the amount of damages if you find that the  
14 plaintiff is entitled to a verdict.

15 Life expectancy shown by the mortality table  
16 is an estimate of the probable -- probably average  
17 remaining length of life of all persons in our country  
18 of a given age, and it is for you to determine the  
19 probable life expectancy of plaintiff from the evidence  
20 in this case, taking into consideration all other  
21 evidence bearing on the same issue, such as occupation,  
22 health, habits, and activities.

23 Jury Instruction No. 39. If, under the  
24 Court's instructions, you find that one or more of the  
25 heirs is entitled to a verdict, you must also award to

1 such heirs as damages an amount representing the pain  
2 and suffering and disfigurement, if any, experienced by  
3 the decedent and legally caused by the act or omission  
4 upon which you base your finding of liability.

5           Jury Instruction No. 40. No definite  
6 standard or method of calculation is prescribed by law  
7 by which to fix reasonable compensation for the heirs'  
8 grief or sorrow or the decedent's pain and suffering  
9 and disfigurement. Nor is the opinion of any witness  
10 required as to the amount of such reasonable  
11 compensation. Furthermore, the argument of counsel as  
12 to the amount of damages is not evidence of reasonable  
13 compensation. In making an award for the heirs' grief  
14 or sorrow and the decedent's pain and suffering and  
15 disfigurement, you shall exercise your authority with  
16 calm and reasonable judgment, and the damages you fix  
17 shall be just and reasonable in light of the evidence.

18           Jury Instruction No. 41. Where plaintiff's  
19 injury or disability is clear and readily observable,  
20 no expert testimony is required for an award of pain,  
21 suffering, anguish, and disability.

22           To grant an award for the pain and suffering  
23 of a decedent, you must find, by a preponderance of the  
24 evidence, that the decedent was conscious and aware.

25           If it is not readily observable that a

1 decedent consciously experienced pain and suffering,  
2 expert testimony is necessary to establish that the  
3 decedent was conscious and aware.

4           Jury Instruction No. 42. One of the  
5 plaintiffs is the personal representative of the estate  
6 of Dr. Kayvan Khiabani. Damages recoverable by the  
7 personal representative of the decedent on behalf of  
8 this estate include:

9           1. Any special damages, such as medical  
10 expenses, which the decedent incurred or sustained  
11 before his death, funeral expenses, burial expenses;  
12 and

13           2. Any penalties including, but not limited  
14 to, exemplary or punitive damages that the decedent  
15 would have recovered if he had lived.

16           Jury Instruction No. 43. If you find that  
17 plaintiffs are entitled to compensatory damages for  
18 actual loss caused by MCI's breach of an obligation --  
19 and this is not arising from a contract -- then you may  
20 consider whether you should award punitive damages  
21 against MCI.

22           You may award punitive damages against the  
23 defendant only if plaintiffs prove by clear and  
24 convincing evidence that the wrongful conduct upon  
25 which you base your finding of liability for

1 compensatory damages was engaged in malice on the part  
2 of that defendant. You cannot punish a defendant for  
3 conduct that is lawful or which did not cause actual  
4 loss to the plaintiffs or which occurred and caused  
5 loss in other states. For the purposes of your  
6 consideration of punitive damages only:

7 "Malice" means conduct which is intended to  
8 injure the plaintiffs or despicable conduct which is  
9 engaged in with a conscious disregard of rights or  
10 safety of a plaintiffs.

11 "Despicable conduct" means conduct that is so  
12 vile, base, or contemptible that it would be looked  
13 down upon and despised by ordinary, decent people.

14 "Conscious disregard" means knowledge of the  
15 probable harmful consequences of a wrongful act and a  
16 willful and deliberate failure to avoid these  
17 consequences.

18 The purpose of punitive damages are to punish  
19 a wrongdoer that acts with malice in harming a  
20 plaintiff and deter similar conduct in the future, not  
21 to make the plaintiffs whole for their injuries.  
22 Consequently, a plaintiff is never entitled to punitive  
23 damages as a matter of right and whether to award  
24 punitive damages against the defendant is entirely  
25 within your discretion.

1           At no time you are to decide only whether one  
2 or more defendants engaged in wrongful conduct causing  
3 actual harm or loss to the plaintiffs with the  
4 requisite state of mind to permit an award of punitive  
5 damages against that defendant, and if so, whether an  
6 award of punitive damages against that defendant is  
7 justified by the punishment and deterrent purposes of  
8 punitive damages under the circumstances of this case.  
9 If you decide an award of punitive damages is  
10 justified, you will later decide the amount of punitive  
11 damages to be awarded after you have heard additional  
12 evidence and instruction.

13           Jury Instruction No. 44. Clear and  
14 convincing evidence is a higher burden of proof than  
15 proof by a preponderance of the evidence. The  
16 plaintiffs have provided clear and convincing evidence  
17 if:

18           1. The proof is strong and clear enough to  
19 satisfy the conscience of a common person; or

20           2. The proof is strong and clear enough to  
21 convince a common person that he or she would act in  
22 his or her own self-interests based on these facts; or

23           3. The proof is strong and clear enough to  
24 establish the element to be highly probable.

25           The evidence does not need to be so strong

1 and clear as to be irresistible. It simply must  
2 provide the basis for a reasonable inference to be  
3 drawn.

4 Proof by clear and convincing evidence is  
5 proof of every factual element which persuades the jury  
6 that the truth of the contentions is highly likely.

7 Jury Instruction No. 45. To find that the  
8 defendant acted with implied malice or with  
9 conscientious disregard for the rights of others, you  
10 must determine that the defendant's conduct was worse  
11 than gross negligence or recklessness.

12 Jury Instruction No. 46. You may not allow  
13 your decision regarding punitive damages to be affected  
14 by the fact that Motor Coach Industries, Inc., is a  
15 company, a profitable company, or a company with the  
16 ability to pay punitive damages.

17 Jury Instruction No. 47. You may only award  
18 punitive damages to plaintiffs based on specific  
19 conduct that caused harm to them. You may not base  
20 your decision to award punitive damages on any other  
21 conduct.

22 Jury Instruction No. 48. You may not award  
23 any punitive damages based on conduct that has no nexus  
24 or connection to the specific harm suffered by  
25 plaintiffs.

1           You may not award punitive damages to punish  
2 defendant for lawful conduct. Therefore, you may not  
3 award punitive damages for the purpose of punishing  
4 defendant for conduct unrelated to plaintiffs' specific  
5 injuries.

6           Jury Instruction No. 49. The fact that I am  
7 instructing you about the punitive damages does not  
8 mean that I believe such an award is appropriate in  
9 this case. Whether to award punitive damages is for  
10 you -- and you alone -- to decide.

11           Jury Instruction No. 50. The Court has given  
12 you instructions embodying various rules of law to help  
13 guide you to a just and lawful verdict. Whether some  
14 of these instructions will apply will depend upon what  
15 you find to be the facts. The fact that I have  
16 instructed you on various subjects in this case,  
17 including that of damages, must not be taken as  
18 indicating an opinion of the Court as to what you  
19 should find to be the facts or as to which party is  
20 entitled to your verdict.

21           Jury Instruction No. 51. When you retire to  
22 consider your verdict, you must select one of your  
23 number to act as foreman who will preside over your  
24 deliberations and will be your spokesman here in court.

25           During your deliberations, you will have all

1 the exhibits which were admitted into evidence, these  
2 written instructions, and forms of verdict which have  
3 been prepared for your convenience.

4 In civil actions, three-fourths of the total  
5 number of jurors may find and return a verdict. This  
6 is a civil action. If your verdict is in favor of the  
7 plaintiff, you are directed to make special findings  
8 consisting of written answers to the questions in a  
9 form that will be given to you. You shall answer the  
10 questions in accordance with the directions in the form  
11 and all of the instructions of the Court. As soon as  
12 six or more of you have agreed upon every answer in the  
13 special findings, you must have the verdict and special  
14 findings signed and dated by your foreman, and then  
15 return with them to this room.

16 Jury Instruction No. 52. It is your duty as  
17 jurors to consult with one another and to deliberate  
18 with a view toward reaching an agreement if you can do  
19 so without violence to your individual judgment. Each  
20 of you must decide the case for yourself but should do  
21 so only after a consideration of the case with your  
22 fellow jurors, and you should not hesitate to change an  
23 opinion when convinced that it is erroneous. However,  
24 you should not be influenced to vote in any way on any  
25 question submitted to you by the single fact that a



1 majority of the jurors or any of them favor such a  
2 decision. In other words, you should not surrender  
3 your honest convictions concerning the effect or weight  
4 of evidence for the mere purpose of returning a verdict  
5 or solely because of the opinion of the other jurors.  
6 Whatever your verdict is, it must be the product of a  
7 careful and impartial consideration of all the evidence  
8 in the case under the rules of law as given you by the  
9 Court.

10           If during your deliberation you should desire  
11 to be further informed on any point of law or hear  
12 again portions of the testimony, you must reduce your  
13 question to writing signed by the foreman. The marshal  
14 will then return you to court where the information  
15 sought will be given to you in the presence of the  
16 parties or their attorneys.

17           Readbacks of testimony are time consuming and  
18 are not encouraged unless you deem it a necessity.  
19 Should you require a readback, you must carefully  
20 describe the testimony to be read back so that the  
21 court reporter can arrange her notes. Remember, the  
22 court is not at liberty to supplement the evidence.

23           Jury Instruction No. 54. Now you will listen  
24 to the arguments of counsel, who will endeavor to aid  
25 you to reach a proper verdict by refreshing in your

1 minds the evidence and by showing the application  
2 thereof to the law; but, whatever counsel may say, you  
3 will hear in -- you will bear in mind that it is your  
4 duty to be governed in your deliberation by the  
5 evidence as you understand it and remember it to be and  
6 by the law as given to you -- given you in these  
7 instructions and return a verdict which, according to  
8 your reason and candid judgment, is just and proper.

9           We are now moving into the phase of the  
10 trial -- I've been trying to give you a chronology --  
11 where the parties are going to make their closing  
12 arguments.

13           Mr. Kemp.

14           MR. KEMP: Yes, Your Honor.

15           THE COURT: You may start.

16           MR. KEMP: Thank you.

17

18                           CLOSING ARGUMENT

19           MR. KEMP: Good morning, ladies and gentlemen  
20 of the jury.

21           IN UNISON: Good morning.

22           MR. KEMP: First off, I would like to thank  
23 you, Your Honor, and your staff for accommodating us  
24 last night.

25           You may notice Jerry's a little tired today.

1 That's because we were here till midnight last night.  
2 And we appreciate you being here. We appreciate your  
3 time. Judge has been working with us on Saturdays,  
4 Sundays. Just so you know, there are a lot of effort  
5 made to try to get this thing moving, even though it  
6 doesn't appear like it's moved sometimes.

7 In any event, this is the closing statement,  
8 and we divide it into two parts: liability and then  
9 damages. I'm going to be talking about damages related  
10 to my two clients, Keon and the estate of the doctor.

11 THE COURT RECORDER: Mr. Kemp.

12 THE COURT: We need you to speak louder.

13 THE COURT RECORDER: Thank you.

14 MR. GODFREY: Madam Court Recorder, I'm not  
15 on his screen either.

16 MR. KEMP: Okay. So liability damages. I'm  
17 going to do the damages for two of the plaintiffs;  
18 Mr. Christiansen is going to do the damages for two of  
19 the plaintiffs. As I understand, Mr. Barger is going  
20 to address liability and then Mr. Roberts is going to  
21 address damages from their side. And then  
22 Mr. Christiansen and I get one last chance to talk to  
23 you. And then you go to work. That's the way it's  
24 going to work.

25 Let's start with liability. And I want to

1 start with the year 1992. 1992. Okay? What happened  
2 in 1992?

3 In 1992 this man was president. The first,  
4 not the second George Bush, the first George Bush was  
5 president.

6 In 1992 Wayne's World came out. If you have  
7 seen that, in 1992 that movie came out.

8 In 1992 this was the phone to have. It was a  
9 Motorola International 3200. That was the phone people  
10 coveted. Look at it now. It looks like an outdated  
11 product.

12 1992, this guy, Pee-wee Herman. This was  
13 when he was arrested for indecent exposure. He was  
14 caught in a movie theater inappropriately touching  
15 himself.

16 Anyway, this all happened in 1992. And why  
17 do I start with 1992? Because that's where this case  
18 started.

19 Shane, can I have my first video.

20 This is Mr. Couch.

21 (Whereupon video was played.)

22 "Q. Was the E coach an existing product  
23 at that time?

24 "A. No, it was new.

25 "Q. Okay. So you were designing a new

1 bus, basically?

2 "A. Right."

3 (Video ends.)

4 MR. KEMP: Okay. So 1992 -- you heard  
5 Mr. Hoogestraat tell you this yesterday -- they  
6 designed a new bus series called the E coach. That E  
7 coach -- can I have the next one, just to make sure we  
8 got the time frames.

9 (Whereupon video was played.)

10 "Q. What time period was the E coach  
11 designed?

12 "A. From '92 is probably the earliest,  
13 until '97.

14 (Video ends.)

15 MR. KEMP: And, basically, the E coach became  
16 the J coach. They just did a facelift of the J coach.  
17 It wasn't a brand-new bus series; it was a facelift.

18 Can we have the next one, please, of  
19 Mr. Couch.

20 (Whereupon video was played.)

21 "A. The J coach is just a facelift of the  
22 E, really."

23 (Video ends.)

24 MR. KEMP: So -- and Mr. Hoogestraat told you  
25 that yesterday too. So, basically, what we have is a

1 bus in this case that was designed in 1992 when they  
2 started the design, but it was made in 2007. They kept  
3 the same coach design. It was an outmoded -- this  
4 is -- a fundamental issue in this case is whether they  
5 used an outmoded product line when it kept making the  
6 2008 J4500 year after year after year.

7           And why do we think it was outmoded? Because  
8 there were a number of safety improvements that we've  
9 talked about during the case. And I showed you this  
10 slide during opening statement. One of the jury  
11 instructions say that it's the date of sale. In this  
12 case, the sale is late 2007, 2008 time period. This is  
13 the time period that these inventions came about.

14           In 1993, they designed a safer, rounded  
15 alternative product, which we'll get into in a minute.

16           1995, that's when the S-1 Gard patent was  
17 filed.

18           1998, the Eaton proximity sensor patent was  
19 filed that we have heard a lot about. This is ten  
20 years before the bus in this case was made without the  
21 rear -- which, 14 years before, they knew about --  
22 without the rear tire protectors -- which, 12 years  
23 earlier, there had been a patent -- and without the  
24 proximity sensors -- which, ten years earlier, there  
25 had been a patent.

1           So, clearly, this 1992 design could have been  
2 benefited by these safety alternatives.

3           Now, Mr. Hoogestraat, when he testified  
4 yesterday, specifically told you that if you have an  
5 old product line, you have an obligation as a  
6 manufacturer to search for and evaluate new technology  
7 if you're going to keep that product line.

8           Now, this is what he said:

9                   (Whereupon video was played.)

10           "Q. Would you agree that a bus  
11 manufacturer who has a product line that starts  
12 in 1992 should search for and evaluate new  
13 technology during the time period the bus  
14 continues to be on the market?

15           "A. Yes."

16                   (Video ends.)

17           MR. KEMP: And that's the problem. They  
18 didn't do that. They did not do that in this case.

19           Using the S-1 Gard in this example, the S-1  
20 Gard as of 2007, as of the present time,  
21 Mr. Hoogestraat said he didn't even know about the S-1  
22 Gard until the year 2017, 25 years after the bus in  
23 this case was designed. He didn't know about.

24           This is his testimony:

25                   (Whereupon video was played.)

1           "Q. So for the eight years from '92 to  
2           2000, and from 2000 till 2017 -- that's how I  
3           got the 25 -- for a quarter of a century, you  
4           didn't know about an S-1 Gard?

5           "A. About an S-1 Gard?"

6           MR. KEMP: Okay. So -- so in 1992 when the  
7           bus was designed, we had these three safety inventions  
8           that come up, they admit they had an obligation to go  
9           out and get them -- go out and look for them. They  
10          didn't do it. So that is really why -- that is the  
11          overriding philosophy of what happened in this case.

12          Now, let me talk about strict liability.

13          The judge gave you a jury instruction on  
14          strict liability. This is a strict liability case. It  
15          is not a negligence case. So in a strict liability  
16          case, where a company sells a product that's  
17          defectively designed or doesn't have an adequate  
18          warning, that company is liable without requiring proof  
19          of negligence.

20          You heard the jury instruction. We do not  
21          have to prove that MCI did anything negligent. If it  
22          was a negligence case, like a regular car accident  
23          case, we'd have to prove that there was some sort of  
24          negligence. We don't have to prove that; this is a  
25          strict liability case.



1           So the first inquiry in this case is whether  
2 or not the product was defectively designed. Next  
3 inquiry is whether that defect caused the injury in  
4 this case. An alternative liability theory is that  
5 there was a failure to warn related to the air blast  
6 danger.

7           Now, the product can be defective and the  
8 cause of an accident even if the user of the product is  
9 not perfect. Okay? You got to remember -- and some  
10 people have a hard time understanding this. This is  
11 the jury instruction, Jury Instruction 33.

12           "Any negligence by the driver in this case is  
13 foreseeable as a matter of law." In other words, they  
14 know that every driver is not a perfect driver. They  
15 can foresee that every driver is not a perfect driver.  
16 So you are not to consider any alleged negligence on  
17 the part of the bus driver. That's a hard thing for a  
18 lot of people to understand.

19           I like to give them this example: If someone  
20 goes off the road and their airbag is defective -- if  
21 the airbag doesn't work -- they can sue the airbag  
22 manufacturer for providing the defective airbag. The  
23 airbag manufacturer can't come in and say, "Oh, it's  
24 your fault. You ran off the road."

25           And the reason for that is because the airbag

1 is a safety device. The manufacturer is presumed to  
2 foresee that that car in which the airbag is installed  
3 can run off the road.

4 In this case, the manufacturer of the bus is  
5 presumed to foresee that the bus driver is not a  
6 perfect driver. And so that means you are not to  
7 consider any alleged negligence on the part of the bus  
8 driver.

9 And I guarantee you, when you go back to the  
10 jury room, someone is going to say, "Well, what about  
11 the alleged negligence on the part of the bus driver?"

12 This is the law. Okay? You have taken an  
13 oath to apply the law. The judge just read you the  
14 instructions regarding applying the law. So if someone  
15 gets -- gets off base and starts -- I call this the  
16 finger-pointing instruction, the product manufacturer  
17 can't point the finger. This has no finger-pointing.  
18 No finger-pointing at the bus driver. Their negligence  
19 is not a defense in this case.

20 Second and -- in a strict liability case, the  
21 second thing and similar.

22 Can I have the next one, Shane.

23 This is the very next jury instruction, Jury  
24 Instruction 34. "Any alleged negligence by  
25 Dr. Khiabani is not a defense to the plaintiffs'

1 products liability claim."

2           So you are not to consider any alleged  
3 negligence on the part of Dr. Khiabani. Okay? And,  
4 again, can't point the finger at Dr. Khiabani. It's  
5 like the airbag example I gave you. The manufacturer  
6 of the airbags, that's why they're making the airbags,  
7 so they can be used in the case of an accident. You  
8 cannot argue -- it is not a defense to say that -- that  
9 either the driver or someone else did something wrong.

10           Those are probably the two most important  
11 jury instructions in this case. There's a third I want  
12 to talk about now.

13           Can I have the next one, Shane.

14           This is called the substantial factor  
15 instruction. When you get back there and you read the  
16 jury instruction, you will see the term "legal cause."  
17 You see the first -- two out of the first three words,  
18 "legal cause." So the Court is trying to explain to  
19 you what a legal cause is. And that may be different  
20 than what you think a cause is just using that  
21 terminology from your everyday life.

22           A legal cause is a substantial factor. Okay?  
23 Substantial factor. In other words, we don't have to  
24 prove that the defects in this case were a predominant  
25 factor, an overwhelming factor, the sole factor. We

1 just have to prove that they're a substantial factor in  
2 causing the accident.

3 And, you know, there's a lot of things that  
4 happen when you have an accident. You know, there's a  
5 lot of moving parts. We just have to prove that the  
6 defects in this case that we're talking about was a  
7 substantial factor.

8 And these are the three -- I think the three  
9 most important jury instructions you will hear today.

10 Now, let's turn to the facts of the accident  
11 for a minute. Okay. We have spent a lot of time in  
12 this case on the facts of the accident. Okay? And if  
13 you remember, I spent a lot of time during opening  
14 statement -- I got the board out. I went through where  
15 the bus and the bike placement was according to each  
16 one of the fact witnesses.

17 That is the key fact in this case because,  
18 right off the bat, in Mr. Terry's opening statement --

19 Do we have that, Shane?

20 Right off the bat in the opening statement,  
21 they made the claim that they were going to prove that  
22 the bike wasn't in the bike lane at the intersection,  
23 that the bike was in the far right turn lane. That's  
24 what they -- that's what they said at the opening  
25 statement. Apparently, that went away. Okay?

1           Because, yesterday, Dr. Carhart changed it a  
2 little bit. Now he has the bike turning in front of  
3 the bus. Okay? And we confronted him with the witness  
4 testimony that, in this case, we have four different  
5 witnesses, four different people. We went through the  
6 placements very carefully.

7           Can I have -- this is Bradley. Look where  
8 she has the bike and look where she has the bus. Okay?  
9 They're side by side at the intersection.

10           Next one, Kolch, side by side approaching the  
11 intersection right at the crosswalk.

12           And, you know, we had Dr. Carhart on the  
13 stand yesterday. Mr. Pepperman was cross-examining  
14 him, saying, "Well, Dr. Carhart, you're telling the  
15 jury that the bike went in front of the bus and your  
16 testimony is inconsistent with all the fact witnesses."

17           And, by the way, the fact witness  
18 testimony -- you heard the jury instruction -- that is  
19 direct evidence. Eyewitness testimony is direct  
20 evidence. It's not circumstantial evidence; it's  
21 direct evidence.

22           So we confronted Dr. Carhart with Kolch's  
23 testimony, with Bradley's testimony. This is Pears'  
24 testimony. Mr. Pears was in the far right lane --  
25 excuse me -- the far right seat. He saw the bike in

1 the bike lane before the accident. Next one was the  
2 gardener. We don't have a placement for the gardener,  
3 but he testified he was in the bike lane too.

4 So you have four different fact witnesses all  
5 saying the same thing. They're saying the bike was in  
6 the bike lane, the bus was in the bus lane at the time  
7 point that they were at the crosswalk, and the bus  
8 started passing him. That is the key fact in the case.

9 So we have four different witnesses telling  
10 you that this is what happens. And we have the  
11 defense. Okay? Like I said before, they started off  
12 trying to put the bike in the far right turn lane.  
13 That didn't succeed. So now they're saying, "Oh, well,  
14 what really happened in this case is the doctor turned  
15 in front of the bus."

16 Four different people. And what did they say  
17 to you? They have Dr. Krauss come in here and say,  
18 "Oh, witnesses, they don't remember. They're not  
19 reliable." And they have Dr. Carhart saying, "Oh, we  
20 have to disregard the witness testimony. It's not  
21 reliable."

22 It's not one witness, it's not two witnesses,  
23 it's not three witnesses; it's four different  
24 witnesses. Okay? This basically destroys their entire  
25 case. If you believe the fact witnesses -- and this is

1 what Dr. Carhart said yesterday. If you believe the  
2 fact witnesses, you can't believe Dr. Carhart.

3 You know, we went through the scales of  
4 justice. We got the four fact witnesses on one side,  
5 we have -- and, by the way, the plaintiffs' experts are  
6 consistent with the fact witnesses. But, in any event,  
7 you know, which is probably more true, what the people  
8 that saw it with their own eyes are telling you, the  
9 people that are not being paid by the defendant to come  
10 in here in court and give some sort of opinion, the  
11 people that -- that are not hired experts that have  
12 worked 34 times for Ford and over and over again for  
13 these other manufacturers? Who is more credible?

14 These four people don't have any financial  
15 bias; they're just regular members of the community  
16 that happened to see a bus accident. And this is what  
17 they came in and told you. So if you believe these  
18 eyewitnesses, Dr. Carhart is wrong.

19 Next, it was undisputed testimony that the  
20 bus driver in this case did not see the bike for the  
21 last 400 feet. You remember we had Mr. Hubbard come in  
22 here and he put -- well, okay. Go ahead. Play it.

23 (Whereupon video was played.)

24 "Q. And for 450 feet after passing the  
25 cyclist at the city cutout, you never saw the

1 cyclist again?

2 "A. No, sir.

3 "Q. And so I'm understanding you  
4 correctly, sir, the bus that you were operating  
5 and driving for that 400 feet between the pink  
6 Post-it on the map and the zero line, you  
7 were -- you did not, at any point in time  
8 before this intersection, between that 450 feet  
9 that we're discussing, see the cyclist?

10 "A. You mean from the cutoff -- cutout?  
11 No, sir, I did not."

12 (Video ends.)

13 MR. KEMP: Undisputed, there's been no  
14 argument about it. Okay? And think about it for a  
15 minute. The bus driver is approaching an intersection.  
16 Where should he be looking? Straight ahead at oncoming  
17 traffic to his left. Their argument is that he should  
18 have been staring through the right side of the front  
19 corner of the bus the entire time. That's their  
20 argument. And we know what that's going to show.  
21 That's going to show the blind spot.

22 But, in any event, this is undisputed  
23 testimony that, for whatever reason -- and we can  
24 contend it was the blind spot -- for whatever reason,  
25 he didn't see the bike during that time.



1           Now, another key piece of evidence is the Red  
2 Rock video. You saw Dr. Carhart didn't want to talk  
3 about the Red Rock video.

4           Okay. In the Red Rock video, you see that  
5 shadow? You see the shadow that's Dr. Khiabani? And,  
6 by the way, counsel, when they cross-examined our  
7 accident reconstruction expert, if you recall, they  
8 suggested to you -- they suggested to you that that's  
9 not really the shadow of Dr. Khiabani; that's the sun  
10 on the other side of the bus. Do you remember  
11 Mr. Barger doing that?

12           When he did that, he knew all his experts  
13 concluded that that's Dr. Khiabani. He knew that. He  
14 was just throwing something out there. But, in any  
15 event, this picture alone proved -- if you don't want  
16 to believe the four witnesses, look at this picture.  
17 Dr. Khiabani is behind the front of the bus. He's not  
18 turning in front of the bus.

19           Can I have my next one, Shane.

20           Again, Red Rock No. 3. There's five of them  
21 in this sequence, I believe. This is 3. First one was  
22 2. The -- the Red Rock No. 1 was the one on the bus  
23 crosswalk just showing the bus.

24           Again, you see the doctor behind the front of  
25 the bus, not in front of the bus like Dr. Carhart said.

1           Next.

2           Another one, doctor little bit farther  
3 behind, but he is not in front of that bus.

4           Next one.

5           Again, the doctor is behind the bus. And, as  
6 you can see, the bus is going faster than the doctor,  
7 so the shadow is moving farther along the back of the  
8 bus.

9           Next one, please. Go back one.

10          So we have four different witnesses, four  
11 different pieces -- photos, and they all show that the  
12 bike did not turn in front of the bus. That's their  
13 theory of the case. You just heard it yesterday. You  
14 heard Dr. Carhart tell you that, according to physics,  
15 that he understood that the four eyewitnesses in these  
16 pictures have to be wrong. Okay?

17          Think about that, ladies and gentlemen. Four  
18 eyewitnesses, four pictures taken from the Red Rock  
19 video, that is wrong? The direct evidence is wrong and  
20 the opinion of Dr. Carhart is right?

21          Another important point that I think came  
22 out, really, for the first time yesterday:  
23 Dr. Khiabani lived to the west of the Red Rock Casino.  
24 So he was coming east down Charleston. He turned south  
25 on Pavilion Center to go home. And he was expected

1 home; you heard the testimony. We played it yesterday.

2 To go home, he would turn right. He would go  
3 west. He wouldn't turn left. So Dr. Carhart is  
4 suggesting to you that, for some reason, Dr. Khiabani,  
5 in this case, turned left away from his house, turned  
6 into incoming traffic. Okay? You know, turned into  
7 incoming traffic, and that that was the cause of the  
8 accident.

9 Makes no sense. Mr. Pepperman asked him on  
10 the stand, "Well, why do you think that occurred? Can  
11 you give us any reason why you are claiming that  
12 Dr. Khiabani turned left?" He didn't have an answer.

13 Okay. You've seen these pictures before.

14 Okay, Shane.

15 The point I want to make now is take a  
16 look -- that's where the brake hood hit the bus. Do  
17 you see a mark from the helmet above that? Remember  
18 they brought Dr. Baden in here to say, "Oh, gee, I  
19 think his head hit." And then he backed off and said,  
20 "Well, I'm -- I'm -- it's sheer speculation that the  
21 head hit."

22 There's no mark from the head hitting, no  
23 mark whatsoever. More importantly, a little lower than  
24 that, there's no mark for the tire hitting. Remember  
25 we went through this with -- our accident

1 reconstruction expert told you that if they had -- if  
2 the bike had turned in, it would have damaged the bike.  
3 We spun the wheel. There's no damage on the bike.

4           So it's pretty clear that what happened in  
5 this case -- and this is what both of the experts --  
6 the accident reconstruction experts said. It's pretty  
7 clear that what happened in this case is that the hood  
8 of the brake hit the side of the bus.

9           And that's another picture of the left-hand  
10 side of the bike to show that that was damaged.

11           All right. Now let's talk about the  
12 right-side blind spot. Let's start -- this is the  
13 picture from Mr. Cohen. Remember, he was the 3-D  
14 visualization expert?

15           The bottom, you can barely see the tires on  
16 the bike. The top, the body -- the entire body of the  
17 bike is blocked. Most of the doctor's body is blocked  
18 and you can see the head. This is the shot that the  
19 3-D animation expert presented to you.

20           And do you remember Mr. Terry, he tried to  
21 move the bike over here and move the bike over there  
22 and move the bike over here to show that there was a  
23 better viewpoint. And he stopped when he saw how the  
24 right-side blind spot was all over the place. But this  
25 is -- this is visual evidence of the right-side blind

1 spot.

2 So, in addition to that, we presented the  
3 testimony of a bus safety expert. And this wasn't any  
4 bus safety expert; this was the bus safety expert from  
5 the Amalgamated Transit Union. That is the biggest  
6 union. They represent 200,000 bus drivers. That is  
7 the biggest bus drivers union in the world.

8 Mr. Sherlock is the safety specialist for the  
9 biggest bus drivers union in the world. This is his  
10 job. He investigates bus accidents. He told you he  
11 used to be a driver. He worked his way up in Seattle,  
12 and now he's in DC. He is the head investigator for  
13 the biggest bus driver union in the world. And this is  
14 what he said about the J4500's right-side blind spot:

15 (Whereupon video was played.)

16 "Q. Okay. And do you have an opinion as  
17 to whether or not the J4500 bus in this case  
18 has a right-side visibility problem?

19 "A. Yes.

20 "Q. What is your opinion?

21 "A. It's extremely bad and extremely  
22 unnecessary. It takes very little to lower the  
23 windshield base so that you can see down  
24 better. It takes very little to make the  
25 pillars thinner. The structural element in

1       there that you can't change is only about that  
2       big (indicating). And the rest can be changed  
3       and intelligently designed so that you have  
4       unobstructed vision. Doors are available that  
5       are all glass. And you'll see that this has  
6       large obstructions.

7               "And all of that would have helped you.  
8       Especially off in this peripheral area of your  
9       view, it's extremely important to have really  
10      unobstructed vision. And it's trivial to do  
11      it."

12                       (Video ends.)

13               MR. KEMP: So here is the bus safety  
14      specialist from the biggest bus driver union in the  
15      world telling you that there's a right-side blind spot.  
16      Okay?

17               So we have the picture from -- from  
18      Mr. Cohen, we have this testimony. And then we have  
19      their expert, Mr. Krauss -- or Dr. Krauss. Excuse me.

20               So Dr. Krauss, he said that they did  
21      right-side visibility tests that -- after the accident,  
22      they did right-side visibility tests. Remember, there  
23      were no right-side visibility tests done on the J  
24      series.

25               And we played Mr. Hoogestraat's testimony.

1 He's the PMK. He said they didn't do any right-side  
2 visibility tests on the J series. He also said he  
3 thought they did them on the E series, but when we  
4 asked him for them, he couldn't find them. So then he  
5 backed off and said, "I don't even know if we did  
6 right-side blind spot tests on the E series."

7           So he's the PMK. You know we read a PMK  
8 instruction. That was Jury Instruction 16. And by  
9 "PMK," I mean he was the 30(b)(6) witness. When you  
10 look at Instruction 16 in your book, you'll see it says  
11 "30(b)(6) witness." He's a witness for three different  
12 areas, one of which is the right-side blind spots. His  
13 testimony is binding -- binding. If you look at the  
14 last word in that instruction, it says "binding." They  
15 can't flip-flop and say "Oh, there's not a right-side  
16 blind spot." He said there is.

17           And, first of all, Dr. Krauss, this is what  
18 he -- he describes a 40-inch right-side blind spot  
19 that's 5 feet deep.

20                   (Whereupon video was played.)

21           "Q. Dr. Krauss, I just asked you if you  
22 would agree with -- you would agree with  
23 Mr. Sherlock's opinion that there was a blind  
24 spot; yes?

25           "A. The blind spot I measured for the

1           bike was 5 feet out and about 40 inches long.

2           "Q. Is that a yes?

3           "A. That's a yes, with that caveat."

4           (Video ends.)

5           MR. KEMP: This is their expert. This is not  
6 my expert. So their expert is telling you that this  
7 bus has a 40-inch, 5-foot deep right-side blind spot.

8           Moving to Mr. Hoogestraat. We played his  
9 videotaped deposition to you. He admitted -- he  
10 admitted that there's a right-side blind spot.

11          Please, Shane.

12          (Whereupon video was played.)

13          "Q.Let's go to real J4500.

14          "A.Let's go real world.

15          "Q.Okay.

16          "A.If that's all right. And, yeah, it will -- it is a  
17 blind spot, although, because the driver is quite a  
18 ways away from it, the angle is very narrow for the  
19 right-hand A-pillar. But an A-pillar in all vehicles  
20 creates somewhat of a blind spot."

21          (Video ends.)

22          MR. KEMP: You know, I don't think I'd call a  
23 4-foot blind spot narrow, but, in any event, he  
24 admitted that there's a blind spot.

25          And the problem in this case is the blind



1 spot gets worse the closer you get to the bicycle. We  
2 presented Mrs. Witherell's testimony. She was a real  
3 bus driver that drove the J4500 for approximately 14  
4 years. You know, she wasn't some expert that they paid  
5 to come in here and drive -- drive buses up and down  
6 test tracks in Phoenix. She was a real bus driver.

7 Here's what Ms. Witherell told you about the  
8 right-side blind spot.

9 Well, excuse me. I think I have Hubbard  
10 first. Mr. Hubbard, the driver in this case, he told  
11 you there's a right-side blind spot.

12 (Whereupon video was played.)

13 "Q. That there are blind spots on this  
14 bus?

15 "A. Yes."

16 MR. KEMP: Okay. And now we have  
17 Mrs. Witherell.

18 (Whereupon video was played.)

19 "Q. The J4500 has a right-side blind  
20 spot?

21 "A. Yes, sir.

22 MR. KEMP: And then she explained to us that  
23 it gets worse as you approach a bike on the right side.  
24 Mrs. Witherell's testimony again.

25 (Whereupon video was played.)

1 "Q. And so as of 2011, the J4500 still  
2 had what you considered to be a right-side  
3 blind spot problem?

4 "A. Yes, sir.

5 "Q.Now, as you approach an object on the right of  
6 you with the bus, does the blind spot problem get  
7 better or get worse, in your experience?

8 "A.As you -- it's as you're starting to pass it, then  
9 it gets -- it starts to get worse.

10 "Q.And why is that?

11 "A.Because you can -- with your field of vision, you  
12 can see in front of you; but then as you're coming  
13 toward that right front of the bus, there's a field  
14 that's a blind spot."

15 Then, even worse, she said that if you are  
16 approaching a bike, that is directly in where the blind  
17 spot would be.

18 Can I have my next one, Shane.

19 (Whereupon video was played.)

20 "Q.So you're driving an MCI J4500 and you're  
21 approaching a bicyclist on the right side. And  
22 Mr. Kemp asked you, you know, is the blind spot worse  
23 as you approach 5 to 10 feet. In that scenario, as  
24 you're approaching the bicyclist on the right-hand  
25 side, at what point, if you sat stationary, would that

1 blind spot kick in? While the bicyclist was still in  
2 front of you or when he was parallel or when he was  
3 behind you?

4 "A. When he's probably roughly, I'd say, maybe 6 to  
5 10 feet in that corner, you might not be able to see  
6 him. And then just as he gets, you know, almost to the  
7 edge of the door there."

8 MR. KEMP: Exactly what happened in this  
9 case. You heard Mr. Hubbard's testimony that he first  
10 noticed the bicycle when it got to the edge of the  
11 door. But, in any event, they didn't rebut this  
12 testimony.

13 I can talk about the jury instruction for  
14 consumer expectations. That's the user of the product,  
15 you look at their expectations. You don't look at  
16 Dr. Khiabani's expectations, because he's not driving  
17 the bus. You look at the user of the product. In this  
18 case, it's the bus driver's. Okay?

19 This testimony was not rebutted. They did  
20 not bring in any bus drivers to say that the coach does  
21 not have a blind spot. We have three different bus  
22 drivers that told you. We have Hubbard; we have  
23 Sherlock, again from the union; and then we have  
24 Ms. Witherell. Three different bus drivers with  
25 real-world experience. Decades. Hubbard had been

1 driving for 20 years. She's got 14. Mr. Sherlock has  
2 got 25. So you have 50 years of experience of three  
3 different bus drivers that were driving this bus, and  
4 they all tell you that there's a blind spot.

5 Their expert says there's a blind spot.  
6 Really not a dispute that there's a blind spot. We  
7 have Sherlock, Krauss, Hoogestraat the PMK, Hubbard,  
8 Witherell. They all told you, there's a blind spot.

9 And there's been people killed because of  
10 these blind spots in addition to Dr. Khiabani. Okay.  
11 Mr. Sherlock told you about a death case in New York.  
12 We played that yesterday. Let me play it one more  
13 time.

14 (Whereupon video was played.)

15 "Q.Have you investigated other fatality cases  
16 involving MCI bus where there were front and side  
17 visibility problems?

18 "A.Yes.

19 "Q.And can you tell the jury about some of those  
20 cases.

21 "A.One was an elderly woman who jaywalked, as I was  
22 talking about the problem in New York and New Jersey.  
23 This elderly woman walked in front -- came between  
24 traffic waiting at a light. And the vehicles were very  
25 tall -- 6 feet -- and she wasn't. So she steps from

1 behind these vehicles right in front of the bus, and  
2 now she's behind the pillar on the left, which is very  
3 similar to the pillar on the right, and the mirror and  
4 the high base of the window, she was unseen and  
5 crushed."

6 MR. KEMP: An MCI bus that's not a J4500. It  
7 has the same type of blind spot problem.

8 Next he told you about a New Jersey case,  
9 another death case.

10 (Whereupon video was played.)

11 "Q.Where was that case at?

12 "A.In New Jersey.

13 "Q.And what happened in that case?

14 "A.A pedestrian was run over by the rear wheels when  
15 the driver couldn't see her behind this  
16 pillar-and-mirror structure. So you've got problems on  
17 both sides on this bus. And they're related in that  
18 big areas of the space you're driving through are  
19 blocked from view. And in both directions, you can  
20 lose track of pedestrians who are tracking with those  
21 blind spots."

22 MR. KEMP: So we have three bus drivers. We  
23 have their PMK, Hoogestraat. We have their expert,  
24 Mr. Krauss, the one with the 40-inch, 5-foot-deep,  
25 blind spot. All those people are telling you there's a

1 blind spot in this bus.

2 Do you know the only person or the only two  
3 people who testified that there's not a blind spot?  
4 The only two people who said, no, there's no blind spot  
5 in this bus, it was the people who designed it. Those  
6 two gentlemen told you that there's no blind spot.  
7 Let's have Mr. Lamothe's testimony.

8 (Whereupon video was played.)

9 "Q.Assuming that technique is not used, would you  
10 agree with me that there's a right-side visibility  
11 obstruction?

12 "A.No, I disagree with that."

13 MR. KEMP: Here's Mr. Couch, another one of  
14 the designers. He was in charge of the design team.  
15 He was in charge of the design team for the J series.  
16 Here's what he said.

17 (Whereupon video was played.)

18 "A.As I said, the MCI's coaches do not have a problem  
19 with blind spots."

20 MR. KEMP: Okay. The two designers say  
21 there's no blind spot. But the PMK, the 30(b)(6)  
22 witness, Mr. Hoogestraat, that's binding on the company  
23 that there's a blind spot. But the important thing  
24 here is that I asked Mr. Couch what you did to rectify  
25 the blind spot problem. You say there's no blind spot.

1 Did you do anything to fix a potential blind spot  
2 problem? He told us that they didn't try to fix  
3 anything because he didn't think there was a problem.

4 (Whereupon video was played.)

5 "Q.Okay. So what did you do as head of the design  
6 engineering to eliminate, mitigate, reduce -- whatever  
7 term you want to use -- right-side blind spots for the  
8 J4500?

9 "A.I don't believe that we had any active initiatives  
10 at that time because we didn't have a problem."

11 MR. KEMP: Active initiatives. That's  
12 engineer speak for doing something about it. Okay?  
13 They didn't do anything about it because he didn't  
14 think they had a problem, whereas we see from all the  
15 other witnesses, they did have a problem.

16 Simple fixes here. They were very simple  
17 fixes to these blind spot problem. Mr. Sherlock told  
18 you about it. They could have lowered the high dash.  
19 They had the highest dash in the industry. Just lower  
20 the dash. How tough is that?

21 They could have made the lower door -- the  
22 middle door is not see-through; the lower door is  
23 see-through. Either they could have flip-flopped the  
24 doors or, as Mr. Sherlock said, they could have used  
25 all-glass doors. Mr. Hoogestraat said, "Oh, gee, that

1 would make the bus noisy."

2 One of the jurors asked, "Well, noisy? Have  
3 you tested this?"

4 No, no test. That's something that  
5 Mr. Hoogestraat came up with.

6 But in any event, the -- this is the  
7 testimony again from Mr. Sherlock. If they had fixed  
8 the right-side blind spot, if they had done anything to  
9 fix it, would it have made a difference in this case?

10 (Whereupon video was played.)

11 "Q.Okay. And with regards to the good right-side  
12 visibility that you've outlined and the bad right-side  
13 visibility that this bus has, if you had cured those  
14 problems, would that have made a difference in your  
15 opinion?

16 "A.It seems extremely likely that Mr. Hubbard would  
17 have seen the bicycle coming his way earlier if the  
18 bicycle wasn't something like 90 percent obscured."

19 MR. KEMP: He said it again.

20 Can I have it again, Shane?

21 (Whereupon video was played.)

22 "Q.Okay. And with regards to the good right-side  
23 visibility that you have outlined" --

24 MR. KEMP: Okay.

25 (Whereupon video was played.)



1 "Q.It is your belief that, if he had had better  
2 visual lines, he would have turned sooner?

3 "A.Precisely.

4 "Q.And that would have avoided the collision?

5 "A.It could have either mitigated or avoided."

6 MR. KEMP: Okay. They could have designed  
7 the bus to eliminate the problem. Could have been a  
8 physical fix.

9 Okay. The other solution here was the  
10 proximity sensor. Okay. So let's talk about -- and  
11 this is the second defect on the verdict form. At some  
12 point we'll talk about the verdict form. This is in  
13 general how a proximity sensor works. This is the  
14 illustration you have seen a couple of times.

15 The rays -- it's either lidar or radar;  
16 there's two different types -- they shoot out and they  
17 bounce back and they have some sort of alert system.  
18 Okay. The rays actually go out farther than this. If  
19 you remember, Mr. Sherlock testified that they went out  
20 300, 350 feet. But this was one solution that they  
21 could have done.

22 Remember, the bus was designed in '92. This  
23 came out in 1998. Okay. So they would have had to  
24 be -- and then the bus was made in this case in 2007.  
25 So they had nine full years to -- remember, they said

1 they were supposed to investigate new developments,  
2 implement new developments -- nine full years to get  
3 this proximity sensor system on a bus.

4           Mr. Sherlock explained that the other buses,  
5 their competitors, had proximity sensors, specifically  
6 the Eaton system, in 2007, the exact same year this  
7 bus -- remember, they -- they say they're the leader in  
8 the industry. They sell more of these motor coaches --  
9 I keep calling them bus; they like to be called motor  
10 coaches. They sell more motor coaches in North America  
11 than anybody else. They claim they're the leader in  
12 the industry. Okay. So we ask them, did other  
13 buses -- motor coaches -- have proximity sensors? This  
14 is the motor coach.

15           Please.

16                       (Whereupon video was played.)

17           "Q.Did other buses have proximity sensors?

18           "A.Yeah. Certainly, the BCI did.

19           "Q.And when did that come out?

20           "A.'07.

21           "Q.2007?

22           "A.2007, correct."

23           MR. KEMP: Okay. And we're going to get to  
24 the Motorcoach News edition that came out on  
25 October 15th, 2007, where this BCI bus is on the front

1 page and there's a description about the proximity  
2 sensor system in the article. That's why we were  
3 asking the questions to Mr. Hoogestraat yesterday to  
4 establish he subscribed that publication.

5 In any event, this system was out there.  
6 They knew about it because they had Bus & Motorcoach  
7 News.

8 Mr. Hoogestraat, again, he is the 30(b)(6)  
9 witness. So go back and look at the jury instruction.  
10 One of the areas he was designated as the 30(b)(6)  
11 witness -- there's three areas. right-side blind  
12 spots, proximity sensor is the second one. But one of  
13 the areas was proximity sensors.

14 So what did he say when we asked him in his  
15 30(b)(6) deposition if he knew -- if he knew that  
16 proximity sensors were available?

17 (Whereupon video was played.)

18 "Q.Right. if You just wanted a warning system,  
19 you could buy the 399 system from Bendix and put it on  
20 the bus; right? That wouldn't have brake  
21 compatibility, but you could give a warning?

22 "A.Warning of what?"

23 "Q.Side-to-side objects, objects to the side of  
24 you.

25 "A.You can buy systems that give little warnings if

1 that's -- I guess."

2 MR. KEMP: He knew the systems were out  
3 there. He knew about this. Okay? At the time the bus  
4 was made, they didn't put it on the bus.

5 So the evidence is established. The J4500  
6 had a right-side blind spot. They knew about it.  
7 There were front and side proximity sensors -- or they  
8 could have even used cameras. Okay. That was another  
9 option available.

10 Competitor buses -- this is the BCI Falcon 45  
11 which we'll get a into in a little bit -- used  
12 proximity sensors. And they didn't do anything. They  
13 didn't design the bus to eliminate the right-side blind  
14 spot problem. They didn't get a proximity sensor.  
15 They didn't get a camera system. They didn't do  
16 anything.

17 So issue: Would a proximity sensor have made  
18 a difference in this case?

19 Here's Mr. Sherlock's testimony about how a  
20 proximity sensor would work.

21 (Whereupon video was played.)

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

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

8 MR. KEMP: Okay. This wasn't rebutted. They  
9 did not call anybody with regards to proximity sensors  
10 to tell you that Mr. Sherlock was wrong. They didn't  
11 call one single witness that said, Oh, a proximity  
12 sensor wouldn't have worked in this case for this,  
13 that, or the other reason. We heard about the S-1 Gard  
14 till we're blue in our faces, but they didn't call one  
15 single witness to say that proximity sensors wouldn't  
16 work. Okay. This is unrebutted.

17 Instead, instead, we had a series of  
18 witnesses who all told you that they thought the bus  
19 should have had a proximity sensor. And, again, when  
20 you get the jury form, it's going to say "consumer  
21 expectations." That's going to be the language. I'm  
22 going to show it to you. But the consumer in this case  
23 is the bus driver. That is the user of the product.  
24 The product is the bus.

25 So under the consumer expectations test, it's

1 what does the consumer expect with regards to safety?  
2 All right? So I'm going to show you what the bus  
3 drivers, the real-world bus drivers, said about whether  
4 a proximity sensor should have been on this bus.

5 First, let's go back to Mrs. Witherell.

6 (Whereupon video was played.)

7 "Q.Do you think the proximity sensors are a good  
8 idea?

9 "A.In my personal opinion, yeah.

10 "Q.And why is that?

11 "A.Just because the right side of the bus is -- you  
12 know, like I said, you've got more blind spots on your  
13 right side than the left side of the bus.

14 "Q.Okay.

15 "A.And anything is better as long as -- you know,  
16 anything that increases the safety is better for  
17 everybody."

18 MR. KEMP: How can you disagree with that?  
19 If it increases the safety, it's better for everybody.

20 Ms. Witherell, again, you heard she expressed  
21 her opinion a little more forcefully.

22 (Whereupon video was played.)

23 "Q.That's your opinion as the bus driver --

24 "A.Yes.

25 "Q.-- for the last 20 year, that all buses should

1 have proximity sensors?

2 "A.On the right side, maybe. Yeah.

3 "Q.On the right side?

4 "A.Uh-huh."

5 MR. KEMP: Mr. Hubbard, the driver in this  
6 case, told you that all buses should have proximity  
7 sensors.

8 (Whereupon video was played.)

9 "Q.Mr. Hubbard, in your experience, would a  
10 proximity sensor or a camera on a bus be a good idea?

11 "A.Yes."

12 MR. KEMP: They didn't call one single  
13 expert, with the exception of Mr. Krauss -- or  
14 Dr. Krauss, who I'm going to get into in a minute, they  
15 didn't call one single expert that told you that  
16 proximity sensors are a bad idea.

17 Do you know why? It's because every one of  
18 their experts has proximity sensors in their personal  
19 cars.

20 Remember Mr. Rucoba? He was their first one.  
21 He had the two Kias from Korea that he gave to the wife  
22 and the daughter that had proximity sensors.

23 We had Mr. Granat. He had the Ford Explorer  
24 that has a proximity sensor.

25 But my all-time favorite in this trial came

1 from Dr. Krauss. This is what he said about the  
2 proximity sensor in his car and why he uses it and how  
3 it works.

4 Dr. Krauss, their expert.

5 (Whereupon video was played.)

6 "Q.Because she can't see your kids' bikes. So  
7 it's important for your wife's car she be able to see  
8 bikes?

9 "A.Well, when you're pulling up -- so just like you  
10 quoted from my book that trucks and cars necessarily  
11 will have some sort of blind spot owing to either the  
12 length of the hood or just the instrument cluster if  
13 you've got a completely flat front. There is  
14 definitely a blind spot. And, like I said earlier, the  
15 lower the object, the greater the blind spot.

16 "So if I'm standing in front of her car,  
17 she can see me just fine, probably doesn't need  
18 the proximity sensor. But for the bucket that  
19 we have that sits in front of her car in the  
20 garage and for my kids' bikes, she can't see  
21 those. So the beeping is actually very helpful  
22 for that."

23 MR. KEMP: This is their expert. A proximity  
24 sensor that beeps is very helpful to his wife. Very  
25 helpful to his wife to see bikes, bikes in their garage



1 so they don't run over them.

2 But then he turns around and says that "Oh,  
3 we don't need a proximity sensor for buses because that  
4 would be too much information for the bus driver."

5 Do you remember him saying that? "We can't  
6 have the proximity sensor with the red light or the  
7 beep or whatever. That would be too much information.  
8 It would be distracting."

9 Well, that's not what the bus driver said.  
10 That's not what Mr. Hubbard said. That's not what  
11 Ms. Witherell said. That's not what Mr. Sherlock,  
12 the -- from the union said. They all wanted proximity  
13 sensors.

14 So it's helpful for their families and for  
15 their wives, but it's not helpful for MCI to put on  
16 this particular bus.

17 So let's talk about what a proximity sensor  
18 would have done. And let's start with the front  
19 proximity sensor.

20 First, we had Mr. Sherlock's testimony.  
21 Again, he's the union bus safety specialist. This is  
22 what he said. Would a proximity sensor have made a  
23 difference in this case?

24 (Whereupon video was played.)

25 "Q.Okay. Let's start with a proximity sensor.

1 Would a proximity sensor have made a difference in this  
2 case?

3 "A.Especially if it was used as a blind spot sensor.

4 The guide does speak specifically to that.

5 "Q.And by make a difference, I'm referring to  
6 would it have moved -- would it have allowed the driver  
7 to move the bus over so that it would have been over  
8 another 4 inches and not run over Dr. Khiabani?

9 "A.There's an extreme likelihood. The driver, for  
10 whatever reason, whether he's looking in his mirrors or  
11 whatever he's doing, he seems to be unaware of where  
12 that bicycle is for a stretch of time prior to its  
13 moving over.

14 "Had this system alerted him, Hey, come  
15 on, check. You've got a problem going on, and  
16 told him where to look, as some of these do,  
17 there's a fair certainty this would not have  
18 occurred."

19 MR. KEMP: All right. And Mr. Hubbard  
20 testified in this trial that, if he had been alerted  
21 earlier, he would have taken evasive action earlier.

22 This is his testimony. Remember he did take  
23 evasive action, just wasn't successful because he  
24 started too late. He said if he had been alerted  
25 earlier, he would have taken evasive action earlier.

1 (Whereupon video was played.)

2 "Q.If you would have been alerted to the bicyclist  
3 earlier, earlier than your peripheral vision, would you  
4 have taken evasive action earlier?

5 "A.Yes."

6 MR. KEMP: And how much earlier could a  
7 proximity sensor with a 300-foot, 350-foot front range,  
8 how much earlier on a bus traveling 25 miles per hour  
9 would it have alerted Mr. Hubbard?

10 We asked this question of Dr. Krauss. And  
11 here's what he said.

12 (Whereupon video was played.)

13 "Q.How many seconds does that bus travel in 350  
14 feet? Is that easier?

15 "A.So are you talking about specifically closing in on  
16 the bike?

17 "Q.Yes, sir, please.

18 "A.So at about 20 feet per second, it's going to be --  
19 is that about 8 -- no, sorry. My math is very bad.  
20 About 17 seconds."

21 MR. KEMP: 17 seconds. Not 1.7 seconds. 17  
22 seconds is when the proximity sensor would have started  
23 the alert at 350 feet.

24 We go down to 300, 250, 200, the time gets  
25 less. But that is the outer range for the front

1 proximity sensor. 17 seconds.

2 Now, Mr. Sherlock said, the bus driver in  
3 this case, because he was already turning, didn't need  
4 17 seconds. He needed .1 to .12 seconds because he was  
5 already turning.

6 (Whereupon video was played.)

7 "Q.Well, it's less than 1.25 seconds; right?

8 "A.Way less.

9 "Q.Probably in the neighborhood .10 to .12  
10 seconds?

11 "A.Oh, sure, yeah.

12 "Q.And with regards to a left proximity sensor --  
13 excuse me, Your Honor -- would that give warning --  
14 it's Friday, ladies and gentlemen. Would that give  
15 .10, .12 seconds' warning -- additional warning to the  
16 bus driver?

17 "A.It seems likely."

18 MR. KEMP: Okay. 17 full seconds of warning  
19 would not have made a difference in this case? They  
20 don't tell you that what -- okay. They did not present  
21 any testimony that, if a proximity sensor had gone off  
22 and given 17 seconds of additional warning, that that  
23 wouldn't have prevented the accident.

24 The only thing they say, the only thing they  
25 say, is Dr. Krauss says, oh, can't have a proximity

1 sensor because it would distract the driver. That is  
2 their testimony in this case. That is their  
3 justification for not having a proximity sensor or that  
4 it would not be a cause to save Dr. Khiabani, that, in  
5 his opinion, it would distract the driver.

6 All right. Let's move over to the S-1 Gard.  
7 Two different witnesses testified that the S-1 Gard is  
8 a good safety feature and it should be used on all  
9 buses.

10 Remember the testimony, it's used on 50,000  
11 buses now. Disney World has it. Santa Monica Bay View  
12 has it. A lot of transit buses have it.

13 This is Dr. Barron -- excuse me --  
14 Mr. Barron's testimony. He is the inventor of the  
15 S-1 Gard. He looks like an inventor. But he  
16 testified -- and he studied the industry. He went  
17 through it with y'all, the statistics and everything.  
18 This is his business, the S-1 Gard business. This is  
19 what he testified.

20 (Whereupon video was played.)

21 "Q.Do you believe that the S-1 Gard should be  
22 standard equipment on all buses?

23 "A.In the U.S. or --

24 "Q.Yes.

25 "A.The U.S., yes.

1 "Q.Okay. Based on your experience in the  
2 industry, do you believe that the safety benefits of an  
3 S-1 Gard outweigh the cost to equip the buses?

4 "A.Absolutely. Absolutely."

5 (Video ends.)

6 MR. KEMP: He also told you that, right now,  
7 as we speak, there's approximately 500 of these Big  
8 Blue Buses -- and they have MCI J4500s -- 500 of these  
9 Big Blue Buses running around Santa Monica with these  
10 S-1 Gards. And they're going back and forth from the  
11 airport to hotels, just like was done in this case.  
12 Okay? They picked up these -- some of these people --  
13 tourists -- at the airport, and they took them to the  
14 Red Rock Casino. That was the use of the bus in this  
15 case.

16 This is what he says about the Santa Monica  
17 Big Blue:

18 (Whereupon video was played.)

19 "Q.In fact, I think you mentioned that you have  
20 sold S-1 Gards to motor coach companies; right?

21 "A.Yes.

22 "Q.And you mentioned specifically motor coach  
23 companies that shuttle people from the airport.

24 "A.Right. Santa Monica Big Blue. It's a big one here  
25 in Los Angeles. It's running about 500 buses. They

1 have MCIs."

2 (Video ends.)

3 MR. KEMP: And the reason this is important  
4 is because I don't know how many times they stood up  
5 and said, "Oh, we're a motor coach; we're not a transit  
6 bus." Santa Monica Big Blue is a motor coach. They're  
7 running 500 motor coaches, including the MCI motor  
8 coaches, back and forth from the airport to the hotels  
9 in Los Angeles. It's being used.

10 And I don't have a tag, but if you remember,  
11 in his deposition, they asked, "Do you know of any  
12 problems -- even one reported problem, Mr. Barron?"  
13 And he would know. He's the one who's making the S-1  
14 Gard. Doesn't know of one single reported problem.  
15 All right?

16 And then, early on in the case, we had  
17 testimony from a man named Ellis. He was an engineer  
18 at New Flyer. New Flyer was another bus manufacturer  
19 that makes transit coaches. But he was actually  
20 involved with a company that was putting the S-1 Gard  
21 on the -- on the transit buses at the factory. They  
22 did it at the factory. If you remember, we showed you  
23 the S-1 Gard literature. The very first name was New  
24 Flyer as a user of the S-1 Gard.

25 So this -- this person has real-world

1 experience in putting on S-1 Gards. Again, he's an  
2 engineer from a different bus manufacturer, New Flyer.  
3 And we asked him, "Do you think this should be used on  
4 all buses?" You know?

5 And the reason we got this testimony is, you  
6 know, Mr. Barron, he's trying to sell these S-1 Gards,  
7 so we got to take his testimony with a grain of salt.  
8 This person is not trying to sell S-1 Gards. This is  
9 an engineer for a rival bus company.

10 (Whereupon video was played.)

11 "Q.And would that be a good safety feature for  
12 buses in general?

13 "A.Again, it's my personal opinion, I would say yes in  
14 terms of if it was just me. But, sure, anytime you can  
15 improve safety, you would want to consider that, sure."

16 (Video ends.)

17 MR. KEMP: "Anytime you want to improve  
18 safety." Sounds like what Ms. Witherell said.

19 All right. They came in and said, "Oh, jeez,  
20 we can't use these S-1 Gards because there hasn't been  
21 real-world testing." All right?

22 Well, there hasn't been real-world testing,  
23 but right now they're on 50,000 buses -- 50,000 buses.  
24 And the federal government pays 80 percent of the cost.  
25 Okay? Remember, we got into that with Mr. Hoogestraat?



1           So our government pays 80 percent of the cost  
2 of these on around 50,000 buses, and they say there  
3 hasn't been real-world testing. Well, there was  
4 real-world testing. There was an accident that  
5 happened in 2003 in Los Angeles. Okay? We tracked  
6 down the person that was in the accident.

7           That bus was going 25 miles an hour, just  
8 like the bus in this case was going 25 miles an hour.  
9 This gentleman did not have a helmet on, didn't have a  
10 helmet on. Okay? This is his testimonial as to what  
11 the S-1 Gard did in a real accident that happened in  
12 2003 in Los Angeles.

13                       (Whereupon video was played.)

14           "Q.After the accident, did you ever believe that  
15 you could have been killed if it hadn't been for the  
16 S-1 Gard?

17           "A.Yes, I thought I would have gotten killed."

18           "Q.Do you -- if we look at Exhibit 2, on page  
19 P01317 at -- at the top it says, quote, the S-1 Gard is  
20 designed to deflect a person out of the path of the  
21 wheels. Did -- did the S-1 Gard work to deflect you  
22 out of the pathway of the wheels in your accident?

23           "A.Yes, I think so.

24           "Q.Do you think the -- based on your experience,  
25 do you think the S-1 Gard is an -- an effective safety

1 device?

2 "Q.Yes. It worked for me."

3 (Video ends.)

4 MR. KEMP: This is not a test dummy; this is  
5 a real person who was involved in a real accident,  
6 riding a bike, where the bike tipped over, he went  
7 under the bus, and the S-1 Gard saved him. Only  
8 difference was -- only difference was he didn't have a  
9 helmet on. Dr. Khiabani had a helmet on.

10 So we get into the big debate here between  
11 the coroner and Dr. Stalnaker on the one side and  
12 Dr. Carhart on the other side as to whether or not  
13 there was an inch going over -- the sidewall was going  
14 over Dr. Khiabani's head or was it more of the tire?  
15 Okay?

16 And the reason for that big debate is they  
17 want to argue that, hey, even if there had been an S-1  
18 Gard on the bus, it wouldn't have made a difference in  
19 this particular case. That's their argument. So  
20 that's why they came up with the pinch theory. All  
21 right?

22 And you remember what Dr. Carhart told you?  
23 This is not the first S-1 Gard case he's worked on.  
24 Remember, he said that he has been involved in previous  
25 cases with regards to S-1 Gards? So it's not the first

1 time he's taken the witness stand. But let's start  
2 with Dr. Stalnaker.

3 Just briefly, on his qualifications,  
4 Dr. Stalnaker is the person that wrote the article from  
5 1973. 1973, he wrote the seminal -- the leading work  
6 on this, because, as we -- we told you -- and, you  
7 know, they seem to -- every time his name comes up,  
8 they go "Oh, jeez, some of these monkeys had to be  
9 extinguished after the testing." You know, like that  
10 makes the results of the test wrong and that you should  
11 hate Dr. Stalnaker because they were using live animals  
12 back in the '70s. Okay.

13 So he was using live animals, he was using  
14 cadaver skulls, he was doing some -- what were they  
15 doing? They were trying to figure out, if a skull is  
16 crushed, where does it break? You know, is there a  
17 circular skull fracture like we have in this case or is  
18 there something else?

19 So this is what Dr. Stalnaker said. And, by  
20 the way, before I forget, he's also a helmet expert.  
21 He testifies in a lot of helmet cases as well. And you  
22 would expect that because, with this kind of expertise,  
23 you know, the head and the helmet being crushed, that  
24 would be the kind of case you would see him in.

25 All right.

1 (Whereupon video was played.)

2 "Q.Now, based on your analysis, did you determine  
3 the amount of tire that came into contact with  
4 Dr. Khiabani's helmet?

5 "A.Not -- no. It was -- it was -- I mean, the tire  
6 width -- there was no way to say that the -- the whole  
7 tire -- there was some -- approximately -- I think it  
8 was about 6 or 7 inches of the tire was over the  
9 helmet, but I don't know whether it was inboard a  
10 little bit or outboard a little bit."

11 (Video ends.)

12 MR. KEMP: Okay. And he also told you  
13 specifically that an S-1 Gard, if it had been on this  
14 bus, would have saved the doctor.

15 (Whereupon video was played.)

16 "Q.Okay. In your opinion, and based on your  
17 analysis, if the S-1 Gard had been installed per the  
18 manufacturer's instructions about an inch or -- about  
19 an inch in from the tire tread, would the S-1 Gard have  
20 contacted Dr. Khiabani's head?

21 "A.Yes, it would have.

22 "Q.And would it have prevented Dr. Khiabani's head  
23 from being run over by the rear wheels of the tire?

24 "A.Yes, it would have knocked his head out of the way.

25 "Q.And is that opinion to a reasonable degree of

1 scientific certainty?

2 "A.Yes, it is."

3 (Video ends.)

4 MR. KEMP: Shane, let's skip the next  
5 Stalnaker clip and go straight to the skull fracture.

6 This is the circular skull fracture, and  
7 that's been highlighted. I told you during opening  
8 statement that it was highlighted. You know, I can't  
9 believe what Dr. Carhart -- "Oh, jeez, someone  
10 highlighted that." Well, of course, I told you it was  
11 highlighted.

12 But, in any event, that is what's called a  
13 circular skull fracture. Dr. Carhart didn't know much  
14 about it because he's not a doctor. Okay? He's not a  
15 medical doctor like the coroner was in this case. But,  
16 in any event, this is a circular skull fracture.

17 So their theory -- and remember he brought up  
18 the example of the egg? He brought up, okay, ladies  
19 and gentlemen, if you drop an egg, this is what  
20 happens. You break it a little bit and then it breaks  
21 more easily.

22 Well, their theory is, if you pinch the side  
23 of the head like the side of the egg -- if you pinch  
24 the side of the head, the bottom of the egg is going to  
25 break. That's their theory. Okay? That's the pinch

1 theory. All right? That if you pinch the side of an  
2 egg, the bottom of the egg is going to break. If you  
3 pinch the top of the head, the side of the head is  
4 going to show this circular skull fracture. And that's  
5 why experience with regards to skull fractures like  
6 Dr. Stalnaker has is important.

7 Let's skip the next one. This is the clip  
8 where Dr. Stalnaker said that the pinch theory here is  
9 impossible. This is what he told you yesterday. We  
10 played the clip yesterday when Mr. Pepperman was  
11 cross-examining.

12 Let me see my slide here.

13 This is what we got. Okay? And I showed you  
14 this during opening. You know, this case really hasn't  
15 changed that much during opening -- since opening.

16 We have Stalnaker on the one side. He's --  
17 his opinion is supported by the coroner in this case.  
18 She's not getting paid by either party. She's an  
19 employee of Clark County. She's an independent,  
20 neutral witness that came down here.

21 So we have Dr. Stalnaker and the coroner  
22 against Dr. Carhart. All right? The coroner  
23 specifically said that the skull was crushed and not  
24 pinched. This is what she said:

25 (Whereupon video was played.)

1 "Q.And his skull was crushed -- this helmet is an  
2 inch and a half thick and the injuries you saw were --  
3 where the helmet sits on the forehead, it was more than  
4 an inch that crushed his skull; correct?

5 "A.Yes.

6 "Q.And it didn't pinch his skull; it crushed it.  
7 Correct?

8 "A.Yes."

9 (Video ends.)

10 MR. KEMP: That's the coroner's testimony.  
11 They want you to disregard the testimony of the coroner  
12 in this case and buy into this pinch theory. All  
13 right?

14 Let's have Dr. Gavin again saying that, to a  
15 reasonable degree of medical probability, that the  
16 skull was crushed.

17 (Whereupon video was played.)

18 "Q.Dr. Gavin, the injuries that you see both in  
19 Exhibit 247, the film -- the x ray taken at your  
20 office, as well as Exhibit 253, the photograph of the  
21 external examination you performed on Dr. Khiabani, are  
22 those injuries consistent with a crushing mechanism?

23 "A.Yes.

24 "Q.Are they inconsistent with the sidewall of a  
25 tire striking the side of somebody's head?

1 "A.This doesn't look like that's what happened. This  
2 looks like something went right over that portion of  
3 his head and pressed his head, essentially squished it,  
4 crushed it.

5 "Q.Crushed it. And the head is inside the helmet.  
6 So if we look at the helmet, crushed it down into the  
7 asphalt?

8 "A.Yes. And it was the tire that ran over his head and  
9 caused the crushing, in your opinion?

10 "A.In my opinion.

11 "Q.To a reasonable degree of medical probability?

12 "A.Yes.

13 (Video ends.)

14 MR. KEMP: Now, they're going to tell you,  
15 well, you should disregard all this testimony because  
16 the coroner didn't come up with all these fancy 3-D  
17 graphics that Dr. -- that their expert had yesterday.

18 But the coroner in this case was the one that  
19 actually touched the body. The coroner, if you  
20 remember, told you that she put her hands on the body  
21 and she analyzed the skull with her own hands. The  
22 coroner's the one that went out to the scene  
23 immediately and investigated the accident. You saw the  
24 pictures that they were taken within two hours of the  
25 accident. The bus is still on the road by the Red



1 Rock. The coroner's out there investigating.

2 So -- and the coroner is a medical doctor.

3 Dr. Carnaker -- Carhart -- Carhart -- turned him into  
4 Carnaker.

5 Dr. Carhart -- I'm tired like Jerry. We were  
6 both here late last night. Sorry, Jerry. I didn't  
7 mean to call you out. Okay.

8 But, anyway, the coroner is a medical doctor.  
9 All right? She's telling you to a reasonable degree of  
10 medical probability. Dr. Carhart is not a medical  
11 doctor.

12 All right. Let's shift away from the S-1  
13 evidence to the aerodynamic issue. And I brought that  
14 up last because, number one, it's last on the verdict  
15 form, and, number two, the first three issues really  
16 don't have anything to do with aerodynamics, so I  
17 didn't want this to get bogged down by the  
18 aerodynamics -- aerodynamic issue.

19 There should be no dispute that the bike  
20 wobbled in this case. That was the key fact I was  
21 trying to convey during the opening statement, that  
22 Mrs. Bradley was going to say that the bike wobbled.  
23 She testified to it numerous times. Let me just play a  
24 couple clips.

25 (Whereupon video was played.)

1 "Q.So when you saw him wobble, did you see him  
2 wobble to the right and then the left, or what did you  
3 see?

4 "A.I only -- what caught my attention was the last --  
5 or I don't know if it was the last or first movement,  
6 but he wobbled to the left into the bus.

7 "Q.Okay. And when he wobbled, was it at the time  
8 the bus was passing him or ahead of him?

9 "A.They were even.

10 "Q.So they were even at the time that he  
11 wobbled -- that you saw him wobble?

12 "A.Yes."

13 (Video ends.)

14 MR. KEMP: Can I have the next one, please.

15 (Whereupon video was played.)

16 "Q.In Summerlin, according to the report by the  
17 meteorologist" --

18 (Video ends.)

19 MR. KEMP: Stop, Shane.

20 Okay. This was Mrs. Bradley's testimony, not  
21 refuted. They didn't call one single witness that said  
22 there was not a wobble. Instead, they jumped  
23 completely over that part of the accident. They  
24 argued, like Dr. Carhart did, is that he thinks that  
25 the bike turned in front of the bus. Couldn't have

1 happened if you believe the eyewitnesses, couldn't have  
2 happened if you believe the Red Rock video.

3 But they don't like the wobble. Okay? They  
4 don't like the fact there was a wobble. They don't  
5 like the position of the bus and the bike when it  
6 wobbled. And the reason is they have no explanation  
7 for the wobble.

8 Okay. Now starting towards the explanations,  
9 one of the jurors had a good question of Mr. Caldwell.  
10 They asked, "Well, jeez, you know, could the wind at  
11 Summerlin have anything to do with the wobble that  
12 day?"

13 And I just want to get this out of the way  
14 quick. It was a good question, but it was an easy one  
15 to eliminate.

16 (Whereupon video was played.)

17 "THE COURT: Yes. And so the second  
18 question is consistent with the first.

19 "Was it windy, the day of accident?"

20 MR. KEMP: I think we have -- I think we have  
21 the first part of Caldwell that we started playing.  
22 And Summerlin according to the report by the  
23 meteorologist. Do you have that one?

24 I'm sorry, ladies and gentlemen. We were up  
25 late last night. Some of us didn't get any sleep.

1 (Whereupon video was played.)

2 "A.In Summerlin, according to the report by the  
3 meteorologist that researched the weather that's much  
4 closer to the accident site, just before the event, it  
5 was blowing at 2 miles an hour out of the west and  
6 gusting to 6."

7 (Video ends.)

8 MR. KEMP: Okay. And the next one, please.

9 (Whereupon video was played.)

10 "THE COURT: Yes. And so the second  
11 question is consistent with the first.

12 "Was it windy the day of accident?

13 "THE WITNESS: And, again, I would  
14 consider those reported wind velocities not  
15 significant for a bicyclist in terms of it --  
16 it being windy. Obviously, there's -- there's  
17 some gustiness that's probably about a factor  
18 of 2 on the -- on the constant wind velocity,  
19 but I don't consider those to be very windy  
20 conditions."

21 (Video ends.)

22 MR. KEMP: All right. And they haven't  
23 argued that wind was a cause. They haven't argued that  
24 at all. I just wanted to point that out.

25 Okay. These are the causes that we have

1 looked at in the case.

2 Can I have the next one, please.

3 This is the same slide I showed you at the  
4 very beginning of the case. All right?

5 The possible wobble causes. We have the air  
6 blast. That's our position; they dispute it. And,  
7 again, we're looking at what caused the wobble.

8 The bike problem, we -- we asked Mr. Rucoba.  
9 No evidence. We asked him about road impediment. No  
10 evidence. We asked about physical impairment of the  
11 doctor. Remember, the coroner's office testified -- or  
12 the coroner testified that they did the electrolyte  
13 study on the doctor and it was normal, so he wasn't  
14 dehydrated. So no evidence of that. No evidence to  
15 support any of these. Okay? No evidence. Not little  
16 bit of evidence; no evidence. And Mr. Rucoba expressly  
17 said that.

18 So we've given you the air blast evidence.  
19 And I'm going to go through that in a minute, but we  
20 had Rucoba -- Rucoba -- on the stand. And, first of  
21 all, he told you that he doesn't even have an opinion  
22 on what caused the bike to wobble.

23 (Whereupon video was played.)

24 "Q.Now, let's see if we can establish a point.

25 You do not have an opinion, as we sit here today, as to