

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
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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

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

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

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

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

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



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

1 what caused the wobble; correct?

2 "A. Correct, I do not.

3 (Video ends.)

4 MR. KEMP: And you know they're going to  
5 stand up here, and even though the jury instruction  
6 says you can't consider contributory negligence on the  
7 part of the doctor, they're going to stand up here and  
8 they're going to try to dance around it and get close  
9 to it and imply to you that the doctor did something  
10 wrong. I guarantee you that's what they're going to  
11 do.

12 So I asked him if there is any evidence  
13 whatsoever -- any evidence -- this is their accident  
14 reconstruction expert -- any evidence with regards to  
15 human error being the cause for the wobble.

16 (Whereupon video was played.)

17 "Q. Isn't it true you have no evidence whatsoever  
18 of human error with regards to being a cause for the  
19 wobble?

20 "A. True.

21 "Q. No evidence?

22 "A. True."

23 (Video ends.)

24 MR. KEMP: No evidence. Okay?

25 Now, let's look at the evidence about bikes

1 and the aerodynamic issue. Let's take a look at the  
2 evidence that we have about the air that actually comes  
3 off a J4500 bus and what it does.

4 We have four different kinds of estimates --  
5 evidence. We have the testimony of Witherell. Again,  
6 she's the bus driver. Okay? We have the testimony of  
7 Sherlock. He's the union -- from the ATU, the safety  
8 specialist. We have the scientific paper by Dr. Kato,  
9 which both experts agreed this was the science on the  
10 case. And then we have an aerodynamic engineer.

11 So here is what Mrs. Witherell told you:

12 (Whereupon video was played.)

13 "Q.Okay. And back to the air blast. You have  
14 personally stood next to a J4500 at about 25 miles per  
15 hour a foot away; correct?

16 "A.Yes, sir.

17 "Q.Tell the jury what you felt.

18 "A.Just it's -- you feel the air as it's coming by you.  
19 And it's a little unsteady feeling that you feel.

20 "Q.While you're standing there, it made you feel  
21 unsteady?

22 "A.It just -- it's -- I wasn't stumbling; it just gave  
23 you the feeling of being unsteady.

24 "Q.Let's stick with the 25 miles per hour.

25 "A.Okay. It's just you can feel a motion.

1 "Q.A motion from the air?

2 "A.Yes, sir.

3 "Q.Is what you're saying? Okay. All right. Is  
4 the same true at 2 feet?

5 "A.Yes, sir. Not as bad, probably."

6 (Video ends.)

7 MR. KEMP: What better evidence could you  
8 have than a real bus driver who's got 14 years'  
9 experience driving the J4500, that is in the bus yards  
10 where the J4500 is going by her? What better evidence  
11 could you have?

12 And they didn't call any bus drivers to say,  
13 "Oh, when the J4500 goes by us, we don't feel  
14 anything." There's no -- there's no -- not one. They  
15 didn't call anybody.

16 Instead, they called Dr. Carhart and  
17 Dr. Granat who testified that, "Oh, we ran buses up and  
18 down a track in Arizona when it was windy. You know,  
19 it was windy that day, 8-, 9-, 10-, 11-,  
20 12-miles-an-hour wind, and we couldn't measure a  
21 200-pound weight being moved." They didn't even  
22 measure -- what's this case about? It's about how much  
23 wind displacement or air blast comes off a J4500.

24 They didn't even measure that. They didn't  
25 measure the wind coming off the bus. You know, he told

1 you that we had the anemometer with Mr. Granat which is  
2 what the weather services use to measure wind. They  
3 didn't use that. They ran these buses up and down.  
4 They didn't want to know what the wind was. They had  
5 the artificial test, which I'll talk about probably not  
6 in this segment but probably in the rebuttal. In any  
7 event, that was Mrs. Witherell's testimony.

8           The next bus driver that testified was  
9 Mr. Sherlock. And why am I focusing on bus drivers?  
10 Again, when you look at the consumer expectations  
11 instruction, you'll see it's the user of the product,  
12 the bus driver. That's who we analyze. We don't look  
13 at the bystander, like Dr. Khiabani. We don't look at  
14 other people. We look at the user of the product, the  
15 bus drivers.

16           This is what Mr. Sherlock said.

17           (Whereupon video was played.)

18 "A.And, as it does that, it has momentum. And when it  
19 tries to go around the corners, that momentum carries  
20 it wide. So the air on the side doesn't go around like  
21 in a well-designed vehicle. It shoots out to the  
22 sides, and that creates a pressure wave where that jet  
23 of air is coming off. And that would push a bicyclist  
24 away.

25           "This is well-studied. There's a Kato

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

8 MR. KEMP: Two different bus drivers, both  
9 saying that the J4500 creates an air blast.

10 Going to the science. Let's see Dr. Kato's  
11 paper.

12 This is the 1981 paper, relied upon by the  
13 experts from both sides. And what are they studying?  
14 They're studying the aerodynamic effects of a  
15 bicycle -- to a bicycle caused by a passing vehicle.  
16 They want to see the reasons why a bicycle wobbles,  
17 just like the bicycle in this case wobbled, according  
18 to Mrs. Bradley. They want to look at the aerodynamic  
19 effects to the bicycle by a passing vehicle.

20 Next one, please.

21 I'll go over this quick. I know you're sick  
22 of Kato.

23 Same conclusions that we had from  
24 Dr. Breidenthal about push force, pull force, and  
25 closer you get, the more force.

1           Next one, please.

2           So we applied this to the Red Rock video. So  
3 the doctor, when he's at this point -- it's probably  
4 after the push force has started, but it starts -- the  
5 push force occurs for the first time as the passing  
6 happens.

7           They haven't disputed that. They have not  
8 disputed this is the science. Remember we had  
9 Mr. Granat on the stand and he said this was a good  
10 article? Not only was it a good article, he downloaded  
11 it himself. Didn't dispute the science.

12          Next one, please.

13          Now, when they come closest together, it  
14 pulls the bicycle towards the vehicle. This is a 1981  
15 paper. It's not something that one of the experts  
16 jiggled up. It's a 1981 paper.

17          Next, please.

18          And then, the closer you get -- and this is  
19 the point, the Red Rock No. 4, where you can see that  
20 the doctor is close. The closer you get, the more  
21 pulling you have.

22          So we have Kato's paper, and now we have  
23 Dr. Breidenthal.

24          Let's -- can I have his -- okay.

25          Dr. Breidenthal. They could have called an

1 aerodynamics expert. You know, obviously, they spent a  
2 lot of money on other experts. They could have called  
3 an aerodynamics expert. They didn't call an  
4 aerodynamics expert.

5 Every single expert they called did not have  
6 a bachelor's degree, a master's degree, or a doctor  
7 degree in aerodynamics. Okay. Dr. Breidenthal has all  
8 three. In addition, this is his -- 40 years ago, he  
9 did his paper with regards to bluff objects causing air  
10 displacement. 40 years ago. He's studied aerodynamic  
11 issues with regards to other bus cases.

12 And these are the things he told you -- and I  
13 don't want to get into radii, although I can pronounce  
14 it right today. But he told you that there's a  
15 10-pound push force and then there's a pull force, and  
16 it lasts 25 seconds.

17 But this is the important thing. Okay. I  
18 went over this with Mr. Hoogestraat a little bit. If  
19 they had done a safer design, like the Mercedes 500 --  
20 the Mercedes 500, which has the .33 drag coefficient --  
21 if they had done a safer design, the push would have  
22 gone down from 10 to 3 and the pull would have been  
23 gone. Would have been gone. No pull.

24 So instead of 10 pounds of push and 20 pounds  
25 of pull, you would have had 3 pounds of push and no



1 pullback. That's what they could have done. They  
2 didn't do it.

3 Next in order, please, Shane.

4 Did they know how to do it? Of course they  
5 knew how to do it. They hired -- I don't want to get  
6 into Dr. Cooper, but he was the one that did the paper  
7 in 1985 about the subject.

8 So they went and they hired Dr. Cooper to do  
9 these wind tunnel tests. And look at the date. It's  
10 August 1993. It's about two years after they started  
11 designing the E series, after they started designing  
12 the E series.

13 So they have suggested to you through some  
14 testimony, which I thought was pretty hilarious -- we  
15 will get to it in a minute. But they have suggested to  
16 you that somehow or other they used this report that  
17 came two years after the time that they designed the  
18 bus.

19 Next, please.

20 These -- that's the standard MG3. That's  
21 Proposal 1. I don't want to get into a lot of detail  
22 here. The point I want to make, though, is they had a  
23 safer alternative front that they could have used in  
24 1993. The bus in this case was made in 2007. So they  
25 could have started using this in '94, '95, '96, all the

1 way up through 2007. They didn't do it.

2 Next, please.

3 These are just comparisons. The new MCI  
4 refers to the safer design. That's the lower drag  
5 coefficient. Remember, the Mercedes Setra has the .33.  
6 They could have got to a .34. The CJ3 had a .6.

7 I asked Mr. Hoogestraat. He is the person  
8 most knowledgeable, the 30(b)(6) witness. And one of  
9 the areas he's a 30(b)(6) witness on is what the drag  
10 coefficient is of this particular bus, referring to the  
11 J4500.

12 I asked him yesterday, could it be .6, .7,  
13 .8?

14 He says, "Could be, but I don't know."

15 To this day, they have not measured the drag  
16 coefficient for the J4500. To this day, they cannot  
17 tell you what the drag coefficient is.

18 In any event, they could have cut it in half  
19 from what -- the CJ3. Could have cut it in half. And  
20 I've already explained to you what Dr. Breidenthal said  
21 that would have done.

22 Next.

23 All right. This is what Dr. Breidenthal did  
24 with regards to comparing the J4500 with the CJ3.

25 Next, please, Shane.

1           Okay. So they bring Mr. Granat on the stand,  
2 and he is a mechanical engineer. They show him  
3 pictures from the wind tunnel test report, and they  
4 say, "Well, in your opinion, is the J4500 the same or  
5 different than the CJ3?"

6           Okay. They ask him that. They showed him  
7 pictures. You know, they had it scripted out. He  
8 goes, "Oh, it's different. It's different. It's  
9 clearly a different bus."

10           All right. So what we did is we took three  
11 pictures of a J4500 and three pictures of the CJ3. We  
12 moved them a little bit. We changed it so it wasn't  
13 nice and bright white so he could tell which is which.  
14 And we made them look more alike.

15           And said, "Okay. You can tell which bus is  
16 better by looking at their shapes. Tell us what is the  
17 better bus here."

18           Remember that when we did that?

19           And this is what he said.

20                       (Whereupon video was played.)

21           "Q.Okay. So you can't tell from this picture what  
22 the radii is; right?

23           "A.No. I would not rely on just looking at a photo as  
24 opposed to measuring.

25           "Q.can you tell from this picture if this bus has

1 a better aerodynamic efficiency than that bus?

2 "A.No. I would do measurements and I would do a wind  
3 tunnel test to evaluate the coefficient of drag, if  
4 that's what your question is.

5 "Q.In bus No. 1, can you tell me if this bus has  
6 better aerodynamic efficiency than bus No. 3?

7 "A.No. I would defer to the testing that was done."

8 MR. KEMP: See, he doesn't know that bus  
9 No. 1 and No. 3 here are the CJ3 and the J4500. So  
10 when we present pictures to him, as opposed to when  
11 they have it all scripted out, when we present pictures  
12 to him, he says, "Oh, I can't tell from the pictures."

13 This is the only testimony that was presented  
14 to you that suggests that the J4500 has any sort of  
15 aerodynamic efficiency. The only witness.

16 And, again, Mr. Granat is not an aerodynamic  
17 engineer, doesn't have a bachelor's of science, a  
18 master's, or a doctorate in that subject. He's a  
19 mechanical engineer.

20 Based on that, ladies and gentlemen, we  
21 submit that they could have made the J4500  
22 aerodynamically better and it would have made a  
23 difference. Dr. Breidenthal has told you exactly what  
24 it was. Instead of 10 out and 20 back, it would have  
25 been 3 out and zero back. Would have made a difference

1 in this case.

2 Now, let me move to the failure to warn.

3 Shane, can I have the slide on this jury  
4 instruction?

5 MR. GODFREY: Yes, but I think the number is  
6 off.

7 MR. KEMP: Okay. Since I have no number.  
8 All right. Here's our jury instruction.

9 Even if it's the greatest product in the  
10 world, you have to have a warning if, without a  
11 warning, it makes the product dangerous. Okay. Even  
12 if it's -- what would otherwise be considered a  
13 faultlessly made product, if you don't have a warning,  
14 that makes the product unreasonably dangerous.

15 In this case, they did not have any warnings,  
16 you know. This is the warning section from the  
17 contract. You've seen this before. The only warning  
18 they gave to people buying this \$400,000 bus, the only  
19 warning they gave is that somehow the air-conditioning  
20 system can destroy the ozone in the upper atmosphere.  
21 Didn't tell them anything else about the bus. The  
22 important point here is there's no warning about an air  
23 blast. There's no warning about air displacement.  
24 They didn't provide any warning whatsoever.

25 Dr. Cunitz was the warning expert. He was a

1 quickie, because, I mean, what do you need a warnings  
2 expert when there's no warning? But he said, that his  
3 opinion -- he's the one from the National Bureau of  
4 Standards from '75.

5 Go ahead.

6 (Whereupon video was played.)

7 "Q.Don't tell me what Dr. Breidenthal said in  
8 those materials, but tell me, do you have an opinion as  
9 to whether or not MCI provided an adequate warning with  
10 regards to that subject matter in this case?

11 "A.I do have an opinion about that.

12 "Q.And what is your opinion?

13 "A.That it needed a warning and did not provide one."

14 MR. KEMP: No warning in this case. You  
15 don't even have to analyze whether it's adequate. You  
16 know, sometimes we get in these pharmaceutical cases  
17 and we're analyzing whether Lilly or somebody like that  
18 gave an adequate warning on the package insert, you  
19 know, Lilly says there's 5 deaths and there's really  
20 25. So we say, gee, that's not adequate. You know,  
21 sometimes adequacy of a warning is an issue.

22 That's not an issue in this case. There's no  
23 warning. There's no warning whatsoever about the air  
24 displacement.

25 By the way, if anybody needs a break -- ah,

1 you do need a break. See, if I hadn't asked you, you  
2 wouldn't have said anything.

3 Your Honor, this is -- juror needs a break.

4 THE COURT: Okay. Let's take a 10-,  
5 15-minute break. Going to admonish you before.

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

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

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

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

25 You're not to form or express any opinion on

1 any subject connected with this trial until the case is  
2 finally submitted to you.

3 THE MARSHAL: All rise. 10-minute recess.

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

6 THE COURT: Okay. I think we can go off the  
7 record.

8 (Whereupon a short recess was taken.)

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

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

13 THE MARSHAL: If you guys will be seated,  
14 please. Thank you.

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

17 (Discussion was held off the record.)

18 THE COURT: Are we ready for the jury? I'd  
19 like to bring them in, and let's get going.

20 MR. CHRISTIANSEN: I believe we're ready,  
21 Judge.

22 THE COURT: Mr. Kemp, do we need any more  
23 time?

24 MR. KEMP: I'm ready, Your Honor.

25 THE COURT: Okay.



1 THE MARSHAL: All rise.

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

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

6 THE COURT: Okay. Thank you.

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

9 THE COURT: Do the parties stipulate to the  
10 presence of the jury?

11 MR. BARGER: Yes, Your Honor.

12 MR. KEMP: Yes, Your Honor.

13 THE COURT: Very good.

14 Mr. Kemp, please proceed.

15 MR. KEMP: Yes, Your Honor.

16 Okay. Ladies and gentlemen, we were talking  
17 about warning, and the -- this playback of Cunitz said  
18 there should have been a warning, and the defense  
19 position in this case has been this way or that way.

20 THE COURT: Mr. Kemp, you have to -- you have  
21 to, please.

22 MR. KEMP: Shane, that's your job, man.

23 MR. GODFREY: Sorry, sir.

24 MR. KEMP: Okay. All right. So they go this  
25 way and that way. First they say there's no air blast,

1 and then they say, well, everybody knows about the air  
2 blast. You know, there's two inconsistent things in  
3 the case.

4 All right. This is Mr. Dorr. He is their  
5 salesman down in L.A., at the service center in L.A.  
6 20 years he's been selling the bus. He actually sold  
7 the bus in this case in September 2007. So I asked him  
8 if he knew about the air blast, and this is his answer.

9 (Whereupon video was played.)

10 "Q.What is your understanding, if you have an  
11 understanding, as to whether or not, when a 2007  
12 vintage J4500 is traveling 35 to 40 miles an hour, what  
13 is your understanding as to whether or not it causes  
14 air blasts or air displacements from the bus?

15 "A.I don't know.

16 "Q.Okay. You don't know one way or the other  
17 whether it would cause air blasts or air displacements?

18 "A.No, I don't."

19 MR. KEMP: And I use the term "air blasts or  
20 air displacements," because, you know, they --  
21 sometimes they say, Well, everybody -- every vehicle  
22 does an air blast or air displacement. He didn't even  
23 know. He's been selling this bus for 20 years.

24 That is evidence that a warning is needed.

25 Okay. That's what Dr. Cunitz told you.

1           Now, there's a jury instruction in a warning  
2 case you have to prove that the warning would have been  
3 acted upon. All right. So the testimony is usually  
4 from the actor, the person who would have gotten the  
5 warning, in this case Mr. Hubbard.

6           So we asked Mr. Hubbard, "What would you have  
7 done if you had gotten a warning?"

8                       (Whereupon video was played.)

9           "Q.Had you ever been trained as to a possible  
10 hazard of an air blast?

11 "A.No.

12           "Q.And in terms of your personal habits, if you're  
13 trained about something relative to safety, do you heed  
14 those training warnings?

15 "A.Absolutely.

16           "Q.And you've never been told that a bus could  
17 create air displacement?

18 "A.No, sir."

19           MR. KEMP: This is the testimony he said he  
20 would have heeded the warning. That's why there should  
21 have been a warning. There wasn't a warning. He would  
22 have acted upon it. That's the warnings case.

23           Let's move to punitive damages real quick. A  
24 lot of the same evidence. This is the punitive damages  
25 instruction, key part of the instruction.

1           Shane, can I have it up, conscious disregard  
2 portion.

3           MR. GODFREY: I don't have that one. Do you  
4 have a number?

5           MS. WORKS: 43.

6           MR. KEMP: 43. In the middle?

7           MS. WORKS: Yes.

8           MR. KEMP: Page 43. You can look at your  
9 jury instructions. This is what you have to prove to  
10 get punitive damages in the case.

11           So go back -- go back to the other one.

12           So this is what defendants are going to yell  
13 and scream, Malice. Malice. Malice. Where's the  
14 malice, ladies and gentlemen? We don't see any malice  
15 here. They haven't proved we acted with malice.

16           So that's going to be their argument. I'm  
17 kind of shortcutting it.

18           But you get punitive damages when you have  
19 conscious disregard, which means you have knowledge of  
20 the probable harmful consequences of a wrongful act and  
21 willful and deliberate failure to avoid those  
22 consequences.

23           Conscious disregard standard. That's what  
24 we're talking about here. We're not talking about  
25 malice. So when they start yelling, screaming about

1 malice, they're setting up a straw man to knock down.

2 So what is the evidence that conscious  
3 disregard, meaning that they knew about the safety  
4 devices; they didn't use them. Okay. What is the --  
5 on the right-side blind spot, I've already played you  
6 Mr. Hoogestraat's testimony. Again, he's the 30(b)(6)  
7 witness.

8 On the proximity sensors, I've already played  
9 you Mr. Hoogestraat's testimony, that he knew about the  
10 kits and they didn't use them.

11 In addition, we proved that they had the  
12 industry magazine.

13 Can I have that, Shane.

14 And, again, we have to show that they knew  
15 about the safety devices. That's why we're giving you  
16 this type of evidence. This is their ad. That's --

17 Shane, can I have the whole thing.

18 It's an ad for a J4500.

19 Can I have the screen back to the whole  
20 article? No, no. That article, the whole thing so we  
21 can see the exhibit.

22 This is Exhibit 198, if you want to look at  
23 it in the jury room.

24 Is this all we have, Shane? Okay. Great.

25 All right. So leading industry publication

1 that Mr. Hoogestraat subscribes to, and a number of MCI  
2 people do. The bus. Okay. Bus Motorcoach News. This  
3 is the article announcing the BCI Falcon 45. It's  
4 called a 45 because it's a 45-foot bus. The important  
5 point is on the next page.

6 Can we have that pop-up, Shane?

7 Okay. The next page, when you get the  
8 exhibit, read the second page of the article. They'll  
9 talk about that this bus, as a standard safety feature,  
10 has Eaton proximity sensors. As a standard safety  
11 feature. Not an optional feature, comes standard on  
12 this bus. So what we're proving through this is that  
13 they knew -- they knew their competitors were using the  
14 Eaton proximity sensors system. Yeah. And that's  
15 Exhibit 198. I think I said that already.

16 The safer alternative front, we've already  
17 talked about. Clearly, they knew about it. They  
18 designed it in the wind tunnel test.

19 The S-1 Gard. Now, Mr. Hoogestraat says he  
20 never heard about it till this case started. And we  
21 took the deposition of the parts guy. That's Pablo  
22 Fierros.

23 Can I have that, Shane.

24 Okay. And so this is the parts guy. So he  
25 saw it at a trade show. He doesn't remember if it was

1 in the aisles. He remembers some conversation about  
2 this product. This would be the S-1 Gard. The time  
3 period he worked for them was '97 through 2000. 2000  
4 would be seven or eight years before the coach in this  
5 case was made. So this shows that they had actual  
6 knowledge of the S-1 Gard prior to the coach being made  
7 in this case.

8 Next one, Shane.

9 Then he says -- remember the flyer you saw  
10 with the S-1 Gard, promotional flyer? He says he saw  
11 that. "I think someone handed it to me." So he saw  
12 the flyer. He knew about the S-1 Gard.

13 Remember Mr. Hoogestraat yesterday said that  
14 "We had an obligation, when we had an old product line,  
15 like the '92 product line, to look for new safety  
16 features and evaluate them."

17 That's what he said. This guy knew about a  
18 new safety feature. But Mr. Hoogestraat, apparently,  
19 didn't -- didn't come to his attention because says he  
20 didn't know about it till 2017.

21 Can I have the other one, Shane.

22 MR. GODFREY: That's all for Fierros.

23 MR. KEMP: Oh, okay.

24 So in addition to Mr. Fierros, we asked  
25 Mr. Barron -- again, he's the inventor of the S-1

1 Gard -- "Hey, did you meet with MCI and offer them the  
2 S-1 Gards?"

3 So here is his testimony.

4 (Whereupon video was played.)

5 "Q.Do you believe that you have offered -- that  
6 you met with representatives or subsidiaries of Motor  
7 Coach Industries and offered to sell the S-1 Gard to  
8 the manufacturer?

9 "A.Not sell. At that time, I believe I was going to  
10 do -- because safety, it's hard to sell. I wanted to  
11 let them -- give them parts at no cost to get them on  
12 the buses so it would become industry-mandated for the  
13 motor coach industry, because nobody puts money out."

14 MR. KEMP: So he met with MCI, and he was  
15 going to give it to them at cost because he was trying  
16 to promote its usage in the industry. He wanted them  
17 to use it.

18 But the important point here is he was going  
19 to give it to them for cost, and they didn't even want  
20 to try it out. Mr. Hoogestraat didn't even know about  
21 it. And this conversation, if you remember the  
22 testimony, took place sometime '97 through 2000, eight  
23 years before the bus in this case was made.

24 All right. And, again, this is intended to  
25 prove knowledge on the part of the manufacturer of the



1 S-1 Gard.

2 Fourth way we're trying to show knowledge is  
3 they put it on over 50,000 buses since 1998. It's  
4 really hard to believe that MCI, the number one bus  
5 seller in North America, didn't know about it. 50,000  
6 other buses.

7 All right. Let's go to the verdict form. Is  
8 this in your packet, the verdict form? If not -- no?

9 THE COURT: No.

10 MR. KEMP: No. Okay.

11 All right. Well, let me spend a few seconds  
12 on this. When you get back there, this is the -- you  
13 know, after you talk about the case, criticize  
14 everyone's clothing and, you know, choice of ties, get  
15 to work -- I know what happens back there. Okay? This  
16 is the verdict form that you have to use in this case.  
17 All right?

18 So can we kind of scroll up slowly, Shane.

19 So "We the jury" -- so the first issues are  
20 liability issues. Is MCI liable for defective design?  
21 Was there a right-side blind spot that made the coach  
22 unreasonably dangerous and a legal cause of  
23 Dr. Khiabani's death?

24 Okay. So right-side blind spot, I've already  
25 talked about that. That made the coach unreasonably

1 dangerous. You'll get an unreasonably dangerous  
2 instruction. And then the legal cause. Again, this is  
3 the substantial factor, the one I have already told you  
4 about.

5 So you answer yes or no. On this you should  
6 answer yes.

7 Lack of proximity sensors -- and you don't  
8 have to -- we don't have to win all five of these; we  
9 just have to win one of the five. Are they liable for  
10 defective design proximity sensors? Same kind of  
11 analysis.

12 The rear wheel protected barrier. Okay.  
13 It's really more than the S-1 Gard. It's could they  
14 have done it? And if you go back and you take a look  
15 at Mr. Couch's testimony, he says, yeah, they had the  
16 expertise if they wanted to to build their own little  
17 triangle thing; they didn't have to use an S-1 Gard.  
18 They didn't want to pay for it even though it was free.

19 So this is the rear wheel protective barrier,  
20 S-1 Gard. You know, this is a defective design. And  
21 then the last one is the aerodynamics design.

22 Excuse me. The last one of the defects, and  
23 then we get to the warning questions. That's the --

24 Shane, we might as well go all the way  
25 through it.

1           Okay. So if you answered yes, you have to do  
2 compensatory damages. We'll come back to those.

3           Keep going.

4           Okay. Okay. Then are they liable for  
5 punitive damages? Yes or no. And, again, this is the  
6 conscious disregard standard I just talked about. Did  
7 they know that these other products were out there that  
8 could have been used for this 1992 product line and  
9 disregard their use of those products? So yes.

10           And then we ask you which one do you think  
11 they knew about and didn't use? Okay. So we got  
12 right-side blind spot proximity sensor.

13           Can you go up a little bit, Shane.

14           We don't have to win all those either, and  
15 then the failure to warn. And I know you think that  
16 looks like a long verdict form, but in the Apple  
17 computer case that was tried about two years ago, Apple  
18 v. Samsung, they had a 78-page verdict form. So this  
19 is -- it's longer than many cases, but it's not that  
20 long.

21           All right. Let's turn to damages. I'm going  
22 to be talking about the damages to Keon and also to the  
23 estate. Mr. Christiansen is going to be talking about  
24 the damages to Aria and to the estate of Dr. Barin.

25           Okay. This is Keon Khiabani. That's his

1 birth certificate. It's in evidence. Born at Sunrise  
2 Hospital -- at Sunrise Hospital, just to show you  
3 that's Keon.

4 At the time of the accident, he was 13 years  
5 old. He's 14 years old now. As Aria told you, he was  
6 going to Clark High School. Now he's moved up to  
7 Montreal and he's living in the basement of his uncle  
8 and aunt's house.

9 It's a big case. The community is watching  
10 this case. You know, MCI's watching this case, lot of  
11 interest in this case. And a couple of reasons, one,  
12 the tragic, needless, and senseless loss to the  
13 Khiabani family. That's one reason they're watching  
14 it.

15 And, two, it's an important issue. Safety on  
16 vehicles that weigh 40,000 pounds and travel through  
17 our city streets, that is a very important issue.  
18 That's why this case is getting so much attention.

19 Now, during opening statements, Mr. Terry  
20 suggested to you that the defendants were going to  
21 offer a different remedy other than money for  
22 compensatory damages. Okay. And I know you don't  
23 remember what he said at that time. So I want to play  
24 it for you.

25 (Whereupon video was played.)

1           "MR. TERRY: We recognize that these young  
2           men have suffered an injury. We just don't  
3           know that money is the way to resolve it,  
4           millions and millions of dollars is the way to  
5           resolve it. And we will explain that to you  
6           after you have had a chance to review the  
7           evidence."

8                        (Video ends.)

9           MR. KEMP: Okay. We found out when  
10          Dr. Smith, their only damages expert -- Dr. Smith, the  
11          guy from Chicago, he came to the stand. We found out  
12          what they thought the alternative to money was. This  
13          is what Dr. Smith said. And, again, this was a planned  
14          and scripted question. You know, they knew what the  
15          answer was going to be before he gave it. But here's  
16          what he said:

17                       (Whereupon video was played.)

18          "Q.And -- and to speculate as to how much he'd be  
19          giving his children 15, 20 years from now, in your  
20          opinion, would that be highly speculative?

21          "A.I think so. And you don't want to give an  
22          18-year-old half a million bucks anyway. You'd rather  
23          give them a bottle of whiskey, frankly."

24          MR. KEMP: A bottle of whiskey. This is what  
25          Mr. Terry and Dr. Smith want to give to Keon Khiabani,

1 a bottle of Jack. Okay? That's what he told you.  
2 You'd rather give them a bottle of whiskey. That's  
3 their position in this case.

4 Well, that was crass, that was uncaring. You  
5 know, they know that whiskey is not on the verdict  
6 form. That's not an option. You don't have a blank  
7 you can fill in and say, you know, a bottle of Jack or  
8 two bottles of Jack. They know we're talking about  
9 money damages, so why would their expert make such an  
10 outrageous suggestion? Why would he do that?

11 Well, it wasn't because they really think  
12 that you're going to give out bottles of Jack. That is  
13 not why he did that. The reason they did that is they  
14 are trying to get a subliminal suggestion to you that  
15 these boys should not get the money they deserve  
16 because they're going to blow it. They're going to  
17 take the money and go buy Jack Daniels and go out and  
18 party and -- you know? So you shouldn't give them what  
19 they're entitled to because they're going to waste the  
20 money. That's why they did that. Okay?

21 And so Mr. Christiansen and I, we saw this  
22 coming. And so that's why we had all the evidence -- I  
23 don't know if you remember, but we had all the evidence  
24 about the guardianship, this is what Katy wanted. And  
25 we presented the testimony from the guardians. And,

1 you know, the forms were signed and in the Canadian  
2 courts. And we have guardians. That's why we  
3 presented all that testimony.

4 You know, I'm sure some of you wondered, what  
5 the heck does this have to do with anything? The  
6 reason it has to do with something is we wanted to  
7 assure you that the guardians of these children --

8 Can I have their pictures, Shane. The  
9 guardians of -- do we have MC's and Babak's? Okay.

10 You know, Shane and I were up late. We're  
11 not perfect.

12 So we had MC's testimony. She was the one  
13 that was the school professor from Montreal. And then  
14 we have Babak Barin's testimony. He's Katy's brother.  
15 He's the one who is a judge. So those are the people  
16 who are the guardians of these children. No one is  
17 going to go on a wild drinking binge and drink bottles  
18 of Jack. That is not going to happen.

19 So let's go back to the verdict form.

20 Can I have the compensatory section, please.

21 Okay. This is the form that you're going to  
22 be given. This is Keon. We have one, two, three types  
23 of damages. I'm going to describe them in -- in -- the  
24 first two, I'm going to describe in a lot of detail.  
25 The other one, loss of probable support,

1 Mr. Christiansen is going to cover because the same  
2 kind of analysis relates to Aria as it does to Keon.  
3 So I'm going to cover the first two.

4           Keon is entitled to past grief and sorrow;  
5 loss of companionship -- and the companionship in this  
6 case would be he lost his father -- he lost his  
7 father -- society, being around his father; comfort,  
8 comfort that he would have gotten from his father from  
9 the past -- that's from today back to the day of the  
10 accident -- and in the future -- the future. So those  
11 are the two elements I want to start talking about.

12           Now, you have been given an instruction that  
13 you should consider the life expectancy -- if you have  
14 an heir and someone who dies, you take the shorter --  
15 excuse me -- you take the shorter life expectancy.

16           So in this case, the life expectancy table,  
17 which is a jury instruction -- it's Jury  
18 Instruction 38. It says that Dr. Khiabani would have  
19 lived another --

20           Can I have 38, please, Shane. Okay. If I  
21 can't have it quickly, I don't want it. Okay. I do  
22 want it.

23           All right. It says that Dr. Khiabani would  
24 have lived another 31 years. So this is the time  
25 period that Keon has been deprived of his father, 31



1 years. You know, you have other evidence besides the  
2 life expectancy table.

3 Can I have my next, please.

4 If you recall the testimony, Dr. Khiabani's  
5 parents were visiting at the time of the accident.

6 Hold that, Shane. Hold that, please.

7 And they're still alive. So, in addition to  
8 the life expectancy table, which is an estimate --  
9 that's a general estimate based on, you know, the whole  
10 public -- we have the fact that his parents are still  
11 alive. So the issue is what should you award for --  
12 and that's -- that's the picture of him with the  
13 parents. Looks like a New Year's party.

14 But, in any event, they're still alive.  
15 They're the ones that were at the house, and then when  
16 he wouldn't -- remember the story that I already told  
17 you, he didn't come home, so Keon was with them and  
18 couldn't speak Farsi.

19 But, in any event, his parents are still  
20 alive. So in addition to the life insurance table  
21 we've shown -- or excuse me -- the life expectancy  
22 table, we've shown that. And it's a 31-year life  
23 expectancy.

24 Now, there are no mathematical formulas here.  
25 Okay? You've been given an instruction that there's

1 not a mathematical formula. You know, in some  
2 jurors -- in fact, some of you came into this  
3 proceeding and said, gee, I wish we had a mathematical  
4 formula.

5           There is not a mathematical formula. You  
6 have to look at what type of family bond this  
7 particular family had and evaluate if, in the future,  
8 Dr. Khiabani would provide -- he would be there for the  
9 sons. That's really what you're looking at in this  
10 case. And so start with a little bit about Keon and  
11 then the other evidence from Aria about the family  
12 bond.

13           Go ahead, Shane.

14           (Whereupon video was played.)

15 "A. So my brother has a strong form of ADHD. So he  
16 struggles in learning environments in the classroom and  
17 just in general. Like, it's hyperactive -- attention  
18 deficit hyperactive disorder."

19           (Video ends.)

20           MR. KEMP: ADHD, that's a -- that's a serious  
21 condition. There's a lot of children out there that  
22 have worse conditions, but that's a serious condition.

23           Let's have the next one.

24           (Whereupon video was played.)

25           "Q. What experiences did you get to have that Keon

1 missed with your father?

2 "A. My dad was always -- I mean, you can see in the  
3 photos. He was always there for us. Like, we would --  
4 we'd wrestle on the couch or, like, we'd make a band.  
5 My brother would play drums, I'd play the bass, and my  
6 dad would play guitar. We'd play rock songs and so on.  
7 And he was always -- he was always very hands-on in  
8 that sense at soccer games or music performances.  
9 Then, when we got older, even more, which was amazing;  
10 right? Because, usually, kids distance themselves from  
11 their parents. I got even closer.

12 "And my dad was there to not only help me  
13 with academics but just in terms of life  
14 advice, like, what happens when you have a  
15 problem with a friend, right, and you want to  
16 fix that problem? Like, the best way to learn  
17 is from your dad or a guy who's been through  
18 that.

19 "Or if you want to ask a girl out on a  
20 date, how do you do that? How do you go about  
21 doing that? And he was the master at that.

22 "But -- and so all these sort of lessons  
23 that I got to learn as I got older, my brother,  
24 unfortunately, won't get -- or at least not the  
25 same from his own father."

1 (Video ends.)

2 MR. KEMP: Okay. Strong family bond in this  
3 case. And let me give you an example of a -- of a  
4 family bond that's not strong. You all know who this  
5 guy is? Steve Jobs. This is a copy of his  
6 autobiography, which, by the way, is an excellent read.

7 But, in any event, Steve Jobs died recently.  
8 He was the guy who founded Apple computer, came out  
9 with the Apple iPhone, you know, the Mac, all this  
10 stuff he gave us. Okay? He had a daughter. When his  
11 daughter was born, he disputed paternity. He fought  
12 it. The court ordered him to pay whatever they make  
13 you pay in California. He didn't go to the daughter's  
14 birthday parties, didn't buy her birthday gifts, didn't  
15 see her on Christmas. So he had a weak family bond.  
16 So if you as a jury were evaluating his family bond,  
17 that would be a weak family bond that you should give  
18 less compensation for.

19 You should give more compensation for a  
20 strong family bond. So what we're going to suggest to  
21 you is that you take the life expectancy of  
22 Dr. Khiabani, the 31 years he would have been there for  
23 Keon, and whatever you deem to be an appropriate  
24 monetary award per year, you know, that should be the  
25 monetary award award for loss of a father.

1           And the way that works if you said it was  
2 500,000 a year for 31 years, you do the math. It's  
3 15 million. If it's 250,000 a year, you do the math.  
4 You know, you can do anything you want to do. But the  
5 first thing you have to do is evaluate the strength of  
6 the family bond. And then the next thing you have to  
7 do is to determine appropriate compensation level for  
8 the 31-year time period.

9           Now, Keon testified by video. Okay? I  
10 didn't want to bring him here. He's a 14-year-old boy.  
11 I just didn't want to bring him here. I could have  
12 brought him here, we brought his brother, but we had  
13 him testify by video. And I think you can understand  
14 why that's appropriate. So what we did is we had Aria  
15 describe what the loss would be to Keon.

16           Can I have that clip, please, Shane.

17           (Whereupon video was played.)

18           "Q.What experiences did you get to have that Keon  
19 missed with your father?

20           "A.My dad was always -- I mean, you can see in the  
21 photos, he was always there for us. Like, we would --  
22 we'd wrestle on the couch or, like, we'd make a band.  
23 My brother would play drums, I'd play bass, and my dad  
24 would play guitar. We'd play rock songs and so on.  
25 And he was always -- he was always very hands-on in

1 that sense at soccer games or music performances. And  
2 then when we got older even -- even more, which was  
3 amazing; right? Because usually kids distance  
4 themselves from their parents. I got even closer.

5 "And my dad was there to not only help me  
6 with academics but just in terms of life  
7 advice. Like, what happens when you have a  
8 problem with a friend, right, and you want to  
9 fix that problem? Like, the best way to learn  
10 is from your dad or a guy who's been through  
11 that.

12 "Or if you want to ask a girl out on a  
13 date, how do you do that? How do you go about  
14 doing that? And he was the master at that.

15 "So all these sort of lessons that I got  
16 to learn as I got older, my brother,  
17 unfortunately, won't get -- or at least not the  
18 same -- from his own father."

19 (Video ends.)

20 MR. KEMP: That's what Aria told you. It's  
21 pretty commonplace, but experience. Instead of this,  
22 this is Keon's fate. That's his experience with his  
23 father from this time forward. No father to wrestle  
24 with him on the couch. No father to go to the soccer  
25 games. No father to teach Keon music. No father to

1 help him with his school work. No father to give him  
2 life advice. No father to teach him about dating. No  
3 father to attend the key events in his life. And no  
4 father to give him support in his moments of need.  
5 That's Keon's fate. And that's the loss that needs to  
6 be compensated in this case.

7           And like I keep saying, there's no formula.  
8 You take a look at Jury Instruction 40, they'll tell  
9 you that there's no mathematical formula, no method of  
10 calculation, it's up to you. No limit on it. I mean,  
11 you know.

12           The third item I want to talk about is the  
13 pain and suffering of Dr. Khiabani. And, again, I move  
14 from Keon now to the estate claim. The doctor's  
15 entitled to recover his estate is any way for the pain  
16 and suffering and the funeral expenses and the medical  
17 expenses.

18           So the big issue is, did he lose  
19 consciousness immediately or did he have some pain?  
20 Obviously, there was some pain because he hits the side  
21 of the bus. And then he falls down, breaks the ribs,  
22 and is run over. Okay? It's not the situation where  
23 he was run over first and then he hits the side of the  
24 bus.

25           And this is Dr. Gavin explaining that:

1 (Whereupon video was played.)

2 "Q.In your opinion, would the contact with the  
3 asphalt before the bus runs over his head have caused  
4 Dr. Khiabani to immediately lose consciousness?

5 "A.It depends on the time between when he's struck and  
6 hits that. I don't know how many seconds or  
7 milliseconds when he's struck by the bus on the under  
8 portion versus him hitting the ground.

9 "Q.And when he hits the ground, at least prior to  
10 the tires hitting his head, would he experience pain?

11 "A.I imagine that would be painful, yes.

12 "Q.And when the bus ran over his head, would that  
13 have been painful?

14 "A.Yes."

15 (Video ends.)

16 MR. KEMP: Okay. And I'm not suggesting this  
17 category is entitled to tens of millions of dollars.  
18 They're going to tell you it's zero, it should be zero  
19 because there's no pain and suffering, no conscious --  
20 that's what they're going to tell you.

21 I'm not suggesting that this is the  
22 big-ticket item on the damages portion, but I am  
23 suggesting that he got run over by a bus. And that  
24 would be painful. He hit the side of the bus. He  
25 broke his ribs. That would be painful. That is



1 entitled to some compensation.

2 I want to talk a little bit about  
3 Dr. Khiabani.

4 Can I have my next slide, please.

5 Excuse me. Before I do this, this is  
6 Samantha Kolch. This is one of the witnesses -- key  
7 witness on the pain and suffering. She was the one  
8 that testified left, right, left, right. She saw it  
9 for a few seconds. And that's after the accident. And  
10 that's a factor to determine pain and suffering. So  
11 this is what she actually said:

12 (Whereupon video was played.)

13 "Q.I'd like to talk to you about when you first  
14 saw Dr. Khiabani after the accident. And you told  
15 Mr. Christiansen that he moved first one shoulder and  
16 then the other shoulder, maybe twice for each shoulder;  
17 is that fair?

18 "A.Yes.

19 "Q.And when you were initially recalling that, you  
20 thought he had maybe moved for a split second. Do you  
21 remember saying that?

22 "A.Yes.

23 "Q.But your best recollection now is it may have  
24 lasted about two seconds?

25 "A.Yes.

1 "Q.A thousand, one; a thousand, two?

2 "A.Yes."

3 (Video ends.)

4 MR. KEMP: A thousand, one; a thousand, two,  
5 he's still moving his shoulders after the accident.

6 All right. Let's talk about Dr. Khiabani  
7 just for a second. What an amazing story. Born in  
8 Iran, leaves Iran, escapes at the time of the  
9 revolution through the mountains by himself when he's  
10 17 years old and goes to Pakistan and then he goes from  
11 Pakistan to Canada. Starts working in a McDonald's.  
12 These are pictures of those McDonald's hats.

13 You know, I have tough time with this one.  
14 It's just so incredible to me that a man could save  
15 McDonald's hats to show them to his sons as evidence of  
16 what hard work can do for you. Hard work made this man  
17 into a doctor.

18 So he was the professor of hand surgery at  
19 UNLV, chief of surgery -- chief of hand surgery at UMC,  
20 I mean. He was a plastic surgeon, but he wasn't -- he  
21 didn't do breast implants, he didn't do facelifts, he  
22 didn't do things like that. He operated on people with  
23 deformities.

24 And Dr. Barin told you a little bit about the  
25 story called "Hannah's Hands." Hannah was the one --

1 she was a five-year-old with a shotgun blast blew off  
2 both of her hands. And Dr. Khiabani restored those  
3 hands to her. And Hannah came to his funeral. And if  
4 you remember, Dr. Barin told you about that.

5 Even after his death, he kept providing for  
6 his community. They stripped his skin off and they  
7 gave it to burn victims. They took out his corneas and  
8 restored someone's sight. So that is Dr. Kayvan  
9 Khiabani.

10 The other damages element is pretty simple.

11 Can we have it?

12 It's the medical and funeral specials. I  
13 don't think they're going to spend a lot of time  
14 talking about it, so I'll just give you the number.  
15 It's about 46,000. There's a spot on the compensatory  
16 damages for medical and funeral specials. You can just  
17 put the 46,000. If someone wants to make a note about  
18 that, it will probably save us some time.

19 And that concludes my closing statement.  
20 Thank you very much for your attention. I appreciate  
21 the attention you've shown.

22

23 CLOSING ARGUMENT

24 MR. CHRISTIANSEN: Nobody ever accused me of  
25 needing a mic. Good afternoon.

1           IN UNISON:   Good afternoon.

2           MR. CHRISTIANSEN:   February the 12th was  
3 to -- all of you probably remember it better than us,  
4 the day we started jury selection.   A number of you --  
5 a few of you were in the exact same seats you were that  
6 day six weeks later, if that makes any sense.   And as  
7 Mr. Kemp told you, I'm going to talk exclusively about  
8 damages, no more discussion of liability, and what the  
9 evidence shows relative to Katy Barin, Dr. Katy Barin,  
10 and Aria Khiabani, the young man who came in here a  
11 couple weeks back and testified.

12           But before I do, I'm -- as you all probably  
13 remember -- very practical.   And, practically, here's  
14 how this works:   We're all going to argue to you what  
15 we think's the evidence shows.   None of that is a  
16 substitute for what came from the stand.

17           At the conclusion of the argument, you all  
18 are going to go deliberate.   In there, when six of  
19 eight of you agree on a position, it's decided --  
20 that's practically how this works -- after one of you  
21 amongst yourselves is selected to the foreperson.   The  
22 instructions say that in big, long, lawyer verbiage.  
23 That's practically what you're going to do.

24           And I always laugh when us lawyers talk to  
25 jurors.   And we all do it.   Mr. Kemp, when he stood up,

1 talked to you about PMKs and 30(b)(6) for a minute.  
2 And I watched some eyes glaze over and go "What in the  
3 heck?"

4 A PMK is a person most knowledgeable. That  
5 was who the defendant chose to be Mr. Hoogestraat.  
6 Okay? It's defined in Jury Instruction No. 16. What  
7 he says is binding, it binds the entity, binds MCI.

8 And so a few housekeeping matters, but before  
9 I begin. Obviously, having been here since February  
10 the 12th, you all know that the case didn't start on  
11 February the 12th. You all recognize voices by this  
12 stage of the game and know that, September the 22nd, 20  
13 days from her death, I preserved the testimony of Katy  
14 Barin.

15 You all know that I talked to Siamak, her  
16 little brother, in a deposition because I played that  
17 for you. And I did that about ten days after she died,  
18 in that same time when I did Keon and Aria and MC, the  
19 little French lady with the -- Rigaud, that I can't  
20 pronounce correctly. But to quote Katy, it's been a  
21 heck of a year.

22 April the 17th, this was the Khiabani family.  
23 February the 12th when I started talking to you all,  
24 you probably didn't suspect that I would drone on for  
25 eight days -- I did -- before I sat down, and by the

1 ninth day, we would have selected a jury.

2 And I mentioned it because the importance of  
3 the oath that you all took. And it's reflected at two  
4 spots in your jury instructions, the first and the  
5 last.

6 It was an oath that said -- and look at the  
7 instructions -- I'll give you my paraphrase -- that you  
8 recall that you stood up and raised your hand and you  
9 said you promise you'd follow the law. You wouldn't  
10 change the standards, you wouldn't alter the burden of  
11 proof, you wouldn't treat one side better or worse than  
12 the other.

13 All the Khiabani family asks of you today is  
14 to keep your word. The evidence in this case is clear.  
15 It's sad. It's overwhelming. Mr. Kemp is kind when he  
16 says the approach of the defense has been crass. But  
17 rather than me describe it, I chose to -- in thinking  
18 about how to talk to you folks, what I really wanted to  
19 do is just play all of Katy's testimony and all of  
20 Aria's because I couldn't think of any better way.

21 Realizing that the marshal may put me in  
22 custody and the judge may hold me in contempt, I  
23 thought I should probably trim it down a bit. And so  
24 I -- I thought maybe the better way would be to listen  
25 to Katy describe the loss of her husband.

1 (Whereupon video was played.)

2 "Q.How did your boys take it? One at a time. How  
3 did Aria?

4 "A.They were devastated. Just crying, bawling. Keon  
5 was, like, freaking out, you know. And then lucky that  
6 we have so many friends around. They took them one by  
7 one for a walk and -- and trying to calm them down.

8 "There was already quite a year with, you  
9 know, me having cancer and then their dad. So  
10 it was tough.

11 "Yeah, Aria's a little more reserved.  
12 He's -- you know, he has to stay tough. But he  
13 felt that he has to immediately be the head of  
14 the family.

15 "And then Keon, of course, is a child and  
16 had to distract himself just playing and, you  
17 know, doing video games, like just completely  
18 zone out on that.

19 "Q.Okay."

20 MR. CHRISTIANSEN: Speaks volumes that this  
21 lady, 20 days from being gone, is saying that she was  
22 lucky that people walked her boys. Shouldn't be lost  
23 on anybody that, for a 17-year-old to assume the mantle  
24 the father of the house, speak volumes -- speaks  
25 volumes of him.

1           Everybody got to see him. So I'll let him  
2 speak for himself.

3                       (Whereupon video was played.)

4           "Q.Help us understand -- none of us were there,  
5 Aria, so help us understand how it affected your mom.

6           "A.My mom and my dad, it was like -- I said, they were  
7 a good team. Right? They -- they bounced off each  
8 other with everything. Right? No -- no one person did  
9 anything alone. And so every -- everything they did as  
10 a family and everything we did together was all a joint  
11 decision between the two of them.

12                    "And especially when you have to make huge  
13 decisions about which -- who is your doctor,  
14 what kind of chemotherapy you're getting,  
15 what's going to happen in the future, what --  
16 you know what I mean? Like, all those big  
17 decisions what happens when somebody gets  
18 diagnosed with stage 4 cancer, she -- she  
19 needed him. And she -- because she -- they  
20 were always together and they were always  
21 making decisions together. And they were  
22 always so good at that.

23                    "And my dad, after she was diagnosed, only  
24 thing that kept her positive was my dad being  
25 there, being, okay, this is all working well.



1 Everything was going well. And so we weren't  
2 worried. She -- although she was stage 4, she  
3 was -- she was doing amazing. Right? She was  
4 still able to work.

5 "She was -- every day she was getting  
6 better. And my dad was there to -- to keep the  
7 kind of the energy going in the house to make  
8 sure everything was still flowing same way, to  
9 make sure nothing skipped a beat. Right? He  
10 was -- he was there to make sure everything  
11 was -- was working.

12 "And then when he wasn't there, like, none  
13 of us -- none of us knew what to do. Right?  
14 Not because we all depended on him, but we all  
15 depended on each other. So when one piece is  
16 missing, especially in a time where you need  
17 all the pieces there and working all together,  
18 it made it extremely difficult."

19 MR. CHRISTIANSEN: Now, folks, let me compare  
20 and contrast the type of evidence you heard in this  
21 case. That's testimony. That's evidence. That's  
22 true. That's not rehearsed. That's not canned.  
23 That's not prearranged. It wasn't prepared by him in a  
24 PowerPoint that he brought with him. That evidence is  
25 unrefuted. Not a word to that boy did they ask.

1           And I would suggest to you that that apple  
2 didn't fall from the tree. Much like his mom, who said  
3 that she was lucky people walked her boys the day her  
4 husband died, the day he was taken from their family,  
5 Aria speaks the same.

6                           (Whereupon video was played.)

7           "Q.Did you have a chance to observe your mom  
8 without that support and comfort after your dad passed?

9           "A.Yes. After my dad passed, my mom -- my mom needed  
10 that support and comfort, and she was getting it to  
11 some extent from me and my brother and all her friends  
12 and community. It was -- I mean, the people who came  
13 when they heard what happened, it was -- it was insane.

14                   "And they were offering so much love and  
15 support. But nothing could ever match what my  
16 dad would have given her and what he was giving  
17 her. And you could tell she -- she -- she  
18 wasn't the same person.

19                   "And then, slowly as the time went by, her  
20 health started to decline, because, I mean,  
21 she -- she needed somebody there with her,  
22 right, like she had her whole life, my dad.  
23 And even when she was diagnosed, the months  
24 leading up to before he died, everything was  
25 working out well because he was there. And

1       then after, when he wasn't, everything went to  
2       hell."

3               MR. CHRISTIANSEN: Let me compare Aria  
4 Khiabani, a 17-year-old boy relocated to Montreal, and  
5 his willingness to come look you in the eye and tell  
6 you without a tear about the loss his family sustained,  
7 let me compare that with the willingness of Dr. Baden.

8               I mean, how shameful that Dr. Baden can write  
9 an opinion that says things are possible and that death  
10 was immediate and that there was no pain and suffering  
11 and then come in here before you folks and leave you  
12 with the misimpression in his direct examination that  
13 Dr. Khiabani suffered no other injuries and that he  
14 died the moment he touched the bus.

15              How disingenuous can it get? Only to be  
16 confronted the next day by me. Dr. Baden is an elderly  
17 gentleman. I tried to be respectful, but, candidly,  
18 it's offensive. He knew, just like Dr. Krauss, the guy  
19 that came after him confronted, Kayvan didn't die  
20 immediately. They knew when they scripted that  
21 whatever it was to you that it wasn't true.

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

23              THE COURT: Yes.

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

1 MR. CHRISTIANSEN: Ladies and gentlemen, I  
2 want to be very clear. Dr. Baden worked for MCI. And  
3 I use him by way of an example to diametrically oppose,  
4 for comparison purposes, what credible testimony that  
5 of a young man who would say the day his dad died was  
6 amazing because people came to help and the mom who  
7 would say it was wonderful because, the day her husband  
8 died, the love of her life, because people walked her  
9 boys versus Dr. Baden. You saw him.

10 The evidence of Katy and Kayvan's  
11 relationship and Kayvan and the boys' relationship is  
12 unrefuted because it's true, folks. You don't make up  
13 pictures like that. That's the one Aria took. You all  
14 remember it. That's an anniversary with their wedding  
15 photo. All of these are in evidence.

16 That's the photo that -- I don't know if you  
17 remember; I took it out so it wouldn't be too long --  
18 but Aria describing his parents as he was looking at  
19 them, he said, "Tsk, tsk." That was his words, not  
20 mine. And what he called, before I forget, their  
21 endless flirting, who loved who the most.

22 And do you recall Aria's song that was chosen  
23 in Katy's funeral was the Bee Gees song? Remember  
24 that?

25 And then the boys' relationship with their

1 father. There were no questions asked because there is  
2 no doubt. I put these in the order as the boys get  
3 older.

4 And then I asked Aria to describe his loss of  
5 comfort.

6 (Whereupon video was played.)

7 "Q>Your dad has got his arms around the two of  
8 you. You're small at the time. Did that change over  
9 the years?

10 "A.Little bit. I mean, he couldn't fit around us, but  
11 he still -- he still tried, and he did it every day  
12 pretty much. Yeah."

13 MR. KEMP: Mr. Kemp referenced that a bit on  
14 behalf of Keon. That was the hugs that he couldn't --  
15 he couldn't fit his arms around them every day anymore,  
16 but he still did every day.

17 I pulled this jury instruction so you all  
18 could focus on the things presented to you via  
19 videotape, people under the same oath as you all here  
20 in court. It carries with it the same weight.

21 Obviously, we have to juggle. You know now  
22 that Marie-Claude and Babak between them have six  
23 children in their houses, from 17 to 6 -- or 7, I  
24 think, is the youngest age. And so getting everybody  
25 here to Las Vegas was a bit of a challenge. And so we

1 did some via videotape. The law says it makes no  
2 difference. They're all under oath.

3 Jury Instruction 35 tells you that Aria and  
4 Keon are the heirs of Dr. Kayvan Khiabani. Katy's  
5 estate was also an heir until she passed away. And,  
6 remember, I spent a lot of time talking to you guys  
7 about the administrators of the estates -- I'm sorry --  
8 executors of the estate and guardians.

9 What Jury Instruction 35 tells you, "In  
10 determining the amount of losses, if any, suffered by  
11 one or more of the heirs as a legal result of the death  
12 of Dr. Khiabani, you will decide upon a sum of money  
13 sufficient to reasonably and fairly compensate each  
14 such heir for the items listed in the following two  
15 instructions."

16 Sum of money sufficient to reasonably and  
17 fairly compensate. Is there a sum of money?

18 Jury instruction goes on to list items and  
19 the heirs' loss of probable support, companionship,  
20 society, comfort, and consortium. Goes on to say,  
21 what -- define what you can think about when you think  
22 about probable support. It says the right of one  
23 person to receive support from another is not destroyed  
24 by the fact that the former does not need the support  
25 nor by the fact that the latter has not provided it.

1 You may consider the following. Actually, says you may  
2 also consider. The age of the deceased and the heir,  
3 the health, the respective life expectancies of the  
4 deceased and the heir, whether the deceased was kindly,  
5 affectionate, or otherwise.

6 Ladies and gentlemen of the jury, there is no  
7 evidence other than Dr. Khiabani gave his life to help  
8 people. Mr. Kemp said, even postmortem, dedicated his  
9 life to bettering persons' health, and most importantly  
10 for your determination today, to bettering his family.  
11 Seems pretty clear from the evidence that Dr. Kayvan  
12 Khiabani lived for his family.

13 You're also to decide -- to consider the  
14 disposition of the deceased to contribute financially  
15 to support the heir.

16 And, folks, I'll point you no further than  
17 the question I asked Aria Khiabani when he was on the  
18 stand.

19 I said, "Aria, do you have any doubt your dad  
20 would have always provided for your mother?"

21 And the answer, without objection, was, no  
22 doubt, 100 percent.

23 Mr. Kemp told you that you are supposed to  
24 only consider the life expectancy, whichever is  
25 shorter. So as it pertains to the boys, obviously,

1 dad's life expectancy was shorter than theirs. He had  
2 a statistical life expectancy of 31 more years.

3 Jury Instruction 37 shows you another line  
4 item -- and I'm going to have Shane pop the verdict  
5 form up here in a minute -- that says any grief, sorrow  
6 suffered by the heir and any grief or sorrow reasonably  
7 certain to be experienced by the heir in the future.

8 That's grief and sorrow. I'm just going to  
9 go back to Katy and Aria. Thought I would maybe let  
10 her tell you.

11 (Whereupon video was played.)

12 "A.And I say he would spend hours and hours, honestly,  
13 thinking about our -- reading about our boys' future  
14 and what's a good field for them to go to, what they  
15 should study, and how he should guide them. So there  
16 were hours that were spent in his life.

17 "Q.When you say he would -- he was -- not the  
18 right word -- was obsessive about topics?

19 "A.Learning, yeah.

20 "Q.About learning?

21 "A.Uh-huh.

22 "Q.Why did he become so interested recently in  
23 education for your boys? Why was that a new area for  
24 Kayvan?

25 "A.So you know, Pete, like, what I'm saying is that the



1 whole reading about -- how he could guide them in the  
2 future started a while ago. He kept, like, reading and  
3 reading. Just because Aria is a junior this year and  
4 we did not go to American colleges, and he then would  
5 read articles that were -- or books, rather, that  
6 hundred pages, just make himself familiar and, like,  
7 know exactly everything that Aria has to take, whether  
8 it's ACT, SAT, which schools to apply to, how to apply  
9 to them. So that was his latest obsession.

10 "Actually, the day before he passed, he --  
11 he just finished a 100-page article that was  
12 sent to him by one of our friends."

13 MR. CHRISTIANSEN: That's the loss of society  
14 those boys and that wife lost April the 18th.

15 The loss of comfort and support. Comfort  
16 bears to mind or brings to mind a particular exhibit.  
17 I can't remember the number, but it's the bed --  
18 remember the bed in Katy's office that she slept in to  
19 tide herself over to get to the next patient? She  
20 spent the last six months of her life without a husband  
21 in the bed next to her because of the actions of the  
22 defendant in this case.

23 Her loss of support, as Aria described it  
24 better than I ever will, affected her. The loss of  
25 comfort of Kayvan, Aria said, we had a piece missing

1 from our machine. It wasn't working right anymore. A  
2 machine that, as Aria told you folks, even upon  
3 learning she was sick, Katy Barin was sick, the machine  
4 didn't miss a beat. Aria described how nobody was  
5 worried. We put our heads down and we kept going  
6 forward. That changed April the 18th, folks.

7 Jury Instruction 40 tells you all that none  
8 of us can tell you how you calculate grief and sorrow.  
9 There's no definite standard, it says. In fact, it  
10 goes on to say in making an award for the heirs' grief  
11 or sorrow and the decedent's pain and suffering and  
12 disfigurement, you shall exercise your authority with  
13 calm and reasonable judgment and the damages you fix  
14 shall be just and reasonable in light of the evidence.

15 And, folks, if I take you back to about  
16 February the 20th, that's the last question I asked  
17 each and every one of you, was can you set sympathy  
18 aside, prejudice, leave it at home, and come decide  
19 this case based on the merits? And I asked all of you  
20 individually some version of that question.

21 Jury Instruction 40 asks you to do just that.  
22 So the verdict form -- I don't have it in its entirety,  
23 but it is broken up for Aria Khiabani to past grief,  
24 sorrow, loss of companionship, society, and comfort and  
25 future grief, sorrow, loss of companionship, society,

1 and comfort.

2 Consistent with Mr. Kemp, a way you may think  
3 about it -- don't have to -- a way you may, I suggest  
4 is a proper way, is to acknowledge that the past has  
5 been just shy of a year, right, past grief and sorrow  
6 for Aria, and the future is the 31 years his dad  
7 statistically was going to be in his life but for Motor  
8 Coach Industries.

9 So for those 31 years, you all decide what's  
10 fair in the past, for the last year. Is the last year  
11 a \$5 million year? \$10 million year? And for the  
12 future for the 31 years, is it 500,000 a year, 250,000  
13 a year Dr. Khiabani -- that's for you folks to decide.

14 I can tell you the loss of probable support.  
15 Probable support, Dr. Stokes -- or Mr. Stokes gave you  
16 a calculation for the earning capacity of Kayvan  
17 Khiabani. He projected it out over his worklife  
18 expectancy to age 69. You guys remember that? And  
19 then he reduced it back to its present value after he  
20 reduced from it personal consumption. And he had a  
21 total of \$15,300,000. Remember that sort of round  
22 figure?

23 Well, I would suggest to you that the number  
24 I put here, 7,420,000, that's half of the earning  
25 capacity of Dr. Khiabani minus the six months or half

1 of his annual salary, 450,000, that Dr. Barin would  
2 have received. That's all the number is. It's all it  
3 represents.

4 (Whereupon video was played.)

5 "Q.Start with, for the jury if you would, with  
6 your oldest boy Aria. Who -- who's personality did  
7 Aria inherit?

8 "A.So Aria physically looks like me, but  
9 personality-wise is an absolute duplication of my  
10 husband in every sense of the way. He's assertive.  
11 He's confident. He's joyous. He fills a room. He's  
12 cheerful. Extremely driven. Extremely intelligent.  
13 And extremely, like, you know, structured, and -- yeah,  
14 and he got a lot of that from -- from his dad. He says  
15 in his speech -- I mean, Aria would be fascinated. He  
16 loved talking to Kayvan because every topic he would  
17 touch, he was like -- he had things that he could learn  
18 from him. He was fascinated by that.

19 "So he had a lot of respect for him  
20 because he -- just no matter what he talked  
21 about, Kayvan had something -- you know, and I  
22 mean he's not talking as an opinion but a  
23 factual information that he would provide to  
24 him.

25 "Q.Aria was how old when his dad passed away?

1 "A.16.

2 "Q.And do you have opinion relative to those years  
3 immediately before 16 being important in developing --  
4 Kayvan developing Aria's personality?

5 "A.Absolutely.

6 "Q.Tell the jury what that is.

7 "A.I mean, you know, the boys, when they were much  
8 younger, of course, you know, would take them around --  
9 together, we would go to things.

10 "But, honestly, after Aria went through  
11 puberty, which he went kind of a littler  
12 earlier than Keon, was like 12, 13, he really  
13 almost became a magnet. And Kayvan took him  
14 under his arms, and they had a special  
15 connection. Hours and hours of conversation,  
16 conversing, talking. They had a lot of things  
17 in common: music, technology, like  
18 education, anything.

19 "So Kayvan had a huge influence on his  
20 formative years. Like, I'm glad he had the  
21 opportunity because they had many good years  
22 together. And then every time he drove him to  
23 school or drove him back, the entire time --  
24 you know how teenagers are, but their  
25 relationship was they spoke the entire time and

1       they connected. It was like not one minute  
2       they would not talk about" --

3               MR. CHRISTIANSEN: That's a mom, 20 days from  
4       passing, describing for you all the loss of her son  
5       who, candidly, when he came in here, he wanted to talk  
6       to you about his mom and his brother.

7               Aria spent very little time talking about his  
8       own loss. Very little time. He told you -- I don't  
9       know if you remember. I played a clip of Keon with the  
10      blonde hair. And I asked his brother, Aria, you know,  
11      "Doesn't it seem like Keon's a bit emotionless?" And  
12      his quote back to me was, "Pete, he's just all cried  
13      out."

14              The estate of Katy Barin is entitled to  
15      recover for Katy's grief, sorrow, loss of  
16      companionship, society, comfort, and consortium between  
17      the day of Dr. Khiabani's death to when Katy died. I  
18      guess 11 days shy of their 19th wedding anniversary.  
19      You all recall that their anniversary is the date of  
20      their first date, October the 23rd, as told to you by  
21      Aria.

22              So she made it to 11 days short of 19 years.  
23      And for that six months that she deteriorated from her  
24      illness without the comfort, society, and companionship  
25      of her husband, I would suggest to you an appropriate

1 award is \$6 million.

2 The loss of probable support for Katy's  
3 estate is nothing more than Kayvan's salary, which is  
4 about \$950,000, as you guys heard, divided by 2,  
5 \$475,000, for a total of \$6,475,000.

6 As I told you, that's -- what I tell you  
7 isn't what you have to do, but I would suggest it's not  
8 worth one penny less.

9 Then I'll leave you with what was truly an  
10 amazing witness.

11 (Whereupon video was played.)

12 "Q.Aria, after your mom and dad passed away, did  
13 you have any family members, adult family members, here  
14 in Las Vegas, Nevada, that could care or provide  
15 parental love and support for you?

16 "A.No.

17 "Q.What was the -- during the healthy debate about  
18 Aria staying at Clark or going elsewhere, what was the  
19 straw that -- straw that broke the camel's back? What  
20 was the final thing that made you decide to go to  
21 Canada? Who was it?

22 "A.My brother.

23 "I -- I wanted to stay in Clark. Like I  
24 said, before, I -- I had a lot of good friends.

25 I had -- I mean, we -- just three weeks ago,

1       they got three kids into Stanford and two into  
2       Harvard and so on. And that's what I wanted to  
3       go for, and I didn't want to leave that.

4               "I had spent -- I had spent 2 1/2 years  
5       developing that, working towards becoming the  
6       president of the clubs, and really studying  
7       extremely hard with these other kids, who are  
8       also studying really hard. And I didn't want  
9       to leave. But my brother had to leave. He  
10      couldn't stay and finish high school because he  
11      was only in 9th grade.

12             "And I knew that my parents put me at  
13      Clark and put my brother at Clark for me to  
14      take care of him. Right? That was their  
15      vision. It was for me to go to the same school  
16      with my brother so I could take care of a kid  
17      with ADHD who had now lost both his parents. I  
18      knew that that's -- that's exactly what I  
19      needed to do

20             "So I had to -- in the end I decided to go  
21      to school in Montreal, regardless of having to  
22      study for six weeks all of Canada history and  
23      physics and math and English and French and so  
24      on and having to make new friends and go to a  
25      completely different school, because my



1 brother -- he needed me. He needed me to be  
2 there for him."

3 MR. CHRISTIANSEN: Thank you.

4 THE COURT: Okay. Is the lunch here?

5 Ladies and gentlemen, we are now going to  
6 take our lunch break. I'm going to admonish you.

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

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

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

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

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

4           We're going to take a short lunch break  
5 because I want to make sure that you're able to wrap  
6 everything up today so that you can start deliberating.  
7 So let's take 30 minutes. Okay?

8           THE MARSHAL: All rise.

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

11           THE COURT: I realize -- I realize it's a  
12 short lunch break, but I need to make sure we get done  
13 with this case.

14           MR. BARGER: It's fine.

15           MR. CHRISTIANSEN: No complaints, Your Honor.  
16 Thank you.

17           MR. KEMP: Did you buy us lunch? Just  
18 asking.

19           THE COURT: Sure. All equally.

20           MR. ROBERTS: And for guidance, Your Honor,  
21 are we still going to be allowed the same length as  
22 they take in both phases?

23           THE COURT: Yes.

24           MR. ROBERTS: Just so we can try to stay  
25 within those parameters, do you know how much you'll

1 take for rebuttal?

2 MR. KEMP: I don't know. Maybe a half hour.

3 MR. ROBERTS: Okay. Thank you.

4 THE COURT: All right.

5 MR. ROBERTS: Thank you, Your Honor.

6 THE COURT: So 30 minutes.

7 (Whereupon a lunch recess was taken.)

8 THE COURT: We ready for the jury? All  
9 right. Is everyone ready for the jury?

10 MR. BARGER: Yes, Your Honor.

11 MR. HENRIOD: Small housekeeping matter.

12 MR. BARGER: We are trying to get the S-1  
13 Gard and the helmet out of the exhibit room, so ...

14 (Discussion was held off the record.)

15 THE MARSHAL: All rise for the jury.

16 (The following proceedings were held in  
17 the presence of the jury.)

18 THE MARSHAL: All the jurors are present,  
19 Your Honor.

20 Please be seated. Come to order.

21 THE COURT: Do the parties stipulate to the  
22 presence of the jury?

23 MR. BARGER: Yes.

24 THE COURT: All right. Ladies and gentlemen,  
25 the defense will now begin their closing argument.

1 Mr. Barger?

2 CLOSING ARGUMENT

3 MR. BARGER: May it please the Court.

4 Good afternoon.

5 IN UNISON: Good afternoon.

6 MR. BARGER: Boy, you got more energy than I  
7 do. We're getting close to the end. Okay?

8 We're going to finish the argument today, and  
9 then the judge will tell us what we're going to do. So  
10 I kind of want to visit with you about a few things.

11 You know, I've done this most of my life.

12 And, usually, I tell the jury that I have three  
13 arguments to make in my closing argument. The first  
14 argument is what I did last night up till -- I don't  
15 know -- 4:00, 5:00 in the morning thinking about it,  
16 getting ready.

17 The second argument is what I do right now.

18 And the third argument is the one I wish I'd  
19 have made after I get finished and sit down, because  
20 Mr. Kemp gets to go again. So I'm going to try to  
21 respond. I think all the lawyers in this -- in this  
22 room have a different style. And what I'm going to try  
23 to do is put some common sense into this, because what  
24 we've seen for six weeks -- I also want to thank you  
25 very much for your attention. Unbelievable. I've

1 never seen a jury so attentive in my life, listening to  
2 what I consider to be a lot of complicated things.

3 So what I want to do is talk to you about  
4 some commonsense things and about the facts. Okay?  
5 Bear with me.

6 And you know what? I've never -- I -- I'm  
7 going to promise you. You know what? I'm from Texas.  
8 I've never been in a courtroom in my life that has live  
9 cameras. Usually, when we get up and -- and argue to a  
10 closing -- closing argument, we have to kind of read  
11 what the transcript says and what a juror said. This  
12 is a very, very unique situation. You get to actually  
13 watch what a juror said. As opposed to what a lawyer  
14 says they said, you get to see what they actually said.  
15 Now, obviously not six weeks' worth of what they said.

16 I'm going to ask you to bear with me because  
17 I'm going to play some of the testimony of some of the  
18 witnesses. And it may be a little bit lengthy. But I  
19 think we need to listen to what they said as opposed to  
20 what we lawyers said. Because, as the judge told you,  
21 we're not evidence. We're a lawyer. So I want you to  
22 hear some of the testimony.

23 Now, you know, I want to say this: I don't  
24 know. There's been some innuendos that I'm really an  
25 evil guy and representing an evil company. But I'm

1 going to tell you, I think this is a very sympathetic  
2 and tragic case. There's no question about it.  
3 There's not a person in this room that will deny that.

4           And the real question for this jury when  
5 y'all start to deliberate is you've got to put aside  
6 the sympathy. And that's hard to do. I mean, I have  
7 children. I mean, we all have families. And you got  
8 to put it aside. You got to do your best and you got  
9 to look at the case on the facts as the jury has  
10 instructed you to look at the case. Because if we  
11 decide a case on sympathy, it never starts. It's over.  
12 There's no doubt about that.

13           You know, it's been a long case and it's been  
14 a lot of witnesses. There really has. And there's  
15 been a lot of experts on both sides. And -- I don't  
16 know -- I'm accused of scripting experts. I don't even  
17 know what that means. If an expert comes and shows  
18 PowerPoints to make a presentation that's responsible  
19 to the jury, I don't find fault with that, if a lawyer  
20 prepares his witness to get to the facts.

21           So I don't know why I'm accused of scripting  
22 the experts, but, I assure you, I don't script experts.  
23 Experts and witnesses give their opinions based upon  
24 what they have done and what they think the facts are.

25           The Court -- and I'm going to ask y'all, if

1 you will, to do me a favor. The Court gave you a set  
2 of jury instructions. And before I start talking about  
3 the case, I would like to kind of go over some of those  
4 instructions. And I would request, if you want to,  
5 that you follow along at those instructions. I'm not  
6 going to put them up on the board because I don't  
7 want -- if you don't mind looking at your instructions,  
8 I want to ask you to look at some of them so we can  
9 talk about some legal concepts.

10 Look at Jury Instruction No. 9. And I think  
11 this is one of the most important instructions that you  
12 get. All of them are important, no question. And it  
13 says, "Although you are to consider only the evidence  
14 in the case in reaching a verdict, you must bring to  
15 the consideration of the evidence your everyday common  
16 sense and judgment as reasonable men and women."

17 It says, "Thus, you are not limited solely to  
18 what you see and hear as the witnesses testify. You  
19 may draw reasonable inferences from the evidence which  
20 you feel are justified in the light of common  
21 experience." Okay?

22 Common knowledge and common experience can  
23 play a role in your -- your deliberations. And the  
24 judge says, even though Her Honor gives you a lot of  
25 instructions and definitions, your common sense can

1 play a role.

2 Now, look if you would, at No. 11. And you  
3 remember Dr. Krauss, the human factors guy we put on a  
4 couple days ago? One of the things that he told you is  
5 what -- something we all know in this room. People see  
6 things differently and do not always recall exactly  
7 what they have. That doesn't mean they're not telling  
8 the truth. But what -- what -- a lot of the witnesses  
9 that saw the accident or were in the area, you got to  
10 remember this was in milliseconds. Some of them were  
11 150 feet away; some of them were closer. They  
12 perceived what they saw and they came in and honestly  
13 tried to tell you the truth. Okay? There's no  
14 question about that.

15 We don't know what they saw, but they, in  
16 their own knowledge, tried to tell you what they saw.  
17 But that's why -- because we know, and the judge tells  
18 you. Her Honor says, "Discrepancies in a witness's  
19 testimony or between his testimony and that of others,  
20 if there were any discrepancies, do not necessarily  
21 mean that the witness should be discredited. Failure  
22 of recollection is a common experience and innocent  
23 misrecollection is not uncommon."

24 That's exactly what Dr. Krauss told you  
25 almost word for word. People see things differently.



1 We have an accident that just happens in a second, very  
2 tragic, very emotional. And people try to do their  
3 best. Okay?

4 So I want you to keep that in mind when we're  
5 looking at the witnesses. And one of the reasons I  
6 want to show you some tapes is because lawyers tend to  
7 not show you the whole story. And I'm not saying  
8 that's wrong or anything else, but you need to get the  
9 whole story.

10 Look, if you would, also at Jury Instruction  
11 No. 19. I want to apologize to you in advance. I tend  
12 to have to drink a lot of water. So bear with me, if  
13 you would.

14 The burden of proof. The burden of proof in  
15 this case is on the plaintiff: Mr. Kemp,  
16 Mr. Christiansen. And the burden of proof is they have  
17 to prove to you by a standard that's called  
18 preponderance of the evidence. It's not a scale that  
19 you put feathers on. It's not a scale that you put  
20 people's pictures on and add them up and say a  
21 preponderance of the evidence.

22 And the Court tells you, she defines for you  
23 the term "preponderance of the evidence." It means  
24 such evidence as, when weighed with that opposed to it,  
25 has more convincing force and produces in your mind a

1 belief that what is sought to be proved is more  
2 probably true than not.

3 And what that goes to is credibility. You,  
4 as the judges of the facts of this case, you're the  
5 judges of the facts. And you have a right to look at  
6 the witnesses, and you have the right to believe what's  
7 credible or what's not. Okay?

8 At the end of the day, you don't decide who  
9 wins or loses; the Court decides that. You find facts  
10 for the Court to evaluate. Okay? So the burden of  
11 proof and -- has to be met by the plaintiffs in this  
12 case.

13 Look at the page, Jury Instruction No. 20.  
14 Remember yesterday when I was asking Dr. Carhart,  
15 because they had put up a scale with four or five  
16 people on it, the witnesses, that I defined for him  
17 that that's -- the preponderance or weight of the  
18 evidence is not necessarily the greater number of  
19 witnesses. Okay? You don't just get to add up the  
20 witnesses and say that creates a preponderance. You  
21 have to follow the credible evidence as to how you see  
22 it.

23 Now, before we get started, this is what the  
24 plaintiff has to prove to you. This is their burden of  
25 proof by a preponderance of the evidence.

1           They have claimed that the MCI bus is  
2 defective, it's a defective product. Now, what they  
3 have to claim is that, number one, the coach was  
4 defective. And what they're saying to you, it's  
5 defective because it didn't have a proximity sensor.  
6 It's defective because it didn't have an S-1 Gard.  
7 It's defective because it's built like a brick. That's  
8 their basic argument. And it causes some sort of air  
9 blast -- air blast, whatever -- and we're going to talk  
10 about discrepancy and movement of air and air blast  
11 after a while.

12           But the third -- the next thing is that the  
13 defect existed when the coach was sold in 2008, not  
14 today. We don't go back and look and see what's  
15 available today or what's better today or what people  
16 think about. You have to look at the year that it was  
17 sold, which was 2008.

18           Because, as we all know, there's a lot of  
19 things that change and evolve over the years. I mean,  
20 I promise you, at my age, I've seen a lot of changes.  
21 That cell phone that Mr. Kemp put up, I mean, I had one  
22 bigger than that. It was this big. So what we have is  
23 changes that evolve, and things get different. But you  
24 have to judge this bus as to what happened in 2008, not  
25 yesterday, not last month, 2008. Okay?

1           The next thing and third thing they have to  
2 prove, that the defect, if it existed, was a legal  
3 cause of the damage or injury to the plaintiffs and/or  
4 the decedent.

5           So they got to prove there was a defect, they  
6 got to prove it existed in 2008, and they got to prove  
7 that it was a legal cause.

8           Now, what does legal cause mean? Look at, if  
9 you would, Instruction No. 24. The judge tells you a  
10 legal cause of injury, damage, loss, or harm is a cause  
11 which is a substantial factor in bringing about the  
12 injury, damage, loss, or harm. A substantial factor is  
13 not defined for you. That's for you to decide as the  
14 jurors in this case.

15           The next thing they have to prove, look at  
16 Jury Instruction No. 25. And each one of these are  
17 tied together. And they're done so far -- and, you  
18 know, I really respect and thank you for looking. If  
19 you don't want to look at it, that's fine too.

20           A product is defective in its design if, as a  
21 result of its design, the product is unreasonably  
22 dangerous. Okay? Now, what does unreasonably  
23 dangerous mean? Not only do they have to prove it was  
24 a defect that existed at the time it was sold, it was a  
25 legal cause, but they have to prove that the defect

1 was -- is unreasonably dangerous. Okay? I think the  
2 Court defines for you what unreasonably dangerous  
3 means. Instruction No. 26.

4 "A product is unreasonably dangerous if it  
5 failed to perform in a manner reasonably to be expected  
6 in light of its nature and intended function and was  
7 more dangerous than would be contemplated" -- by whom?  
8 -- "by the ordinary user of the product having the  
9 ordinary knowledge available in the community."

10 So the user of the product was the bus driver  
11 and the passengers. Okay? And I think that's what  
12 that's telling you. It's a -- it is unreasonably  
13 dangerous if it -- "expected in light of its nature and  
14 intended function was more dangerous than would be  
15 contemplated or thought of by the ordinary user."

16 So -- and there's one other thing. You know,  
17 the fact that an accident happened doesn't mean that  
18 the product was unreasonably dangerous. Okay? The  
19 judge tells you that. So what we want to do with you  
20 is go over the evidence. Before I do, I want to read  
21 you one more instruction, or maybe two.

22 If you'll look at Jury Instruction No. 29.  
23 "For purposes of determining whether the motor coach is  
24 unreasonably dangerous, the expectations of bystanders  
25 such as the -- the decedent in this case, Dr. Khiabani,

1 are not relevant."

2           So Dr. Khiabani, the judge is telling you,  
3 his expectations are not relevant. What is relevant is  
4 the user of the product. Okay?

5           The last -- they have a cause of action for  
6 what they call failure to properly warn. And I think  
7 Mr. Kemp suggested to you that would be the bus driver  
8 himself, Mr. Hubbard. And I don't disagree with that.

9           "A product, though faultlessly made, is  
10 defective for its failure to be accompanied by a  
11 suitable and adequate warning concerning its safe and  
12 proper use if the absence of such warnings render it --  
13 the product unreasonably dangerous."

14           And what we want to look at is what  
15 Mr. Hubbard and bus drivers do. Okay? And he brought  
16 you some bus drivers, no question about it. The judge  
17 tells you in 31 -- and I'm almost through. I just want  
18 to go over these instructions with you again.

19           "If you find that the warnings provided with  
20 the motor coach were inadequate, the defendant cannot  
21 be held liable unless plaintiffs prove by a  
22 preponderance of the evidence" -- they have to prove to  
23 you that the individual who might have acted or any  
24 warning -- would have acted in accordance with the  
25 warning, and that doing so would have prevented the

1 injury.

2           Therein lies an extremely legal term, "would  
3 have prevented the injury." Okay? That's what that  
4 means.

5           Now, the judge tells you in Jury Instruction  
6 No. 33 -- okay? And I want you, if you can, let's read  
7 that carefully.

8           "Any negligence by the driver in this case is  
9 foreseeable as a matter of law, thus cannot insulate  
10 defendant from liability, if any. So you are not to  
11 consider any alleged negligence on the part of bus  
12 driver."

13           Now, here comes in what's very, very  
14 important and I want to highlight for you.

15           "However, you should consider all the  
16 evidence" -- all of it -- "to determine if there was a  
17 defect, and, if so, whether that defect" -- what? --  
18 "caused the collision." That is the key. The defect  
19 has to cause the collision.

20           So and they also tell you in 34 the same with  
21 Dr. Khiabani. You don't consider his negligence -- any  
22 alleged negligence by Dr. Khiabani is not a defense to  
23 my -- to the product claims. So you are not to  
24 consider any alleged negligence on the part of  
25 Dr. Khiabani.

1 "However" -- that's a big however -- "you  
2 should consider all the evidence to determine if there  
3 was a defect and, if so, whether that defect caused the  
4 collision."

5 Okay? And I'll try to tie this in with you a  
6 little bit. So the causation of the collision in this  
7 case is what is critical and what is very important.  
8 Now, there's a verdict form, and I'll talk to you more  
9 about that verdict form later. You don't have it, but  
10 we'll put it up on the board.

11 That's -- that's a verdict form. It's called  
12 a special verdict. And it has some questions. At the  
13 end of this -- all this argument, what's going to  
14 happen is the judge is going to tell you what to do. I  
15 suspect -- commonly, you will go to the jury room,  
16 you'll be provided the evidence, and you will then sit  
17 down, elect a foreperson, and go over these questions  
18 and come to your conclusions.

19 There's eight people who will sit on the  
20 jury. Six -- they have to have six of the eight.  
21 Okay? Six people are going to have to decide the case.  
22 That's what the Court tells you in your instructions.  
23 It has to be the same six people on every question and  
24 answer, the same question and answer. Okay? You can't  
25 have one group of six decide one question and the



1 second group of six decide. It has to be all six  
2 people.

3 Now, let me make a suggestion. What -- my  
4 job is to give you the facts and how I see the facts as  
5 I saw the witnesses and for you to determine on your  
6 own volition what you think the facts are. But let me  
7 tell you what I think the facts in this case show. I  
8 think -- common sense. Okay? Just for a moment -- for  
9 one moment -- forget about all these experts and all  
10 these terms and tests and so forth.

11 What we know and what I think we have shown  
12 is the bicycle made a left-turn movement into the right  
13 travel lane in front of the bus. That's what happened.  
14 Why it happened, that's another question. But that's  
15 what happened. You're going to hear from the witnesses  
16 as to what they saw, and you're going to hear from the  
17 experts as to what they did.

18 And, by the way, I am not going to apologize  
19 for having experts run tests and do their job of  
20 scientific analysis. I'm kind of criticized for that a  
21 little bit, but I think that's what a lawyer has to do.  
22 You have to address this from the scientific approach.  
23 And that's what we tried to do with the experts.

24 Remember, the accident and impact occurred  
25 6 feet in the right-hand travel lane of this bus. In

1 other words, remember we have -- and I'm not going to  
2 put a picture up, but I think you can all draw it for  
3 me if you wanted to because you've heard this.

4           You have a right-hand turn lane. You have a  
5 bicycle lane. You have a right-hand travel lane. And  
6 then you have this other travel lane, two lanes going  
7 south. Every expert in this case that testified, both  
8 their expert Mr. Caldwell, my expert Dr. Rucoba, they  
9 agreed that the impact occurred in the right-hand  
10 travel lane 6 feet -- between 5 1/2 and 6 feet from the  
11 bicycle lane edge -- okay? -- in the lane that the cars  
12 and buses are supposed to be in.

13           There was a question, how does the bicycle  
14 get over to that lane? And we're going to discuss  
15 that. The lawyers representing Dr. Khiabani say it was  
16 blown over there. It was blown out, sucked in, and  
17 blown over there 6 feet. And that's -- and you'll --  
18 now you'll understand why we had Dr. Carhart and  
19 Dr. Kevan Granat -- excuse me -- Kevan Granat do their  
20 tests.

21           Because I'll tell you right now, there is not  
22 an air blast on a bus going 25 miles an hour and a  
23 bicycle going 13 miles an hour. You know, if that were  
24 true, you couldn't be on the streets. There's all  
25 kinds of -- even in Las Vegas, there's all kinds of

1 buses and people. When I walk to the courthouse, I see  
2 them. You see them.

3 If we -- if a bus going 25 miles an hour --  
4 common sense -- comes by a bicycle or a pedestrian and  
5 causes an air blast, we would be having unbelievable  
6 amount of people killed, and we don't. So how did this  
7 bicycle get over to the right-hand travel lane where  
8 the bus was driving at the time? That's what we're  
9 going to talk about.

10 If you remember Dr. Rucoba, who was my expert  
11 who testified, I think, late last week, I asked him  
12 this question: "From a reasonable engineering  
13 probability, what was the cause of this collision  
14 between the bicycle and the bus?"

15 And his testimony was, to you, "Dr. Khiabani  
16 turned his bike to the left. Dr. Khiabani began his  
17 turn in front of the bus and then ultimately ran into  
18 the side of the bus."

19 You heard Dr. Carhart yesterday who said the  
20 same thing. Now, the plaintiffs put up a bunch of  
21 photographs of the eyewitnesses and said nobody ever  
22 said he was in front of the bus. I want to show you --  
23 I want to discuss with you some of the testimony, and I  
24 want to show it to you, as to what those witnesses  
25 said.

1           Before I -- before I do that, I want to show  
2 our first slide.

3           No, I want to go back to the very first slide  
4 on -- next one. All right.

5           It is MCI's position, the following: That  
6 there is no right-side blind spot that caused the coach  
7 to be defective. I'll talk to you more about  
8 right-side blind spots, about every vehicle, even when  
9 we get in our car and drive home with, has a blind  
10 spot. And I'll talk more about it.

11           But, you know, the blind spot in moving  
12 vehicles exists for a millisecond because vehicles are  
13 moving. It's not like you sit there parked next to a  
14 car and worry about a blind spot. So nobody has ever  
15 denied -- in fact, I think you heard all the witnesses  
16 say there's a right-side blind spot. It depends on  
17 where -- how fast you're going and what you're doing.  
18 The faster you're going, the less of a blind spot,  
19 right, because you're going past a vehicle.

20           Now, it is our position that the absence of a  
21 proximity sensor is not defective. We all know that  
22 there's been testimony here that some people have  
23 proximity sensors; some don't. But, in this case, the  
24 lack of a proximity sensor did not cause this  
25 collision. And that's my job to talk to you about.

1           The absence of a rear wheel protective  
2 barrier is -- does not make this coach defective. The  
3 aerodynamic design does not make this coach defective.  
4 And any failure to warn does not make this coach  
5 defective. None of those -- I say to you the evidence  
6 shows that none of those caused this collision. The  
7 cause of the collision was the swerving and moving to  
8 the left by the bicyclist. That's what caused it to  
9 happen.

10           Now, let's talk about the fact witnesses.  
11 And I'm going to show you some of the testimony.  
12 And -- and, you know, it's Thursday afternoon at -- is  
13 it 4:15? -- 3:15 right after lunch. So -- so smile at  
14 me a little bit so -- I'll try not to bore you, but I  
15 think this is important to watch. Because you've been  
16 here for -- what? -- five weeks and we're down to now  
17 it's time to make your decision. Okay?

18           So let's look at Mr. Sacarias. Remember the  
19 gentleman, the gardener? There's a couple of things I  
20 want you to see. And there -- and I may stop and show.  
21 Now, if you remember, he came through an interpreter.  
22 So let's see -- let's play that video.

23                       (Whereupon video was played.)

24           "Q. So where was the bus that you saw in this  
25 accident when you first saw it?

1 "A.Between -- in the middle between the light and the  
2 bus stop.

3 "Q.Okay. Can I ask permission to put -- would you  
4 please put this little sticky where you first saw the  
5 bus. You know what? Let me write 'bus' on it. Okay?  
6 I think the interpreter will show you I wrote 'bus.'  
7 Place that where you first saw the bus.

8 "A.Okay.

9 "Q.Now, where was the bicycle when you first saw  
10 the bus?

11 "A.In the bicycle lane.

12 "Q.I understand it's in the bicycle lane, but  
13 where on the map is it? And I'm going to write  
14 'bicycle.' I think the interpreter will show you that  
15 I wrote 'bicycle.'

16 "A.About here in the lane.

17 "Q.So the bicycle was ahead of the bus --

18 "A.Yes.

19 "Q.-- in the bicycle lane?

20 "A.Yes.

21 "Q.Where -- what lane was the bus in?

22 "A.Second.

23 "Q.Okay. Let's see if I understand.

24 "You see how it comes down? You have  
25 right turn lane up here; right?

1 "A.Yes.

2 "Q.You have a bicycle lane?

3 "A.Yes.

4 "Q.Then you have a travel lane?

5 "A.Yes.

6 "Q.And then you have another travel lane?

7 "A.Yes.

8 "Q.Okay. Was he in the first travel lane?

9 "A.There was one to enter and one to go straight ahead.  
10 He was in the second.

11 "Q.Okay. Was he in the lane, the travel lane next  
12 to the bicycle lane?

13 "A.Yes.

14 "Q.And how far was the bumper of the bus from the  
15 bicycle when you first saw it?

16 "A.About 10 feet.

17 "Q.Okay. And the bicycle was in front of the bus?

18 "A.Yes.

19 "Q.In your opinion, at least 10 feet?

20 "A.Yes.

21 "Q.Could it have been more?

22 "A.Around it.

23 "Q.Okay. And then the bus, did it catch up to the  
24 bicycle?

25 "A.Yes.

1 "Q.All right. And then did the bus enter the  
2 bicycle lane?

3 "A.Yes.

4 "Q.Okay. So I want to make sure that it's your  
5 testimony -- and by the way, I've read your  
6 deposition -- is that the bus was behind the bicycle?

7 "A.Yes.

8 "Q.Driving in that travel lane?

9 "A.Yes.

10 "Q.And the bicycle was ahead at least 10 feet?

11 "A.Yes.

12 "Q.In the bicycle lane?

13 "A.Yes."

14 MR. BARGER: Stop it for a minute.

15 So let me try to explain what I think is  
16 important for you to look at here.

17 Remember the gardener is the one that  
18 everybody has said he was about 15 feet from it, had  
19 the best view. He's telling you he looked back and he  
20 saw the bicycle 10 feet ahead of the bus. And if  
21 you're 10 feet ahead of the bus, I think that the  
22 evidence shows you could see the bicycle, even with the  
23 proximity sensors and all those charts.

24 So if the bicyclist is out in the bike lane  
25 10 feet ahead of the bus, he is visible. Okay.



1           Now, I will tell you, I think Mr. Sacarias  
2 made a mistake when he said the bus crossed over to the  
3 bike lane because everybody agrees that the impact  
4 occurred in the right-hand travel lane.

5           But there is no doubt that this eyewitness  
6 places the bicycle at least 10 feet in front of the bus  
7 as it's coming down south to that intersection on  
8 Pavilion. Okay?

9           Now, let's continue with that if we could.

10          MR. CLARK: The next one?

11          MR. BARGER: Yeah, just continue with the --

12                   (Whereupon video was played.)

13          "Q.And then did the bus enter the bicycle lane?

14          "A.Yes.

15          "Q.Okay. So I want to make sure that it's your  
16 testimony -- and by the way, I've read your  
17 deposition -- is that the bus was behind the bicycle?

18          "A.Yes.

19          "Q.Driving in that travel lane?

20          "A.Yes.

21          "Q.And the bicycle ahead at least 10 feet?

22          "A.Yes.

23          "Q.In the bicycle lane?

24          "A.Yes.

25          "Q.And the bus just turned into the bicycle lane?

1 "A.Yes.

2 "Q.That's what you saw happen?

3 "A.Yes.

4 "Q.Could you be mistaken about that?

5 "A.No."

6 MR. BARGER: Okay. I want to play the clip  
7 where he discusses he did not see a wobble.

8 (Whereupon video was played.)

9 "Q.So the bicycle out in front of the bus is in  
10 the bicycle lane, and the bus behind the bicycle turns  
11 into the bicycle lane?

12 "A.When it was in the lights, the four lights, they  
13 were side to side, the bicycle and the bus.

14 "Q.Can you repeat that?

15 "A.Yes, sir. When they were approaching the light, the  
16 four lights, the bicycle and the bus were side to side.

17 "Q.Okay. And at some point at the end -- and  
18 you're not changing your testimony about the bicycle  
19 being out in front of the bus, but at the end, they got  
20 closer together?

21 "A.Close.

22 "Q.All right. And then the bus went into the  
23 bicycle lane?

24 "A.Yes. He turned.

25 "Q.The bus turned?

1 "A.Yes.

2 "Q.In your deposition, you stated you never saw  
3 the bicyclist wobble before the accident; correct?

4 "A.No.

5 "Q.Well, is that correct? Did you ever see --  
6 before the accident, did you ever see the bicycle  
7 wobble?

8 "A.No.

9 "Q.Okay. After the bicyclist hit the bus, did you  
10 see the bicycle wobble and fall down?

11 "A.Yes.

12 "Q.So it's your testimony here today --

13 "A.Yes.

14 "Q.-- you never saw the bicycle wobble before the  
15 accident?

16 "A.No."

17 MR. BARGER: Okay. You can stop it. Thank  
18 you.

19 Now, you remember there's all kinds of  
20 discussion about wobbles and what happened. Okay?  
21 This eyewitness never saw the bicycle wobble, because  
22 the plaintiffs' theory is he hits -- he gets hit by an  
23 air blast, he wobbles to the right and then he wobbles  
24 back to the left, and that causes him to go 6 feet over  
25 into the right-hand travel lane.

1           This eyewitness said there was no wobble  
2 prior to the accident.

3           So let's go to the next eyewitness, which is  
4 Erika Bradley. And I want to ask you to bear with me.  
5 This one is a little bit long, but I think it's  
6 important that you see all of Erika Bradley's  
7 testimony -- well, not the whole testimony, but a  
8 substantial portion of it to see what she had to say.

9           And would you please start that clip.

10                   (Whereupon video was played.)

11           "Q.But in the videos you've seen, were they  
12 similar to what you saw?

13           "A.Yes."

14           MR. BARGER: Now you can stop it there,  
15 Brian.

16           Remember this bicycle in the Russian video?  
17 Remember that bicycle where the -- the bicycle is  
18 trying to turn right very clearly and runs into the  
19 truck and his handlebars get caught? Well, the purpose  
20 of the plaintiffs' showing you that was they were  
21 trying to show you what a wobble is and what air  
22 displacement is and an air blast. But the fact of the  
23 matter is we all saw it, we all saw it broken down, and  
24 even Ms. Bradley saw it and said that was not a wobble.  
25 What she saw was similar to what happened in the

1 accident with Dr. Khiabani, and that is make a movement  
2 as opposed to being displaced by the air.

3 I'm not going to show that Russian video  
4 because we almost don't have time, but let's scoot  
5 down, if you can, and skip past the video.

6 You know what, Brian? I'll make it easy.  
7 Just play it. Just play it. Don't try to scoot down.

8 (Whereupon video was played.)

9 "Q.But in the videos you've seen, were they  
10 similar to what you saw?

11 "A.Yes.

12 "Q.And can you tell the jury why you think the  
13 video is similar?

14 "A.It's similar because it looks very similar to the  
15 movement that I saw when he wobbled to the left into  
16 the bus.

17 "Q.And the video you saw was taken from the back?

18 "A.Yes.

19 "Q.Just like where you were?

20 "A.Yes.

21 "Q.In the video, you saw the bike wobble the same  
22 way you saw it?

23 "A.Yes."

24 MR. BARGER: Continue, please.

25 (Whereupon video was played.)

1 "Q.So the video you saw, was it substantially  
2 similar to what you observed?

3 "A.It was -- can you define "substantially"?

4 "Q.It was similar to what you saw?

5 "A.Yes, it was similar to what I saw.

6 "Q.Very similar to what you saw?

7 "A.I only saw one wobble, when he wobbled to the left.  
8 On the videos that I saw, there was a lot more wobbling  
9 than what I witnessed.

10 "Q.Other than the amount of the wobbles, the video  
11 is the same?

12 "A.Yes.

13 "Q.Can you tell the jury why you think that's  
14 similar to what you saw?

15 "A.As the truck is passing the biker, the initial  
16 wobble, when it wobbles in towards the truck, is what I  
17 recall seeing.

18 "Q.And same thing --"

19 MR. BARGER: And to speed this up a little  
20 bit, Mr. Kemp was asking her about wobbles, and she  
21 said what she saw was similar. Okay? And what she  
22 saw, and she eventually says -- you'll remember; I'm  
23 not going to play it -- is that that was similar to  
24 this Russian video. And she said that -- and she  
25 agreed that the bicycle was making a right-hand turn,

1 sticking his hand out, remember, and making that  
2 right-hand turn off of that freeway?

3 So that's not what is a wobble. That's a  
4 direct movement making a turn. And the reason I want  
5 to talk to you about this is you may remember she was  
6 asked in her deposition, if you'll start at page 47,  
7 line 25.

8 (Whereupon video was played.)

9 "Q.Do you think you testified -- so when you saw  
10 the bus at the 50-foot mark on the map, the bicyclist  
11 was approximately 15 feet ahead of it; right?

12 "A.Yes, that's correct.

13 "Q.Okay. So that would be consistent with what  
14 you recall today?

15 "A.Yes.

16 "Q.All right. So we know at 50 feet, and I think  
17 your testimony is the bus was in the right travel lane?

18 "A.Yes, that's correct.

19 "Q.And the bicyclist was in the bicycle lane?

20 "A.Yes.

21 "Q.And 15 feet out front of the bus?

22 "A.Yes."

23 MR. BARGER: Stop it right there.

24 Erika Bradley told you at the 50-foot mark  
25 the bicycle was 15 feet in front of the bus. Clearly,

1 you don't need a proximity sensor to see the bicycle  
2 15 feet in front of the bus.

3 Continue, please.

4 MR. CLARK: Next clip?

5 (Whereupon video was played.)

6 "Q.You know, we've been talking -- you talked this  
7 morning with Mr. Kemp about swerves and wobbles.

8 "Do you recall that?

9 "A.Yes.

10 "Q.Actually, a "wobble" is a term you never used  
11 in the deposition until Mr. Kemp told you it was a  
12 wobble; correct?

13 "A.That's correct.

14 "Q.What you actually said is swerved, didn't you?

15 "A.Yes."

16 MR. BARGER: Look at page -- go to page 50,  
17 line 18. This is what she said.

18 (Whereupon video was played.)

19 "A.In the deposition I said that, as we were driving, I  
20 saw the bicyclist and it looked to me like he swerved  
21 into or in front of the bus and he was struck by the  
22 bus.

23 "Q.And what did you tell us that you were  
24 specifically thinking happened that very moment that  
25 you saw it for the first time? What did you think



1 happened?

2 "A.I said that I was trying to make sense of what I had  
3 seen happen and I didn't know what was going on, that I  
4 thought perhaps the bicyclist was trying to cut across  
5 the intersection because of the movement he made into  
6 the bus.

7 "Q.Okay. So let me see if I can understand it.  
8 Is that your testimony today?

9 "A.Yes.

10 "Q.Okay. When asked -- the first time you were  
11 asked what did you see, you said you saw the bicyclist  
12 swerve into the -- towards the bus; right?

13 "A.Correct.

14 "Q.All right. You didn't use the word "wobble,"  
15 did you?

16 "A.No. I used the word "swerve."

17 "Q.You used the word "swerve." And you're an  
18 intelligent person, and you know what you meant by  
19 "swerve," didn't you?

20 "A.Yes. What I meant was I saw -- I saw him move in to  
21 the bus.

22 "Q.And you thought, based on what you saw, your  
23 first impression, you gasped; right?

24 "A.Yes.

25 "Q.And you thought he was trying to cut over in

1 the intersection to the left; right?

2 "A.In my mind, I was trying to make sense of what I  
3 saw, and that was -- I didn't know what had happened.  
4 So that was the first thing I thought was, was he  
5 trying to cut across the intersection?"

6 MR. BARGER: If you'll go to page 54,  
7 line 22.

8 (Whereupon video was played.)

9 "Q.Where was it -- let me -- it's my understanding  
10 that your testimony is that the bus passed the bike  
11 somewhere past the 50-foot mark; right?

12 "A.Yes.

13 "Q.So the bike was out in front whatever footage  
14 it was. The bus was going faster than the bike?

15 "A.Yes, that's correct.

16 "Q.So the bus -- I want you to take the bus and  
17 show us approximately where the bus was when you  
18 thought the bike swerved over to the left.

19 "A.They were at the intersection. So at this zero  
20 point.

21 "Q.So somewhere between the 50-foot mark and the  
22 zero mark, which is the intersection, the beginning of  
23 the intersection --

24 "A.Yes.

25 "Q.-- the bus passed the bike because he was going

1 faster, and that -- at the zero mark, is that where you  
2 saw the bike swerve to the left?

3 "A.Yes. It was at the intersection, at the zero mark.

4 "Q.Okay. Now --"

5 MR. BARGER: You can stop it there. And I  
6 want you to go one more time to page 58, line 12 and  
7 play through line 16, please. 58, line 12 through line  
8 16.

9 MR. CLARK: Which line?

10 MR. BARGER: Line 12 through 16.

11 And I apologize. What we're trying to do is  
12 these are were cut, and I'm trying to cut the cut down  
13 into the form.

14 MR. CLARK: Which page, Darrell?

15 MR. BARGER: Page 58, line 12 through line  
16 16.

17 (Whereupon video was played.)

18 "Q.You saw the doctor's torso being run over?

19 "A.I would say between 50 and 100 feet.

20 "Q.And then -- you can go back.

21 "A.Okay."

22 MR. BARGER: You know what? Let's just go to  
23 the next one.

24 So the point being said is that Erika  
25 Bradley, coming down the street -- remember, she was

1 behind Dr. Khiabani. She said he was out in front of  
2 the bus 15 feet. And, of course, we know the bus was  
3 going 25 miles an hour and the bicycle was about 13.  
4 But at some point, he passed and there was an impact --  
5 and he swerved to the left and there was an impact in  
6 the right-hand travel lane. Okay?

7 Now, let's go to the -- do you remember  
8 Dr. Plantz -- excuse me -- Mr. Plantz? There's been a  
9 lot of discussion that Mr. Terry, my law partner, it's  
10 Mr. Terry's theory of what happened.

11 Well, we just want to show you what  
12 Mr. Plantz said happened. It's not our theory of what  
13 happened. It's for you to decide what happened. And  
14 what he's going to do -- and this one may be a little  
15 lengthy, and I will be reading to see if I can cut it  
16 and get it to the chase.

17 Start at page 49.

18 MR. KEMP: Judge, can we approach for one  
19 second.

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

22 MR. BARGER: So let's play this. This is  
23 Mr. Plantz, who was also on the bus, if you recall.

24 (Whereupon video was played.)

25 "Q.All right. Mr. Plantz, now, if you would --

1 if you would for me, place the paper clip, which is the  
2 bicyclist, Dr. Khiabani, in the lane that he was in  
3 sort of at the corner as he's going to make that  
4 southbound turn into Pavilion Center before he makes  
5 it. Is that the right turn lane?

6 "A.It's the right turn lane. He was in the right turn  
7 lane.

8 "Q.So at this juncture, it's very clear to you  
9 that the driver, Mr. Hubbard, sees Dr. Khiabani?

10 "A.Yes, because he verbally said, 'I see you, buddy.'

11 "Q.All right. Why don't you make the right-hand  
12 turn as you saw Dr. Khiabani make it with the paper  
13 clip and then place the bus where it was southbound  
14 behind him. Those little Post-its are stubborn today.

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

23 "Q.Okay.

24 "A.And so I noticed at that point that he did not  
25 indicate his turn. He was -- as I said, his front

1 wheel was wobbly, and he was going very slow. He made  
2 the turn at that time.

3 "So after the bus stopped for a period of  
4 time, after it made its corner, the cyclist had  
5 gone up further up the road. He was somewhere  
6 around this -- this bulge.

7 "Q.We're going to engage in this exercise every 50  
8 feet. So why don't you move the bus 50 feet to the  
9 250-foot mark, and if you would move Dr. Kayvan to  
10 where you think he was.

11 "A.(Witness complies.) He was riding very slowly.  
12 Again, his front wheel -- again, as before, I was  
13 watching because he appeared to be riding much slower  
14 than a cyclist out for an exercise ride. He was not  
15 pedaling. He was coasting quite a bit of the time,  
16 maybe pedaling a little bit. I believe this was flat  
17 here, but I was watching him because --

18 "Q.Before we take a picture, is the bus gaining on  
19 the slow-riding Dr. Khiabani?

20 "A.Definitely.

21 "Q.Thank you. And we'll mark as Exhibit 12 and  
22 get our videographer to take another picture for us.

23 "At 50 feet you still got the bus driver  
24 in T2; fair?

25 "A.Yes.

1 "Q.And you've got -- still got Dr. Khiabani in the  
2 right cutout turn lane to the right of the demarked  
3 bicycle lane?

4 "A.Yes.

5 "Q.And then why don't you do again for me, if you  
6 will, at zero. You do your placements --

7 "A.Yep.

8 "Q.-- so I'm not doing mine, the bicyclist and the  
9 bus as they entered the intersection of Griffith Park  
10 and southbound Pavilion Center.

11 "Did you place those where you recall  
12 everything to be?

13 "A.Yes. At that point the cyclist had slowed down  
14 almost to the point of not moving. I thought he was  
15 turning right, and the bus driver then proceeded  
16 through the intersection. And somewhere around here is  
17 where -- how do I say it? -- things went bad.

18 "Q.The collision occurred?

19 "A.Where the actions that caused the collision started  
20 to happen.

21 "Q.So in Exhibit 17 we're entering -- or the bus  
22 is entering the intersection along with the bicycle;  
23 fair?

24 "A.Yes.

25 "Q.The bicycle is in the right cutout lane to the

1 right of the demarked bicycle lane?

2 "A.Yes.

3 "Q.And the bus driver is in the T2 or the most  
4 westbound -- western southbound lane?

5 "A.Correct.

6 "And you know, I don't know exactly where  
7 the cyclist was if he's just entering, put he's  
8 almost not moving. And then at that point,  
9 that's when I see him take his hand off, at  
10 least the left hand off. I don't see -- I  
11 don't see a signal again.

12 "I don't see him signal, but I do see him  
13 veer out toward the bus.

14 "Yes. And if -- if I can share one thing.  
15 When the cyclist veered, he veered, and my last  
16 sight of him was actually -- I saw him through  
17 the glass door. I don't -- I believe it was  
18 all glass. I remember seeing all of the  
19 cyclist. I don't remember a panel here. I  
20 think the door may have been all glass, but I  
21 do remember seeing the cyclist, and he was  
22 passing by the side of the bus."

23 MR. BARGER: There you go.

24 (Whereupon video was played.)

25 "A.And let me adjust this, because the last I saw the



1 cyclist was as he disappeared along the side of the  
2 bus, which I think was somewhere around right here  
3 (witness indicating). He was very close to the bus.  
4 He had closed the distance. The bus driver was still  
5 in T2, but a sharp angle. He came over, took his hand  
6 off, and closed the distance to the bus."

7 MR. BARGER: Okay. Thank you. Do you  
8 understand when I say it's tedious, but I think you  
9 have to see what they actually said to put this  
10 together. So bear with me. I have a couple more and I  
11 will get back to my --

12 THE COURT RECORDER: Court's indulgence.

13 Mr. Barger, volume, please.

14 THE COURT: Can you speak louder, please.

15 Okay.

16 THE COURT RECORDER: Sorry about that.

17 MR. BARGER: Sorry. My fault.

18 We're going to -- let's go to Mr. Pears'  
19 deposition, please. I promise you this is the last one  
20 that we have.

21 (Whereupon video was played.)

22 "Q.-- that you look up, Dr. Khiabani is parallel  
23 with the bus and the collision takes place?

24 "A.It was -- so he is in the bike lane at that point,  
25 and then he pulls into the through lane right parallel

1 with the bus. And that is where I recall him taking  
2 his hand off the steering wheel. Look, there's a --  
3 sorry -- he's looking, takes his hands off the steering  
4 wheel, sees the bus, which is a couple of feet.

5 "Q.And from your vantage point out of -- if we  
6 look at Exhibit 6 -- that window on the door, the  
7 doctor -- you would have seen that look of shock in his  
8 face out of the window; correct?

9 "A.I recall seeing it out of -- looking down. So it  
10 would have been this way if you want to put --

11 "Q.Okay. Now we're at the 50-foot line, and  
12 you've placed -- is that your recollection of where the  
13 doctor was and where the bicyclist -- I'm sorry -- the  
14 bus was at the 50-foot line?

15 "A.Yes.

16 "Q.And the bike is in the bike lane; fair?

17 "A.Correct.

18 "Q.You've got the bus in the travel lane?

19 "A.Correct.

20 "Q.And isn't it true that if you can't tell me  
21 where the bus was between 250 and 50, that you can't  
22 tell me the angle the bus was in either when you looked  
23 up?

24 "A.When I saw -- at this point, the bus was pretty  
25 straight parallel. I mean, it was --

1 "Q.Was it partially in the bike lane? Do you know  
2 one way or another?

3 "A.It was straight. At the point when I looked down,  
4 he was parallel. It was pretty straight, yes. I would  
5 not put him at an angle, no.

6 "Q.And he was -- if I use the distance you've told  
7 me, and you're sitting right above that passenger tire?

8 "A.So I'm left -- the passenger tire. And so initially  
9 when I saw him, he is in the bicycle lane. And I would  
10 place him about there. So I'm about here.

11 "Q.Okay.

12 "A.So I'm looking down at him. And, of course, it's  
13 occurring very quickly.

14 "Q.And is this where the doctor looks over his  
15 shoulder and you see the look of shock?

16 "A.He then pulls over. This is right here. He pulls  
17 over -- starts to pull out, and then he pulls -- let me  
18 put it this way.

19 "Q.I think you turned the bike around. Let's keep  
20 the bike going --

21 "A.Okay. There you go. So he pulls out of that.

22 "Q.So it's at an angle towards the bus?

23 "A.Correct. And he is very, very close.

24 "Q.He's -- as the bus starts to pass him, it's  
25 your testimony that the bike rider at sort of a small

1 angle starts to veer into the bus?

2 "A. Correct.

3 "Q. So on a 45-degree angle, he doesn't turn dead  
4 into the bus; right?

5 "A. No, he's -- he's at a -- he -- if I do it this way,  
6 he is at a slight angle, and he falls in towards the  
7 bus, if that makes sense.

8 "Q. That's right after you see the look of shock on  
9 his face; correct?

10 "A. Correct.

11 "Q. The bus is overtaking him, going faster than  
12 him, is it not?

13 "A. Correct.

14 "Q. And once the nose of the bus and even the tire  
15 passes him, you see him lose control?

16 "A. Correct.

17 "Q. That's after he outstretches his arm?

18 "A. Correct.

19 "Q. And once he loses control, there's a loud bang?

20 "A. There's a bang.

21 "Q. So when you did finally look back to the  
22 bicycle at the point that you did --

23 "A. Uh-huh. Yes.

24 "Q. -- what made you -- what drew your attention to  
25 Dr. Khiabani on the bicycle?

1 "A.The shock that he was there. I did not -- when you  
2 suddenly look down and you see a bicycle pulled over so  
3 close to the bus, and the look on his face. I mean, it  
4 just -- it occurred very quickly. But I would say I  
5 was in as much shock as he was.

6 "Q.Well, isn't it true that you said that you  
7 saw -- when you next looked up to see Dr. Khiabani, he  
8 was in the bike lane?

9 "A.Correct.

10 "Q.Was he driving normally at that time?

11 "A.To my knowledge, yes.

12 "Q.Okay. And then you saw him come closer to --

13 "A.Yes.

14 "Q.The bus; right?

15 "A.Yes.

16 "Q.When he came closer to the bus, that's when you  
17 saw that he noticed the bus and he had the look of  
18 shock on his face; correct?

19 "A.Correct.

20 "Q.Now, you said that he got into the travel lane  
21 with the bus; right?

22 "A.Correct.

23 "Q.Did -- could you see Dr. Khiabani in the same  
24 lane as the bus?

25 "A.At that point where he sees the bus, he looks over,

1 he was in the travel lane.

2 "Q.How do you know that?

3 "A.Because I'm looking down at him.

4 "Q.What -- what made you believe that he was in  
5 the same lane as the bus as opposed to in the bike lane  
6 just close to the bus?

7 "A.Because I'm looking down and seeing him in the  
8 travel lane at that point.

9 "Q.How did you know he was in the travel lane?

10 "A.Because I'm looking down.

11 "Q.Could you see the -- the line between the  
12 travel lane and the bicycle lane?

13 "A.Yes.

14 "Q.And you saw that he was on the outside of the  
15 line of the bicycle lane?

16 "A.Yes."

17 (Video ends.)

18 MR. BARGER: That's fine. You can stop it  
19 there.

20 Now, there was some discussion about the bus  
21 driver this morning, a Mary Witherell. I think y'all  
22 remember Ms. Witherell. And Mr. Kemp had asked her  
23 some questions, had she felt displacement of air when  
24 she's standing outside with a bus going by. And she  
25 said she did feel displacement. But I want to show you

1 the -- the entire clip of what she says with respect to  
2 that displacement of air.

3 And if you'll -- Brian, if you'll turn to  
4 page 98, line 25, that clip, and play that, please.

5 (Whereupon video was played.)

6 "Q.Okay. Have you had occasion to have lots of  
7 buses of different brands pass you as part of your job  
8 history?

9 "A.Yes, sir.

10 "Q.And they've passed as close as 3 feet?

11 "A.Yes, sir.

12 "Q.And they've passed you 5 feet?

13 "A.Yes, sir.

14 "Q.And every now and then, do they pass you closer  
15 than 3 feet?

16 "A.On occasion, yes, sir.

17 "Q.Okay. Think back in your mind to every time  
18 that that's happened over the last 20 years. Have you  
19 had buses or trucks pass you at 5 miles an hour?

20 "A.Uh-huh. Yes, sir.

21 "Q.10 miles an hour?

22 "A.Yes, sir.

23 "Q.15 miles an hour?

24 "A.Yes, sir.

25 "Q.20 miles an hour?

1 "A.Yes, sir.

2 "Q.25 miles an hour?

3 "A.Yes, sir.

4 "Q.30 miles an hour?

5 "A.Yes, sir.

6 "Q.35 miles an hour?

7 "A.Yes, sir.

8 "Q.40 miles an hour?

9 "A.Yes, sir.

10 "Q.45 miles an hour?

11 "A.Yes, sir.

12 "Q.And higher than 45 miles an hour?

13 "A.Yes, sir.

14 "Q.Okay. Based on your own personal experience,  
15 do you have a personal opinion of how fast a bus would  
16 have to be going 3 feet away from you before you would  
17 feel that that air caused a safety hazard?

18 "A.Around the 45 and higher range.

19 "Q.And you've personally experienced a bus going  
20 by you at 45 miles an hour?

21 "A.Yes, sir.

22 "Q.And you felt that was a hazard?

23 "A.If you're too close to the bus, yes, sir.

24 "Q.But it didn't actually hurt you on those  
25 occasions?



1 "A.No, sir."

2 (Video ends.)

3 MR. BARGER: You can stop it there.

4 And I'm going to get through Ms. Witherell.  
5 She also testified she had driven the J4500 buses. I  
6 think you'll recall that. I'm not going to take the  
7 time to show it. And I think you'll recall her  
8 testimony was that she saw -- had no problems driving a  
9 J4500 bus. She also said every vehicle, as we all  
10 know, has a right-side blind spot for a moment if it's  
11 traveling. There's no question about that.

12 So -- so Ms. Witherell has actually  
13 experienced buses going by all those speeds, and she  
14 said she never had an issue with some sort of air  
15 blast. Okay?

16 Now, I want to talk for a moment about  
17 plaintiffs' experts.

18 And let's go to the slide with Mr. Caldwell.

19 Because I don't have a lot of time, I'm going  
20 to kind of summarize kind of the testimony. I'm not  
21 going to try to show any more at this point in time.

22 The bus speed, Mr. Caldwell agreed, was  
23 25 miles an hour. He agreed with Dr. Rucoba on that.  
24 He agreed the bicycle was 12 to 13. He agreed --  
25 remember the first contact smear of the bike brake? He

1 agreed that's where it happened. The contact was -- he  
2 agreed that the contact -- that's misspelled -- contact  
3 in the right-hand travel lane at 5.4 feet from the bike  
4 lane edge. I think that Mr. Rucoba -- Dr. Rucoba put  
5 it at about 6 feet. The contact between the bus and  
6 the bicycle did occur in the right-hand travel turn  
7 lane.

8 He also testified he had no idea where  
9 Dr. Khiabani was in the lane before the video shows the  
10 bus. You remember the Red Rock video? He said -- he  
11 didn't know where he was before it got to that one  
12 frame right there at the crosswalk. But he said  
13 there's no doubt that the bus and bicycle, the impact  
14 was in the right-hand travel lane.

15 Now, next slide with Mr. Caldwell.

16 He agreed -- do you remember when I was  
17 cross-examining -- or examining him and we had the --  
18 had him walk off. You know? And I don't want to get  
19 into perception-reaction time because there's not  
20 enough time left. You've heard that testimony.

21 He agreed that in order for that impact to  
22 have been in that right-hand travel lane when it did,  
23 that the bicycle -- 1 second before that, the bicycle  
24 was at least 14 feet out in front of the bus, 14 feet.  
25 That's backing it up one second. You back it up 2

1 seconds, the bicycle was 34 feet in front of the bus.  
2 Okay? You back it up 3 seconds coming down the road,  
3 the bicycle was -- would be another -- probably another  
4 14 or 15 feet.

5 A proximity sensor at that distance is not  
6 going to do you any good because you can see the  
7 bicyclist. So we'll talk about proximity sensors  
8 later. I think the interesting thing, remember, he had  
9 his PowerPoint -- or I guess his script, what somebody  
10 wants to call it. Remember, I brought the PowerPoint  
11 that he had and it came out of his file. He didn't  
12 have his file with him. He didn't have the PowerPoint  
13 with, didn't have anything with him. But what did I  
14 show him? And he agreed. You see.

15 MR. KEMP: Your Honor, can we approach?

16 THE COURT: Yes.

17 MR. KEMP: Can we take that down, please.

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

20 MR. BARGER: I can play the testimony, but  
21 I'm not going to. I think you'll recall what he said  
22 was that was his PowerPoint. And if you recall what it  
23 says, the bicyclist was making a left-hand turn. Do  
24 you remember that? That's what he said. And then he  
25 said, though, that was a mistake that apparently was

1 never corrected.

2           So their expert reached his initial  
3 conclusion that the bicyclist was turning, making a  
4 left-hand turn. That's what Mr. Caldwell, their  
5 expert, said on his PowerPoint.

6           Now, he -- candidly, he said, "Well, that's  
7 wrong." That's what he said. "That was a mistake" is  
8 what he said.

9           Dr. Stalnaker. Now, y'all remember  
10 Dr. Stalnaker. He was there to testify about the S-1  
11 Gard. And I'm going to summarize very quickly what he  
12 said. I'm not going to play any videos because -- he  
13 never went to the accident scene; right? He never  
14 inspected the bus. In fact, he didn't even know it had  
15 three tires on each side in the back. He didn't have  
16 any idea.

17           He never laser-scanned the tires. He did not  
18 inspect the S-1 Gard, nor had he ever seen an S-1 Gard  
19 prior to the trial. The day before he testified, he  
20 saw one for the first time. He never saw or knew how  
21 it was installed. He agreed there were no scientific  
22 studies on the S-1 Gard. He -- no testing was done on  
23 the S-1 Gard. He did no testing whatsoever. He did no  
24 testing on the impact between the head and bicycle  
25 helmet like Dr. Carhart did.

1           He was not recommended -- and this is -- he  
2 said, "I would not recommend to anyone to use the S-1  
3 Gard. The S-1 Gard has never been properly tested or  
4 evaluated." He would not sign his name to say "put  
5 this on a bus." And he did not testify that a bus  
6 without an S-1 Gard was unreasonably dangerous. That  
7 was their expert with respect to the S-1 Gard.

8           And you know what? I'm going to -- this is  
9 an exhibit that will go back to the jury room. And I  
10 want you, if you will, to look at it and pick it up and  
11 feel it, how -- how heavy and solid this is.

12           And he had never seen one, but he says if  
13 this would have been installed on the bus and  
14 Dr. Khiabani hit that with a helmet on, he would have  
15 survived and not have been hurt, minimal injuries going  
16 25 miles an hour. I want y'all to go back and feel  
17 this. And use your own, quote/unquote, common sense,  
18 if you hit -- if a bus with this hit you in the head  
19 with a helmet on going 25 miles an hour, I think that  
20 you will see that that is just not going to happen  
21 where nobody gets hurt. Okay?

22           And Dr. Stalnaker, their S-1 Gard expert,  
23 would not ever say he agreed to put on one. And he did  
24 not say that that bus without an S-1 Gard was  
25 unreasonably dangerous or defective.

1           Now let's talk about Brian Sherlock. And I'm  
2 not going to speak much about Mr. Sherlock. He's the  
3 gentleman from the bus -- the -- the bus organization.  
4 He never operated a -- he came here and wanted to be  
5 critical of everything. He wasn't a design engineer.  
6 He never designed a bus. He did no testing. He just  
7 had opinion -- had an opinion about visibility and --  
8 but he was refuted by Dr. Krauss.

9           He looked at an S-1 Gard. Remember? He's  
10 seen them. He's in the -- in an organization, a union,  
11 that has 200,000 bus drivers. He said he's looked at  
12 it, he has not encouraged its use, and there's no data  
13 to say it would be effective.

14           So their expert said, "I can't tell you to  
15 put one of those things on." He wouldn't do it. He  
16 came to talk about visibility.

17           You folks one day got to go onto the bus.  
18 Okay? You got to walk onto it and look around. And I  
19 think you could see that there's tremendous visibility  
20 there. We'll talk about the right-hand blind spot in a  
21 moment, but there's tremendous visibility seeing out of  
22 that bus.

23           All right. Let's talk about Dr. Breidenthal.  
24 He's their aeronautical engineer that they brought who  
25 had never seen a J4500, had never tested a J4500, never

1 inspected a J4500, and never designed a bus. Remember,  
2 he's an airplane guy, aeronautical doctor.

3           What Dr. Breidenthal -- and it went on for  
4 hours, so I'm trying to get through this. All he  
5 provided was an estimate of force with no basis of what  
6 that estimate was. He hadn't done any testing, hadn't  
7 even seen this J4500 before. He never tested the force  
8 he estimated impacted Dr. Khiabani or caused the  
9 collision.

10           I'm next going to talk about Dr. Cunitz.  
11 He's the gentleman that Mr. Kemp put on in seven  
12 minutes, I believe. And he came up there, and he said,  
13 "You should -- you should warn of this air blast. You  
14 should warn of it." And he didn't have any idea what  
15 the warning would be. He hadn't done any studies or  
16 anything; he just said "You should warn, and "Because  
17 you didn't, you didn't."

18           They want to talk about a warning about the  
19 environment, I think, on the sales slip. Let's talk  
20 about other things, like manuals and stuff, so forth.  
21 Mr. Hubbard -- and I -- I don't want to play it right  
22 now. I can in a minute. Mr. Hubbard testified that he  
23 was aware of air dispersement. I think Mr. Hubbard  
24 testified he had never heard the word "air blast," but,  
25 you know, when he -- you've heard his testimony. When

1 he's passing people in bicycle lanes, he had moved  
2 over. You saw that. That's what he said.

3 So Mr. Hubbard, an experienced bicycle --  
4 excuse me -- excuse me -- an experienced bus driver,  
5 driving for 30 years, he knew what -- a bus had air  
6 displacement. There's no doubt about it. He said that  
7 he did. He had never heard the word "air blast," and  
8 neither had I before this.

9 So Mr. Hubbard is who they say you should  
10 give a warning to that there could be air displacement  
11 or an air blast as you're driving down the road. I  
12 assure you, bus drivers who had 30 years' experience  
13 know that. And they are -- they know not to get close  
14 to people or bicycles. They know that. So any warning  
15 that was -- MCI didn't go tell Mr. Hubbard -- now,  
16 don't forget, he doesn't -- he's not employed by MCI.  
17 He's employed by a bus company. That gentleman knew,  
18 because if you remember the testimony of the street  
19 when he passed the bicycle the first time, he -- he  
20 moved to the left and went and got in the center of the  
21 lane.

22 So Dr. Krauss, who you heard and I'll talk  
23 about in a minute, came and talked to you about why you  
24 didn't need a warning with respect to that.

25 I will tell you that Mr. Roberts, when I sit



1 down, is going to handle damages part. Okay? And  
2 he'll talk to you about Dr. Gavin. He'll talk to you  
3 about Dr. Baden. So that's not my job right now.

4 But I will tell you they really got on  
5 Dr. Carhart because he was critical -- or not critical;  
6 he just didn't agree with Dr. Gavin, who is -- who is  
7 the medical examiner. Dr. Carhart said, after his  
8 analysis, that -- now, remember, Dr. Gavin did not do  
9 any sort of testing. I agree she took care of  
10 Dr. Khiabani when he came into the mortuary, but she  
11 said the bus ran over his head. Dr. Carhart disagrees.  
12 And I'm going to talk to you about the reasons why  
13 after a while.

14 But Dr. Baden agreed there's no way this bus  
15 ran over Dr. Khiabani's head, a 38,000-pound bus, and  
16 just would not -- and did not crush his head.

17 Dr. Gavin says his head was crushed, the  
18 other people who look at it said his head was not  
19 crushed; it was fractured. There's no question about  
20 it. It was fractured.

21 But, for some reason, Dr. Gavin, who did not  
22 do a biomechanical analysis, who did not look at the  
23 helmet with respect to inspecting it and doing an  
24 analysis as being a helmet expert, she had a different  
25 opinion. That's all I'm going to say about it.

1 I brought you Dr. Carhart, who -- you saw  
2 what he did -- you saw the testing that he did and the  
3 time that he and Kevan Granat spent with respect to  
4 that air blast theory and their bicycle riding. Okay?  
5 And that's all I'm going to say about Dr. Gavin. She's  
6 a fine doctor. We disagree with what they brought her  
7 to say with respect to because she didn't do the  
8 testing and she had -- you know, she had not done any  
9 analysis to that extent.

10 Now, I'm going to talk to you about the  
11 experts that I brought. Mr. Rucoba -- and, Your Honor,  
12 does -- is anybody keeping time of how much time I've  
13 used? Can I ask one of my people so they can tell me?

14 THE COURT RECORDER: You started at 2:45.

15 MR. BARGER: Okay. An hour and a half,  
16 basically. I have some time.

17 MR. ROBERTS: An hour, 21.

18 MR. BARGER: What?

19 MR. ROBERTS: An hour and 21.

20 MR. BARGER: Okay. I have some time  
21 limitation because, obviously, I have to leave time for  
22 Mr. Roberts to get up here before he kicks me off.

23 But I want to talk to you about what  
24 Dr. Rucoba did. And let's just go to his -- to a few  
25 slides, and I'll remind you. In order to formulate his

1 opinion, he inspected the bus. He photographed,  
2 laser-scanned the motor coach, found no mechanical  
3 problems that caused or contributed to the crash. He  
4 did find the scuff mark, which everybody remembers. So  
5 I'll keep going.

6 He photograph and laser-scanned the bike. He  
7 found no mechanical problems that caused or contributed  
8 to the crash. And he found that the left brake hood --  
9 it had evidence of the contact.

10 And that's the picture of the bike. I just  
11 wanted to kind of refresh your memory. You've seen  
12 this probably ten times. And it shows the bike angling  
13 in.

14 So what did -- the next slide.

15 What did Dr. Rucoba determine? He determined  
16 the point of impact of the J4500 operated by  
17 Mr. Hubbard and the bicycle operated by Dr. Khiabani.  
18 He looked at the physical evidence, photographs, the  
19 video. And you recall he was on the stand for several  
20 hours with the video that he did the analysis of.

21 And he found the point of impact was south of  
22 the pedestrian crosswalk, approximately 6.1 feet into  
23 the motor coach lane, essentially in agreement with  
24 Mr. Caldwell, between 5 1/2 and 6 feet into the right  
25 travel lane. The speed of the bus was 25. There's no

1 disagreement. And the bus was moving left as it was --  
2 approached the point of impact.

3 Next slide, please.

4 The speed of the bike was 13 to 14 miles an  
5 hour. The bike began the event in the middle of the  
6 bike lane, according to witnesses, and in front of the  
7 bus because of the relative speeds. The bike moved  
8 left and into the bus travel lane. And that's his  
9 opinion, that, in all reasonable engineering  
10 probability, the cause of the impact was that  
11 Dr. Khiabani turned his bike to the left. And he began  
12 his turn in front of the bus and ultimately ran into  
13 the side of the bus.

14 You folks will remember probably the  
15 slide-by-slide frame analysis, how he showed obviously  
16 the bus had to be behind the bicycle before the  
17 bicyclist made his movement to the left. Okay?

18 Kevan Granat, he was this week. So you  
19 probably can remember, he was the first gentleman that  
20 talked about the testing and so forth. He described  
21 his testing, it was performed in a scientific manner  
22 with respect to what scientists and engineers do. His  
23 aerodynamic disturbance -- excuse me -- his aerodynamic  
24 disturbance forces created by a J4500 coach traveling  
25 at 25 miles an hour are not substantial. There is no

1 air blast. There is no pulling you in. There's no  
2 sucking you in.

3 The measured peak lateral force magnitude is  
4 on the order of 1 pound, 1 pound. Test runs at higher  
5 speeds exhibited smooth variation of forces that  
6 followed aerodynamic principles. That's a lot of  
7 words. Here's what he said in words that I can  
8 understand.

9 He ran a test. And they drove by the  
10 bicycle. Remember, they used the dummy, they used real  
11 people, they used surrogates who had the same weight  
12 and height as Dr. Khiabani. In all those tests that  
13 you saw, there was no force that would push out  
14 Dr. Khiabani and then pull him back in. It's just a  
15 ride-by. Yes, there's some disturbance of the air, but  
16 it is not to the extent that the plaintiffs want you to  
17 believe after doing no tests.

18 They did absolutely no tests. They can  
19 criticize my experts for their tests, but you got to do  
20 tests to be able to be critical. And that absolutely  
21 there was no effect that would have caused a  
22 disturbance of the bicycle rider at 25 miles an hour if  
23 the bicycle is going 13.

24 We showed you some videos. I'm not going to  
25 show you -- I'm going to show you the videos through

1 Dr. Carhart. We'll show you three or four of them.

2 Let's go to the next slide.

3 MR. CLARK: Carhart?

4 MR. BARGER: Dr. Carhart. His conclusions,  
5 the leftward movement to the bicycle to the point of  
6 contact, which is 6-foot in the right-hand travel lane  
7 of the bus, was not caused by a hypothetical air blast  
8 or suction effect based upon his testing. The leftward  
9 movement of the bicycle to the point of contact with  
10 the motor coach was caused by left turning maneuver.

11 Dr. Khiabani sustained his head injury  
12 contact as a result of interaction between the sidewall  
13 of the right rear tire, drive tire, and his head while  
14 his helmet was constrained -- that was, you know,  
15 that's -- they want to make fun of my pinching theory,  
16 of the doctor's pinching theory because they want to  
17 say a 38,000-pound bus ran over the top -- remember the  
18 helmet? And I'm not going to pass it, obviously, but  
19 remember the -- this is the crush that Dr. Stalnaker  
20 says 5 to 7 inches of a 38,000-pound bus rolled over  
21 Dr. Khiabani's head and that's what the damage it did.

22 I think Dr. Carhart did extensive studies and  
23 explained to you -- and I don't have time remember all  
24 the deformation issues and so forth -- and Dr. Carhart  
25 said, if a 38,000-pound bus ran over a man's helmet and

1 head, it would crush it.

2           Go back to Dr. Stalnaker who says that this  
3 is -- this is what happened. That this bus ran  
4 7 inches across the top of -- 38,000 pounds -- 7 inches  
5 across the top of this helmet. Remember -- I want to  
6 go back to the bus. You know, you remember it has --  
7 on the rear it has what's called a drive axle, has two  
8 tires. And there's one behind it called the tag axle;  
9 right? We can show you a picture, but I'm not going  
10 to.

11           If you remember the testimony of Dr. Carhart,  
12 the tag axle tire is 2 inches inset, inset, from the  
13 last tire.

14           Dr. Carhart said if this bus had run over  
15 Dr. Khiabani's head, it would have totally crushed him;  
16 and this tag axle -- because if it's 7 inches, 6 to  
17 7 inches of what he was run over by the first tire and  
18 the second tire is only -- is 2 inches inset, there's  
19 no way that that second tire wouldn't have run over  
20 him. It would have to have run over him just for  
21 physics. And it did not.

22           So Dr. Carhart -- and trust me, they -- they  
23 don't like this theory that what happened -- and you  
24 saw the testing. What happened was he did not get run  
25 over directly by the -- by the tire.

1           And the reason that's important is because  
2 they want to put the S-1 Gard on there and say, if he  
3 hit it at 25 miles an hour, he -- and wearing a helmet,  
4 he wouldn't have been hurt.

5           I don't have the time to go through  
6 Dr. Carhart's testimony again. He gave it yesterday,  
7 so I think you all remember that he said this did not  
8 happen in that way. Yes, the tire -- Khiabani hit the  
9 outside of the tire. And that's what happened. And an  
10 S-1 Gard, properly placed, he would not hit the S-1  
11 Gard. Then he did the tests.

12           Let me -- let me show you the videos of the  
13 driveby tests with respect to the air blast theory.

14           Just show me a couple from Dr. Carhart,  
15 please.

16           And you know we had multiple ones. I'm not  
17 going to show you them all. They're all -- basically  
18 show the same thing, going somewhere between 25, 27.

19           Okay. Here comes the bus. I think that was  
20 at 25. He's riding a bicycle at 13. That's the first  
21 view. Absolutely no disturbance.

22           Here he is riding the bike. Bus comes by.  
23 That's his left handlebar. No disturbance.

24           There's a view looking down.

25           And you'll have these videos back with you.



1 You'll have a computer that, if you want to watch them,  
2 you can. But the point is --

3 Here he comes. This bus is going about 25.  
4 No disturbance.

5 This air blast theory at 25 miles an hour  
6 with a bicycle at 13 just does not exist because the  
7 real-world testing shows that it does not.

8 Now, okay. That's -- there's six to ten of  
9 those things that you can watch.

10 Remember the rocket? He attached the rocket  
11 and had it go off. And you remember the reason why.  
12 Because he knew somebody would come in and say, well,  
13 you knew this was going to happen, so you pressed down  
14 hard.

15 But he did the rocket test, which means he  
16 didn't know when he was going to get a force. And it  
17 did not affect his stability, because it went off and  
18 he had no idea when it was going to go off. I'm not  
19 going to show you the rocket -- well, maybe we are  
20 going to show you the rocket test.

21 Yes. Has no idea when this thing is about to  
22 go off. It just went off. Did not affect his  
23 stability.

24 Dr. Krauss talked to you about proximity  
25 sensors, and you heard his testimony yesterday,

1 actually, I believe it was. So it's fresh in your  
2 mind. You recall he talked about how you would not  
3 need a proximity sensor in this case and the visibility  
4 would be fine for a driver. There's nothing that would  
5 block his ability to see the driver.

6 Now, right-side blind spot okay. Let's talk  
7 about right-side blind spots. Everybody has one. A  
8 right-side blind spot, they want to talk about  
9 Dr. Krauss said it was at 40 inches. That's true if  
10 either vehicle is moving.

11 But when you have a bus moving or a car  
12 moving or a truck moving and another vehicle moving,  
13 that blind spot is a millisecond. Unless they're both  
14 stopped, as in that photograph was, there is a little  
15 bit of a difficult time to see.

16 Virgil Hoogestraat testified he was aware of  
17 a right-side blind spot. MCI's aware that there's a  
18 right-side blind spot. Every manufacturer in the world  
19 is aware. He was not aware of any problems that they  
20 had because, when you construct the bus and you -- and  
21 you drive it, there is a millisecond that there is  
22 little blockage. So that didn't happen in this case  
23 because the bus is moving and the bicycle is moving.

24 Is there a left-side blind spot? There's  
25 been a little bit bigger because of the mirrors, but

1 you heard about some accident involving a left-side  
2 blind spot.

3 Mr. Hoogestraat told you they had never --  
4 MCI had never heard of somebody being struck on the  
5 right side of a bicycle because of a blind spot causing  
6 them to go to the rear wheels. This is the first time  
7 that there has ever been any incident that somebody  
8 says caused it because of an air blast or an S-1 Gard.  
9 Okay?

10 So I think -- if you go to the next slide.  
11 You know, I could spend three hours up here, but I'm  
12 not going to. I promise you. I know it's 4:30 in the  
13 afternoon.

14 Dr. Krauss said, even if a bus had been  
15 equipped with a proximity sensor, it would have no --  
16 not afforded the driver sufficient time to avoid. You  
17 remember all that testimony? You do because I know  
18 you're shaking your head. You heard it yesterday.

19 Any suggestions that warnings from MCI would  
20 have changed the outcome of this accident are baseless  
21 and misguided.

22 Now, let's go to the next slide.

23 I want to show you a photograph and not say  
24 anything about it. This was in evidence. You see that  
25 brown thing with the red thing on it on the handlebars?

1 That was identified as a speaker.

2 Thank you. Next slide, please.

3 All right. The wind tunnel.

4 May I confer with counsel about my time  
5 limits?

6 THE COURT: Yes.

7 MR. BARGER: I got a little bit of time left.

8 Remember the 1993 wind tunnel test they keep  
9 talking about? And they talk about -- there's some --  
10 we talked to Kevan Granat about how the J4500 was  
11 similar to the proposal which the plaintiffs' claim is  
12 the safer alternative design.

13 And, by the way, does anybody need a break at  
14 this point? Okay. If you do, I think there's a signal  
15 you tell the judge.

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

17 THE COURT: Yes.

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

20 MR. BARGER: I'm informed that I have 10  
21 minutes left for me. So I got to come through some  
22 things remember.

23 Oh, Judge, are we -- oh, okay.

24 THE COURT: Okay. Go ahead.

25 MR. BARGER: I will just point this out. Do

1 you remember the testimony of that 1993 test and they  
2 were talking about that -- this is that CJ3 model, and  
3 this was the -- this is the actual J4500, and you can  
4 see how it is definitely streamlined different.

5 And remember the -- I think Mr. Kemp  
6 suggested that Proposal 2 from that study would be the  
7 safer alternative design. There's Proposal 2. And you  
8 can look -- and this you won't have back, but you'll  
9 have the actual smaller exhibit. You can look that  
10 there are a lot of similarities between those two. So  
11 the argument is they don't try to streamline the  
12 vehicles. Then I think that shows that that's  
13 incorrect.

14 I now have nine minutes left. And I want to  
15 talk to you about something I think is very important.  
16 Remember the discussion about federal government  
17 standards and regulation? Federal Motor Carrier Safety  
18 Administration. NHTSA, National Highway Trade --  
19 National Highway Traffic Safety Administration. And  
20 remember the testimony from Mr. Hoogestraat.

21 There are no -- there were not in 2007, and  
22 there are not today, any requirements by the federal  
23 government, who study these things and make rules that  
24 manufacturers have to comply with, no requirement of a  
25 proximity sensor device. Absolutely none. The federal

1 government has said we are not going to make you put  
2 one on.

3           Number two, there are no factors for  
4 aerodynamics drag factor. There are factors for length  
5 of a bus, width of a bus, and all kinds of what they  
6 call FMBSS standards. There are no studies -- excuse  
7 me -- there are no requirements by the federal  
8 government to say you should put on an S-1 Gard.

9           And you know why? Well, you remember the one  
10 study where they did study it and said we don't have  
11 enough information. This thing has not been tested by  
12 anybody, never been evaluated, and who knows what it  
13 could -- yeah, they have some out there. But you don't  
14 put something on your vehicle that's not been tested.

15           And when Dr. Stalnaker, their expert, says,  
16 "I wouldn't put this on a vehicle. It's not been  
17 tested. Who knows what it could do to people?"

18           Do you have the -- Dr. Carhart's slide with  
19 the dummy, the actual video?

20           Do you remember the video yesterday on the  
21 sled test? You know, not everybody is going to be  
22 wearing helmet when they're around a bus. In fact,  
23 very few people probably are. Can you imagine what  
24 would happen if someone --

25           I'm sorry. Did you -- I'm sorry?

1 MR. KEMP: That's a demonstrative too.

2 MR. BARGER: I understand. This is a  
3 demonstrative exhibit. Okay? You don't take this  
4 back. But I want to --

5 MR. KEMP: Well, that means you can't show  
6 it.

7 MR. BARGER: You know what? I'm not going to  
8 waste any time arguing. You saw the video. You saw  
9 what it did to that dummy. Okay.

10 I want to turn if you will -- and I don't  
11 think you have a copy. I've got to talk to you a  
12 little bit about the special verdict form. Okay? And  
13 I'm going to put it on the ELMO, if I can find it.

14 Special verdict. The judge asked you  
15 questions, and we've already discussed the standards  
16 that you have to utilize. But the judge asked you  
17 questions.

18 Question No. 1. Is MCI liable for a  
19 defective design? Was there a right-side blind spot  
20 that made the coach unreasonably dangerous and a legal  
21 cause of Dr. Khiabani's death? I suggest to you that  
22 the answer to that question respectfully is no.

23 No. 2. Is MCI liable for defective design  
24 due to the lack of proximity sensors? Did it make the  
25 coach unreasonably dangerous and a legal cause of

1 Dr. Khiabani's death? The answer is no.

2 Is MCI liable for defective design with  
3 respect to the rear wheel protective barrier? Does it  
4 make the coach unreasonably dangerous and a legal  
5 cause? The answer is no.

6 The aerodynamic design question is next, same  
7 question. And the answer, no, respectfully.

8 Did MCI fail to provide an adequate warning  
9 that would have been acted upon? The answer is no.

10 With respect to the next issue with respect  
11 to damages, that is going to be covered by Mr. Roberts,  
12 but I have to address one last issue.

13 And the plaintiffs are asking you is MCI  
14 liable for punitive damages for the same issues? Now,  
15 this is where it gets very, very important with respect  
16 to what you have to read, because there's a definition  
17 of what it -- and it basically means the following.

18 I may need five minutes of your time here. I  
19 need five minutes of your time.

20 I just bought back five minutes of  
21 Mr. Roberts' time.

22 No, you're going to give up five minutes  
23 here.

24 This is very, very, very important. You're  
25 asked a question: Is MCI liable for the punitive



1 damages? And you have some questions. I suggest to  
2 you the answer is no for all of that. Okay?

3 But I want to talk to you about the  
4 definition of punitive damages and what -- what it  
5 really means. And the judge has given you some very  
6 definitive legal definitions, and they're very  
7 important for y'all to read and read them carefully.

8 There's a different standard. It's called  
9 clear and convincing evidence. It's not a  
10 preponderance of the evidence. It's a higher standard  
11 that you look at, and it will be in your special  
12 verdict form.

13 But here's what judge is telling you: You  
14 cannot punish a defendant for conduct that is lawful or  
15 which did not cause actual loss to the plaintiffs. For  
16 your consideration of punitive damages, malice -- you  
17 have to have malice -- means conduct which is intended  
18 to injure the plaintiffs, or despicable conduct, which  
19 is engaged in a conscious disregard of the rights and  
20 safety of others.

21 Despicable conduct is -- means conduct that  
22 is so vile, base, or contemptible that it would be  
23 looked down upon and despised by the ordinary, decent  
24 people.

25 "Conduct disregard" means knowledge of a

1 probable harm, consequences of a wrongful act, and a  
2 willful deliberate failure to avoid the consequences.

3           The interesting thing there, and -- and  
4 you'll have this, but you have to basically find that  
5 MCI did this on purpose and intended to do it. That's  
6 basically what that is asking.

7           I want you to read that very carefully.  
8 There is no conscience indifference with malice and  
9 despicable act. The cause of this collision was a  
10 bicycle turning to the left for whatever reason. And  
11 that bicycle was being driven by Dr. Khiabani, and he  
12 turned to the left in front of the bus and it was  
13 struck by the bus. I don't know why. And it's not  
14 my -- I'm not going to talk about why. It happened.

15           It was not because of a lack of proximity  
16 sensors, an S-1 Gard, aerodynamics of the bus. I mean,  
17 it -- if this bus is not aerodynamically designed,  
18 every bus in the United States that you see out there  
19 is a threat to us.

20           Now, I have used up my time. And I wish I --  
21 candidly, I got about two more hours to talk to you  
22 about, but, first off, you would throw rocks at me if I  
23 did that. And I think you watched this case. You  
24 understand. I want you -- when you go back, I really  
25 want you to use your common sense about what really

1 happened here.

2           It is very tragic. There's no doubt about  
3 it. Not a person in this room could think that, if  
4 they could go back, they would never want this to  
5 happen. And these young men, they lost their father.  
6 There's no question about it. But you have to be able  
7 to look at the facts and use your common sense and  
8 follow the law and you make that decision.

9           All right. I want to say this. I don't get  
10 to talk to you anymore. I've enjoyed being in  
11 Las Vegas, but I'm ready to go home. I'm not enjoying  
12 being in this trial because it's not fun doing this.  
13 Okay? It's not. I'm trying to do my job the best I  
14 can. And now it's time for you to do your job the best  
15 you can.

16           And whatever you decide, I'll understand your  
17 decision. Okay? And I wish you the luck in your  
18 decision and hard work. Don't hurry through it. If it  
19 takes time, I understand. You sacrificed a lot.  
20 There's no question about it. But let's don't waste  
21 five weeks by hurrying through something.

22           And so what I'm going to ask you to do is now  
23 listen to Mr. Roberts because he will talk to you about  
24 the damage issue if you get to answer those questions.  
25 Okay?

1           So thank you very much for your attention and  
2 your time and courtesy. I've enjoyed speaking with  
3 you. Thank you very much.

4           THE COURT: Okay. Jerry, do we need a break?

5           THE MARSHAL: Anyone needs a break?

6           They're ready to go, Your Honor.

7           MR. ROBERTS: Your Honor, I need a minute to  
8 get my boards out for my easels. So maybe we could  
9 take five minutes. I also wanted to address one thing  
10 with the Court before I started. Thank you.

11          THE COURT: All right. Let's do a  
12 five-minute break. Do you stipulate to --

13          MR. BARGER: Yes, we do.

14          THE COURT: -- to omitting the admonition?

15          THE MARSHAL: All rise.

16                 (Whereupon a short recess was taken.)

17                 (The following proceedings were held  
18 outside the presence of the jury.)

19          THE COURT: We'll go on the record.

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

22                 (Discussion was held off the record.)

23          THE COURT: We are ready for the jury?

24          MR. ROBERTS: Yes, Your Honor.

25          MR. KEMP: Yes, Your Honor.

1 THE MARSHAL: All rise.

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

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

6 THE COURT: All right. Very good.

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

9 THE COURT: Do the parties stipulate to the  
10 presence of the jury?

11 MR. ROBERTS: Yes, Your Honor.

12 THE COURT: All right. Very good.

13 Ladies and gentlemen, I just wanted to  
14 correct something before Mr. Roberts begins his  
15 closing.

16 During Mr. Barger's closing a few minutes  
17 ago, he said there's eight people who will sit on a  
18 jury -- actually, it starts here. It has to be -- when  
19 he talks about "The Court tells you in your  
20 instructions it has to be the same six people on every  
21 question and answer, the same question and answer.  
22 Okay? You can't have one group of six decide one  
23 question and the second group of six decide. It has to  
24 be all six people."

25 And I just want to correct that. In Nevada,

1 it has to be six of the eight for every question, six  
2 of the eight jurors, but not necessarily the same six.  
3 Just six. Okay? There's a difference in the law in  
4 Nevada.

5 MR. BARGER: Apologize for that.

6 THE COURT: Absolutely. I just wanted to  
7 make sure you understand what the law is in Nevada.  
8 All right. Thank you.

9 Mr. Roberts, you can go ahead.

10 MR. ROBERTS: Thank you very much and for --  
11 how much time do I have?

12 THE COURT: You have about 28, 29.

13 THE COURT RECORDER: 29 minutes.

14 MR. ROBERTS: 28 to 29 minutes. Okay. Go.

15

16 CLOSING ARGUMENT

17 MR. ROBERTS: Good evening, ladies and  
18 gentlemen. As you heard, we've got 29 more minutes and  
19 then the plaintiffs will get to make their rebuttal  
20 case. I appreciate your time and patience, and I -- we  
21 all apologize for keeping you after 5:00 o'clock, but  
22 we're glad that we're going to get it to you tonight.

23 You may remember in voir dire, which was back  
24 mid February, long time ago, I talked to you about the  
25 fact that an attorney representing a defendant, even if

1 it's contending that there is no liability under the  
2 facts of the case, still has a duty to address the  
3 issue of damages. I have a duty to my client.

4 And it is very similar to an instruction the  
5 Court read to you at the beginning of the day today,  
6 and that's Instruction No. 50 where the Court says the  
7 fact that I've instructed you on various subjects,  
8 including damages, must not be taken as indicating an  
9 opinion of the Court. She has a duty to instruct you  
10 on damages. She's not rendering an opinion that you  
11 should get to damages.

12 Similarly, I have a duty to address this. In  
13 the fact I'm talking to you about it, I don't want you  
14 to misunderstand and think I believe you should reach  
15 that issue.

16 One of the things you just heard about again  
17 was Mr. Terry's suggestion during the opening statement  
18 that a money award is not the answer in this case.

19 Well, Mr. Terry wasn't talking about if you  
20 find us liable, you should still -- shouldn't award  
21 money. That's not what he was talking about. The  
22 point that Mr. Terry was making is that the evidence,  
23 after you've heard the evidence, you will find that a  
24 defect in this motor coach did not cause Dr. Khiabani's  
25 death and, therefore, money is not the answer in this

1 case under these facts.

2 That's the point that Mr. Barger just  
3 addressed with you, and I'm not going to repeat it.

4 I do want to address the issue of the whiskey  
5 bottle because I put Dr. Stan Smith on, the buying your  
6 kid whiskey. You've observed what happened here, and  
7 if you saw my face when he said that, I will leave it  
8 up to you whether you think I believed I was going to  
9 get that answer. Maybe he was trying to express his  
10 astonishment that someone would get a half a million  
11 dollars a year from their parents after they were  
12 adults. But, certainly, we are not attempting to make  
13 light of this.

14 And I am now going to talk to you about the  
15 damages which we believe is reasonable under the  
16 evidence and the law if you reach that issue. And it's  
17 not a bottle of whiskey. It's fair and substantial.

18 You have just heard Mr. Christiansen talking  
19 about 5 to 10 million for each one of the sons for this  
20 year and then maybe another half a million for 30  
21 years. What's that? 25 million each, 50 million  
22 bucks. 6 million for Katy Barin, a million dollars a  
23 month. 50, 60, 70, 80 million.

24 But, of course, it's up to you.

25 These numbers are not reasonable compensation



1 under the evidence. And I'm going to talk to you about  
2 rational numbers, what I believe are reasonable  
3 numbers. And I'm not suggesting these numbers so that  
4 you can split the difference between my numbers and his  
5 and come up with something in between. That would not  
6 be consistent with your duty, to come up with numbers  
7 that you believe are consistent with the evidence and  
8 the law if you reach the issue of damages. Not more.  
9 And not less.

10 So let's first talk about what the law says  
11 the heirs get. And this is very important distinction  
12 because this is Nevada law, passed by the Nevada  
13 legislature, decided what the damages would be in  
14 what's called a wrongful death action. And the heirs  
15 would be the wife and the sons in this case.

16 The heirs' loss of probable support,  
17 companionship, society, comfort, and consortium. And  
18 consortium is sort of like companionship but more  
19 intimate. And then the Court has given you guidance  
20 for what you may consider in determining the loss.

21 So let's look first at loss of probable  
22 support.

23 Loss of probable support is economic support.  
24 It's not like comforting someone, emotional support.  
25 That's in companionship, society, comfort, and

1 consortium. So the first thing you need to look at is  
2 probable support, and there's going to be a separate  
3 line item in your verdict where you can deal with that.

4 Now, these words were carefully chosen by the  
5 legislature. The legislature could say the decedent's  
6 loss of income had he lived. That's not what it says.

7 So what you need to determine here is not  
8 damages for the death of their father. But the  
9 question before you is, if Dr. Khiabani had lived, how  
10 much economic support, more likely than not, would he  
11 have given to each of his heirs? That's the question.  
12 And it's their burden of proof to give you something to  
13 support that calculation.

14 Now, they put on Dr. Larry Stokes, an  
15 economist. And one of the things that you can consider  
16 under this instruction is the earning capacity of the  
17 deceased. So you can consider that to determine the  
18 loss of support, but it's not the loss of support.  
19 Obviously, someone can give to an heir no more than  
20 they can earn, less what they would spend on  
21 themselves. So then that number is a top cap.

22 But that doesn't mean they automatically get  
23 the top cap. How -- what's more likely than not had  
24 Dr. Khiabani lived? If you recall -- and Pete used  
25 this number. And let me use this. I keep blocking the

1 judge, so I didn't know what do with it.

2 THE COURT: That's okay.

3 MR. ROBERTS: Mr. Kemp, is this going to  
4 bother you right here?

5 Okay. So -- and the number that  
6 Mr. Christiansen used, 15,316,000. So that's all the  
7 earnings reduced to present value. That means how much  
8 would you have to have right now to get paid out the  
9 amount of his earnings had he lived over his lifetime.

10 So this is the amount that he would have  
11 earned reduced to present value less his personal  
12 consumption. And you remember that Dr. Stokes used  
13 statistical tables for that. The question before you  
14 from the form is loss of probable support. Dr. Stokes  
15 never gave you an opinion on loss of probable support.

16 Brian, do you have Stokes Clip A?

17 Do we need to toggle to Brian? There we go.

18 (Whereupon video was played.)

19 "Q.Let's move on to your calculations of loss of  
20 income, the economic loss that you just went through.  
21 Is it fair to say that Mr. Kemp requested that you  
22 estimate the present value of the loss of earnings,  
23 income, and fringe benefits resulting from the Death  
24 Dr. Kayvan Khiabani?

25 "A.Yes.

1           "Q.Okay. Were you ever asked to estimate the loss  
2 of probable support to either Dr. Barin before she  
3 passed to Aria Khiabani or to Keon Khiabani?

4           "A.No, I was not."

5                               (Video ends.)

6           MR. ROBERTS: Okay. Did you hear that? He  
7 was never even asked to estimate the loss of probable  
8 support. There's another item he told you about, which  
9 was loss of household services. And this is part of  
10 loss of support.

11                   What's the cash value of the services that he  
12 provided around the home, grocery shopping, shuttling  
13 the kids somewhere, other things that you spend that  
14 you could spend money to replace? And he calculated  
15 that out as \$53,673.

16                   And this one, this is actually his predicted  
17 loss of support. He did the calculation here. He  
18 didn't calculate for the whole lifetime, as he did for  
19 lost income, to come up with an income number. He came  
20 up with a number only until the boys reached the age of  
21 18.

22                   And I asked him why he cut it off at age 18  
23 for loss of probable household services. And he said  
24 it can't be assumed, more likely than not, that  
25 someone's going to continue supporting their children

1 after they're 18, because you're dealing with more  
2 likely than not, just like an economist has to deal  
3 more likely than not, or they can't use those magic  
4 words "to a reasonable degree of economic probability"  
5 or "to a reasonable degree of economic certainty" that  
6 you heard.

7           And he says, "As an economist, the assumption  
8 always is that kids leave the home." And that's  
9 because, statistically speaking, that's what happens,  
10 so more likely than not, that's what you have to  
11 consider. That's why he cut this off at age 18.

12           Now, he was never asked when he would cut off  
13 loss of probable financial support, economic support.  
14 Never asked. But you have to presume he would have  
15 given the same answer. Maybe that's why he was never  
16 asked. But what you just heard from Mr. Christiansen  
17 was that you should just divide this number in half and  
18 give it to the kids less what Dr. Barin would have  
19 gotten for the six months that she lived after his  
20 death.

21           So their economist didn't support that.  
22 That's not the entitlement under the statute. They  
23 don't just get to get his lost earnings. That's not  
24 the standard measure.

25           It could be argued isn't this a windfall

1 that -- you know, his wife would have gotten  
2 substantial economic support had she lived; it's not  
3 fair that we don't have to pay it just because she  
4 died. Well, you have to follow the law. And let me  
5 give you an example. What if Dr. Khiabani had no wife  
6 and no children? Under the wrongful death statute, no  
7 one would be entitled to any lost support because the  
8 right belongs to the heirs. So it's not a question of  
9 right or wrong, it's not question of windfall, it's a  
10 question of following the law.

11 We put on Dr. Stan Smith and he addressed  
12 this topic.

13 And, Brian, could you play Smith Clip B,  
14 page 111, just the short lines 18 and 19.

15 I asked him, "What's the likelihood of an  
16 adult child receiving substantial support after the age  
17 of 22?"

18 (Whereupon video was played.)

19 "A.Well, it defies economic probability. It also  
20 defies common sense that that would happen."

21 (Video ends.)

22 MR. ROBERTS: So, common sense, he has to  
23 look at economic probability. He told you tables  
24 published by the census bureau that he's studied. And  
25 the percentage of adult children who are supported by

1 their parents in substantial amounts is minuscule.  
2 It's very small. And this is common experience. The  
3 kids get a half a million dollars a year from their  
4 parents as adults? That's not what would have happened  
5 had Dr. Khiabani lived, so that can't be your award now  
6 that Dr. Khiabani has unfortunately died. It's loss of  
7 probable support.

8 Let's take a look at the chart again, at some  
9 of the other things the Court and the law say that you  
10 can consider. You can consider the age of the deceased  
11 and the heir, the health of the deceased and the heir  
12 to see who is going to die first because it has to be  
13 support over the lifetimes. So it's the shortest  
14 lifetime that governs, which is why the Court has  
15 instructed you that, for Dr. Barin's claim, which is  
16 now held by her estate, that you're limited to  
17 providing this number until she dies. It's right in  
18 the verdict form.

19 You can consider whether the deceased was  
20 kindly, affectionate, or otherwise. Certainly, they  
21 have put on that evidence. And that goes also to  
22 comfort, society, and consortium. And we're not  
23 contesting that.

24 The disposition of the deceased to contribute  
25 financially to support the heir. It's not controlling

1 that it's never been done. But if you want to get more  
2 than the statistics and the economists say you would  
3 normally get, you have to put on evidence of that. And  
4 there's been none, no evidence of how much he provided  
5 to the boys in economic support before he passed. They  
6 chose not to put on that evidence, so they're stuck  
7 with the statistics.

8           You -- you may recall that Dr. Stokes had  
9 them fill out a questionnaire of the hours that  
10 Dr. Khiabani spent on family services. And it was a  
11 low number, so he used the statistics which were twice.  
12 And that's fine. We had no objection to it. But if  
13 you don't put on the evidence, you're stuck with the  
14 statistics -- which are, from an economic viewpoint,  
15 very, very small -- that you would have received  
16 financial support after the age of 22.

17           Dr. Stokes ended it at 18 for household  
18 services. Dr. Smith, our economist, said that's a  
19 little too strict because you have to look in this  
20 family. If it's a well-to-do family and the kids are  
21 doing all right in school, then, yeah, it does rise to  
22 an economic probability that they're going to get help  
23 with college because that's what happens. But, after  
24 college, age 22, it's no longer an economic  
25 probability.



1 Habits of industry and thrift, why would that  
2 be relevant? Because, again, it's the amount left over  
3 after his personal consumption, after what he spends on  
4 himself. And if he doesn't spend as much as a normal  
5 person on himself, then there might be more available  
6 to the kids. But they put on no evidence of his habits  
7 of industry or thrift. So we're left with the  
8 statistics.

9 You may remember that I -- I took this board  
10 and I went over and I tried to do an illustration. And  
11 just to make sure, even though he said I was never  
12 asked to calculate loss of support, I asked him to give  
13 me the number from a table. He had a long table of  
14 numbers that all added up to the 15 million. 2018, the  
15 first full year, 1,013,000 was his gross income. And  
16 he predicted that that year, he would have spent 83,000  
17 on himself.

18 And I -- and, at this time, unfortunately,  
19 Dr. Barin had passed, 2018. And you may remember, I  
20 asked Dr. Stokes, their economic expert, "Certainly,  
21 you're not saying that the loss of support to the  
22 Khiabani sons is this number minus the personal  
23 consumption? You're not saying they should get that?"  
24 And he said, "No, no." But that's what  
25 Mr. Christiansen just asked for.

1           There's very little evidence that you can use  
2 in order to come up with this number; very little  
3 evidence has been submitted by the plaintiffs in  
4 support of this claim. But we're not arguing that,  
5 because of that, you should give them nothing.

6           There -- there was evidence that he wanted to  
7 go to college. They didn't tell you where he wanted to  
8 go. They didn't tell you how much it was going to cost  
9 so you could figure out a number.

10           They mention -- mentioned just now the  
11 attention deficit disorder that the younger brother  
12 has, but they haven't told you whether he's got  
13 treatment, whether he's got medication, how much it's  
14 been costing, how much it's going to cost in the  
15 future, nothing, nothing for you to work with, which --  
16 which leaves me to struggle in my attempt to propose a  
17 fair and reasonable number, to suggest something to you  
18 that I feel like I need to do as a duty to my client.

19           I'm going to get up at the ELMO and I'm going  
20 to -- to suggest something on that. But let me -- let  
21 me talk about one other thing before I do. And that's  
22 the grief, the companionship, society, comfort, and  
23 consortium.

24           There's no standard for this, no standard.  
25 It's just up to you. But it has to be a fair and

1 reasonable value. The grief from losing a loved one,  
2 which you're going to have to decide, there's no  
3 number, there's no table, there's no formula. There's  
4 no formula like the one they've suggested, a half a  
5 million a year. But I will suggest this to you.

6 Steve Jobs has nothing to do with this case.  
7 And the fact that Dr. Khiabani made a million a year  
8 doesn't have anything to do with this case. The love  
9 of a caring rich father is worth no more in support and  
10 grief than the love of a hardworking, honest, good man  
11 making 25,000 a year. The number doesn't change.

12 The other thing that doesn't change is the  
13 fact this is a compensatory phase, harms and losses.  
14 And Mr. Christiansen told you about that in opening.  
15 It's the harm and loss to the heirs that you have to  
16 consider, not how much money you think MCI might have,  
17 because that's inappropriate.

18 Now, this is hard to get your mind around,  
19 but because these are compensatory damages that you're  
20 coming up with a number for, it doesn't matter whether  
21 the person who caused the harm is a big company like  
22 MCI or a high school student from UNLV. And if you  
23 wouldn't award \$80 million in compensatory damages  
24 against a high school student from UNLV causing the  
25 same harm, you can't award it against MCI because that

1 wouldn't -- that wouldn't be treating us equally as  
2 individuals. It would be basing your award on our  
3 worth and ability to pay rather than the harms and  
4 losses.

5           And we're not talking about the amount that  
6 they would pay to bring them back. That can't happen,  
7 and that's not the standard under the law. You've got  
8 to come up with a fair and just number, as difficult as  
9 that is. And it's the same number that you would reach  
10 regardless of who the defendant was should you find  
11 fault.

12           I'm going to suggest that -- for these types  
13 of damages, that a million dollars to each of the  
14 heirs, a million to each boy and a million to  
15 Dr. Barin's estate, is fair and just calculation. And  
16 it's the amount that you could find just and reasonable  
17 regardless of who the defendant was or their ability to  
18 pay.

19           Ask yourself that question. Is this more  
20 than I would award against an individual with no money?  
21 Because that -- that's -- that's what it's about. It's  
22 about compensation, not punishment and not ability to  
23 pay. It's the harm and the loss.

24           Pain and suffering, this is going to be  
25 another line item on the verdict form. Should you

1 reach damages, you'll have to consider it.

2 MR. TERRY: Lee, five minutes.

3 MR. ROBERTS: Five?

4 Mr. Kemp guessed zero. But that wasn't  
5 because I told him; that's because he heard the same  
6 evidence you all did.

7 Dale Horba, Captain Horba, from the fire  
8 department, from the time he first laid eyes on  
9 Dr. Khiabani until he passed, he never observed any  
10 indication that he was in pain. It was like the body  
11 just took over, just electrical activity.

12 Samantha Kolch, she saw his shoulders move  
13 for two seconds -- a thousand one; a thousand two. You  
14 were just reminded of that. But she couldn't say. She  
15 said, "I'd like to say it was purposeful because that's  
16 what I thought at the time, but, you know, I'm not sure  
17 what an unconscious spasm would look like in a body. I  
18 don't know."

19 And once she got within the point where she  
20 could see him and she could see his face, she said he  
21 never made any facial expression that would be  
22 indicative of pain from the first time she could see  
23 his face.

24 Dr. Baden said agonal breathing such as that  
25 that you're going to see on the tape is only in an

1 unconscious person. And even though Dr. Baden had no  
2 information before Horba got there, what he did know is  
3 that he saw that tape for a period of time, and he saw  
4 agonal breathing and no indication of consciousness, no  
5 indication of pain.

6 Now, Dr. Gavin says, "Yeah, if he was  
7 conscious, then he hit the ground and his ribs were  
8 broken and he had those abrasions, he would feel the  
9 pain." But nobody really knows if -- remember, one of  
10 the witnesses, Pears or Plantz, said, "After he went  
11 behind me, I heard a bang." What was the bang? Could  
12 it have been his helmet hitting the side of the bus  
13 like Dr. Baden said could have happened? Just because  
14 the skull fracture didn't happen until his head was  
15 under the tire doesn't mean he wasn't unconscious.

16 The defendant doesn't prove he felt no pain.  
17 The plaintiffs have to prove he was conscious and he  
18 would have felt pain. The Court has instructed you  
19 that you have to be conscious in order to recover.

20 There's a disfigurement line item.  
21 Disfigurement, if you look at the instruction, has to  
22 be experienced by the decedent. It's not the trauma to  
23 the body -- to the dead body; it's did Dr. Khiabani  
24 experience disfigurement before he died.

25 So, yes, we will ask you, ladies and

1 gentlemen, to put a zero in that line should you reach  
2 the issue of damages.

3 I will close with presenting -- let's see if  
4 I can. And -- and these don't go back with you. So if  
5 you have a pen and want to write these down, you're  
6 going to have to break out the million each to future  
7 and past -- that's a half a million future, half a  
8 million past -- loss of probable support, 906,000, adds  
9 up to about 1906 for Keon.

10 Aria, I've got at 100 -- these are based on  
11 \$100,000 a year until he turns 22, enough to take care  
12 of them, enough to get them through college no matter  
13 what college they go to, 100,000 a year. Who gets that  
14 from their parents? Who gets more than that from their  
15 parents more likely than not?

16 And Aria's damages are a little less because  
17 it's 100,000 till he turns 22. He's two years older,  
18 so it's 200,000 less.

19 Then, as I told you, we've got a million for  
20 the estate of Katy Barin, we've got 500,000 in loss of  
21 probable support -- that's for the six months that she  
22 lived beyond Dr. Khiabani's death -- for a total of  
23 1.5 million. We have zero for pain and suffering and  
24 disfigurement because it was not consciously  
25 experienced by Dr. Khiabani.

1           And as -- as Pete said, we're not going to  
2 quibble with the funeral expenses. Should you find  
3 liability, we're not contesting a dollar of the medical  
4 and funeral expense and the travel up to Canada  
5 to -- to go to the services for -- for the wake that  
6 was held and the cost of the wake. None of that is --  
7 is being disputed.

8           Is this -- this isn't a negligible amount.  
9 We're not suggesting that you give them a bottle of  
10 whiskey. This is the total compensatory damages that  
11 we're suggesting. It all adds up to \$5,158,000,  
12 substantial money. A fair amount of money but not a  
13 ridiculous amount of money based on the worth of the  
14 company.

15           We're asking you to fill out the general  
16 verdict form, which says "We find in favor of MCI."  
17 You're going to have that form back there. And if you  
18 don't believe they've met their burden of proof, you  
19 just check that and turn it in. But if you get to this  
20 form, this is what I would suggest is just and fair  
21 under the circumstances.

22           You know, all of the people in this case --  
23 the attorneys for the plaintiff, all of the defense  
24 attorneys, the experts -- you're going to see in the  
25 instructions that we are required to have expert



1 testimony on certain issues by the rules of the court.  
2 These people don't testify for free. Their experts  
3 don't testify for free other than Dr. Gavin because she  
4 was under subpoena. But, certainly, Breidenthal and  
5 Stalnaker and Mr. Sherlock, they're all paid. You have  
6 to compensate people for their time, but you don't buy  
7 testimony. That's so cynical. It's -- that's just to  
8 distract you from the evidence.

9           If they think someone is wrong, it's our duty  
10 as a lawyer to cross-examine and show you the weakness  
11 in their case. And if you got no weakness that you can  
12 find, then you're going to complain that they're being  
13 paid. And that's not right and it's not fair. And I  
14 would ask you not to be distracted by that type of  
15 sideshow and base your decision on the law and the  
16 evidence which we believe justifies a defense verdict  
17 for Motor Coach Industries.

18           Thank you, ladies and gentlemen.

19           THE COURT: Thank you.

20           MR. ROBERTS: Thank you for your indulgence,  
21 Your Honor.

22           THE COURT: At this time, the plaintiffs are  
23 going to follow up with their final closing argument.

24

25                           REBUTTAL CLOSING ARGUMENT

1           MR. KEMP: I used to use boards like that,  
2 then I had a big accident --

3           THE COURT: Do you have the mic on?

4           THE COURT RECORDER: No.

5           MR. KEMP: Am I on? Need a new?

6           I was saying I used to use boards like this,  
7 then I had an accident in federal court and dumped them  
8 over. It was a really bad experience.

9           THE COURT: Mr. Kemp?

10          MR. KEMP: Can you hear me? Can you hear me?

11          THE COURT RECORDER: Barely. I'm picking you  
12 up.

13          THE COURT: You have to speak up.

14          MR. HENRIOD: How's that? Better? Is that  
15 better?

16          All right. This is rebuttal. This is what's  
17 called rebuttal. So what that means is, when they made  
18 a point, I get to rebut it. I don't get to make up  
19 entirely new points; I'm limited by the points they  
20 made, and then I give our response. It's like that  
21 show "Point-Counterpoint." I don't know if you saw  
22 that back in the day.

23          In any event, first -- and because it's  
24 rebuttal, we jump around a lot. There's not a lot of  
25 flow here. So I just take their point and then I rebut

1 it. Okay?

2 So the first point I want to talk about is  
3 Mr. Barger's point on what you have to prove to get  
4 punitive damages.

5 Shane, can I have the conscious disregard  
6 instruction.

7 He told you that we have to prove that MCI  
8 did it, quote, on purpose, unquote. We don't have to  
9 prove MCI did it on purpose. You know, in a battery  
10 case, when someone hits someone, they have to prove  
11 that that was done on purpose. In this case, all we  
12 have to prove is conscious disregard, knowledge of the  
13 probable harmful consequences and a willful and  
14 deliberate failure to avoid these consequences --  
15 failure to avoid.

16 What did they do in this case? They sold a  
17 1982 product line and they didn't update it regularly.  
18 They didn't update it. You've seen the testimony  
19 already. There is no requirement that we prove that  
20 they intentionally did it, that they purposefully did  
21 it. We just have to prove conscious disregard.

22 Next rebuttal point, Mr. Barger started with  
23 a lot of witness testimony. And I think the intent  
24 there was to show to you that -- that if you  
25 cherry-pick -- and that's what we call it -- that's a

1 term of art. If you cherry-pick it, you take a little  
2 bit from this witness and a little bit from that  
3 witness and little bit from this witness, you can make  
4 it sound like the witnesses are all against us. Okay?  
5 And you can especially do that if you don't show all  
6 the key testimony of an eyewitness.

7 And let me give the example. The first thing  
8 he did is he showed you questions and answers about  
9 Mrs. Bradley's testimony when she said -- in her  
10 deposition, didn't say this at trial. She said in her  
11 deposition her first impression, when she was trying to  
12 make sense of what was going on, her first impression  
13 was there was a swerve to the left. Okay. Do you  
14 remember how he showed you that testimony?

15 Okay. What he didn't show you is the  
16 testimony about what Ms. Bradley testified she thought  
17 happened.

18 Can I have the Rucoba clip, please.

19 MR. GODFREY: Regarding the wobble?

20 MR. KEMP: Yes.

21 (Whereupon video was played.)

22 "Q.Isn't it true that you have no evidence  
23 whatsoever of human error with regards -- being a cause  
24 for the wobble?"

25 (Video ends.)

1           MR. KEMP: This is the one I gave you at the  
2 break, line 115, that you did?

3           MR. GODFREY: Sure.

4           MR. KEMP: Okay. Why don't we try to find  
5 that, and I'll move on and we'll come back. Tell me  
6 when it's ready and we'll come back to it.

7           All right. Let's move to the federal  
8 standards. The argument that there's no federal law  
9 that makes them have a proximity sensor. That's true.  
10 That's true.

11           So what they're really arguing to you is we  
12 are not going to make a safe product with proximity  
13 sensors until the federal government makes us do it.  
14 That's what they're saying to you. The fact that  
15 there's no federal standard, there's no federal  
16 standard one way or the other. They're not precluded  
17 from using proximity sensors. The other competing bus,  
18 the BCI, did in fact use proximity sensors. That's  
19 Exhibit 198. We already talked about it.

20           Jumping forward to a different subject. He  
21 said that the -- the ozone language we had was on a,  
22 quote, sales slip, unquote. That was not on a sales  
23 slip. That was on a 20-page purchase agreement for the  
24 sale of the bus.

25           And then he said to you that, well, if you

1 look at the manual, there's a warnings in the manual.  
2 Take a look at the manual, ladies and gentlemen. It's  
3 Exhibit 135. It's about 200 pages long. It goes on  
4 and on about the bus. Not one single warning in that  
5 manual. And the point is there's no warning in this  
6 case.

7 Next, he put up Jury Instruction 26.

8 Can I have that, Shane.

9 And, Eric, can you get me the Horba testimony  
10 so I can read it in if I have to. Oh, you do have the  
11 Rucoba.

12 All right. Back to Mr. Rucoba. Again, this  
13 is Mrs. Bradley. They've cherry-picked. And so  
14 Mrs. Bradley supposedly said it was her impression that  
15 the bike swerved to the left. This is -- this is what  
16 Mr. Rucoba testified about what the true testimony was.

17 (Whereupon video was played.)

18 "Q.And so she later on said in that deposition  
19 that her first impression was wrong; right?

20 "A.I don't recall that portion of the deposition.

21 "Q.You don't recall her saying later on in the  
22 deposition that her first impression was wrong?

23 "A.No. Can you show me that?

24 "Q.Different -- different. Is that fair?

25 "A.Again, if you show me that text. I don't remember

1 that line of comments by her, about being different or  
2 wrong.

3 "Q.Actually, she gave a potential cause for the  
4 wobble in her deposition, did she not?

5 "A.She said it was possible.

6 "Q.Possible that it was a?

7 "A.Oh, that it was an air blast."

8 (Video ends.)

9 MR. KEMP: Okay. So he cherry-picked a  
10 portion of Mrs. Bradley's testimony where she said her  
11 impression was that it was a left swerve. But what she  
12 really said -- when you look at the whole testimony,  
13 she really said that it was possible that it was an air  
14 blast.

15 I don't want to go through all the witnesses.  
16 We don't have time.

17 Next slide.

18 This is the consumer expectations test. I  
19 talked about it and Mr. Barger talked about it. I just  
20 want to emphasize one thing again.

21 Can I have J, Jury Instruction 26, please.

22 All right. You judge whether or not the  
23 product is unreasonably dangerous by the ordinary user.  
24 Okay? In this case, the ordinary user is the bus  
25 driver. That's why I emphasize to you all of the bus

1 driver testimony about proximity sensors.

2 Mr. Hubbard wants them. Witherell wants  
3 them. Sherlock wants them. Everybody that was a bus  
4 driver that testified said the bus should have had  
5 proximity sensors. Every one that was a bus driver  
6 that testified -- Mr. Ellis -- said that the bus should  
7 have had an S-1 Gard. Everyone that was a bus driver  
8 that testified said that it had a right-side blind  
9 spot. Okay?

10 That is whose testimony is relevant, the  
11 ordinary user, the bus driver. The bus driver. Not an  
12 expert witness sitting on the stand, not an attorney  
13 making up an argument, but the bus drivers' testimony.  
14 That's the ordinary user.

15 So what was missing in the trial?

16 Can I have my next slide, Shane?

17 I know you don't see these so much because we  
18 have this Amber Alert now, but back in the day used to  
19 see these missing milk boxes all the time.

20 What was missing? They did not present one  
21 single bus driver that testified there's not a blind  
22 spot. No testimony whatsoever. I already referenced  
23 three people we called.

24 What's the next one, Shane?

25 Didn't present one single bus driver witness.



1 This is the ordinary user. The bus driver is the  
2 ordinary user. No bus driver testimony that proximity  
3 sensors are not needed. The only witness they  
4 presented on this was Dr. Krauss. And what did he tell  
5 you? He told you they were great for his wife to avoid  
6 running over bikes in the garage. Okay? That is the  
7 only witness they put on with regards to proximity  
8 sensors. No bus driver testimony.

9 Next one, Shane.

10 No bus driver testimony that an S-1 Gard's  
11 not needed. I talked about Mr. Ellis's testimony.  
12 Again, he's the bus driver up for New Flyer. He  
13 testified that S-1 Gards is a good safety measure.  
14 Mr. Barron testified to it. We presented the victim.  
15 But they presented no testimony of the ordinary user  
16 with regards to S-1 Gards.

17 Next one, Shane.

18 No testimony from a bus driver that an air  
19 blast warning was not needed. They didn't present  
20 that. Okay? We presented that.

21 Can I have Ms. Witherell's testimony.

22 (Whereupon video was played.)

23 "Q.Okay. And back to the air blast, you have  
24 personally stood next to a J4500 at about 25 miles per  
25 hour a foot away; correct?

1 "A.Yes, sir."

2 MR. KEMP: I think it's the next one, Shane.  
3 Skip that one and go to the next one.

4 Sorry, ladies and gentlemen. We're trying to  
5 go fast to get you out of here. Court's staff is going  
6 to start throwing things at me if we go much longer.

7 Next one, Shane.

8 (Whereupon video was played.)

9 "Q.And you've told me that you don't know one way  
10 or another whether or not all buses produce the same  
11 type of air blast; right?

12 "A.Right, sir. I would assume they all do.

13 "Q.Okay. And if one produces twice the air blast  
14 of another bus, do you think that manufacturer should  
15 give a warning?

16 "A.Yes, sir.

17 "Q.Why is that?

18 "A.Just more knowledge that you have for the public's  
19 knowledge."

20 MR. KEMP: This is the only bus driver  
21 testimony in the case about whether a warning is  
22 needed. And she says if there's a differential -- in  
23 other words, a Mercedes Setra 500 has a .33  
24 coefficient, this bus, according to Dr. Breidenthal,  
25 had a .6, twice -- twice as much for this bus, the

1 J4500. She said there should be a warning. This is  
2 the testimony of the user.

3 Okay. Let's switch gears a little bit. I  
4 told you they'd tried to finger-point. I told you  
5 that. What did they do? They showed you the speaker  
6 on the doctor's bike. Okay. Why did they show you the  
7 speaker on the doctor's bike? Because they wanted to  
8 imply to you that maybe the doctor was listening to  
9 loud music and somehow or another that was a factor to  
10 the accident.

11 So that's wrong for two reasons. First of  
12 all, the gardener testified he didn't hear any music.  
13 That was the testimony in the case. That was the only  
14 testimony in the case about whether there's music. He  
15 said no music.

16 But the second reason it's wrong is they're  
17 finger-pointing. They're pointing at the doctor.  
18 They're implying that because -- merely because there  
19 was a speaker on the bike -- and this is pretty  
20 desperate -- a speaker on the bike that there's no  
21 evidence he was using, they're implying that the doctor  
22 was negligent. That's finger-pointing. That's  
23 forbidden by Jury Instruction No. 9 -- 34.

24 All right. They told you that, according  
25 to -- they told you that Mr. Hoogestraat and MCI were

1 not aware of all these problems, that they weren't  
2 aware about the right-side blind spots, that they  
3 weren't aware about the aerodynamic problem, that they  
4 weren't aware about the high dashboard.

5 Well, this is what Mr. Sherlock testified  
6 that he personally told MCI.

7 Can I have my Sherlock clip, Shane.

8 (Whereupon video was played.)

9 "Q.And what did you tell MCI about MCI buses?

10 "A.Well, we've had a rather extensive conversation  
11 where we got together and looked through the driver's  
12 work station and the issues there, everything from that  
13 dashboard that comes back so you get better sight  
14 lines, better ergonomics through going out and  
15 specifically looking at the pillar structure and the  
16 curvature and what that would do to the airflow and  
17 everything from driver vision through the interior air  
18 quality and disturbance to people proximate to the  
19 bus -- near the bus as it goes by.

20 "Q.And when you talked to MCI, did you actually  
21 have a J4500 available?

22 "A.Yeah, we were standing right in front of them.

23 "Q.Did you explain the dash problem to them?

24 "A.Yes.

25 "Q.Did you discuss aerodynamics with them?

1 "A.On the dash, yes."

2 MR. KEMP: So they told you that they didn't  
3 know about all these problem, yet the safety analyst  
4 for the ATU, 200,000 bus driver union, told them about  
5 this. Told them about it.

6 Now, they referred to Mr. Granat's testing.  
7 Let's -- and that was the -- he rode bikes back and  
8 forth behind a stationary -- excuse me -- buses back  
9 and forth behind stationary bikes with a 200-pound  
10 dummy.

11 There were three problems with that.  
12 Dr. Breidenthal criticized it.

13 I don't want to play that, Shane. That's too  
14 long.

15 But what he told you is that, in his opinion,  
16 that was a flawed test because of the inertia in the  
17 test object. In other words, the bike weighs  
18 200 pounds.

19 So there were three problems with these  
20 tests. One, they didn't take any wind measurements.  
21 They did not measure wind. Okay? When we had  
22 Mr. Granat on the stand, we showed him this device, and  
23 we said, "All right. What wind did you measure when  
24 you kept running those buses back and forth?"

25 They didn't measure the wind. Remember

1 Dr. Breidenthal estimated it was 40 miles an hour. How  
2 easy would it have been to set up one of those? They  
3 didn't want to know wind.

4 What they said they were doing is they were  
5 measuring force. So what they did is they hooked up a  
6 measuring gauge onto the 200-pound test dummy and they  
7 measured force. All right. So let's -- let's --  
8 here's an example for you. That's from the Easter  
9 Islands. That's one of those statues you need --

10 Okay. No problem. No problem.

11 JUROR: I could go solo.

12 MR. KEMP: Solo, Judge? Solo trip? You have  
13 Jerry?

14 THE COURT: Let me get my marshal. Excuse  
15 me.

16 MR. BARGER: Judge, we are willing to waive  
17 the admonishment.

18 MR. KEMP: Got to wait for the judge now.

19 MR. BARGER: I didn't know she wasn't on the  
20 bench.

21 THE COURT: Before you go, do the parties  
22 waive?

23 MR. CHRISTIANSEN: Yes, we do.

24 MR. BARGER: Yes, we do.

25 THE COURT: Would you please escort him to

1 the restroom.

2 (Whereupon a juror left the courtroom.)

3 MR. KEMP: It's not an endurance contest.

4 Any time anyone has to go to the bathroom, just -- it's  
5 better this way a lot quicker.

6 THE COURT: It's all good.

7 (Whereupon a juror returned.)

8 THE MARSHAL: All the jurors are present,  
9 Your Honor.

10 THE COURT: All right. Thank you.

11 Okay. It's okay. Go ahead. Are we back on  
12 the record?

13 THE COURT RECORDER: Yes, Your Honor.

14 MR. KEMP: Back to Easter Island.

15 THE COURT: Go ahead. That's fine.

16 MR. KEMP: Easter Island. These are one of  
17 the big statues that are there. This is an island in  
18 the middle of the Pacific. Hurricanes go by. They  
19 don't roll the statue.

20 The concept that we're trying to explain to  
21 you here is that when you have a big, heavy object and  
22 you hook up a force gauge to it and the bus goes past,  
23 the force is just too quick for the object to register.  
24 That's what Dr. Breidenthal was trying to explain to  
25 you. Inertia and speed.

1           So this is the test they ran. They ran this  
2 kind of, you know, inertia test. They didn't run the  
3 wind measurement test.

4           And then the third flaw, we've already gone  
5 through it. The day they did the testing down there on  
6 the 7th and the 8th of October last year, we had 10-,  
7 12-, 13-mile-an-hour winds. And so you're trying to  
8 measure -- you're trying to measure air force coming  
9 from air -- air disturbance coming from the front of  
10 the bus. How can you do that when the wind is going  
11 this way or that way or this way?

12           So those are the three flaws.

13           Now, Mr. Barger argued to you that, oh, the  
14 J4500 has similarities to the safer alternative design  
15 and that we tried to streamline it when we designed the  
16 J4500.

17           Do you remember him saying that to you?  
18 Well, here's what the designer said.

19           MR. BARGER: Excuse me. Object to that form  
20 of the question. It's not what I said at all.

21           MR. KEMP: You said quote --

22           THE COURT: Overruled.

23           MR. KEMP: All right. Next. Here's what --  
24 here's what the actual designer said with regards to  
25 what they did when they're trying to design it the



1 J4500.

2 May I have Mr. Lamothe, please, Shane.

3 (Whereupon video was played.)

4 "Q.So, as far as you know, when the J4500 was  
5 designed, no one looked at the aerodynamics and the  
6 safety factor? Just as far as you know."

7 MR. KEMP: Didn't even look at aerodynamics.

8 (Whereupon video was played.)

9 "A.Not to my knowledge."

10 MR. KEMP: Okay. The next one, Shane.

11 (Whereupon video was played.)

12 "Q.Did MCI make any effort in designing the J4500  
13 to reduce the aerodynamic drag by modifying the shape  
14 of the front of the coach?

15 "A.I have no knowledge of that."

16 MR. KEMP: This guy is on the design team.  
17 He has no knowledge of it.

18 Next one, Shane.

19 (Whereupon video was played.)

20 "Q.So, in addition to making the right-hand  
21 corners more rounded, you can also make the -- the roof  
22 slope more rounded; is that correct? In theory?

23 "A.In theory, yeah.

24 "Q.Was any consideration given, when you designed  
25 the 4500, to design it with a larger radii for the roof

1 slope?

2 "A.Not that I'm aware of."

3 MR. KEMP: This is the actual designer. They  
4 didn't do anything when they -- they did this bus, the  
5 J4500. Didn't do anything to make it more  
6 aerodynamically efficient.

7 And that's my rebuttal. Thank you again for  
8 your attention, ladies and gentlemen.

9 THE COURT: Okay.

10 MR. CHRISTIANSEN: Shane, can I have the  
11 first Aria video, please.

12

13 CLOSING ARGUMENT

14 MR. CHRISTIANSEN: Good evening. Dubious  
15 distinction of speaking last. So I'm going to try to  
16 be brief and try to get you all about your business.

17 I want to show you two Aria clips and compare  
18 them to the points raised to you by Messrs. Barger and  
19 Roberts.

20 Go ahead.

21 (Whereupon video was played.)

22 "Q.Financially, was your dad the main breadwinner  
23 in the family?

24 "A.Yes.

25 "Q.Any doubt in your mind he would have always

1 taken care of your mother?

2 "A.No doubt in my mind.

3 "Q.Junior year is this year?

4 "A.Yes.

5 "Q.They have proms in Canada? Dances?

6 "A.Yes.

7 "Q.Is that a type of a thing that your dad won't  
8 get to see you go through, and your brother?

9 "A.Yes.

10 "Q.High school graduation?

11 "A.Yep.

12 "Q.College?

13 "A.Yes.

14 "Q.Girlfriends?

15 "A.Yeah.

16 "Q.Wife?

17 "A.Yeah.

18 "Q.Kids?

19 "A.Yeah."

20 MR. CHRISTIANSEN: Now, ladies and gentlemen,  
21 let's compare to the argument you just heard.

22 I heard Mr. Barger say to you that the  
23 S-1 Gard wouldn't have -- would have caused the same  
24 damage because doctor would have been hit by it at  
25 25 miles an hour.

1           Folks, did that doctor just freeze in time  
2 when that bus knocked him off his bike? Or do you  
3 think, like Dr. Stalnaker said, there was still some  
4 forward momentum and that MCI took some liberties when  
5 it said to you 25 miles an hour and showed you those  
6 rammings of the test they did on the sled? Do you  
7 think there was a few liberties taken with you to lead  
8 you to the misimpression that the doctor stopped dead  
9 in his tracks?

10           I then heard counsel suggest to you that  
11 Dr. Gavin didn't do any tests. You should rely on the  
12 guy that, 40 times in a row, testifies for Ford because  
13 him and the 40 engineers that he supervises on a  
14 two-and-a-half-acre place down outside of Phoenix that  
15 are a known quantity, give known results, they're the  
16 more reliable persons.

17           The credibility and believability is for you  
18 to decide. The jury instruction says you should look  
19 for bias, reason they may have to come to the  
20 conclusions they did.

21           Dr. Gavin has no bias. And, folks, you've  
22 been looking at the tests she did since the first day  
23 of trial. They're called CAT scans and X rays. Those  
24 are tests. She did them. And when they suggest to you  
25 she didn't so that they can try to push up their,

1 quote/unquote, experts, it's not right.

2 Finally, I guess some issue with me has been  
3 taken relative to my cross of Mr. Rucoba. Do you  
4 remember my cross of Mr. Rucoba? I asked him, I said,  
5 "Sir, you got control of this examination up there in  
6 your hands."

7 And he said, "Yeah."

8 I go, "So you knew the questions and the  
9 answers before you came in here?"

10 "Yeah."

11 And I took issue with it. I admit it. I'm  
12 not of the vintage of Mr. Barger. He's got a few years  
13 on me. But I've been doing this in this jurisdiction  
14 since 1994. You don't can testimony. It's not what  
15 you do. That's all you saw from that witness stand  
16 from these experts -- prepackaged, canned testimony.

17 And, folks, you know, maybe it's because  
18 Mr. Barger's last thing he said to you is the truth,  
19 which is, okay, regardless of what happens,  
20 everything's going to be okay. I'm going to get to go  
21 home.

22 Well, you know, unfortunately, ladies and  
23 gentlemen, Aria and Keon Khiabani don't get a second  
24 chance. They don't get another trial. This is it.  
25 This is what they get. You are who they chose.

1 Justice is yours to mete out. In this town, in this  
2 state, with witnesses who -- you know, think about it.  
3 The witnesses that have been thrown under the bus or  
4 cherry-picked or whatever word you want to use are just  
5 regular folk: Ms. Kolch, Ms. Bradley, Mr. Sacarias,  
6 Mr. Pears, Mr. Plantz. What did any of them do wrong?  
7 Dr. Gavin. Where is her bias?

8 Can I have my second Aria quote, please.

9 (Whereupon video was played.)

10 "Q.Lastly, Aria, why don't you help us understand  
11 the thing that makes you the most proud about your dad.

12 "A.What makes me the most proud of my dad is his  
13 ability to come from nothing, zero, with no family and  
14 no support, to being able to create a family where he  
15 is the -- where he is the support and he is the one  
16 who's putting us in a better place than he was because  
17 of his ability to do good and to strive and to study  
18 hard and to really create opportunities for himself and  
19 for his family.

20 "Like, I've never met somebody who's able  
21 to overcome what he did. Right? Leaving your  
22 parents at 17 and going to a different country  
23 and learning a new school system there and  
24 being able to manage that and work at a  
25 McDonald's and to drink the condensed milk

1       there because you couldn't afford milk at a  
2       grocery store and to do all those things that  
3       he did just so he could create a better life  
4       for his kids. That's what will ultimately  
5       drive me into, hopefully, being as good of a  
6       dad as he was.

7       "Q.How about as good of a husband? Tell us about  
8       the running joke between your mom and your dad. The  
9       ladies and gentlemen got to hear it from your mom. She  
10      said your dad was picky and she told your dad she felt  
11      lucky he picked her.

12     "A.Yeah. They always had a running joke of who loved  
13     who more. It was a big game of flirting, and they were  
14     really good at it. And I said it in my speech, but,  
15     like, if I can find, like, love like that at some point  
16     in my life, I'm super, super lucky.

17             "And he was -- he was a picky guy.

18             There's a funny story, actually, that he" --

19             MR. CHRISTIANSEN: Ladies and gentlemen of  
20     the jury, that is testimony that carries a  
21     preponderance of the evidence.

22             Stan Smith, who hits the stand and tells you  
23     all, in questions by counsel who prepared him for his  
24     testimony, that you should give Keon a bottle of  
25     whiskey as opposed to compensate him, crass is an

1 understatement. And to suggest that the figure --  
2 total figure that they give you of \$5,158,489 is their  
3 efforts to be reasonable from the person who put  
4 Dr. Baden on the stand and had him leave Dr. Baden on  
5 behalf of MCI, left you all with the misimpression at  
6 the end of the day on his direct examination that  
7 Dr. Khiabani had died in an instant, only to be  
8 confronted the next day and be forced to say, "Well,  
9 could have happened. Might have happened. Maybe it  
10 happened. I guess I don't know that it happened. I  
11 don't really think that it happened. I just don't do  
12 milliseconds."

13 Does anybody really think that's the  
14 reasonable and just reward? Does anybody really think  
15 Dr. Khiabani didn't feel pain? Really. At the end of  
16 all of this, when MCI stands up and says to you he felt  
17 no pain and suffering in those last moments as he's  
18 falling to the ground, knowing his wife is dying and  
19 his boys are going to be raised without a parent, are  
20 you -- are they to ask you to believe he felt no pain?

21 And then to further say to you that the law  
22 requires he knew he himself was disfigured, without  
23 showing you the law -- they got law. Judge gave you  
24 the jury instructions. When you go back, read them.  
25 That's not a requirement. It's not in there. That's



1 why he didn't show you.

2 And, folks, you need look no further than  
3 Stan Smith's testimony when I said to him, "Dr. Smith,  
4 isn't it true, if Katy Barin were alive today, every  
5 red cent, every nickel of that \$15,300,000 you'd be  
6 telling this jury goes to her."

7 And he said, "That's right." And he made  
8 light of it again. He said, "You give everything to  
9 your spouse when you're alive, and you leave them  
10 everything when you're gone."

11 So who wants the windfall? The argument is  
12 that I properly showed you under the statute things you  
13 may consider -- earning capacity, generosity of  
14 Dr. Kayvan Khiabani, his relationship with his  
15 children. But MCI wants to benefit because his wife  
16 died early.

17 MR. ROBERTS: Objection, Your Honor.

18 THE COURT: Sustained.

19 MR. CHRISTIANSEN: They told you that Aria  
20 Khiabani didn't, from this stand, look at you folks and  
21 say I want to go to Harvard or University of Penn.  
22 Mr. Roberts just told you that. There's no evidence  
23 anybody said where the boy wanted to go to school, how  
24 hard he worked to get into Clark to better himself  
25 because that's what his dad did. That's what his dad

1 wanted of him. And the internal fight he had. What a  
2 fight for a 17-year-old, to stay and follow the dreams  
3 you knew your mom and dad wanted for you or to go take  
4 care of your little brother.

5 The time for lawyer arguments is over. I'm  
6 going to show you the verdict form. And as we have all  
7 told you, there is no calculation for damages for grief  
8 and sorrow.

9 Scroll down, Shane, for me if you would. Go  
10 to the damages portion.

11 I would suggest to you that the appropriate  
12 amount for past grief, sorrow, loss of companionship,  
13 society, and comfort for both boys is \$2 1/2 million  
14 each.

15 I would further suggest to you, as Mr. Kemp  
16 did, on behalf of Keon, that these boys will live  
17 without a dad for his statistical life of 31 years.  
18 That's right in your jury instructions. You need look  
19 no further than there. And that loss doesn't end when  
20 Keon's 13, when his dad dies. It doesn't end today  
21 when Keon's 14. You heard Aria just now talk about a  
22 few of the things that he and his brother will both  
23 miss.

24 Whatever number you affix to the yearly loss  
25 for the boys should be multiplied by 31. Those are the

1 years statistically that Dr. Khiabani would have lived.

2 Next page, please.

3 I've already told you what the estate of Katy  
4 Barin's damages should be for grief, sorrow, loss of  
5 companionship, society, and comfort.

6 And it sounded to me just now that MCI agrees  
7 that 500,000 a year for probable support, they put that  
8 number in their little chart Mr. Roberts wrote for you.  
9 He wrote 500,000. So evidently, 500,000 a year -- that  
10 was only for six months -- is okay and I'm light in my  
11 request, right, because I said 500 was the top per  
12 year. It's okay until mom dies, and then the boys'  
13 loss of companionship for their father should go away.

14 If you have one parent or two parents -- if  
15 you have two, the loss of one's horrible. Who's  
16 shoulder to cry on?

17 I further suggest to you folks that the pain  
18 and suffering that Dr. Kayvan Khiabani suffered in the  
19 moments before he died, whether he was gasping for air  
20 and getting blood or it was the moment before he knew  
21 that tire was coming over his head, knowing his wife  
22 was likely terminal and his boys wouldn't have a home,  
23 would have to leave the country like he did, at ages 13  
24 and 17 and start anew in a garage and a basement.

25 Those are appropriate figures. This is the

1 time for you to go do the oath you swore. It's four  
2 different spots in your jury instructions. Four  
3 different times, the judge tells you how important your  
4 job is. Maybe 50 times starting February the 12th, you  
5 all told me you could do it.

6 MR. ROBERTS: Objection, Your Honor.

7 THE COURT: Sustained.

8 MR. CHRISTIANSEN: Lastly, all of you just  
9 heard the argument forwarded by MCI that -- and I wrote  
10 it down. That is a family of means. And the clear  
11 implication was because Dr. Khiabani had gone from --  
12 from Tehran through Pakistan to Montreal to McDonald's  
13 to better himself as a doctor here, that that should be  
14 held against him and that somehow the plaintiffs were  
15 overreaching. Ask yourself the flip side. Use your  
16 common sense. If I was representing children of a  
17 \$50,000-a-year earner, would the defense lawyers have  
18 the gall to stand up and tell a jury like you that I  
19 was overreaching because the family didn't have means?

20 Take the blindfold off. Lady Justice  
21 requires you now go together, talk with each other as  
22 you've been admonished not to do every day for six  
23 weeks, reach an agreement and return a verdict.

24 We very much appreciate your time. Thank  
25 you.

1 THE COURT: Thank you.

2 All right. Madam Clerk, as soon as the  
3 marshal comes back in -- as soon as Marshal Ragsdale  
4 comes back, Madam Clerk is going to swear him and our  
5 executive -- my executive assistant, Ms. Powell.  
6 Marshal Ragsdale will dedicate himself. He will be in  
7 charge of the jury and Ms. Powell of the alternates.

8 THE CLERK: So raise your right hands.

9 You and each of you do solemnly swear that  
10 you will well keep this jury together in some private  
11 and convenient place, that you will not permit any  
12 person to speak to them, nor speak to them yourselves,  
13 unless it be by the order of this Court except to ask  
14 them whether you have agreed upon a verdict, and that  
15 you will return them into this court when they have so  
16 agreed, so help you God?

17 THE MARSHAL: I do.

18 MS. POWELL: I do.

19 THE COURT: All right. Thank you.

20 Ladies and gentlemen of the jury, I want to  
21 first thank you very, very much for your patience and  
22 your dedication. And, as I have indicated before,  
23 there are going to be eight jurors. And in the way  
24 that we do it in this courtroom it's the eight that are  
25 in the first eight seats, 1 through 8. And we have six

1 alternates. The alternates are in Seat 8 -- excuse  
2 me -- Seat 9, Mr. Tuquero; Seat 10, Ms. Romero;  
3 Seat 11, Ms. Phillips-Chong; Seat 12, Mr. Stephens;  
4 Seat 13, Mr. Krieger; and Seat 14, Ms. Mosqueda.

5 So the jurors will be led by Marshal Ragsdale  
6 to a room right now. And the others will follow  
7 Ms. Powell.

8 THE MARSHAL: All rise. Bring all your  
9 belongings, pads. The alternates ...

10 Everyone out?

11 THE COURT: Yes, you're going to follow  
12 Ms. Powell, please.

13 (The following proceedings were held  
14 outside the presence of the jury.)

15 THE COURT: All right. Thank you. All  
16 right.

17 Okay. Do we -- I just want to make sure I  
18 have all the parties' contact.

19 MR. CHRISTIANSEN: Should we give them to  
20 Ms. Clerk?

21 THE CLERK: Yes, please.

22 MR. CHRISTIANSEN: Yes, Your Honor. We will.  
23 Thank you, Your Honor.

24 THE COURT: Thank you. Okay.

25 THE CLERK: Counsel, I need to ask if the

1 exhibits that are admitted are the only exhibits that  
2 are going to go back to the jurors. The exhibits that  
3 you have not admitted, including depositions, anything  
4 else, would you like to have those returned to you?  
5 You can have them picked up or however you decide to do  
6 it. Do you want us to keep -- what do you want to do?

7 MR. ROBERTS: We --

8 MR. KEMP: Go ahead.

9 MR. ROBERTS: We can pick up ours tomorrow.

10 THE COURT: For the record, that's  
11 Mr. Roberts.

12 MR. ROBERTS: Yes. I'm sorry, Your Honor.  
13 Thank you.

14 MR. KEMP: I think -- I take you need to  
15 leave the depositions down here in case they require a  
16 readback?

17 THE COURT: Yes.

18 MR. HENRIOD: But other than that, we want to  
19 pick ours up too.

20 THE COURT: Okay. All right. And so I  
21 ask -- I have asked Marshal Ragsdale to get a read to  
22 see if they want to start deliberating this evening.

23 THE CLERK: I'm sorry. Mr. Kemp, you said  
24 you wanted what?

25 MR. KEMP: We wanted to make sure the

1 original depositions are here in case the jury requests  
2 readback.

3 THE CLERK: Yes, only the depositions that  
4 have been published will -- will be kept.

5 MR. KEMP: Right.

6 THE COURT: Yes, yes. We -- they -- yes,  
7 those will be kept, but everything else --

8 MR. KEMP: Okay.

9 THE COURT: You're going to take them or what  
10 do you want to do with them?

11 MR. CHRISTIANSEN: How about if I have  
12 somebody pick them all up tomorrow? Is that okay?

13 THE CLERK: Yes.

14 MR. ROBERTS: I assume the Court will get our  
15 phone numbers?

16 THE COURT: No, you need to give them to  
17 Madam Clerk right now.

18 Did you understand that?

19 MR. ROBERTS: Yes.

20 THE COURT: Okay. Good.

21 MR. ROBERTS: Are we still on the record,  
22 Your Honor? I don't know that it matters, but -- we  
23 are.

24 There is one, I guess, point that we need to  
25 address, and that is that several of the marked



1 exhibits are flash drives with videos. We have asked  
2 Brian Clark to provide a clean computer that could be  
3 used to view the videos. We would ask that plaintiffs  
4 agree to share the cost. I think it's --

5 How much is it, Brian?

6 MR. CLARK: I don't know. It's nothing.

7 MR. KEMP: Agree -- I agree to half of  
8 nothing.

9 MR. ROBERTS: I wasn't asking about a pig in  
10 a poke, Your Honor, but --

11 MR. KEMP: Your Honor, we'll agree to that.

12 MR. ROBERTS: Okay. Thank you.

13 Thank you, Your Honor.

14 THE COURT: Very good. Is there anything  
15 else that we need to address right now?

16 MR. CHRISTIANSEN: Judge, not on the record.  
17 Let's go off.

18 THE COURT: Okay.

19 But while we're still on the record, I would  
20 like every person, every counsel that wants to be  
21 contacted -- that needs to be contacted, share your  
22 information with Madam Clerk before you go. Thank you.  
23 We can go off the record now.

24 (Discussion was held off the record.)

25 THE MARSHAL: Are we ready, Your Honor?

1 THE COURT: Is everyone ready?

2 All right. I have the jury coming back in.

3 THE MARSHAL: Is everyone ready?

4 THE COURT: Let's get them back and -- and  
5 let them go.

6 THE MARSHAL: All rise.

7 (The following proceedings were held in  
8 the presence of the jury.)

9 THE MARSHAL: Your Honor, all the jurors are  
10 present.

11 THE COURT: I'm going to -- please be seated.

12 THE MARSHAL: Please be seated. Come to  
13 order.

14 THE COURT: Thank you. All right.

15 I'm going to admonish the jurors -- all of  
16 the jurors the -- the jurors and the alternates now.  
17 Before I do that, I understand that the jurors are  
18 coming back tomorrow at 9:00 a.m.; correct?

19 JUROR: Correct.

20 THE COURT: And then what arrangements have  
21 you made, Ms. Powell, for the alternates?

22 MS. POWELL: They pretty much don't want to  
23 come back, but if you want them back, they'll be here.

24 THE COURT: No, they just need to be  
25 available. Okay?

1 MS. POWELL: I have their contact  
2 information.

3 THE COURT: We absolutely -- you have to have  
4 everyone's contact info. And you need to make sure  
5 that we're able to contact you. Okay?

6 All right. Very good.

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

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

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

22 You are not to talk with others, text others,  
23 tweet others, message others, google issues, or conduct  
24 any other kind of book or computer research with regard  
25 to any issue, party, witness, or attorney involved in

1 this case.

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

5           For the Jurors No. 1 through 8 that are  
6 coming back tomorrow, as soon as you go into the jury  
7 room, the marshal escorts you, you can start  
8 deliberating and discussing everything finally. And  
9 the alternate jurors cannot speak to anyone about this.  
10 Okay?

11           All right. Thank you very much. Have a  
12 great evening.

13           THE MARSHAL: All rise.

14           THE COURT: We are off the record.

15                   (Thereupon, the proceedings  
16 concluded at 6:26 p.m.)

17                               -oOo-

18

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

21

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23

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25



KRISTY L. CLARK, CCR #708

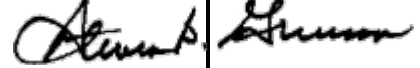
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Steven D. Grierson

CLERK OF THE COURT



1 CASE NO. A-17-755977-C

2 DEPT. NO. 14

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 \* \* \* \* \*

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

17 Plaintiffs, )

18 vs. )

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

Defendants. )

21 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

22 BEFORE THE HONORABLE ADRIANA ESCOBAR  
23 DEPARTMENT XIV

24 DATED FRIDAY, MARCH 23, 2018

25 RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

1 APPEARANCES:

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

4 BY: WILLIAM S. KEMP, ESQ.  
5 **BY: ERIC PEPPERMAN, ESQ.**  
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11 For the Plaintiffs Aria Khiabani and Katayoun  
12 Barin:

13 BY: PETER CHRISTIANSEN, ESQ.  
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21 For the Defendant Motor Coach Industries, Inc.:

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- AND -

For the Defendant Motor Coach Industries, Inc.:

BY: DARRELL BARGER, ESQ.  
BY: MICHAEL G. TERRY, ESQ.  
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(214) 369-2100

010197

1 LAS VEGAS, NEVADA, FRIDAY, MARCH 23, 2018;

2 2:21 P.M.

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

4 \* \* \* \* \*

5 THE COURT: I'm going to have Ms. Powell  
6 escort the alternatives in, and they're going to  
7 sit out there.

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

10 THE MARSHAL: All rise. Your Honor, all  
11 the jurors are present.

12 Please be seated. Come to order.

13 THE COURT: Thank you. Will you call  
14 the roll.

15 THE CLERK: Yes, Your Honor.

16 Byron Lennon.

17 JUROR NO. 1: Here.

18 THE CLERK: John Toston.

19 JUROR NO. 2: Here.

20 THE CLERK: Michelle Peligro.

21 JUROR NO. 3: Here.

22 THE CLERK: Raphael Javier.

23 JUROR NO. 4: Here.

24 THE CLERK: Dylan Domingo.

25 JUROR NO. 5: Here.

010198



1 THE CLERK: Aberash Getaneh.

2 JUROR NO. 6: Here.

3 THE CLERK: Jaymi Johnson.

4 JUROR NO. 7: Here.

5 THE CLERK: Constance Brown.

6 JUROR NO. 8: Here.

7 THE COURT: Before we get started, I  
8 want to thank all of you for being so dedicated,  
9 the jurors and our alternatives, who have been  
10 here all day as well, they've chosen to be here.  
11 So I want to thank you so very much for being so  
12 dedicated and thoughtful and really performing a  
13 tremendous civic duty.

14 Let's get started. Do the parties  
15 stipulate to the presence of the jury?

16 MR. KEMP: Yes, Your Honor.

17 MR. BARGER: Yes, Your Honor.

18 THE COURT: Has the jury selected a  
19 foreperson?

20 JUROR NO. 1: Yes.

21 THE COURT: Who is the foreperson, for  
22 the record?

23 JUROR NO. 1: Byron Lennon.

24 THE COURT: Okay. Mr. Lennon, have at  
25 least six of the eight jurors agreed upon a

010199

1 verdict?

2 JUROR NO. 1: Yes.

3 THE COURT: Okay. Please hand the  
4 verdict form to the marshal.

5 The clerk will now read the verdict out  
6 loud.

7 THE CLERK: District Court, Clark County  
8 of Nevada, in the case of Keon Khiabani and Aria  
9 Khiabani, minors by and through their guardian,  
10 Marie-Claude Rigaud; Siamak Barin as executor of  
11 the Estate of Kayvan Khiabani, MD, decedent -- the  
12 Estate of Kayvan Khiabani, MD, decedent; Siamak  
13 Barin as executor of the Estate of Katayoun Barin,  
14 DDS, decedent; and Estate of Katayoun Barin, DDS,  
15 decedent, plaintiffs, v. Motor Coach Industries,  
16 defendant, in Case Number A755977 in  
17 Department 14.

18 We the jury return the following  
19 verdict: Liability.

20 1. Is MCI liable for a defective  
21 design? Was there a right-side blind spot that  
22 made the coach unreasonably dangerous and a legal  
23 cause of Dr. Khiabani's death?

24 No.

25 2. Is MCI liable for a defective

010200

1 design? Did the lack of proximity sensors make  
2 the coach unreasonably dangerous and a legal cause  
3 of Dr. Khiabani's death?

4 No.

5 3. Is MCI liable for a defective  
6 design? Did the lack of a rear wheel protective  
7 barrier make the coach unreasonably dangerous and  
8 a legal cause of Dr. Khiabani's death?

9 No.

10 4. Is MCI liable for a defective  
11 design? Did the aerodynamic -- excuse me --  
12 design of the coach make it unreasonably dangerous  
13 and a legal cause of Dr. Khiabani's death?

14 No.

15 5. Did MCI fail to provide an adequate  
16 warning that would have been acted upon?

17 Yes.

18 If you answered "yes" to any of the  
19 above liability questions, fill in the amount of  
20 compensation that you deemed appropriate for each  
21 plaintiff's compensatory damages arising from the  
22 death of Dr. Kayvan Khiabani.

23 Compensatory damages.

24 Keon Khiabani damages -- past grief and  
25 sorrow; loss of companionship, society, and

010201

1 comfort: \$1 million.

2 Future grief and sorrow, loss of  
3 companionship, society, and comfort: \$7 million.

4 Loss of probable support: \$1.2 million.

5 For a total of \$9,200,000.

6 Aria Khiabani damages, past grief and  
7 sorrow, loss of companionship, society, and  
8 comfort: \$1 million.

9 Future grief and sorrow; loss of  
10 companionship, society, and comfort: \$5 million.

11 Loss of probable support: \$1 million.

12 For a total amount of \$7 million.

13 The estate of Katy Barin damages --  
14 grief and sorrow; loss of companionship, society,  
15 comfort, and consortium suffered by Katy Barin  
16 before her October 12, 2017, death: \$1 million.

17 Loss of probable support before her  
18 October 12, 2017, death: \$500,000.

19 For a total of \$1,500,000.

20 Damages to be divided among the heirs.

21 Pain and suffering of Kayvan Khiabani:  
22 \$1 million.

23 Disfigurement of Kayvan Khiabani: 0.

24 For a total of \$1 million.

25 The Estate of Kayvan Khiabani --

010202

1 compensatory damages, medical and funeral  
2 expenses: \$46,003.62.

3 If you answered "yes" on any of the  
4 above liability questions, you must also determine  
5 plaintiffs' claim for punitive damages against  
6 MCI.

7 Is MCI liable for punitive damages? No.

8 Dated this 23rd day of March 2018.

9 THE COURT: Do either of the parties  
10 desire to have the jury polled?

11 MR. ROBERTS: No, Your Honor.

12 MR. KEMP: No, Your Honor.

13 THE COURT: Okay. You are now going to  
14 place that in the minutes?

15 THE CLERK: Yes. I will record this.  
16 It will be recorded into the minutes.

17 THE COURT: All right.

18 At this point, I would like to again  
19 thank everyone for the length of time and the  
20 dedication that you've given to our community in  
21 serving as jurors.

22 As I indicated in the beginning -- and I  
23 still feel the same way -- it really is very  
24 important in our country, and it's really one of  
25 the greatest things that we have. It's one of the

010203

1 things that makes us so great.

2 Thank you. And, now, I'm going to  
3 discharge you at this point. The admonishment no  
4 longer stands.

5 Thank you very much, ladies and  
6 gentlemen.

7 THE MARSHAL: All rise.

8 (Jury excused.)

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

11 THE COURT: Anything that we need to  
12 discuss at the bench or for the record?

13 THE MARSHAL: Please be seated.

14 THE COURT: Release the alternates.

15 MR. ROBERTS: I was just wondering if  
16 the Court was going to inform the jury that, if  
17 they desire to talk to the lawyers, they can wait  
18 in jury services and have the lawyers come down  
19 after an appropriate time.

20 THE COURT: That's being done.

21 MR. ROBERTS: Thank you, Your Honor.

22 MR. KEMP: Your Honor, I appreciate it.  
23 I know what you've gone through. Like I told you  
24 2 1/2 months ago, when you referee a Super Bowl,  
25 you know, it's a different thing. And we really

010204

1 appreciate everything you've done.

2 THE COURT: Thank you.

3 MR. POLSENBERG: I join in that, Your  
4 Honor. In fact, I said it the other night, how  
5 much I enjoyed working with you. And I repeat  
6 that.

7 MR. PEPPERMAN: And, Your Honor, I'd add  
8 that that would go for you and your staff, who  
9 have been very accommodating to us.

10 THE COURT: Thank you very much. It's  
11 really been a pleasure and an honor to work with  
12 all of you.

13 MR. BARGER: I would want to join in all  
14 those statements as well. Thank you.

15 THE COURT: I'm not sure where the jury  
16 will go.

17 MR. CHRISTIANSEN: Usually, they go down  
18 to get paid on the third floor. We usually just  
19 go to the third floor and wait there for them.

20 THE COURT: Very good. If you go, you  
21 can probably chat with them now.

22 THE CLERK: Does anybody want a copy of  
23 the verdict?

24 MR. CHRISTIANSEN: I would, please.

25 MR. BARGER: Can we get three copies?

010205

1 MR. CHRISTIANSEN: Three for us? Thank  
2 you, ma'am.

3 THE COURT: We can go off the record  
4 now.

5 (Thereupon, the proceedings  
6 concluded at 2:38 p.m.)  
7  
8

9 -o0o-

10 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
11 PROCEEDINGS.  
12

13   
14 /S/ Kimberly A. Farkas, RPR  
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010206



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105

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DISTRICT COURT  
CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI,  
minors, by and through their guardian,  
MARIE-CLAUDE RIGAUD; SIAMAK  
BARIN, as executor of the ESTATE OF  
KAYVAN KHIABANI, M.D., (Decedent);  
the ESTATE OF KAYVAN KHIABANI, M.D.  
(Decedent); SIAMAK BARIN, as executor  
of the ESTATE OF KATAYOUN BARIN, DDS  
(Decedent); and the Estate of KATAYOUN  
BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., et. al.

Defendant.

Case No. A755977

Dept. No. 14

**PROPOSED JURY INSTRUCTIONS  
NOT GIVEN**

JURY INSTRUCTION NO. \_\_\_\_

In order to establish a claim of strict liability for a defective product, the plaintiff must prove the following elements by a preponderance of the evidence:

1. That MCI was the manufacturer of the product;
2. That the product was defective;
3. That the defect existed when the product left MCI's possession;
4. That the product was used in a manner which was reasonably foreseeable by MCI; and
5. That the defect was a proximate cause of the damage or injury to the plaintiffs.

Δ's Proposed - Not Given  
A

Source: NEV. J.I. 7PL.3 (modified to include "proximate" cause rather than "legal"); *Allison v. Merck and Co., Inc.*, 110 Nev. 762, 767, 878 P.2d 948, 952 (1994); see also *Shoshone Coca Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 443, 420 P.2d 855, 858 (1966); *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970) (definition of "defective").

Refused AK

JURY INSTRUCTION NO. \_\_\_\_

The manufacturer of an automobile has no duty to design the vehicle so as to prevent harm to objects or people who may collide with it.

Δ's Proposed and Rejected  
B

Source: See *De Veer v. Land Rover*, No. B141538, 2001 WL 34354946, at \*3 (Cal. Ct. App. Aug. 14, 2001).

Refused ~~Ar~~

JURY INSTRUCTION NO. \_\_\_\_

The manufacturer of an automobile has no duty to design the vehicle so as to cushion any impact for objects or people who may collide with it.

Δ's Proposed and Rejected  
C

Source: *See De Veer v. Land Rover*, No. B141538, 2001 WL 34354946, at \*3 (Cal. Ct. App. Aug. 14, 2001).

Refused ~~AE~~

JURY INSTRUCTION NO. \_\_\_\_

A product need not be free from all risk of harm. The law does not require that a product be accident proof, fool-proof, incapable of causing harm or perfectly safe.

*Δ's Proposed and Rejected*

*D*

Source: *Bradshaw v. Blystone Equip. Co. of Nevada*, 79 Nev. 441, 445, 386 P.2d 396, 398 (1963) ("We have not yet reached the state where a manufacturer is under the duty of making a machine accident proof or fool-proof."); *Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7<sup>th</sup> Cir. 1975) ("It is axiomatic in products liability law, and appellant concedes, that a manufacturer is legally bound to design and build products which are reasonably fit and safe for the purpose for which they are intended. Nevertheless, it is equally clear that a manufacturer is under no duty to produce accident or fool-proof products. Neither is the manufacturer an insurer that its product is incapable of producing injury."); *Henderson v. Harnischfeger Corp.*, 527 P.2d 353, 361 (Cal. 1974) ("accident-proof language in jury instruction was appropriate to convey the concept that a product need not be free from all risk of harm." \* \* \* "We regard the 'accident-proof' language as an attempt to delineate the outer limits of legal responsibility in a products liability action."); 72 C.J.S. *Products Liability* § 12 ("The law does not require that a product be accident free, foolproof, incapable of harm or perfectly safe."); *Maxted v. Pacific Car & Foundry Co.*, 527 P.2d 832, 837 (Wy. 1974) (citing *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. Date) (holding instruction that manufacturer has a duty to design its product to make it not accident or fool proof but safe for functional use is a misstatement of the law that a product be reasonably safe) (emphasis in original)).


*Refused* 

JURY INSTRUCTION No. \_\_\_\_

When I use the expression "proximate cause," I mean that cause which, in natural foreseeable and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

*Δ's Proposed and Rejected*  
*E*

Source: 4NG.13; *Wyeth v. Rowatt*, 126 446, 464, 244 P.3d 765, 778 (2010) (even in a product defect case, "[a] but-for causation instruction applies when each party argued its own theory of causation, the two theories were presented as mutually exclusive, and the cause of the plaintiff's injuries could only be the result of one of those theories, but not both."); *see also Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 797 (2004) citing *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (quoting *Mahan v. Hafen*, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960)); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998); RESTATEMENT (SECOND) OF TORTS § 431.

*Refused* 

## JURY INSTRUCTION NO. \_\_\_\_

Clear and convincing evidence is a higher burden of proof than proof by a preponderance of the evidence. The plaintiffs have provided clear and convincing evidence if:

1. The proof is strong and clear enough to satisfy the conscience of a common person; or
2. The proof is strong and clear enough to convince a common person that he or she would act in his or her own self-interests based on those facts; or
3. The proof is strong and clear enough to establish the element to be highly probable.

The evidence does not need to be so strong and clear as to be irresistible, it simply must provide the basis for a reasonable inference to be drawn.

Proof by clear and convincing evidence requires that plaintiffs establish every factual element to be highly probable or evidence which must be so clear as to leave no substantial doubt.

Proposed and rejected  
F

Source: Nevada Jury Instruction – Civil, 2011 Edition Inst. 10FR.8 (modified); *Wynn v. Smith*, 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (“Clear and convincing evidence means evidence establishing every factual element to be highly probable or evidence which must be so clear as to leave no substantial doubt”); *In re Drakulich*, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (“This court has held that clear and convincing evidence must be ‘satisfactory’ proof that is ‘so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.’” (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890))); Ninth Circuit Model Civil Jury Instruction 1.4. 3 EDWARD J. DEVITT, CHARLES B. BLACKMAR & MICHAEL A. WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 90.46 (4th

Refused 



1 ed. 1987) (“Clear proof is convincing, unequivocal proof; proof by a substantial  
2 margin. It means proof by more than the mere preponderance of the evidence,  
3 as defined in these instructions. The standard for ‘clear proof’, however, is not  
4 so strict as the standard of ‘proof beyond reasonable doubt’ used in criminal  
5 cases.”); 3A KEVIN F. O’MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE,  
6 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 157.32 (5th ed. 2000) (“Clear  
7 proof is convincing, unequivocal proof or proof by a substantial margin. It  
8 means proof by more than the mere preponderance of the evidence. The  
9 standard for ‘clear proof,’ however, is not so strict as the standard of  
10 ‘proof beyond reasonable doubt’ used in criminal cases.”).

Refused 

JURY INSTRUCTION NO. \_\_\_\_

Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character, as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight negligence, or the want of even scant care.

Proposed and rejected

5

NEV. J.I. 6.21. Gross Negligence Defined.

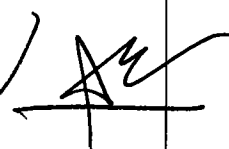
Refused 

INSTRUCTION NO. \_\_\_\_\_

For conduct to rise to the level of recklessness, the risk of harm that the actor disregards must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

**Source:** MODEL PENAL CODE § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.") The Nevada Supreme Court cited with approval to this section's definition of criminal negligence. *Cornella v. Justice Court*, 132 Nev. Adv. Op. 58, 377 P.3d 97, 102 (2016).

Proposed and rejected  
H

Refused 

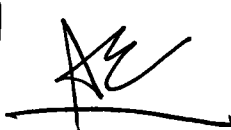
JURY INSTRUCTION NO. \_\_\_\_

"Gross negligence" is very great negligence. It is substantially higher in magnitude and more culpable than ordinary negligence. A person is grossly negligent when he fails to exercise even a slight degree of care. It is more than the lack of care that constitutes simple inadvertence.

Proposed and rejected

I

Source: *Hart v. Kline*, 61 Nev. 96, \_\_\_, 116 P.2d 672, 674 (1941) ("Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence."); see also *Johns v. McAteer*, 85 Nev. 477, 481, 457 P.2d 212, 214 (1969) (citing *Hart v. Kline*).

Revised 

## JURY INSTRUCTION NO. \_\_\_\_\_

For purposes of determining whether to impose punitive damages, the manufacturer of a product who is not aware that the product is unreasonably dangerous cannot be deemed to have consciously disregarded the rights of another.

The mere possession of data from which the manufacture could have inferred that the product is unreasonably dangerous cannot constitute conscious disregard. You may not award punitive damages if the defendant lacked actual knowledge that the product was unreasonably dangerous when the product was made, even if you believe the defendant should have known that the product was unreasonably dangerous.

Proposed & rejected

J

Source: 1 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 6:21 (2017 ed.) (“A defendant that is unaware of a product’s defect can hardly “consciously” or “recklessly” disregard any other party’s rights.”); *see, eg., Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653-54 (Md. 1992) (“Constructive knowledge,” “substantial knowledge” or “should have known” is not enough to meet the “actual knowledge” requirement); *Owens-Corning Fiberglas Corp. v. Mayor & City Council of Baltimore City*, 670 A.2d 986, 995 (M.D. App. 1996) (punitive damages cannot be awarded where “knowledge of the defect and danger” could be found “only by superimposing the twenty-twenty hindsight”); *Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d 442, 446 (Mo. App. 1988) (mere suggestions from which the defendant might deduce the existence of a dangerous defect are not enough); *see also* NRS 42.001(1) (conscious disregard requires “a willful and deliberate failure to act to avoid [the probable harmful] consequences”).

Refused 


JURY INSTRUCTION NO. \_\_\_\_\_

1  
2  
3 You may not award punitive damages if the defendant lacked actual  
4 knowledge that the product was unreasonably dangerous when the product was  
5 made, even if you believe the defendant should have known that the product  
6 was unreasonably dangerous.  
7  
8  
9  
10

11 Prepared and  
12 rejected  
13  
14

15 K  
16  
17

18 Source: 1 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 6:21 (2017 ed.) (“A  
19 defendant that is unaware of a product’s defect can hardly “consciously” or  
20 “recklessly” disregard any other party’s rights.”); see, eg., *Owens-Illinois, Inc. v.*  
21 *Zenobia*, 601 A.2d 633, 653-54 (Md. 1992) (“Constructive knowledge,”  
22 “substantial knowledge” or “should have known” is not enough to meet the  
23 “actual knowledge” requirement); *Owens-Corning Fiberglas Corp. v. Mayor &*  
24 *City Council of Baltimore City*, 670 A.2d 986, 995 (M.D. App. 1996) (punitive  
25 damages cannot be awarded where “knowledge of the defect and danger” could  
26 be found “only by superimposing the twenty-twenty hindsight”); *Sch. Dist. of*  
27 *Independence v. U.S. Gypsum*, 750 S.W.2d 442, 446 (Mo. App. 1988) (mere  
28 suggestions from which the defendant might deduce the existence of a  
dangerous defect are not enough); see also NRS 42.001(1) (conscious disregard  
requires “a willful and deliberate failure to act to avoid [the probable harmful]  
consequences”).

Refused 

JURY INSTRUCTION NO. \_\_\_\_

You may not award punitive damages if the defendant lacked actual knowledge that the product was unreasonably dangerous when the product was made, even if you believe the defendant should have known that the product was unreasonably dangerous. If you find that the defendant was presented multiple warning signs of the unreasonable danger that its product posed but that the defendant willfully and deliberately ignored those warning signs, you may infer that the defendant had actual knowledge of the product's unreasonable danger.

**Source:** *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008) (“[T]he Thitcheners argue that Countrywide knew that it might have misidentified the Thitcheners' unit while handling Rangel's foreclosure due to numerous ‘red flags,’ but willfully and deliberately failed to act to avoid the consequences of its mistake by neglecting to adequately investigate these warning signs. \* \* \* In this case, the Thitcheners presented evidence of multiple ignored warning signs suggesting that Countrywide knew of a potential mix-up, as well as evidence indicating that Countrywide continued to proceed with the foreclosure despite knowing of the probable harmful consequences of doing so. \* \* \* Based on the above, there was sufficient evidence to infer that Countrywide knew that it may have been proceeding against the wrong unit.”).

Proposed and  
rejected L

Refused 

JURY INSTRUCTION NO. \_\_\_\_\_

The mere possession of data from which the manufacture could have inferred that the product is unreasonably dangerous cannot constitute conscious disregard. You may not award punitive damages if the defendant lacked actual knowledge that the product was unreasonably dangerous when the product was made, even if you believe the defendant should have known that the product was unreasonably dangerous.

Proposed and  
Rejected  
M

Source: 1 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 6:21 (2017 ed.) (“A defendant that is unaware of a product’s defect can hardly “consciously” or “recklessly” disregard any other party’s rights.”); *see, eg., Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 653-54 (Md. 1992) (“Constructive knowledge,” “substantial knowledge” or “should have known” is not enough to meet the “actual knowledge” requirement); *Owens-Corning Fiberglas Corp. v. Mayor & City Council of Baltimore City*, 670 A.2d 986, 995 (M.D. App. 1996) (punitive damages cannot be awarded where “knowledge of the defect and danger” could be found “only by superimposing the twenty-twenty hindsight”); *Sch. Dist. of Independence v. U.S. Gypsum*, 750 S.W.2d 442, 446 (Mo. App. 1988) (mere suggestions from which the defendant might deduce the existence of a dangerous defect are not enough); *see also* NRS 42.001(1) (conscious disregard requires “a willful and deliberate failure to act to avoid [the probable harmful] consequences”).

Refused 



JURY INSTRUCTION No. \_\_\_\_\_

1  
2 For purposes of determining whether to impose punitive damages, the  
3 manufacturer of a product who is not aware that the product is unreasonably  
4 dangerous cannot be deemed to have consciously disregarded the rights of  
5 another.  
6

7  
8 *Proposed and rejected*  
9 *N*  
10  
11  
12  
13  
14  
15  
16

17 Source: 1 PUNITIVE DAMAGES: LAW AND PRAC. 2D § 6:21 (2017 ed.) (“A  
18 defendant that is unaware of a product’s defect can hardly “consciously” or  
19 “recklessly” disregard any other party’s rights.”); *see, eg., Owens-Illinois, Inc. v.*  
20 *Zenobia*, 601 A.2d 633, 653-54 (Md. 1992) (“Constructive knowledge,”  
21 “substantial knowledge” or “should have known” is not enough to meet the  
22 “actual knowledge” requirement); *Owens-Corning Fiberglas Corp. v. Mayor &*  
23 *City Council of Baltimore City*, 670 A.2d 986, 995 (M.D. App. 1996) (punitive  
24 damages cannot be awarded where “knowledge of the defect and danger” could  
25 be found “only by superimposing the twenty-twenty hindsight”); *Sch. Dist. of*  
26 *Independence v. U.S. Gypsum*, 750 S.W.2d 442, 446 (Mo. App. 1988) (mere  
27 suggestions from which the defendant might deduce the existence of a  
28 dangerous defect are not enough); *see also* NRS 42.001(1) (conscious disregard  
requires “a willful and deliberate failure to act to avoid [the probable harmful]  
consequences”).

*Refused* 

JURY INSTRUCTION No. \_\_\_\_

You may not award punitive damages if the defendant lacked actual knowledge that the product was unreasonably dangerous when the product was made, even if you believe the defendant should have known that the product was unreasonably dangerous. If you find that the defendant was presented multiple warning signs of the unreasonable danger that its product posed but that the defendant willfully and deliberately ignored those warning signs, you are neither precluded from inferring nor required to infer that the defendant had actual knowledge of the product's unreasonable danger.

**Source:** *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008) ("[T]he Thitcheners argue that Countrywide knew that it might have misidentified the Thitcheners' unit while handling Rangel's foreclosure due to numerous 'red flags,' but willfully and deliberately failed to act to avoid the consequences of its mistake by neglecting to adequately investigate these warning signs. \* \* \* In this case, the Thitcheners presented evidence of multiple ignored warning signs suggesting that Countrywide knew of a potential mix-up, as well as evidence indicating that Countrywide continued to proceed with the foreclosure despite knowing of the probable harmful consequences of doing so. \* \* \* Based on the above, there was sufficient evidence to infer that Countrywide knew that it may have been proceeding against the wrong unit.").

*Proposed and  
revised*

**O**

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_

If the employer is a company, these requirements must be met by an officer, director or managing agent of the company who was expressly authorized to direct or ratify the employee's conduct on behalf of the company.

A "managing agent" is a person who exercises substantial independent authority, discretion and judgment in his or her corporate decision making so that his or her decisions ultimately determine company policy. The fact that someone described their role as "manager" is not, by itself, evidence of the type of managerial capacity that the law requires to charge an employer punitively with the conduct of a managing agent.

An employer cannot ratify an employee's wrongful act unless, with full knowledge of the act and the way in which it was done, the employer adopts the act as the policy of the company, as manifest by words or conduct that cannot otherwise be explained.

*Proposed and rejected*  
*P*

*Refused* *[Signature]*

JURY INSTRUCTION NO. \_\_\_\_

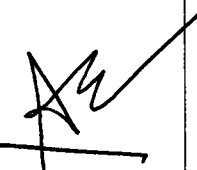
You cannot find that an officer, director, or managing agent of a company cannot ratified an employee's wrongful act unless plaintiff proves all of the following elements by clear and convincing evidence:

(1) The officer, director, or managing agent was expressly authorized to ratify the employee's act on behalf of the company.

(2) The officer, director, or managing agent had possession of full knowledge of the act and the way in which it was done.

(3) The officer, director, or managing agent adopts the act as the policy of the company, as manifest by words or conduct that cannot otherwise be explained.

*Proposed and rejected*  
*Q*

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_


You cannot find that an officer, director, or managing agent of a company cannot ratified an employee's wrongful act unless plaintiff proves all of the following elements by clear and convincing evidence:

(1) The officer, director, or managing agent was expressly authorized to ratify the employee's act on behalf of the company.

(2) The officer, director, or managing agent had possession of full knowledge of the act and the way in which it was done and ratifies it.

*Proposed and rejected*

*R*

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_

An employer cannot ratify an employee's wrongful act unless, with full knowledge of the act and the way in which it was done, the employer adopts the act as the policy of the company, as manifest by words or conduct that cannot otherwise be explained.

*Proposed and rejected*  
*S*


*Refused* *AK*

INSTRUCTION NO. \_\_\_\_\_

To allow plaintiff to recover punitive damages, the jury's verdict must be unanimous.

**Source:** *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (stating that punitive damages "serve the same purposes as criminal penalties"); *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 150 (S.C. 2010) ("[P]unitive damages are quasi-criminal in nature."); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995) ("In contrast to compensatory damages, exemplary damages rest on justifications similar to those for criminal punishment.").

Proposed Not Given T

Refused 

JURY INSTRUCTION NO. \_\_\_\_

As you have been previously instructed during the trial, any negligence by the driver in this case is foreseeable as a matter of law and thus cannot insulate Defendant from liability, if any. Accordingly, you are not to consider whether any conduct on the part of the driver constitutes negligence. You also should consider all of the evidence to determine if there was a defect and, if so, whether the defect caused the collision.

Proposed and rejected U

Refused 



JURY INSTRUCTION NO. \_\_\_\_

Everyone is presumed to know the law. This includes professional drivers, who are presumed to know the traffic laws that apply to them.

There was in force at the time of the occurrence in question a law which read as follows:

When overtaking or passing a bicycle or electric bicycle proceeding in the same direction, the driver of a motor vehicle shall exercise due care and:

(a) If there is more than one lane for traffic proceeding in the same direction, move the vehicle to the lane to the immediate left, if the lane is available and moving into the lane is reasonably safe; or

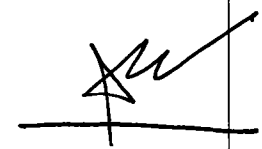
(b) If there is only one lane for traffic proceeding in the same direction, pass to the left of the bicycle or electric bicycle at a safe distance, which must be not less than 3 feet between any portion of the vehicle and the bicycle or electric bicycle, and shall not move again to the right side of the highway until the vehicle is safely clear of the overtaken bicycle or electric bicycle.

Source:

First paragraph: *Atkins v. Parker*, 472 U.S. 115, 130 (1985); see *Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) ("mistake or ignorance of the law is not a defense"). This is true even in a civil context. *Lucas v. Wisconsin Elec. Power Co.*, 466 F.2d 638 (7th Cir. 1972); *Hicks v. State*, 419 S.W.3d 555, 558 (Tex. App. 2013). This includes professional drivers, who are presumed to know the traffic laws that apply to them. See e.g., *Mallery v. Int'l Harvester Co.*, 690 So. 2d 765, 768 (La. App. 1996); see *Alfonso v. Robinson*, 514 S.E.2d 615, 618 (Va. 1999).

Second paragraph: NRS 484B.270 (2011)

Proposed and rejected ✓

Refused 

JURY INSTRUCTION NO. \_\_\_\_

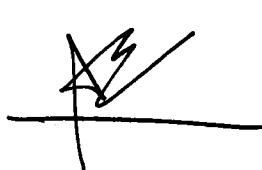
The defendant contends that the plaintiff assumed the risk of the harm that he suffered. To establish that the plaintiff assumed this risk, the defendant must show, by a preponderance of the evidence, that:

1. The plaintiff actually knew and appreciated the particular risk or danger created by the defect;
2. The plaintiff voluntarily encountered this risk while realizing the danger; and
3. The plaintiff's decision to voluntarily encounter the known risk was unreasonable.

A person who thus assumes the risk is not entitled to recover for damages which resulted from the danger to which he exposed himself.

*Proposed and rejected W*

Source: 7PL.9 (Assumption of the Risk).

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_

Plaintiff may not recover damages if the comparative negligence of plaintiffs' decedent contributed more to his death than the combined negligence of all the defendants (MCI; Michelangelo Leasing Inc. d/b/a Ryan's Express; Edward Hubbard; Bell Sports, Inc. d/b/a Giro Sport Design; and Sevenplus Bicycles, Inc. d/b/a Pro Cyclery) in the case. However, if the plaintiffs' decedent was negligent, the plaintiffs may still recover a reduced sum so long as the comparative negligence of plaintiffs' decedent was not greater than the combined negligence of all the defendants.

If you determine that the plaintiffs are entitled to recover, you shall return by general verdict the total amount of damages sustained by the plaintiffs without regard to the comparative negligence of plaintiffs' decedent and you shall return a special verdict indicating the percentage of negligence attributable to the plaintiffs' decedent and to the combined negligence of all the defendants (MCI; Michelangelo Leasing Inc. d/b/a Ryan's Express; Edward Hubbard; Bell Sports, Inc. d/b/a Giro Sport Design; and Sevenplus Bicycles, Inc. d/b/a Pro Cyclery).

The percentage of negligence attributable to plaintiffs' decedent shall reduce the amount of plaintiffs' recovery by the proportionate amount of such negligence and the reduction will be made by the court.

*Proposed and rejected X*

Source: NEV. J.I. 4NG.21; NRS 41.141; *Martin v. U.S.*, 546 F.2d 1355 (9th Cir. 1976); *Young v. Aeroil Products Co.*, 248 F.2d 185 (9th Cir. 1957).

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_

Any alleged negligence by Dr. Khiabani is not a defense to Plaintiffs' product defect claims; so you are not to consider whether Dr. Khiabani's conduct constitutes negligence. However, you may consider whether his conduct was the sole cause of his injuries. You also should consider all of the evidence to determine if there was a defect and, if so, whether the defect caused the collision.

Proposed Not Given

Refused

JURY INSTRUCTION NO. \_\_\_\_

You should keep in mind that compensatory damages, although awarded to compensate a plaintiff for his or her injuries, also have the effect of punishing and deterring misconduct. Therefore, in determining whether to award punitive damages, you should consider the deterrence and punishment imposed solely by any compensatory damages you award. Punitive damages may be awarded only if Motor Coach Industries, Inc.'s culpability, after having paid the compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve the proper amount of punishment or deterrence.

*Proposed - Not Given*  
Z

Source: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) ("Compensatory damages, however, already contain this punitive element."); *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) ("The cleanup expenses Exxon paid should be considered as part of the deterrent already imposed. Depending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses."); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence . . . operates through the mechanism of damages that are compensatory – damages grounded in determinations of plaintiffs' actual losses."); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J. dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) (reversing punitive award and noting that "heavy compensatory damages, recoverable under some circumstances even without proof of negligence, should sufficiently meet the objectives" otherwise served by punitive damages); PROSSER AND KEETON ON TORTS § 4 at 25-26 (one reason for imposing tort liability is to provide incentive to avoid future harm; this "idea of prevention shades into punishment of the offender"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1173-75, 1182 (1931) ("if the compensatory damages are large, the defendant is severely admonished without the addition of any punitive damages" (internal citations omitted)).

*Refused* 

JURY INSTRUCTION NO. \_\_\_\_

## CONSIDERATION OF PROBABLE TAXES

In determining the amount of the loss of probable support, if any, suffered by the heirs as a result of the death of Dr. Khiabani, you must subtract probable income taxes and necessary personal living expenses from Dr. Khiabani's lost earning capacity, as he could not have given the heirs funds that he spent on himself or paid in taxes or used for other purposes.

Proposed and rejected  
AA

Authority:

Restatement (Second) of Torts § 914A. (The damages recoverable under a wrongful death statute measured by the contributions that the deceased would have made to the heirs had the deceased lived "obviously could not be equivalent to [the deceased's] gross earnings, as he could not have given [the heirs] funds that [the deceased] spent on himself or paid in taxes or used for other purposes; and an appropriate percentage of [the deceased's] expected earnings, taking into consideration these various types of expenditures, is proper").

See also *Tesler v. Johnson*, 583 A.2d 133, 136 (Conn. Ct. App. 1990) ("The determination of the amount of damages, if any, to be awarded is within the sole province of the jury. *Holbrook v. Casazza*, 204 Conn. 336, 359, 528 A.2d 774, cert. denied, 484 U.S. 1006, 108 S.Ct. 699, 98 L.Ed.2d 651 (1987). It is also the function of the jury alone to judge the credibility of expert witnesses and the weight to be accorded their testimony. *Hartford Federal Savings & Loan Assn. v. Tucker*, 196 Conn. 172, 183, 491 A.2d 1084, cert. denied, 474 U.S. 920, 106 S.Ct. 250, 88 L.Ed.2d 258 (1985). In fact, the jury in the present case was specifically instructed that they could accept or reject any part of Martin's testimony. If they chose to do so, however, the trial court's charge left them with no guidance as to the calculation of damages for loss of earning capacity. To avoid this peculiar problem, therefore, we now hold that, in wrongful death actions, which require a determination of damages for loss of earning capacity, the jurors must be instructed that, in calculating such damages, they are to subtract probable income taxes and necessary personal living expenses).

Refused



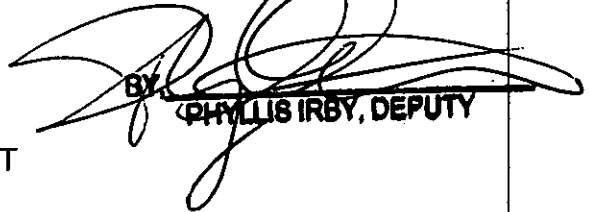
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ORIGINAL

MAR 23 2018

BY   
PHYLLIS IRBY, DEPUTY

JURL

DISTRICT COURT

CLARK COUNTY, NEVADA

KATAYOUN, BARIN

Plaintiff(s),

CASE NO. A-17-755977

DEPT. NO. 14

-vs-

MOTOR COACH INDUSTRIES INC.

Defendant(s).

AMENDED JURY LIST

- |                     |                    |
|---------------------|--------------------|
| 1. BYRON LENNON     | 5. DYLAN DOMINGO   |
| 2. JOHN TOSTON      | 6. ABERASH GETANEH |
| 3. MICHELLE PELIGRO | 7. JAYMI JOHNSON   |
| 4. RAPHAEL JAVIER   | 8. CONSTANCE BROWN |

ALTERNATES

- |                          |                      |
|--------------------------|----------------------|
| 1. ENRIQUE TUQUERO       | 2. RAQUEL ROMERO     |
| 3. PAMELA PHILLIPS-CHONG | 4. GREGG STEPHENS II |
| 5. GLENN KRIEGER         | 6. EMILIE MOSQUEDA   |

A-17-755977-C  
AJUR  
Amended Jury List  
4731890





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ORIGINAL

FILED IN OPEN COURT  
STEVEN D. GRIERSON 010237  
CLERK OF THE COURT

MAR 23 2018

DISTRICT COURT  
CLARK COUNTY, NEVADA

BY:   
DAVID S. KIRBY, DEPUTY

21360

KEON KHIABANI and ARIA KHIABANI,  
minors, by and through their guardian,  
MARIE-CLAUDE RIGAUD; SIAMAK  
BARIN, as executor of the ESTATE OF  
KAYVAN KHIABANI, M.D., (Decedent);  
the ESTATE OF KAYVAN KHIABANI, M.D.  
(Decedent); SIAMAK BARIN, as executor  
of the ESTATE OF KATAYOUN BARIN, DDS  
(Decedent); and the Estate of KATAYOUN  
BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., et. al.

Defendant.

Case No. A755977

Dept. No. 14

SPECIAL VERDICT

A-17-755977-C  
SJV  
Special Jury Verdict  
4731891



1 We the jury return the following verdict:

2 LIABILITY

3 1) Is MCI liable for defective design (Was there a right-side blind spot that made  
4 the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

5 Yes \_\_\_\_\_ No ✓

6  
7  
8  
9 2) Is MCI liable for defective design (Did the lack of proximity sensor(s) make  
10 the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

11 Yes \_\_\_\_\_ No ✓

12  
13  
14 3) Is MCI liable for defective design (Did the lack of a rear-wheel protective bar-  
15 rier make the coach unreasonably dangerous and a legal cause of Dr. Khiabani's  
16 death)?

17 Yes \_\_\_\_\_ No ✓

18  
19  
20 4) Is MCI liable for defective design (Did the aerodynamic design of the coach  
21 make it unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

22 Yes \_\_\_\_\_ No ✓

23  
24  
25 5) Did MCI fail to provide an adequate warning that would have been acted  
26 upon?

27 Yes ✓ No \_\_\_\_\_

1 If you answered "Yes" to any of the above liability questions, fill in the amount  
2 of compensation that you deem appropriate for each Plaintiff's compensatory  
3 damages arising from the death of Dr. Kayvan Khiabani:  
4

5  
6 COMPENSATORY DAMAGES

7 KEON KHIABANI DAMAGES

8 Past Grief and Sorrow, Loss of Companionship,  
9 Society, and Comfort \$ 1,000,000.00

10 Future Grief and Sorrow, Loss of Companionship,  
11 Society, and Comfort \$ 7,000,000.00

12 Loss of Probable Support \$ 1,200,000.00

13  
14 TOTAL \$ 9,200,000.00

15  
16 ARIA KHIABANI DAMAGES

17 Past Grief and Sorrow, Loss of Companionship,  
18 Society, and Comfort \$ 1,000,000.00

19 Future Grief and Sorrow, Loss of Companionship,  
20 Society, and Comfort \$ 5,000,000.00

21 Loss of Probable Support \$ 1,000,000.00

22 TOTAL \$ 7,000,000.00

23  
24 THE ESTATE OF KATY BARIN DAMAGES

25 Grief and Sorrow, Loss of Companionship,  
26 Society, Comfort, and Consortium suffered by  
27 Katy Barin before her October 12, 2017 death \$ 1,000,000.00

1 Loss of Probable Support before her  
2 October 12, 2017 death \$ 500,000.00

3 TOTAL \$ 1,500,000.00

4  
5 DAMAGES TO BE DIVIDED AMONG THE HEIRS

6 Pain and Suffering of Kayvan Khiabani \$ 1,000,000.00

7 Disfigurement of Kayvan Khiabani \$ 0

8  
9 TOTAL \$ 1,000,000.00

10

11 THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

12 Medical and Funeral Expenses \$ 46,003.62

13 If you answered "Yes" on any of the above liability questions, you must also deter-  
14 mine Plaintiffs' claim for punitive damages against MCI:  
15

16 **PUNITIVE DAMAGES**

17 Is MCI liable for punitive damages?

18 Yes \_\_\_\_\_ No ☒ \_\_\_\_\_

19  
20 If so, for which of the following defect(s) do you find MCI liable for punitive dam-  
21 ages?

22  
23 1) Right-side blind spot?

24 Yes \_\_\_\_\_ No \_\_\_\_\_

25 2) Proximity sensor(s)?

26 Yes \_\_\_\_\_ No \_\_\_\_\_

27  
28 ///

1 3) Rear-wheel protective barrier?

2 Yes \_\_\_\_\_ No \_\_\_\_\_

3  
4 4) Aerodynamic design?

5 Yes \_\_\_\_\_ No \_\_\_\_\_

6 5) Failure to warn?

7 Yes \_\_\_\_\_ No \_\_\_\_\_

8  
9  
10 Dated this 23 day of March, 2018.

11  
12  
13   
14 Foreperson

108

108

ORIGINAL

FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

010242

MAR 23 2018

BY

PHYLLIS ARBY, DEPUTY

INST

DISTRICT COURT  
CLARK COUNTY, NEVADA

Case No. A755977

Dept. No. 14

KEON KHIABANI and ARIA  
KHIABANI, minors, by and through  
their guardian, MARIE-CLAUDE  
RIGAUD; SIAMAK BARIN, as execu-  
tor of the ESTATE OF KAYVAN  
KHIABANI, M.D., (Decedent); the  
ESTATE OF KAYVAN KHIABANI, M.D.  
(Decedent); SIAMAK BARIN, as exec-  
utor of the ESTATE OF KATAYOUN  
BARIN, DDS (Decedent); and the Es-  
tate of KATAYOUN BARIN, DDS (De-  
cedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., et  
al.

Defendants

JURY INSTRUCTIONS

A-17-755977-C  
JI  
Jury Instructions  
4731892



010242

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010242



## JURY INSTRUCTION NO. 1

## LADIES AND GENTLEMEN OF THE JURY:

It is my duty as Judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

## JURY INSTRUCTION NO. 2

1  
2  
3 If, in these instructions, any rule, direction or idea is repeated or stated  
4 in different ways, no emphasis thereon is intended by me and none may be  
5 inferred by you. For that reason, you are not to single out any certain sen-  
6 tence or any individual point or instruction and ignore the others, but you are  
7 to consider all the instructions as a whole and regard each in the light of all  
8 the others.

9 The order in which the instructions are given has no significance as to  
10 their relative importance.  
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## JURY INSTRUCTION NO. 3

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3 If, during this trial, I have said or done anything which has suggested  
4 to you that I am inclined to favor the claims or position of any party, you will  
5 not be influenced by any such suggestion.

6 I have not expressed, nor intended to express, nor have I intended to  
7 intimate, any opinion as to which witnesses are or are not worthy of belief,  
8 what facts are or are not established, or what inferences should be drawn  
9 from evidence. If any expression of mine has seemed to indicate an opinion  
10 relating to any of these matters, I instruct you to disregard it.

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## JURY INSTRUCTION NO. 4

The purpose of trial is to ascertain the truth.

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## JURY INSTRUCTION NO. 5

One of the parties in this case is a company. A company is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

## JURY INSTRUCTION NO. 6

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a company.

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## JURY INSTRUCTION NO. 7

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3 The evidence which you are to consider in this case consists of the tes-  
4 timony of the witnesses, the exhibits, and any facts admitted or agreed to by  
5 counsel.

6 Statements, arguments and opinions of counsel are not evidence in the  
7 case. However, if the attorneys stipulate as to the existence of a fact, you  
8 must accept the stipulation as evidence and regard that fact as proved.

9 You must not speculate to be true any insinuations suggested by a  
10 question asked a witness. A question is not evidence and may be considered  
11 only as it supplies meaning to the answer.

12 You must disregard any evidence to which an objection was sustained  
13 by the court and any evidence ordered stricken by the court.

14 Anything you may have seen or heard outside the courtroom is not evi-  
15 dence and must also be disregarded. However, you may consider your view of  
16 the subject motor coach.

## JURY INSTRUCTION NO. 8

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3       There are two kinds of evidence; direct and circumstantial. Direct evi-  
4 dence is direct proof of a fact, such as testimony of an eyewitness. Circum-  
5 stantial evidence is indirect evidence, that is, proof of a chain of facts from  
6 which you could find that another fact exists, even though it has not been  
7 proved directly. You are entitled to consider both kinds of evidence. The law  
8 permits you to give equal weight to both, but it is for you to decide how much  
9 weight to give to any evidence. It is for you to decide whether a fact has been  
10 proved by circumstantial evidence.

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