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.

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

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	Defendants Filed Under Seal on March 26, 2019			
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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 Forseeability 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

4. Interpreter Fess

NRS 18.005(6) limits the recovery of interpreter fees to "[r]easonable fees of necessary interpreters." Plaintiffs request includes costs that are not taxable. Those impermissible fees and costs are outlined below:

Fee Description	Amount	Total
Parking Fee	$12.00	$12.00
Credit Card Processing Fee	$8.76	$8.76
		$20.76

Plaintiffs' request of $620.76 should be reduced to $600.00.

5. Process Server Fees

NRS 18.005(7) limits the fee of any sheriff or licensed process server to "the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary." Plaintiffs' request for $2,469.50 in this category includes fees for services not authorized for recovery under Nevada law. Those impermissible fees and costs are outlined below:

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Fee Description	Amount	Total
Service of TRO	$95.00 + $235.00 + $95.00	$425.00
Attempted Services	$149.50 + $35.00 + $55.00 + $55.00 + 55.00	$349.50
Rush Service	$135.00 (Keck Hospital) $45.00 (Day)	$180.00
Duplicate Service	$140.00 (P. Hubbard)	$140.00
Database Search/Skip Trace	$25.00 + $45.00	$70.00
Wait Time	$35.00	$35.00
Pre-Depo Meeting	$500.00	$500
		$1,699.50

Plaintiffs' recovery of service of process costs should be reduced by $1,699.50, and not exceed $1,395.00.

6. Official Reporter Fees

Plaintiffs claim a total of $49,625.42 for official reporter fees. Included in their calculation is a $31.50 charge for a rough draft transcript. That charge is

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impermissible. The remaining prices for the trial transcripts incorporate fees for real time feed and rush or daily charges. A reasonable fee for the official reporter, as contemplated by NRS 18.005(8), is $3.65 per page, which is the maximum per-page rate set forth in 28 U.S.C. § 753. Plaintiffs costs should be retaxed as follows:

KGI Court Reporting, Inc.

Fee Description	Amount	Total
Voir Dire – Invoice #434	732 pages x $1.83 (1/2 of $3.65)[1]	$1,339.56
Voir Dire – Invoice #431	120 pages x $1.83 (1/2 of $3.65)[2]	$219.60
Deposit – Invoice #414	$5,000.00[3]	$0
Transcripts – Invoice #427	642 pages x $3.65	$2,343.30
Transcripts – Invoice #433	473 pages x $3.65	$1,726.45
Transcripts – Invoice #437	652 pages x $3.65	$2,379.80
Transcripts – Invoice #439	550 pages x $3.65	$2.007.50
Transcripts – Invoice #447	67 pages x $1.00	$67.00
		$10,083.21

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Organized, Inc.

Fee Description	Amount	Total
Rough Draft	$31.50	$0
Deposit	$5,000.00[4]	$0
Transcripts	1,189 pages x $3.65	$4,339.85
Transcripts	653 pages x $3.65	$2,383.45
		$6,723.30

[1] KJC paid 1/2 of the $7.25 per-page expedite cost reflected on the invoice. The cost is adjusted to reflect 1/2 the $3.65 per-page maximum for an ordinary transcript.

[2] KJC paid 1/2 of the $7.25 per-page expedite cost reflected on the invoice. The cost is adjusted to reflect 1/2 the $3.65 per-page maximum for an ordinary transcript.

[3] Any deposit would be credited to charges incurred or returned if unused. It is not a taxable cost and should be reduced to $0.

[4] Any deposit would be credited to charges incurred or returned if unused. It is not a taxable cost and should be reduced to $0.

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Plaintiffs' request should be reduced by $16,806.51, and not exceed $32,818.91.

7. Faxes

Plaintiffs seek an award of $61.60 in costs for faxes, but provide only an internal printout from the Kemp, Jones & Coulthard, LLP ("KJC") to justify the fees. Plaintiffs provide no explanation why the costs were necessary. Presumably e-mail was an option for transmission. Construing the statute strictly, these costs should be denied. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543.

8. Copying Expenses

Plaintiffs seek an award of $44,301.61 in copying fees. NRS 18.005(12) limits recovery to "[r]easonable costs for photocopies." Many of plaintiffs' costs are excessive, unreasonable and not recoverable under Nevada law. Those impermissible fees and costs are outlined below:

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Fee Description	Amount	Total
Internal B&W Printing	$12,394.80	$12,394.80
Internal Color Printing	$12,306.70	$12,306.70
Internal Scanning	$658.72	$658.72
Unsubstantiated Charges	$39.00 (LVMPD)[5]	$39.00
Outside Vendor Charges for Scanning	$764.00 + $825.90 + $1,134.72 + $758.43 +	$3,483.05
Outside Vendor Charges for Oversize Color Printing	$770.04	$770.04
Outside Vendor Color Printing	$54.13 + $1,019.55 + $556.95 + $3,239.10	$4,869.73
Outside Vendor B&W Printing	$909.30 + $809.10	$1,718.40
Duplication for X-rays and Investigative Photos	$59.00	$59.00
Notary Fees	$5.00	$5.00
Copies of Pleadings in Unrelated Case	$15.00 + $30.60	$45.60

[5] This charge is described as fee for a copy of a police report, but the receipt appears to be for a subpoena.

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Unknown Search Fee	$1.00	$1.00
		$36,351.04

Plaintiffs have not demonstrated why it was necessary to print in excess of 100,000 pages or have a vendor charge above-average costs for prints/scans. Scanning costs are not provided for under statute and are not supported by evidence of reasonableness or necessity. These costs are not recoverable. Plaintiffs' request should be retaxed to $7,950.57, a reasonable amount for copies in this case.

9. Long-Distance Phone Calls

Plaintiffs seek an award of $890.41 for phone calls, but provide only internal printouts from the KJC firm to justify the bulk of the fees. The two invoices provided, which total $65.66, are for conference call setups (at least one of which was with the Special Master). Plaintiffs provide no explanation why the costs were necessary. In *Cadle Company v. Woods & Erickson, LLP*, the Nevada Supreme Court reversed much of a cost award because "[t]he affidavit of counsel *told* the court that the costs were reasonable and necessary, but it did not "*demonstrate* how such fees were necessary to and incurred in the present action." 131 Nev., Adv. Op. 15, 345 P.3d 1049, 1054 (2015) (emphasis in original). Construing the statute strictly, these costs should be denied. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543.

10. Postage Fees

Only reasonable costs for postage are recoverable under NRS 18.005(14). Of the $1,812.48 claimed by plaintiffs, only $130.87 is for actual postage. The remaining $1,681.61 are FedEx charges. There is no justification for why this indiscernible packages could not be shipped using standard U.S. mail postage charges. Construing the statute strictly, the FedEx costs should be denied. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543. Plaintiffs' request should be retaxed to $130.87.4

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11. Travel Expenses

Plaintiffs seek an award of $14,036.65 in travel expenses. NRS 18.005(15) limits travel expenses to "reasonable costs for travel and lodging incurred taking depositions and conducting discovery." Plaintiffs request an unreasonable and unjustifiable amount. All flights booked by KJC are Business Select flights. Much cheaper airfare could have been purchased. Those impermissible and luxury fees and costs are outlined below:

Fee Description	Amount	Total
Business Select Flights	$1,167.96 + $516.63 + $1,201.56	$2,886.15[6]
WiFi on Flight	$8.00	$8.00
Airfare for Witnesses at Trial	$527.96 (Witherell)	$527.96
Rental Car	$303.99[7]	$303.99
Hotels for Trial Witnesses	$1,219.98	$1,219.98
Meal Costs	$83.24 + $38.01 + $75.00 + $110.00 + $8.32 + $46.18 + $10.49 + $24.15 + $28.98 + $7.57 + $12.70 + $52.45 + $57.77 + $65.97 + $56.02 + $75.22	$752.07
Cab Fares and Parking Charges for Witnesses, Trial, and Court Hearings	$225.37	$225.37
Undocumented Travel[8]	$6,855.29 + $509.40	$7,364.69
		$11,364.11 - $12,326.16

The Court should reduce the amount for travel expenses and award costs

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[6] Southwest Airlines tends to charge 1.5-3 times more for Business Select flights. The Court should reduce these costs to an amount between $962.05 – 1,924.10.

[7] A rental car in Chicago is not necessary. Public transportation is widely available, as are Uber and Lyft.

[8] Attorneys Peter Christiansen and Kendelee Works provide credit card statements that lack the itemization and detail needed to determine the reasonableness and necessity of the claimed costs.

not to exceed the range of $1,710.49 or $2,672.54.

12. Expenses Not Recoverable Under NRS 18.005

Plaintiffs seek an exorbitant amount of fees for costs that are not recoverable under NRS 18.005. All those costs should be reduced to $0.

a. Legal Research

Plaintiffs seek an award of $30,018.77 in legal research costs. Legal research costs are only recoverable if they are demonstrated to be "reasonable and necessary." NRS § 18.005(17). Plaintiffs make no such showing here, and these costs should be denied entirely. *See, e.g., Waddell v. L.V.R.V, Inc.,* 122 Nev. 15, 25–26, 125 P.3d 1160, 1166–67 (2006) (cost for computerized legal research properly denied "because those costs were not sufficiently itemized"). The "supporting documentation" for these claimed costs is nothing more than an itemized list of the costs, with no documentary support and no description of the charges, showing that they were actually incurred or explaining why they were necessary and reasonable for the action.

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Further, computerized research expenses must be necessarily incurred in the course of litigation, not merely helpful or advantageous. *Bergmann v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560, 560 (1993). Computerized research is only taxable if the expenses incurred are for "electronic discovery expenses" and "do not represent part of the [party's] legal fees." *In re Dish Network Deriv. Litig.*, 133 Nev., Adv. Op. 61, 401 P.3d 1081, 1093 (2017).

b. Run Service

Plaintiffs request an award of $1,887.00 in runner fees. Runner fees are not specifically enumerated under NRS 18.005 and plaintiffs seek to recover these costs under the "catch-all" provision of NRS 18.005(17), but provide no explanation as to why their runner/messenger costs are were necessary to and incurred in this action. Additionally, all of the runs charged by KJC appear to have been performed by an in-house runner and should be part of the firm's

overhead. Because plaintiffs have failed to demonstrate how these costs are necessary and reasonable, they are not taxable under NRS 18.005 and must be reduced to $0. *Cadle*, 131 Nev., Adv. Op. 15, 345 P.3d at 1054.

c. Trial Support

Plaintiffs request $129,099.30 in "trial support" fees. All of these cost are not specifically enumerated in NRS 18.005 and should be reduced to $0. The $3,190.00 claimed by KJC for flash drives are not sufficiently documented. *Id.* The costs for staff overtime are prohibited. The bulk of the costs are for professional consultants. While these services are desirable, the were not necessary for presentation of plaintiffs' case and are not recoverable. Many of the consultants were assisting with research and analysis more akin to attorneys' fees. *Dish Network*, 133 Nev., Adv. Op. 61, 401 P.3d at 1093. Plaintiffs incurred a tremendous expense for unnecessary and excessive services and products. The Court must deny all these costs.

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CONCLUSION

Based on the foregoing, MCI respectfully requests that the Court grant its motion to retax and award an amount of costs not to exceed the range of $112,912.03 and $113,874.08.

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Dated this 30th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2018, a true and correct copy of the foregoing "Motion to Retax Costs" was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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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., a Delaware corporation; et al.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

OPPOSITION TO MOTION FOR LIMITED POST-TRIAL DISCOVERY

COME NOW Plaintiffs, by and through counsel of record, and hereby oppose the motion for "limited" post-trial discovery on the following grounds:

(1) Losing litigants are not permitted to take discovery after judgment;

(2) NRCP 27(b) does not authorize post-judgment discovery;

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(3) MCI was given an authorization to obtain "any and all records, reports and information concerning [Kayvan Khiabani's] employment on July 26, 2017, and MCI apparently neglected to send the authorization to the employer;

(4) MCI can never show that it "could not have reasonably discovered this evidence during pre-trial discovery" because the written authorization for the employment file was provided on July 26, 2017, and discovery did not close until December 2017; and

(5) MCI has not provided one iota of competent evidence to support any of its scandalous allegations that (i) decedent was involved "in UNR's [alleged] billing fraud" (Obj., 8:17); (ii) that decedent, **a tenured professor**,[1] had somehow been "let go from his employment" without a hearing (Obj., 13:14); (iii) that decedent incurred a "loss of his medical license" (Obj., 12:13); or (iv) that decedent was the subject of "criminal charges for Medicaid fraud" (Obj., 12:13).

I. ARGUMENT

A. Losing Litigants Are Not Permitted to Take Discovery After Judgment

It is well-settled that "[t]he normal rules governing discovery pertain to the period between the pleadings and trial." *Goldy v. Beal*, 91 F.R.D. 451, 454 (M.D. Penn. 1981), citing FRCP 26-27; *accord* NRCP 26-27; *In re Wyatt, Inc.* 168 B.R. 520, 523 ("normal rules concerning interrogatories and requests for documents do not apply"); *U.S. ex rel. Free v. Peters*, 826 F.Supp. 1153, 1154 (N.D. Ill. 1993) ("the flexible discovery provisions of the [] Rules of Civil Procedure are applicable only to the period between the pleadings and trial"). Accordingly, courts have repeatedly recognized that "**post-trial discovery is generally not permitted**." *Underwood v. B.E. Holdings, Inc.*, 269 F.Supp.2d 125, 134 (W.D. N.Y. 2003) (bold added).

---

[1] Under the Bylaws of the Nevada System of Higher Education (NSHE), which are adopted as Nevada law in NRS Ch. 396, a tenured university professor like Dr. Khiabani may only be terminated for cause and "[a] hearing… shall be required before the employment of an employee may be terminated for cause." *See* Bylaws of the Board of Regents, 5.13.2 and 6.3.6. Even then, the act of termination is judicial in nature and subject to review by the Nevada Supreme Court. *See State ex rel. Richardson v. Board of Regents of Univ. of Nev.*, 70 Nev. 144, 149 (1953).

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This is especially true when the request for post-trial discovery is for the purpose of attacking a final judgment under Rule 60(b) (motion for relief from judgment) or 59(a) (motion for new trial). "In that 'a request for discovery for the purpose of attacking a final judgment involves considerations not present in pursuing discovery in a pending action prior to judgment… [i.e.,] the public interest of the judiciary in protecting the finality of judgments,' courts generally embrace restrictive discovery rights post-trial, **requiring a prima facie demonstration of success on the merits**." *Peters*, 826 F.Supp. at 1154, *citing H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976) (bold added).

Goodyear involved a Rule 60(b) attempt by the losing party to overturn a judgment on the basis of fraud. 536 F.2d 1115. Following the entry of judgment, Goodyear learned of information that caused it to believe that the opposing party failed to disclose critical documents during discovery in the underlying case. *Id.* at 1118. In support of its motion, Goodyear argued that its adversary possessed certain documents, which, if exposed, would support its request to vacate the final judgment and sought post-judgment discovery on that basis. *Id.* The district court denied the request for post-judgment discovery, and Goodyear appealed. *Id.*

On appeal, the Sixth Circuit first observed that "Goodyear has not cited, and we have not found, any cases dealing with the **right** to post-judgment discovery…." *Id.* (bold added). Nevertheless, the Court considered the issue and soundly affirmed the district court's decision denying Goodyear's extraordinary request for post-judgment discovery for the purpose of attacking a final judgment:

> **Goodyear is plainly not entitled to discovery of documents it did not request in pretrial discovery**…. Goodyear apparently believes that it is entitled to broader discovery so that it can fish for other documents arguably within the class of documents which it could have requested in pretrial discovery. **We do not consider the granting of post-judgment discovery a proper vehicle for reviewing the integrity of pretrial discovery. Allegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court.** *Id.*, citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2870, p. 254 (1973) (bold added).

Based on this clear authority, MCI's inappropriate request for post-judgment discovery should be denied.

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B. NRCP 27(b) Does Not Authorize Post-Judgment Discovery.

MCI relies solely upon NRCP 27(b) as the basis for its extraordinary request to conduct post-judgment discovery that MCI could have done with the July 26, 2017 authorization provided to MCI but that MCI neglected to do. (Obj., 10:6 to 11:3). Rule 27 neither justifies nor supports MCI's request.

NRCP 27 is a preservation rule. It "is available in **special circumstances** to **preserve testimony** which could otherwise be lost due to some occurrence other than the passage of time." *Sunrise Hosp. v. Eighth Jud. Dist. Ct.*, 110 Nev. 52, 55 (1994) (bold added); NRCP 27(b) (pending appeal, the district court "may allow the taking of the depositions of witnesses to **perpetuate** their testimony for use in the event of further proceedings in the district court."). If, for example, "a witness is aged or gravely injured and in danger of dying," a deposition under Rule 27 may be appropriate either before the action or pending appeal to perpetuate and preserve such witness' testimony for the coming action or possible further proceedings in the district court following the appeal. *Id.*, *quoting Cardinal v. Zonneveld*, 89 Nev. 403, 405 (1973) ("'The purpose of the perpetuation rule, NRCP 27, is to provide an ancillary proceeding to prevent a failure of justice by preserving testimony which would otherwise be lost before the matter to which it relates is ripe for judicial determination.'"); *See also* 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2076 (1970).

"Perpetuation of testimony pursuant to NRCP 27 is not intended as a substitution of discovery." *Sunrise Hosp.*, 110 Nev. at 55. Courts generally agree that to allow Rule 27 to be used for anything other than the perpetuation of testimony that might otherwise be lost "would be an abuse of the rule." *Id.*, citing 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2071. The Nevada Supreme Court has directly admonished that "[a] district court may **not** grant a petition to perpetuate testimony pursuant to NRCP 27 for the sole purpose of allowing the petitioner to obtain information with which to formulate the petitioner's complaint." *Id.*

Although the Nevada Supreme Court has not had the occasion to apply this rule in the context of a request to perpetuate testimony pending appeal, there is no reason to believe that it

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wouldn't render the same holding in this situation, as the majority of courts that have addressed the issue have not drawn a distinction between the Rule's application before the action and pending appeal. For example, in *CPR Associates, Inc. v. Penn. Chapter of AHA*, the United States District Court soundly rejected a request for post-trial discovery under Rule 27(b) for the same reasons articulated in *Sunrise Hosp.*:

> Rule 27(b) provides that discovery may be had before the taking of an appeal if the time therefor has not expired (which, in this case it has not) only by leave of the district court in which the judgment was rendered, and only for the purpose of perpetuating testimony for use in further proceedings in the district court. **By implication, especially when read in conjunction with the legal standards for consideration of new trial motions, post-trial discovery is not permitted for the purpose of marshalling new evidence**. 1990 WL 200267 *2 (W.D. Penn. Dec. 3 1990) (bold added).

Similarly, in *Central Bank of Tampa v. Transamerica Ins. Group*, the United States District Court held that Rule 27(b) did not authorize post-judgment discovery:

> Under Rule 27(b), the court "may" allow the perpetuation of testimony (sought here by deposition) pending appeal where it is "proper to avoid a failure or delay of justice." It appears that the rule is primarily designed to perpetuate testimony in those instances where it appears that the passage of time or the unavailability of witnesses pending the hearing of the appeal and possible new trial would cause injustice.
>
> Here, rather than perpetuate testimony which may become lost, plaintiff attempts to utilize Rule 27(b) to obtain documents allegedly supporting an argument raised for the first time post-judgment. In such a case justice supports [denying the motion]. 128 F.R.D. 285, 286 (W.D. Fl. 1989) (citations omitted) (bold added).

Because MCI solely relies on Rule 27(b), which does **not** authorize post-judgment discovery, its extraordinary request must be denied.

C. MCI Was Provided but Did Not Use an Authorization To Obtain Employment Records On July 26, 2017.

The first argument that Plaintiffs made to the Special Master was the MCI was provided an employment records authorization on July 26, 2017 and was belatedly seeking records that it neglected to obtain with the authorization. These are the exact same records that MCI now seeks. (Obj., 9:21; "Here, Defendant seeks production of Dr. Khiabani's employment records.")

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Hence, the precise issue before the Court is whether or not a Defendant that fails to do discovery before the verdict can do the exact same discovery after entry of judgment against it.

MCI's response to the Special Master on this dispositive point was silence. In the objection, MCI does not even mention to the Court that MCI was given an authorization to do the exact same discovery that it now seeks on July 26, 2017—**during the first week of discovery**.

Plaintiffs argued at the Special Master hearing that MCI did not use the authorization (based upon the absence of any production to Plaintiffs of records that MCI would have procured from the authorization). MCI has never explicitly confirmed or denied whether or not it forwarded the authorization to UNR and, if so, what records were provided. In the event that MCI did not use the authorization, that should be the end of this matter. If MCI did use the authorization, however, then MCI should immediately produce the records obtained and explain why the records were not provided by MCI to Plaintiffs.

D. MCI's Apparent Excuse for Not Using the July 27, 2017 Authorization Has No Merit.

On page 13 of the Objection, MCI argues that its apparent failure to forward the written authorization for employment records to UNR should be excused because there was "expedited discovery":

> No party can or should be expected to brainstorm on every hypothetical scenario, no matter how far-fetched, and then seek discovery on each feeble possibility. And that practical recognition is especially important where there was an expedited discovery schedule as truncated as this one. (Obj., 13:8-13) (emphasis by MCI).

In response, the authorization was provided to MCI on July 26, 2017—again, **during the first week of discovery**. Discovery ended on December 21, 2017 (and MCI was still subpoenaing documents long after the close of discovery, right up to trial). MCI had August, September, October, November, December (and then some) to forward the authorization to UNR. Not only was this not "truncated", it is much longer than most standard discovery periods.

Regarding MCI's claim that obtaining employment records is "a hypothetical scenario" that is "far-fetched", MCI did in fact get an employment record authorization. It was executed

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by Plaintiffs. MCI conducted other discovery on the loss of probable support issue as well. The problem is not that MCI did not consider getting the employment records—it did—the problem is that MCI failed to forward the records authorization to the employer after getting the signed authorization. MCI has no one to blame for this failure but MCI.

E. MCI Can Never Show That MCI "Could Not Have Reasonably Obtained Employment Records During Pre-trial Discovery" Because the Written Authorization for The Employment File Was Provided on July 26, 2017.

The failure of MCI to get the employment file last July certainly cannot be twisted to prove that MCI "could not have reasonably discovered this evidence during pre-trial discovery." (Obj., 12:23). MCI has not even told the Court whether MCI forwarded the July 26, 2017 authorization to UNR (or confessed to its own neglect). Likewise, MCI has not explained why MCI asked for and received the written employment record authorization but then apparently failed to use it. Instead of casting malicious aspersions of criminal fraud on decedent with absolutely no admissible evidence, MCI should start with an honest explanation to the Court as to how and why MCI dropped the ball on the MCI discovery regarding the employment records.

F. MCI Has Not Provided Any Evidence to Support Its Scandalous Claims

There is no affidavit (or other testimony) provided in support of the motion. Instead, MCI relies solely upon a television report that quotes anonymous sources. This is not evidence.

MCI admits as much but states that an unverified report based on anonymous hearsay should be deemed to be evidence because MCI believes that the journalist is "trusted." Ignoring the fact that this is the exact same journalist who, for **decades**, has reported that UFOs exist, the bottom line is that, by its own admission, MCI has not offered any evidence to supports its scandalous claims.

///

///

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II. CONCLUSION

MCI was provided a written authorization for employment records on July 26, 2017. It now seeks the same discovery. This extraordinary request should be denied for the reasons set forth herein

DATED this 3 day of May, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 3 day of May, 2018, the **OPPOSITION TO MOTION FOR POST-TRIAL DISCOVERY** was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

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Signature Block

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

Defendants.

Case No. A755977

Dept. No. 14

APPENDIX OF EXHIBITS TO:

MOTOR COACH INDUSTRIES, INC.'S MOTION FOR A LIMITED NEW TRIAL

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Dated this 7th day of May, 2018.

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Lewis Roca
ROTHGERBER CHRISTIE

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2018, a true and correct copy of the foregoing appendix was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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Edward Hubbard

/s/ Jessie M. Helm
An Employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP

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EXHIBIT A

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EXHIBIT A

ORIGINAL

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

SPECIAL VERDICT

We the jury return the following verdict:

LIABILITY

1) Is MCI liable for defective design (Was there a right-side blind spot that made the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

Yes _____ No ✓

2) Is MCI liable for defective design (Did the lack of proximity sensor(s) make the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

Yes _____ No ✓

3) Is MCI liable for defective design (Did the lack of a rear-wheel protective barrier make the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

Yes _____ No ✓

4) Is MCI liable for defective design (Did the aerodynamic design of the coach make it unreasonably dangerous and a legal cause of Dr. Khiabani's death)?

Yes _____ No ✓

5) Did MCI fail to provide an adequate warning that would have been acted upon?

Yes ✓ No _____

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If you answered "Yes" to any of the above liability questions, fill in the amount of compensation that you deem appropriate for each Plaintiff's compensatory damages arising from the death of Dr. Kayvan Khiabani:

COMPENSATORY DAMAGES

KEON KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort	$ 1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort	$ 7,000,000.00
Loss of Probable Support	$ 1,200,000.00
TOTAL	$ 9,200,000.00

ARIA KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort	$ 1,000,000.00
Future Grief and Sorrow, Loss of Companionship, Society, and Comfort	$ 5,000,000.00
Loss of Probable Support	$ 1,000,000.00
TOTAL	$ 7,000,000.00

THE ESTATE OF KATY BARIN DAMAGES

Grief and Sorrow, Loss of Companionship, Society, Comfort, and Consortium suffered by Katy Barin before her October 12, 2017 death	$ 1,000,000.00

Loss of Probable Support before her October 12, 2017 death $ 500,000.00

TOTAL $ 1,500,000.00

DAMAGES TO BE DIVIDED AMONG THE HEIRS

Pain and Suffering of Kayvan Khiabani $ 1,000,000.00

Disfigurement of Kayvan Khiabani $ 0

TOTAL $ 1,000,000.00

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses $ 46,003.62

If you answered "Yes" on any of the above liability questions, you must also determine Plaintiffs' claim for punitive damages against MCI:

PUNITIVE DAMAGES

Is MCI liable for punitive damages?

Yes _____ No ✓

If so, for which of the following defect(s) do you find MCI liable for punitive damages?

1) Right-side blind spot?

Yes _____ No _____

2) Proximity sensor(s))?

Yes _____ No _____

///

3) Rear-wheel protective barrier?

Yes _____ No _____

4) Aerodynamic design?

Yes _____ No _____

5) Failure to warn?

Yes _____ No _____

Dated this 23 day of March, 2018.

Foreperson

EXHIBIT B

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EXHIBIT B

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident, et al.,

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED THURSDAY, MARCH 1, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
Larry Stokes, PhD	66	91	113	
Edward Hubbard	130	170	197	

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
230		142	
231		142	
232		142	
233		142	
234		142	
235		142	
236		142	
237		142	
503		197	
504		197	
505		197	
506		197	
507		197	

Dr. -- the present value of the total economic loss for Dr. Kayvan Khiabani?

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

THE COURT: Yes.

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

MR. CHRISTIANSEN: May I proceed, Your Honor?

THE COURT: Yes.

BY MR. CHRISTIANSEN:

Q. I'm sorry, Doctor. Tell me again what the total was, for present value of the total economic loss of the life of Dr. Kayvan Khiabani.

A. The total of the two numbers that we've dealt with is $15,316,090.

Q. And, Doctor, when you told the ladies and gentlemen of the jury that, on a yearly basis, you did reductions, did you make -- is one of the exhibits to your chart -- or to your report that annual reduction back to present value that you explained to us?

A. Yeah. In table page 1 of my report, all of the figures in there are in present value terms.

Q. Okay. And table page 1, I'm not going to spend any time on it, just to show that you actually did the calculation for each and every year --

OFFER OF PROOF

BY MR. ROBERTS:

Q. Okay. A few minutes ago when we were talking, you told me that the year 2016 was the base year that you used for your calculations; correct?

A. Correct.

Q. And you gave me an income number of $909,503; right?

A. Correct.

Q. Okay. Did you have Dr. Khiabani's W-2 from the board of regents at the time you did your report?

A. Not sure. What's -- for this year? For 2016?

Q. For 2016.

A. I must have, yes.

Q. And I'm going to show you a copy of the W-2 for 2016 from your work file that you provided in this matter.

Does this W-2 indicate the total reported income from the board of regents?

A. It appears to, yes.

Q. And what is the amount of that income as reported on the W-2?

A. $990,503.12.

Q. Okay. So is it fair to say that the number

that you previously gave to the jury as the base number for calculations was a gross income number?

A. Yes.

Q. Okay. It was before taxes?

A. Yes.

Q. Okay. And does the W-2 indicate the amount of taxes that were withheld before the money was paid to Dr. Khiabani?

A. It shows -- it shows reductions, yes.

Q. Okay. And what -- what's the amount of tax up on that top line, "Federal tax withheld"?

A. 300 -- pardon me. $332,302.91.

Q. Okay. So is it fair to say that the amount of income that Dr. Khiabani was receiving throughout the year was his gross income of 952 and some change less the taxes, or approximately just -- $619,777?

A. I'll take your word for it.

Q. Okay. Sounds about right?

A. It does.

Q. You work with numbers a lot. I got close.

Now, we know that the amount withheld isn't the amount finally paid. Even though that's the amount he would have had in his hand that year, he would have had an opportunity to file tax returns and either get some back or pay extra; right?

A. Yes.
Q. And you have the 2016 income tax returns in your file showing the actual amount of tax paid by Dr. Khiabani's family; correct?
A. I believe that's the case, yes.
MR. ROBERTS: If I could approach, again, Your Honor?
THE COURT: Certainly.
MR. ROBERTS: Thank you.
BY MR. ROBERTS:
Q. Here's one page from the 2016 tax return showing the summary of the total income to the family and the total amount paid. Do you see that?
A. Yes.
Q. And am I correct that that's just a little bit over 35 percent of the gross income that the Khiabanis paid in taxes?
A. Looks like it, yes.
Q. Okay. So the amount withheld from taxes is actually a little less than the actual tax Dr. Khiabani had to pay; right?
A. For 2016, yes.
Q. Okay. So we can use that number as a pretty safe number of the maximum amount he would have had to spend after he paid his federal taxes?

A. For that -- for -- yes. For 2016?
Q. Okay.
A. Correct.
Q. And Mr. Christiansen said that it's up to the jury to determine how much he would have provided to his children in lost support; correct?
A. I believe so, yes.
Q. All right.
A. Oh, yes, he did.
Q. He couldn't have given his children any more than he had left in his pocket after he paid his federal taxes, could he?
A. Not in any current sense, no, he could not.
MR. ROBERTS: Okay. Thank you very much Doctor.
That's all I have, Your Honor. I appreciate the opportunity.
THE COURT: Okay. Thank you.
Mr. Christiansen, anything? Okay.
Thank you very much. You're excused. Thank you.
MR. KEMP: Mr. Stokes is excused?
THE COURT: Yes, he's excused.
I'm going to start using my mic. I'm also too soft-spoken at times. All right.

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Q. And it's my recollection your testimony was that, from the point at the city bus cutout, which is, to your best estimate, 450ish feet from the intersection, where you put the red Post-it up there on that map --

A. Yes.

Q. -- from that point when you pass the bike up through the zero line, you did not see a cyclist?

A. Correct. Not in the bike lane, no, sir.

Q. Not only did you not see the cyclist in the bike lane, you didn't see the cyclist in this turn lane; correct?

A. Correct, yes.

Q. You didn't see the cyclist at all?

A. Correct.

Q. From the moment you passed him here at the city bus cutout, what you've done your best to estimate for me is about 450 feet north of the zero line at the intersection.

A. Correct.

Q. And during this time, you were paying attention, was your testimony?

A. Yes, sir.

Q. You had operated this bus before?

A. Yes, sir.

EXHIBIT C

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EXHIBIT C

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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 VERDICT FORM
NOT USED AT TRIAL

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Case Number: A-17-755977-C

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., Defendant.	Case No. A755977 Dept. No. 14 **SPECIAL VERDICT**

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We the jury return the following verdict:

LIABILITY

1. Do you find, by a preponderance of the evidence, that the motor coach was defective and that the defect was a legal cause of Kayvan Khiabani's death? (Check all boxes that apply.)

Allegedly defective aspect of the coach	***Did this make the coach unreasonably dangerous?***	***Was the defect a legal cause of Khiabani's Death?***
Right-Side Blind Spot	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Proximity Sensor	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Rear-Wheel Protective Barrier	☐ Yes ☐ No	☐ Yes ☐ No

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Aerodynamic Design	☐ Yes	☐ No	☐ Yes	☐ No
Failure to Warn	☐ Yes	☐ No	☐ Yes	☐ No

If you did not answer "Yes" to both "Defect" and "Legal Cause" for any alleged defect, please sign and return this form. Do not answer any further questions.

COMPENSATORY DAMAGES

2. Fill in the amount of compensation that you deem appropriate for each of plaintiffs' compensatory damages arising from the death of Kayvan Khiabani:

KEON KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort $ _____

Future Grief and Sorrow, Loss of Companionship, Society, and Comfort $ _____

Loss of Probable Support $ _____

TOTAL $ _____

ARIA KHIABANI DAMAGES

Past Grief and Sorrow, Loss of Companionship, Society, and Comfort $ _____

Future Grief and Sorrow, Loss of Companionship, Society, and Comfort $ _____

Loss of Probable Support $ _____

TOTAL $ _____

THE ESTATE OF KATY BARIN DAMAGES

Greif and Sorrow, Loss of Companionship, Society, Comfort, and Consortium suffered by Katy Barin before her October 12, 2017 death $ _____

Loss of Probable Support before her October 12, 2017 death $ _____

TOTAL $ _____

DAMAGES TO BE DIVIDED AMONG THE HEIRS

Pain and Suffering of Kayvan Khiabani $ _____

Disfigurement of Kayvan Khiabani $ _____

TOTAL $ _____

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses $ _____

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PUNITIVE DAMAGES

3. Do you find, by clear and convincing evidence, that the defendant acted with malice in its conduct relating to a defect that caused Kayvan Khiabani's death?

Yes ___ No ___

If you answered "Yes," please indicate for what defects you find by clear and convincing evidence, that the defendant acted with malice

Right-Side Blind Spot	☐ Yes	☐ No
Absence of Proximity Sensor	☐ Yes	☐ No
Absence of Rear-Wheel Protective Barrier	☐ Yes	☐ No
Aerodynamic Design	☐ Yes	☐ No
Failure to Warn	☐ Yes	☐ No

4. Do you choose to award the plaintiffs punitive damages against the defendant for the sake of example and punishment?

Yes ___ No ___

If "Yes," you will hear additional evidence and argument before awarding punitive damages. Do not award punitive damages now.

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Foreperson

Date: _____

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EXHIBIT D

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EXHIBIT D

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October 16, 2017

Darrell L. Barger, Esq.
HARTLINE DACUS BARGER DREYER LLP
1980 Post Oak Blvd, Suite 1800
Houston, Texas 77056

Subject: Khiabani v. MCI
Exponent Project No. 1707127.000

Dear Mr. Barger:

I am submitting this report to detail my findings to-date in regard to the above-referenced matter.

I am a Principal Scientist in the Human Factors practice at Exponent Failure Analysis Associates (Exponent). I have specialized knowledge in the areas of human factors, human perception and performance, safety, and risk analysis. I have extensive publications in this field, including several in the area of accurately representing low light scenes using digital photography. I received a B.S. degree in biopsychology and cognitive science (1998) from the University of Michigan and an M.A. and Ph.D. in cognitive neuroscience (2000, 2003) from the University of California, Los Angeles. I am a member of the Human Factors and Ergonomics Society and the Society of Automotive Engineers. A list of materials I have reviewed is attached as Appendix A. A copy of my curriculum vitae is attached as Appendix B, and a list of my sworn testimony for the last four years is attached as Appendix C. My company, Exponent, bills my time at $470 per hour in 2017.

Exponent was retained by Hartline Dacus Barger Dreyer LLP to assess human factors issues that may have contributed to an accident that occurred in Las Vegas, NV on April 18th, 2017, in which a bicyclist collided with a motor coach.

Incident Description

The collision between bus driver, Mr. Hubbard, and bicyclist, Dr. Khiabani, occurred on April 18th, 2017 at approximately 10:36 a.m. at the intersection of Pavilion Center Drive and Griffith Peak Drive.[1] At the time of the incident, Mr. Hubbard was transporting Thermo Fisher Scientific employees from McCarran International Airport to Red Rock Casino for a national

[1] TCR pg. 1

sales meeting.[2] He was driving a 2008 MCI J4500 motor coach operated by Michelangelo Leasing.[3] Mr. Hubbard testified that he first noticed Dr. Khiabani in the bike lane ahead of him as he was approaching the intersection of Charleston and Pavilion, just north of the area of the accident. On Pavilion Center Drive, at the intersection with Griffith Peak Drive, the front left handlebar of the bicycle impacted the bus just aft of the front right wheel well.[4] Subsequently, the bicyclist fell to the ground and was impacted by the outer portion of the curbside drive axle tire.[5]

Mr. Hubbard stated that he was able to see the bicyclist as he passed him and maintained a distance of at least 3 to 4 feet from the bicyclist the entire time.[6] Mr. Hubbard testified that near the intersection of Pavilion and Griffith, he saw the bicyclist move towards the door area of the bus.[7] Although Mr. Hubbard tried to swerve out of the way, Dr. Khiabani still impacted the side of the bus.[8]

There were several witnesses to the accident. Robert Pears and Michael Plantz were passengers on the subject bus, seated in the front row, at the time of the incident.[9] Both passengers indicated that they first noticed the bicyclist on Charleston ahead of the bus[10]. They also both testified that the bicyclist was in the right-hand turn lane on Pavilion, although Mr. Pears recalls that when Dr. Khiabani turned onto Pavilion, he initially turned into the right through lane (lane 2), then pulled into the bicycle lane, and then moved into the right turn lane before moving back to lane 2. They stated that near the intersection, the bicyclist then moved through the turn lane, past the bike lane, and into lane 2, the lane the bus was in.[11] Mr. Pears thinks that the bicyclist veered toward the bus at a slight angle, while Mr. Plantz recalled a veering maneuver closer to a 45° turn.[12] Both witnesses described that the bicyclist looked like it was going to make a left-

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[2] Hubbard deposition pg. 16; Plantz deposition pgs. 14-15

[3] TCR pg. 3; Krauss inspection photo DSC_7143

[4] TCR pg. 1; Krauss inspection photo DSC_7143; discussions with other experts

[5] Discussion with other experts

[6] Hubbard deposition pg. 35; Las Vegas Metropolitan Police Department Interview Transcript p. 1-3

[7] Hubbard deposition pg. 28

[8] Hubbard deposition pg. 27, 227; Las Vegas Metropolitan Police Department Interview Transcript p. 1-2

[9] Pears deposition pg. 20; Pears Exhibit 3; Plantz deposition pgs. 17, 19

[10] Pears deposition pgs. 77-78; Plantz deposition pg. 48; Plantz Exhibit 8

[11] Pears deposition 78-79, 80-81; Plantz deposition pg. 60-61, 76, 109

[12] Pears deposition pg. 132; Plantz deposition pg. 186

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hand turn and did not realize that the bus was there.[13] The bicyclist collided with the side of the bus, and both witnesses lost sight of Dr. Khiabani.[14]

Erika Bradley was driving behind the bus at the time of the incident and Aaron Bradley was her passenger.[15] Mr. Bradley did not notice the bicyclist or bus until after the impact.[16] Mrs. Bradley first noticed the bus and bicyclist on Pavilion.[17] At that point, she recalls the bicyclist was in the center of the bike lane and the bus was in the right lane traveling at about 35 to 40 mph.[18] She testified that either at or just before the intersection, as the bus and bike were neck-and-neck, the bicyclist swerved suddenly and without warning and cut towards the bus.[19] Mrs. Bradley stated that she initially thought the bicyclist was trying to cut in front of the bus.[20]

Luis Fernando Sacarias Pina was using a leaf blower on the side of the road at the time of the accident.[21] Mr. Pina testified that when he first observed the bicyclist, it was in the bike lane on Pavilion.[22] At that time, the bus was in the right through lane traveling at about 40 to 45 mph with approximately one meter separation between the two.[23] He alleges that at some point, the bus crossed over into the bike lane and hit the bicyclist and then straightened up again.[24] He states that he did not observe the bicyclist wobble or change direction until after contact with the bus.[25]

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Site Inspections

On September 26, 2017, I visited the site of the incident and inspected the incident bus, the incident bike and an exemplar bike. I photographed the scene as well as the vehicles involved. I

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[13] Pears deposition pgs. 70-71; Plantz deposition pgs. 82, 139

[14] Pears deposition pg. 189; Plantz deposition pg. 82

[15] Erika Bradley deposition pg. 11, 24-25; Aaron Bradley deposition pg. 8

[16] Aaron Bradley deposition pgs. 9-10

[17] Erika Bradley deposition pgs. 24-25

[18] Erika Bradley deposition pgs. 33-34, 54

[19] Erika Bradley deposition pgs. 70-71, 92

[20] Erika Bradley deposition pg. 72

[21] Pina deposition pg. 12

[22] Pina deposition pgs. 13, 29

[23] Pina deposition pg. 18, 66

[24] Pina deposition pgs. 13, 15-16

[25] Pina deposition pg. 54-55

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did not identify any environmental conditions, such as sightline obstructions or roadway-design characteristics that would help explain this accident from a human factors perspective.[26]

With respect to my inspection of the incident bus, I generally noted the visibility and sightlines from the perspective of the driver, including views through the side mirrors. I also documented the sightlines from the perspective of both the driver and passenger-side front row of the bus toward the area outside of the right of the bus where the accident occurred. Consistent with their testimony, both the driver and the front-right passenger, Mr. Pears, would have been afforded a direct view of Dr. Khiabani prior to impact.[27]

On October 9th, 2017, Exponent inspected an exemplar MCI J4500 bus to more carefully analyze visibility from the driver's perspective. At the inspection, a surrogate driver was outfitted with a head-mounted Go Pro video camera while monitoring the bus's mirrors and windows as an exemplar bicycle was walked from the back of the bus to the front of the bus at 1-foot, 3-feet, and 5-feet distances to the right of the bus. This was done to determine the locations at which a bicyclist would and would not be visible to the driver. At 1 foot away from the bus, the exemplar bicyclist was visible all the way from the back of bus to the front of the bus when using the bottom mirror, top mirror, and door windows (Figure 1).[28] Figure 1A illustrates the last point at which the exemplar bicyclist is visible in the top mirror. At this location, the front tire of the bicycle is already visible through the door window, shown in Figure 1B.

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[26] Krauss Inspection Photos DSC_7205 to DSC_7231

[27] Krauss Inspection Photos DSC7149 to DSC_7159, DSC_7187 to DSC_7202

[28] GoPro video GOPRO0655

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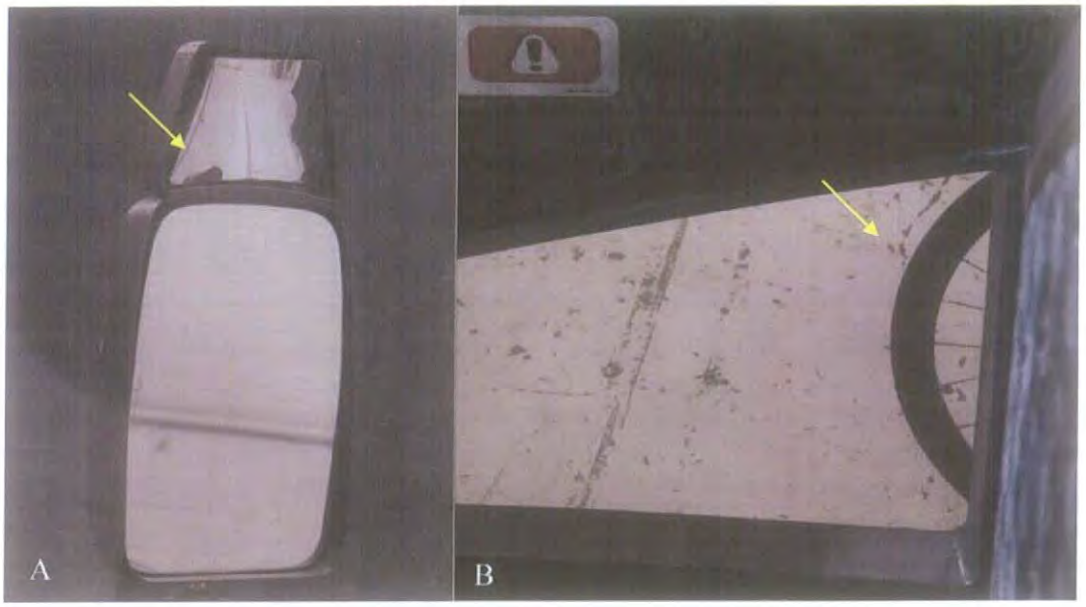

Figure 1. Photograph of the exemplar bicyclist one foot to the right of the bus, viewed in the mirror (A) and door window (B) from the driver's perspective. The bicyclist is in the same location in figures A and B. These photographs demonstrate that just before visibility of the bicyclist is lost in the mirror, the bicyclist was already visible through the window of the door. Source: DSC_1955 and DSC_1956

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Likewise, at 3 feet away from the bus, at least part of the bicycle was still visible from the back of the bus all the way up to the front of the bus.[29] At 5 feet from the bus, when the front axle of the bicycle was between 6 and 46 inches from the front of the bus, none of the bicyclist was visible.[30] Other than that 40-inch gap, the bicyclist was visible from the back to the front of the bus. Overall, the visibility from the driver position of the bus is consistent with the testimony of Mr. Hubbard who indicated he could see Dr. Khiabani prior to impacting just behind the front right wheel well.[31]

Human Factors Analysis

Perception-response time. In order to assess whether an accident could have been avoided, the proper human factors assessment consists of an analysis of the involved drivers, the involved vehicles, the environment and the interaction between each of them. Critically, one's ability to

[29] GoPro video GOPRO0656; Dunning Inspection Photos IMG_1961, IMG_1962

[30] GoPro video GOPRO0657; Dunning Inspection Photos IMG_1965 to IMG_1968

[31] Hubbard deposition pg. 28; Las Vegas Metropolitan Police Department Interview Transcript p. 1-3

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avoid an accident is dependent on having sufficient time and distance to avoid an interaction with a roadway hazard.[32] Perception-response time (PRT) refers to the amount of time that elapses between when a hazard is first detected and when a driver initiates his or her response to the hazard. PRT is comprised of four stages: detection, identification, decision, and response.[33] During the detection stage, the driver initially perceives an object in the environment. Next, the driver must identify whether or not it is a hazard. Then, a decision must be made about what action, if any, is necessary to avoid the hazard. After the decision has been made to take some action, the driver must initiate and carry out that action. The required physical movements to carry out the decided-upon action represent the response stage. While it is difficult to pin down precise times for each of these stages, scientific research has provided estimates for PRTs in various accident scenarios. Depending on the circumstances, a driver's PRT can range from about one second (for a highly visible, expected hazard) to five seconds or more.[34] Factors that may affect PRT include hazard conspicuity, ambient illumination, number of response alternatives and driver expectancy. When PRT increases, a driver requires additional time to avoid a hazard, indicating the hazard must be detected sooner. Generally, attentive drivers who encounter a surprise hazard can respond in approximately 1.5 seconds in the absence of other driver or environmental factors. This number can go up or down depending on the specific factors associated with each collision scenario.

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A simple way to assess how avoidable an accident was from a human factors perspective is to evaluate the critical window.[35] This approach compares the time/distance *required* to react with the time/distance *available* to react. In this case, Mr. Hubbard was aware of the presence of the bicyclist, although the veering maneuver was unexpected. There were also multiple considerations for the appropriate reaction, such as determining whether or there was traffic in the adjacent lane that would prevent the driver from safely swerving into that lane. However, PRT only takes into account the time to perceive and react to a hazard. It would have taken additional time to physically maneuver a 45-foot bus effectively to avoid a collision.

The majority of the witnesses of the collision testified that the bicyclist veered towards the bus while the bus maintained its lane, and there is general agreement among the accident reconstruction experts on both sides that this is the case. Thus, when performing the critical window analysis, the available time for Mr. Hubbard to respond is defined by the length of time it would have taken Dr. Khiabani to deviate from the bike lane into the side of the bus. Note that this length of time presumes Mr. Hubbard is staring in the direction of Dr. Khiabani when this maneuver begins, and there is no evidence this was the case.

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[32] Krauss et al. (2012)

[33] Krauss et al. (2015)

[34] Krauss et al. (2015)

[35] Krauss et al. (2012)

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The time it would have taken for Dr. Khiabani to close 3 feet of distance at different angles and different speeds is listed in Table 1. Since Dr. Khiabani's position would have moved from the benign position in the bike lane to being in contact with the bus over such a short period of time, even if Mr. Hubbard were able to complete his PRT before impact, which is highly unlikely, there would not have been enough (or any) time for him to maneuver the bus in a way to keep Dr. Khiabani from impacting him.

Angle Towards Bus (in degrees)	Time to cross 3-foot closing distance (in seconds) at:		
	10 mph	15 mph	20 mph
10	1.18	0.79	0.59
20	0.60	0.40	0.30
30	0.41	0.27	0.20
40	0.32	0.21	0.16
50	0.27	0.18	0.13

Table 1. Time it would have taken Dr. Khiabani to travel 3 feet laterally at various speeds for different veering angles. The left column represents possible angles (from straight) of the bicycle during the veering maneuver. The right columns indicate the corresponding time it would take to move 3 feet towards the bus at each angle and each speed.

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Proximity sensors and PRT. Mr. Hubbard testified he was maintaining a distance of 3 to 4 feet from the bicyclist, consistent with the Vehicle Code that mandates a minimum separation of 3 feet.[36] At a separation of 3 feet or greater, there is no reason for Mr. Hubbard to make an evasive maneuver. As such, a proximity sensor alerting the driver to an object that is more than 3 feet away and located in the designated bike lane would be impractical and not useful for warning of a hazard. It could also result in over-warning, which studies have shown increases the likelihood of a warning being ignored altogether.[37]

In his report, plaintiffs' expert Mr. Cohen included a figure schematically depicting how such a sensor would work. In that figure (p. 5), he shows a sensor alerting a driver, such as Mr. Hubbard, to the presence of a cyclist ahead of the bus, properly positioned in the bike lane. An audible alert to a cyclist who is located where he is supposed to be, particularly when Mr. Hubbard testified he was aware of Dr. Khiabani's presence anyway, is redundant, unnecessary and ineffective.[38] If a hypothetical sensor were to behave optimally and only to warn of an

[36] NV Rev Stat § 484B.270 (2013); Hubbard deposition pg. 35

[37] Frantz et al. (1999); McCarthy (1995)

[38] Las Vegas Metropolitan Police Department Interview Transcript p. 1-2

impending collision, Table 1 shows that such a warning still would not have provided sufficient warning for a driver to perceive the warning and safely execute an avoidance maneuver, given the short period of time between the start of Dr. Khiabani's lane deviation and his impact with the side of the bus.

Visibility. An inspection of an exemplar MCI J4500 bus demonstrated that at 1 and 3 feet from the bus, at least a portion of the exemplar bicyclist remained visible either in the mirrors or windows for the entire length of the bus. When the surrogate cyclist was positioned 5 feet from the bus, the cyclist was continually visible from the back of the bus to the front of the bus with the exception of when the front axle of the bicycle was located 6 inches to 46 inches from the front of the bus.

Consistent with Mr. Hubbard's reported awareness of Dr. Khiabani, there were no sightline obstructions on the bus that can explain this accident. Put simply, there is no alternative design of this bus that would have enabled Mr. Hubbard to have anticipated and perceived Dr. Khiabani's maneuver toward the bus any more efficiently to enable an effective avoidance response by the bus than what Mr. Hubbard's behavior demonstrated.

Warnings. Plaintiffs' expert, Dr. Cunitz, suggested that a failure to warn on the part of MCI contributed to this accident.[39] Dr. Cunitz based his opinion on the "surprising" forces that would have been experienced by Dr. Khiabani prior to the accident.[40,41] Generally, a determination about whether to warn about a particular hazard should be based on the risk associated with that product or activity.[42] Risk is a metric that accounts for both the severity of the consequence associated with the hazard as well as the frequency or likelihood of being exposed to the hazard.[43] In this case, my understanding is that Dr. Cunitz has done no such analysis. In fact, I have seen no bases to conclude that the involved bus did anything different from any other bus passing a cyclist on any other roadway. If a bus in a right through lane passing a cyclist in a designated bike lane is a safe, common occurrence, warning drivers is improper, misleading, and ineffective. As I've already stated, warning about hazards that are low-risk can result in recipients of that warning dismissing it altogether.[44]

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[39] Cunitz report (10/5/2017), pg. 3

[40] Cunitz report (10/5/2017), pg. 4

[41] I am not addressing the validity of the forces in this report as that is being addressed by other experts in this case. However, my interpretation of Dr. Cunitz's opinions is that should these forces be shown to be irrelevant with respect to the accident in this case, then no warnings would be needed at all because Dr. Cunitz cited no other issues that he believed require warning.

[42] McCarthy (1995)

[43] *Ibid.*

[44] Frantz et al. (1999)

Dr. Cunitz failed to explain what the allegedly required warnings from MCI would say. The goal in designing warnings is to state the hazard, a method to avoid exposure to the hazard and finally, the consequences of not avoiding the hazard. Here, it is unclear what information such a warning would contain. In this case, Mr. Hubbard testified he was aware of the Nevada law about maintaining a 3-foot minimum clearance between his vehicle and cyclists. This knowledge of the law would likely increase compliance more than any warning as there is voluminous evidence that associating an enforced penalty with failed compliance increases compliance rates.[45] Thus, based on my reading of Dr. Cunitz's report, any added warnings from MCI would be redundant with respect to the existing laws and therefore would likely be ineffective as well.

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[45] e.g., Chou et al. (2010); Campbell (1988)

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Opinions

Based on my background, education and experience, I hold the following opinions to a reasonable degree of scientific certainty:

1. The design of the bus affords drivers ample visibility around the bus such that sightline restrictions cannot provide an explanation for this accident.

2. Within the area that a proximity sensor would operate to detect a hazard, at least a portion of Dr. Khiabani or his bicycle was visible from Mr. Hubbard's vantage.

3. The way in which Dr. Khiabani impacted the bus did not afford Mr. Hubbard, or any other typical driver in Mr. Hubbard's position, sufficient time to respond and carry out any sort of effective maneuver to avoid the accident.

4. Even if the bus had been equipped with a proximity sensor, it would not have afforded Mr. Hubbard sufficient time to avoid Dr. Khiabani.

5. Any suggestion that warnings from MCI would have changed the outcome of this accident is baseless and misguided.

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These opinions represent my findings to-date on this matter. I reserve the right to amend or amplify these opinions as new material becomes available and as I continue my work on this project.

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Sincerely,

David Krauss, Ph.D.
Principal Scientist

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References

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Krauss, D., Todd, J. J., & Olson, P. (2015). Driver perception-response time. In D. Krauss (Ed.), *Forensic Aspects of Driver Perception and Response* (4th ed., pp. 233–267). Tucson, AZ: Lawyers & Judges Publishing Company, Inc.

McCarthy, R. L., Ayres, T. J., Wood, C. T. (1995). Risk and effectiveness criteria for using on-product warnings. *Ergonomics, 38*, 2164-2175.

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Appendix A: List of Client-Supplied Materials

Depositions

- William Bartlett (w/ Exhibits)
- Aaron Bradley (w/ Exhibits)
- Erika Bradley (w/ Exhibits)
- Lisa Gavin (w/ Exhibits)
- Shaun Harney (w/ Exhibits)
- Dale Horba
- Edward Hubbard (w/ Exhibits)
- Guus Kieft
- Samantha Kolch
- Andrew Louis
- Terry McAfee (w/ Exhibits)
- Robert Pears (w/ Exhibits)
- Michael Plantz (w/ Exhibits)
- Luis Fernando Pina (w/ Exhibits)
- Mary Witherell
- Robert Wesson (w/ Exhibits)
- Tiffany Brown (w/ Exhibits)
- Mark Barron (w/ Exhibits)

Video of Dr. Khiabani and the scene after the accident
Pears & Plantz written statements
Las Vegas Metropolitan Police Department Final Report

Photos

- Scene Photos (122)
- Photos of subject bus (5)
- Photos of right and left front seat views (5)
- Clark County Coroner photos; Autopsy, Scene, & X-rays (193)
- Photos of Bicycle and Misc taken by KJC (66)
- Photos of Helmet taken by KJC (30)
- Caldwell Inspection Photographs taken 8-9-17; PA Bus and Bicycle & Scene (180)
- Stoberski Bus Inspection Photos
- Stoberski Helmet Photos 6-20-17
- JCU Photos; scene, helmet, bike, gear
- Volvo Side Door
- Pears photos (2)

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- View from inside bus (5)

GoPro Videos

- GOPRO118
- GOPRO119
- GOPRO120
- GOPRO121
- GOPRO122
- GOPRO123
- GOPRO124
- GOPRO125
- GOPRO126
- GOPRO127
- GOPRO128

Expert Disclosure
Expert Reports

- Breidenthal
- Caldwell
- Cohen
- Sherlock
- Cunitz
- Loftus
- Green

Exemplar Cyclist Extreme video (1) and images (85)
Mass Transit Stuntman video
S-1 Gard Dangerzone Barrier exemplar video
S-1 Gard Dangerzone Deflector Product Info
S-1 Gard Installation Instructions
Safety Guard Patent
DDEC Reports (6-27-2017_10-15-25 & 6-27-2017_10-17-36)
Tractor Fault Information

Rimkus Bus Download

- Audit Train Data
- Common Data
- Fault Codes Data
- Instrumentation Data
- Log File Data

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- Parameters Data
- Rating Data
- Standard Data
- Stored Data
- EEPROM Data
- Component ABS – Warning image
- Component ABS image
- Component ID image
- Image of phone with time zone
- Memorized data image
- On Guard image
- Pneumatic ABS image
- Real Time Clock image
- Tire size image
- Tractor ABS Diagnostic image

Bus Diagrams

- MCI J4500 3D Model
- MCI J4500 Plan View

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Case Management Order
Prehospital Care Report Summary (Clark County Fire Department)
Journal Article: The Causal Factor of Bus Wheel Injuries and Remedial Method for Prevention of These Accidents
DTC Report for Serial Number
Simple Bus in Wind Tunnel Simulation video
Duluth Barge Heading Out video
Plaintiff responses to MCI Interrogatories
Plaintiffs 1st Amended Complain & Jury Demand
Report from Erik Johnson
UMC Medical Records
American Medical Response Invoice

Maps

- 50to1-detail-map
- 50to1-detail-map-rev1
- intersection-only-nts
- vicinity-map-nts
- vicinity-map-nts-rev1

Appendix B: Curriculum vitae of David Krauss, Ph.D.

Exponent®
Engineering & Scientific Consulting

David A. Krauss, Ph.D.
Principal Scientist | Human Factors & Industrial Engineering
5401 McConnell Avenue | Los Angeles, CA 90066
(310) 754-2749 tel | dkrauss@exponent.com

Professional Profile

Dr. Krauss has specialized knowledge in human perception and cognition, reaction time, attention, distraction, fatigue, the effects of lighting conditions on vision, and how stress affects behavior. He uses this experience to investigate human factors in a wide array of scenarios such as automobile, motorcycle, bicycle, train/railroad, and trucking accidents; industrial and occupational accidents; injuries associated with consumer products; and trip-and-fall incidents. Dr. Krauss has studied and investigated, within these areas, the behavioral effects of the use of mobile electronics, including cell phones and other in-vehicle or portable devices. In 2015 Dr. Krauss published the fourth edition of *Forensic Aspects of Driver Perception and Response*, a comprehensive reference book on driver behavior.

Dr. Krauss' analysis methods include programming custom image-processing software to quantify visibility and conspicuity for many applications, including product development and recreating accident scenarios. He has also developed, published, and implemented a method to accurately capture and display digital photographs of low-visibility or nighttime accident scenes. Dr. Krauss performs quantitative injury and risk analyses using large-scale incident and injury data from various sources including the Consumer Product Safety Commission (CPSC) and manufacturer trade associations.

As part of his consulting practice, Dr. Krauss oversees human-subject testing to assess product usability and to gather user opinions for various products. He incorporates elements of anthropometry, visual assessments, psychophysics, questionnaires, and observational techniques to conduct comprehensive evaluations of a variety of consumer and industrial products.

Dr. Krauss' doctoral dissertation addressed human visual perception and reading. His familiarity with the cognitive-psychology literature has been applied to the development of warnings, instructions, and safety information for various products as well as to the assessment of the role of warnings in accidents.

Academic Credentials & Professional Honors

Ph.D., Psychology/Cognitive Neuroscience, University of California, Los Angeles (UCLA), 2003

M.A., Psychology/Cognitive Neuroscience, University of California, Los Angeles (UCLA), 2000

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B.S., Biopsychology and Cognitive Science, University of Michigan, Ann Arbor, 1998

Pauley Graduate Fellowship, University of California, Los Angeles, 1998

Undergraduate honors, University of Michigan, 1994

Licenses and Certifications

OSHA-Qualified General Industry Safety Trainer

Certified Forklift Operator

Academic Appointments

Lecturer, University of California, Los Angeles Department of Psychology

Instructor, University of California, Los Angeles Extension

Professional Affiliations

Human Factors and Ergonomics Society (member)

Society for Automotive Engineers (member)

Publications

Todd JJ, Tavassoli A, Krauss DA. The moon's contribution to nighttime illuminance in different environments. Proceedings, 59th Annual Meeting of the Human Factors and Ergonomics Society, Los Angeles, CA, 2015.

Khan FS, Krauss DA, Alper SJ, Droll J, Arndt SR, Lakhiani SD, Cades DM. Do people heed warnings at gas stations? Proceedings, 2nd Annual World Conference of the Society for Industrial and Systems Engineering, pp. 114-117, Las Vegas, NV, November 5-7, 2013. ISBN: 97819384960-1-1.

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Todd J, Sala J, Heckman G, Krauss D. Validation of high dynamic range photography as a tool to accurately represent low-illumination scenes. SAE Technical Paper 2012-01-0078, Society for Automotive Engineers, Inc., 2012.

Krauss DA, Todd JJ, Kim R, Scher I. A risk analysis of fall-related injuries using the NEISS database. Proceedings, 55th Annual Meeting of the Human Factors and Ergonomics Society, Las Vegas, NV, 2011.

Khan F, Arndt S, Krauss D. Understanding the relationship between safety climate and warning compliance in occupational settings. Proceedings, 14th Annual International Conference on Industrial Engineering: Theory, Applications and Practice, Anaheim, CA, 2009.

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Polk TA, Lacey HP, Nelson JK, Demiralp E, Newman LI, Krauss D, Raheja A, Farah MJ. The development of abstract letter representations for reading: Evidence for the role of context. Cognitive Neuropsychology 2009; 26(1):70-90.

Kubose T, Krauss D. Methodological considerations for using the English XL tribometer for post-hoc slip-and-fall evaluations. Proceedings, 52nd Annual Meeting of the Human Factors and Ergonomics Society, Santa Monica, CA, 2008.

Krauss D, Arndt S, Lakhiani S, Khan F. Additional considerations when applying the "Safety Engineering Hierarchy" in industrial work settings. Proceedings, 13th Annual International Conference on Industrial Engineering: Theory, Applications and Practice, Las Vegas, NV, 2008.

Arndt S, Krauss D, Weaver B. A previously unidentified failure mode for ladder-climbing fall-protection systems. Proceedings, American Society of Safety Engineers Professional Development Conference and Exposition, Las Vegas, NV, 2008.

Krauss D, Lieberman D, Grossman H, Ray R, Scher I. An evaluation of perceptual experience of skiers using quantitative image processing. Journal of ASTM International 2008; 5(4).

Kuzel M, Krauss D, Moralde M, Kubose T. Comparison of subjective ratings of slipperiness to the measured slip resistance of real-world walking surfaces. International Conference on Slips, Trips and Falls, From Research to Practice, 2007.

Krauss DA, Kuzel MJ, Cassidy P, Goodman J. A review of technologies for studying visual perception under low-illumination conditions. Proceedings, 50th Annual Meeting of the Human Factors and Ergonomics Society, Santa Monica, CA, 2006.

Arndt SR, Wood CT, Delahunt PB, Wall CT, Krauss DA. Who's in the back seat? A study of driver inattention. Proceedings, 50th Annual Meeting of the Human Factors and Ergonomics Society, Santa Monica, CA, 2006.

Krauss DA, Kuzel MJ, Arndt SR, Delahunt PB. Validation of digital image representations of low-illumination scenes. SAE Paper 2006-01-1288, Society for Automotive Engineers, Inc., 2006.

Young D, Huntley-Fenner G, Trachtman D, Krauss D. Human performance issues in auditory collision-avoidance systems. Proceedings, 10th Annual International Conference on Industrial Engineering — Theory, Applications and Practice, pp. 64-68, Clearwater, FL, 2005.

Al-Tarawneh IS, Cohen WJ, Trachtman D, Bishu RR, Krauss DA. The effect of hands-free cellular telephone conversation complexity on choice response time in a detection task. Proceedings, 48th Annual Meeting of the Human Factors and Ergonomics Society, Santa Monica, CA, 2004.

Krauss DA. Mechanisms of letter perception. Doctoral Dissertation, Department of Psychology, University of California, Los Angeles, June 2003.

Books

Krauss D. Forensic aspects of driver perception and response. 4th Edition. Tucson, AZ: Lawyers and Judges Publishing Company, Inc., 2015.

Non-Peer Reviewed Articles

Cades DM, Arndt, SR, Sala, JB, Krauss, DA. What you need to know about the distracted driver. Feature Article in The Illinois Association of Defense Trial Counsel Quarterly 2013; 23(4).

Krauss DA, Todd JJ. Comprehensive human factors evaluations of nighttime auto accidents. Transportation Lawyers Association, Annual Meeting Proceedings, May 2013.

Khan FS, Cades DM, Krauss DA. Cyclist and pedestrians vs. cars: Cars win! A human factors perspective. Feature Article in the Illinois Association of Defense Trial Counsel Quarterly 2012; 22(3):30-33.

Kahn F, Krauss D, Alper S, Droll J, Arndt S, Lakhiani S, Cades D. Do people heed warnings at gas stations? Michigan Defense Trial Counsel, May 2012.

Arndt S, Young D, Krauss D. Human factors issues in trucking — What does a qualified expert need to know? Trucking Law Seminar, Phoenix, AZ, April 17, 2008.

Presentations and Posters

Krauss D, Hall D, Bamberger SK, Bennett S. No deadheading here: The power and weight of human factors expert testimony. American Trucking Association Forum for Motor Carrier General Counsel, Bellevue, WA, 2016.Clausner TC, Fox JR, Krauss DA. Comprehension and production of graphs that metaphorically express linguistic semantic event structure. 8th International Cognitive Linguistics Conference, La Rioja, Spain, 2003.

Krauss DA, Engel SA. Effects of stimulus crowding in human extrastriate cortex. Meeting of the Society for Neuroscience, San Diego, CA, 2001.

Krauss DA, Engel SA. Differential effects of crowding on feature detection and letter recognition. Meeting of the Cognitive Neuroscience Society, New York, NY, 2001.

Krauss DA, Engel SA. Perceptual learning in color classification. Meeting of the Association for Research in Vision and Ophthalmology, Fort Lauderdale, FL, 2000.

Polk TA, Krauss D, Nelson J, Pond H, Raheja A, Farah MJ. The development of abstract letter identities: Evidence for a contextual hypothesis. Annual Meeting of the Psychonomics Society, 1998.

Project Experience

Evaluated the visibility of pedestrians, tractor-trailer combinations, and other parked vehicles on roadways under various reduced-lighting conditions.

Analyzed the performance capabilities, including perception-response time, for drivers and pedestrians under a variety of lighting and traffic conditions.

Created representative low-light photographs to use as demonstrative exhibits using recently developed and validated software and photography techniques.

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Assisted companies with development and revision of product warnings and instructions for a wide range of products including those used in home, occupational, recreational, and agricultural settings.

Peer Reviewer

Human Factors and Ergonomics Society

Society for Automotive Engineers

Worth Publishers

Accident Analysis and Prevention

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Appendix C: List of Last Four Years of Sworn Testimony of David Krauss, Ph.D.

Depositions

1. Ramos v City of Torrance, October 12, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC573018

2. McGowan v County of Kern, September 28, 2017, in the United States District Court, Eastern District of California, Case No. 1:15-cv-01365-KJM-SKO

3. Hernandez v 1061 Terra Bella Associates, September 8, 2017, in the Superior Court of the State of California in the County of Santa Clara, Case No. 115CV283277

4. Rozen v Los Angeles County Fire Department, August 15, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC601967

5. Sithisombath v Nguyen, August 8, 2017, in the Superior Court of the State of California for the County of Orange, Central Justice Center, Case No. 30-2016-00847967-CU-PA-CJC

6. Bobrowski v Loveland Ready Mix, August 1, 2017, in the District Court of County of Larimer, Colorado, Case No. 2016CV30520

7. Corona v City of Riverside, July 28, 2017, in the Superior Court of the State of California in the County of Riverside, Case No. RIC1514353

8. Sidlo v Casa Blanca Builders, Inc., July 27, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC538357

9. Araujo v City of San Jacinto, July 18, 2017, in the Superior Court of the State of California in the County of Riverside, Case No. RIC1411590

10. Victoria v City of Los Angeles, June 22, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC541698

11. Christensen v Swift Transportation Co, June 21, 2017, in the Superior Court of the State of California in the County of Riverside, Case No. CIVDS 1411681

12. Samora v Muhammad, June 16, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC556079

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13. Villalobos v Transit Systems Unltd, Inc, June 14, 2017, in the Superior Court of the State of California in the County of Orange, Case No. 30-2016-00844732

14. Roberto v CRST, June 7, 2017, in the Superior Court of the State of California in the County of Riverside, Case No. RIC1507880

15. Cedotal v Entergy, June 6, 2017, in the 18th Judicial District Court Parish of East Baton Rouge, State of Louisiana, Case No: 75,883

16. Araujo v City of San Jacinto, May 19, 2017, in the Superior Court of the State of California in the County of Riverside, Case No. RIC1411590

17. Androlia v Entertainment Center, May 17, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC534479

18. Foster v Lee, May 11, 2017, in the Superior Court of the State of California in the County of Ventura, Case No. 56-2015-00463880-CU-PA-VTA

19. Rodriguez v Competitor Group, April 19, 2017, in the Superior Court of the State of California, County of San Diego, Case No. 37-2014-00034463

20. Walter v City of Palm Springs, April 17, 2017, in the Superior Court of the State of California for the County of Riverside, Case No. INC1302238

21. McFarlane v Urbana Tahoe, April 10, 2017, in the Superior Court of the State of California in the County of Eldorado, Case No. SC20150085

22. Simone v Jameson, March 27, 2017, in the Superior Court of the State of California in the County of Orange, Case No. 30-2016-00832256

23. Friend v First Transit, March 20, 2017, in the Superior Court of the State of Arizona, County of Maricopa, Case No. CV2015-094759

24. Kerr v Union Pacific Railroad Company, March 9, 2017, in the Superior Court of the State of California for the County of Riverside, Case No. RIC1409999

25. Roennigke v Reeves, March 1, 2017, in the Superior Court of the State of California in the County of San Francisco, Case No. CGC-14-54-611

26. Perez v City of Anaheim, February 28, 2017, in the Superior Court of the State of California in the County of Orange, Case No. 30-2015-00807504-CU-PO-CJC

27. Martin v City of Los Angeles, February 2, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC576751

28. Pearce v Keating, January 27, 2017, in the Superior Court of the State of California in the County of Orange, Case No. 30-2015-00794672-CU-PA-CJC

29. Valdez v State of California, January 5, 2017, in the Superior Court of the State of California in the County of San Bernardino, Case No. CIVDS1416659

30. Castro v City of Thousand Oaks, December 9, 2016, in the Superior Court of the State of California in the County of Ventura, Case No. 56-2013-00432039-CU-PA-VTA

31. Saunders v Chen, November 23, 2016, in the Superior Court of the State of California in the County of Orange, Case No. 30-2015-00822364-CU-PA-CJC

32. Rivas v UD Trucks, et al., November 11, 2016, in the Superior Court of the State of California in the County of Marin, Case No. CIV 1302666

33. Martinelli v State of California, November 4, 2016, in the Superior Court of the State of California in the County of Santa Barbara – Santa Maria, Case No. 1407847

34. Luther v Mehdyzadeh, October 13, 2016, in the Superior Court of the State of California in the County of Los Angeles, Central District, Case No. BC578739

35. Guerrero v NFI Industries Inc, October 7, 2016, in the Superior Court of the State of California in the County of San Bernardino, Case No. CIVDS1412866

36. Cardenas v Wilson, October 6, 2016, in Superior Court of the State of California in the County of Sacramento, Case No. 34-2014-00161392

37. Taulbee v EJ Distribution Corp, September 15, 2016, in the Superior Court of the State of California in the County of Orange, Case No. 30-2013-00678721-CU-PA-CJC

38. Muller v Wal-Mart, September 9, 2016, in the Circuit Court of Lee County, Florida, Case No. 12-CA-003645

39. Holmes v Praxair, August 29, 2016, in the United States District Court Southern District of Ohio Western Division, Case No. 3:15-CV-00277

40. Mirfakhraie v City of Irvine, August 18, 2016, in the Superior Court of the State of California for the County of Orange, Case No. 30-2014-00707952

41. Zisette v Starline, et al., August 10, 2016, in the Superior Court of the State of California for the County of Los Angeles-South Central District, Case No. BC569928

42. Gonzalez & Vega v Vemma, August 1, 2016, in the Superior Court of the State of California for the County of Riverside, Case No. MCC1300105

43. Zukanovic v Martin Transport, July 29, 2016, in the 218th Judicial District Court of La Salle County, Texas, Case No. 15-03-00044-CVL

44. Bustos v Toro, July 27, 2016, in the Superior Court of the State of California for the County of San Diego - Central Division, Case No. 37-2015-00006140-CU-PA-CTL

45. Arias v. San Diego Gas & Electric Company, July 21, 2016, in the Superior Court of the State of California, County of San Diego, Case No. 37-2014-00002124-CU-PO-CTL

46. Hammond v Schneider, July 8, 2016, in the United States District Court for the Eastern District of Texas Beaumont Division, Case No. 1:15-CV-00241-MAC

47. Hysick v Razor, June 30, 2016, in the United States District Court for the Middle District of Pennsylvania, Case No. 1:15-CV-00745-JEJ

48. Stutes v R&L Carriers, June 27, 2016, in the 15th Judicial District Court of the State of Louisiana, Parish of Lafayette, Case No. 20131119 "F"

49. Kempker/Shikles v MFA Oil Biomass, LLC, June 24, 2016, in the Circuit Court of Cole County, Missouri, Case Nos. 13 AC-CC00219 / 13 AC-CC00350

50. Boggs v Bullco, LLC, June 13, 2016, in the 26th Judicial Circuit Court of the Commonwealth of Kentucky, Harlan County, Case No. 15-CI-00102

51. Hernandez v First Student, Inc., June 7, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC513802

52. Pacific Indemnity Company v Gaughan South LLC, May 31, 2016, in the District Court of Clark County, Nevada, Case No. A-12-674257-C

53. Loeb v City of Los Angeles, May 24, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. SC111168

54. Ibarra v Stevens Transport, April 28, 2016, in the Superior Court of the State of California, County of Imperial, Case No. ECUO8157

55. Minjarez v Fastrucking, April 20, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. NC057708

56. Fleming v City of Long Beach, March 14, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC511775

57. Salazar v Skanska, February 24, 2016, in the Superior Court of the State of California, County of San Bernardino, Case No. CIVDS1400771

58. Rodriguez v Rose Rock Midstream Field Services, February 17, 2016, in the District Court of Zavala County, Texas, 293rd Judicial District, Case No. 15-01-13356-ZCV

59. Mendoza v On Site Safety, January 20, 2016, in the Superior Court of the State of California, County of Sutter, Case No. CV-CS-12-0592

60. Palmieri v Nanayakkara, January 7, 2016, in the Superior Court of the State of California, County of Riverside, Case No. RIC 1310464

61. Picazzo v CW Driver, December 18, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC531187

62. Hyoung v. Target Corporation, December 16, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. NC058059

63. Villalobos, et al. v Arana, et al., December 14, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC533248

64. Rutledge v Offshore Crane & Service Co., December 4, 2015 in the Superior Court of the State of California, County of Kern, Case No. S-1500-CV-282801-DRL

65. Moore v Caltrans, October 30, 2015, in the Superior Court of the State of California, County of San Luis Obispo, Case No. 138038

66. Everett v Halliburton, October 28, 2015, in the District Court of Irion County, Texas, Case No. CV13-011

67. Crowder v John Christner Trucking, October 21, 2015, in the Superior Court of the State of California, County of Kern, Case No. S-1500-CV-281241-DRL

68. Guernsey v Sammut Brothers, September 1, 2015, in the Superior Court of the State of California, County of Monterey, Case No. M126693

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69. Ekbatani v United Independent Taxi Drivers, August 21, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC504902

70. Etcitty v State of Arizona, August 12, 2015, in the Superior Court of the State of Arizona, County of Maricopa, Case No. CV2012-004611

71. Gonzalez v Lew, August 10, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. KC064256

72. McCarty v Camp Pendleton, August 7, 2015, in the United States District Court for the Southern District of California, Case No. 13CV1602-BTM-WMC

73. Wu v Hawkins, August 6, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC534694

74. Kelley v Nierman, July 29, 2015 in the Superior Court of the State of California, County of San Diego, Case No. 37-2013-00077573

75. Jones v Allen, July 23, 2015, in the Superior Court of the State of California, County of Ventura, Case No. 56-2014-00455829-CU-NP-VTA

76. Corwin v Foscue, June 8, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC516688

77. David v D&H Trucking, April 14, 2015, in the Superior Court of the State of California, County of Ventura, Case No. 56-2011-00391849-CL-PA-VTA

78. Ong v Alvarez, April 7, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. PC054623

79. Lopez v Global Road Sealing, March 31, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. TC027195

80. Schrier v Pedroza, March 22, 2015, in the Superior Court of the State of California, County of Stanislaus, Case No. 2004245

81. Thomas v Wakefern Foods, March 17, 2015, in the State of Connecticut Superior Court, Judicial District of Fairfield at Bridgeport, Case No. FBT-CV13-6033016S

82. Rhinesmith v Harborland Ventures, March 11, 2015, in the Superior Court of the State of California, County of Orange, Case No. 30-2012-00595750-CU-PO-CJC

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83. Herrera v R&L, February 12, 2015, in the United States District Court for the Western District of North Carolina, Charlotte Division, Case No. 3:13-CV-00529

84. Burks-Herrmann v Walmart, February 10, 2015, in the Superior Court of the State of California, County of San Mateo, Case No. CIV519722

85. Contovasilis v Boy Scouts of America, February 6, 2015, in the Superior Court of the State of California, County of San Bernardino, Case No. CIVDS1305395

86. Lopez v Preston Pipelines, January 7, 2015, in the Superior Court of the State of California, County of Alameda, Case No. HG13699138

87. Kalmar v Safety Marking, Inc., December 9, 2014 in the State of Connecticut Superior Court, Judicial District of Fairfield at Bridgeport, Case No. FBT-CV-6027677-S

88. Vallone v Taco Bell, December 2, 2014 in the Superior Court of the State of California, County of Orange, Case No. 30-2013-00691532

89. Remsen v Norco, November 13, 2014 in the Superior Court of the State of California, County of Riverside, Case No. 1216135

90. Cattanach v BNSF, October 29, 2014 in the United States District Court for the District of Minnesota, Case No. 13-cv-1664

91. Kao v Power Plus, October 17, 2014 in the Superior Court of the State of California, County of San Bernardino, Case No. CIVDS1209502

92. Gap v Apex, September 26, 2014 in the Superior Court of the State of California, County of San Francisco, Case No. CGC-12-526547

93. Adams v Target Corporation, September 24, 2014 in the United States District Court for the Central District of California, Case No. CV13-05944-GHK

94. Howie v North American Crane Bureau, September 23, 2014 in the Superior Court of the State of California, County of San Diego, Case No. 37-2011-00085124 CU-PO-CTL

95. Valtierra v EZ Mailing Services, Inc., September 17, 2014 in the Superior Court of the State of California, County of Los Angeles, Case No. BC497835

96. Roitman v Snug Seat, September 10, 2014 in the Superior Court of the State of California, County of Los Angeles, Case No. VC0601999

97. Lung-Straw v Safe 1 Credit Union, September 9, 2014 in the Superior Court of the State of California, County of Kern, Case No. S-1500-CV-280157 SPC

98. Makihele v SDG&E, July 22, 2014 in the Superior Court of the State of California, County of San Diego, North County Division, Case No. 37-2013-0041487-CU-PO-NC

99. Ratliff v Boulware, June 12, 2014, in the Superior Court of the State of California, County of Marin, Case No. 1205072

100. Shanks v State of California, April 28, 2014, in the Superior Court of the State of California, County of Ventura, Case No. 56-212-00423044-CU-PO-VTA

101. Chung v Solis, April 2, 2014, in the Superior Court of the State of California, County of Los Angeles – Southeast District, Case No. VC06119

102. Hernandez v Cirque du Soleil, et al., March 27, 2014, in the District Court of Nevada, Clark County, Case No. A-11-638623-C

103. McLaughlin v Bethesda Softworks, March 13, 2014, in the Superior Court of the State of California, County of San Diego, Case No. 37-2011-00090789-CU-PL-CTL

104. Brandt v Burger King, March 6, 2014, in the Superior Court of the State of California, County of Los Angeles – South District, Case No. NC058352

105. Roehrig v Union Pacific, February 27, 2014, in the Superior Court of the State of California, County of Shasta, Case No. 174959

106. Wilcox v BNSF, February 20, 2014, in the Superior Court of the State of Arizona, County of Maricopa, Case No. CV2011-000477

107. Stow v Los Angeles Dodgers, December 12, 2013, in the Superior Court of the State of California, County of Los Angeles, Case No. BC462127

108. Thomas v Bartscherer, December 11, 2013, in the Superior Court of the State of California, County of Los Angeles – Northeast District, Case No. GC049509

109. Mendoza v Stein, November 20, 2013, in the Superior Court of the State of California, County of Los Angeles – Burbank Limited, Case No. GC048904

Trials

1. Rozen v Los Angeles County Fire Department, September 22, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC601967

2. Samora v Muhammad, July 11, 2017, in the Superior Court of the State of California in the County of Los Angeles, Case No. BC 556079

3. Villalobos v Transit Systems, June 29, 2017, in the Superior Court of the State of California in the County of Orange, Case No. 30-2016-00844732-CU-PA-CJC

4. Castro v City of Thousand Oaks, May 23, 2017, in the Superior Court of the State of California in the County of Ventura, Case No. 56-2013-00432039-CU-PA-VTA

5. Deleon v Fregoso, January 18, 2017, in the Superior Court of the State of California, County of Los Angeles, Case No. BC 528572

6. Ekbatani v United Independent Taxi Drivers, December 22 & 29, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC504902

7. Saunders v Chen, December 6, 2016, in the Superior Court of the State of California, County of Orange, Case No. 30-2015-00822364-CU-PA-CJC

8. Hernandez v First Student, November 30, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC513802

9. Mirfakhraie v City of Irvine, November 14, 2016, in the Superior Court of the State of California for the County of Orange, Case No. 30-2014-00707952

10. Taulbee v EJ Distribution Corp, November 7, 2016, in the Superior Court of the State of California in the County of Orange, Case No. 30-2013-00678721-CU-PA-CJC

11. Zisette v Starline, et al., November 3, 2016, in the Superior Court of the State of California for the County of Los Angeles-South Central District, Case No. BC569928

12. Bustos v Toro, November 1, 2016, in the Superior Court of the State of California for the County of San Diego - Central Division, Case No. 37-2015-00006140-CU-PA-CTL

13. Stutes v Greenwood Motor Lines, October 21, 2016, in the 15th Judicial District Court of Lafayette, Louisiana, Case No. C-20131119F

14. Hochman v Cattone, July 19, 2016, Supreme Court of The State of New York County of Nassau, Index No.: 601279/11

15. Bagby v The Palisades Homeowners Association #4, June 14, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC551261

16. Cattanach v BNSF, February 3, 2016 in the United States District Court for the District of Minnesota, Case No. 13-cv-1664

17. Villalobos, et al. v Arana, et al., January 25, 2016, in the Superior Court of the State of California, County of Los Angeles, Case No. BC533248

18. David v. D&H Trucking, October 16, 2015, in the Superior Court of the State of California, County of Ventura, Case No. 56-2011-00391849-CL-PA-VTA

19. Shanks v State of California, August 20, 2015, in the Superior Court of the State of California, County of Ventura, Case No. 56-212-00423044-CU-PO-VTA

20. Corwin v Foscue, July 6, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. BC516688

21. Thomas v Wakefern Foods, May 12, 2015, in the State of Connecticut Superior Court, Judicial District of Fairfield at Bridgeport, Case No. FBT-CV13-6033016S

22. People v Leung, May 11, 2015, in the Superior Court of the State of California, County of Los Angeles, Case No. KA106990

23. Wilcox v BNSF, April 30, 2015, in the Superior Court of the State of Arizona, County of Maricopa, Case No. CV2011-000477

24. Maclean v Korean Air Lines, January 21, 2015, in the United States District Court, Eastern District of New York, Case No. 10-CV-2489 (SLT) (JO)

25. Teague v Crosinili, December 15, 2014 in the Superior Court of the State of California, County of Los Angeles, Case No. SC119599

26. Valtierra v EZ Mailing Services, Inc., December 15, 2014 in the Superior Court of the State of California, County of Los Angeles, Case No. BC497835

27. Wallerstein v City of Beverly Hills, July 11, 2014, in the Superior Court of the State of California, County of Los Angeles, Case No. BC410866

28. Bush v R & L Trucking, April 17, 2014 in the District Court of Dallas County, TX, 298th Judicial District, Case No. DC-11-16041

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29. City of Los Angeles v Cendreda, October 15 & 16, 2013, in the Los Angeles Metropolitan Court, Case No. 3MPO3331

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EXHIBIT E

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EXHIBIT E

DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother; KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs,	
vs.	Case No. A-17-755977-C
MOTOR COACH INDUSTRIES, INC., a Delaware corporation, et al. Defendants.	

DEPOSITION OF DAVID KRAUSS, PH.D., taken on behalf of Plaintiff, at 12777 West Jefferson Boulevard, Suite 300, Los Angeles, California, 9:17 a.m., Thursday, November 9, 2017, before LINDA D. WHITE, Certified Shorthand Reporter Number 12009 for the State of California, pursuant to Notice.

Job No.: 430147

REPORTED BY:
LINDA D. WHITE, CSR NUMBER 12009

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APPEARANCE:

For the Plaintiffs (Telephonically):

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
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702.385.6000
BY: WILL KEMP, ESQUIRE
BY: PETER S. CHRISTIANSEN, ESQUIRE
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For the Defendant Motor Coach Industries, Inc.:

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BY: HOWARD J. RUSSELL, ESQUIRE
hrussell@wwhgd.com

Also Present:

Brian Murphy, Videographer

-- we would debate that. To the extent there isn't, then obviously we don't need warnings.

Q. So you would agree with me that if there is a hazard, there should be a warning?

MR. RUSSELL: Objection. Misstates testimony.

THE WITNESS: No. I don't agree with that. Simply because you have to look at what that warning would state, right? So the laws, the rules, the training already establish the quote/unquote corrective behavior that would be prescribed by that warning.

So the whole point of a warning is to affect behavior change in a way that makes something safer or alleviate the hazard. From my understanding, that by increasing the spacing between the bus and the bike, this alleged hazard is alleviated. Mr. Hubbard was already attempting to do that.

BY MR. KEMP:

Q. Okay. Let's go back to Dr. Green for a minute. Is it your understanding that Dr. Green's testimony was directed at the air blast coming from the front of the bus or directed at the rotating wheels at the rear of the bus?

A. I don't know. I didn't get into that level of detail. I don't know.

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I further certify that I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in the outcome of this action.

IN WITNESS WHEREOF, I have subscribed my name this 19th day of November, 2017.

Linda White

_____

LINDA D. WHITE, CSR NUMBER 12009

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EXHIBIT F

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EXHIBIT F

ORIGINAL

INST

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.

Defendants

Case No. A755977

Dept. No. 14

JURY INSTRUCTIONS

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.

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JURY INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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JURY INSTRUCTION NO. 3

If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what inferences should be drawn from evidence. If any expression of mine has seemed to indicate an opinion 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.

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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

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded. However, you may consider your view of the subject motor coach.

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JURY INSTRUCTION NO. 8

There are two kinds of evidence; direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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JURY INSTRUCTION NO. 9

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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JURY INSTRUCTION NO. 10

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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JURY INSTRUCTION NO. 11

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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JURY INSTRUCTION NO. 12

Certain testimony has been either presented via videotape deposition or read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

JURY INSTRUCTION NO. 13

A person who has special knowledge, skill, experience, training or education in particular science, profession or occupation may give his or her opinion as an expert as to any matter in which he or she is skilled. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his or her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

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JURY INSTRUCTION NO. 14

Expert witnesses have testified about their reliance on books, treatises, articles, statements, and studies, some of which have not been admitted into evidence. Reference by the expert witnesses to unadmitted materials is allowed so that the expert witnesses may tell you what they relied upon to form their opinions. You may not consider the unadmitted materials as evidence in this case. Rather, you may only consider the unadmitted material to determine what weight, if any, you will give to the experts' opinions.

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JURY INSTRUCTION NO. 15

A question has been asked in which an expert witness was told to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

JURY INSTRUCTION NO. 16

You heard testimony from witness Virgil Hoogestraat. Defendant MCI, selected Mr. Hoogestraat to present its position on the following topics:

1. The general parameters of the design or engineering for right side visibility for the time period 1997 to 2016, including but not limited to right side visibility for the MCI J4500 in general and the 2008 MCI J4500;

2. The general parameters of the design or engineering of any and all proximity sensors being designed or investigated for the time period 1997 to 2016, including but not limited to proximity sensors being designed or investigated for the MCI J4500 in general and the 2008 MCI J4500; and

3. Whether it is feasible to place an S-1 Gard on a 2008 MCI J4500.

As a result, you should regard Mr. Hoogestraat's testimony on the aforementioned areas as the knowledge of Defendant MCI and not merely his own individual opinions or knowledge. Mr. Hoogestraat's answers to questions posed by counsel regarding the aforementioned issues are to be regarded as having been given on behalf of MCI and thus, those responses are binding upon MCI.

JURY INSTRUCTION NO. 17

During the course of the trial you have heard reference made to the word "interrogatory". An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

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JURY INSTRUCTION NO. 18

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

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JURY INSTRUCTION NO. 19

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same not to be true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force and produces in your mind a belief that what is sought to be proved is more probably true than not true.

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JURY INSTRUCTION NO. 20

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

JURY INSTRUCTION NO. 21

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

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JURY INSTRUCTION NO. 22

The plaintiffs seek to establish liability on one or both of two different legal bases: (1) defective product because of defective design and (2) defective product because of failure to warn. I will now instruct you on the law relating to the strict liability claim for defective product.

JURY INSTRUCTION NO. 23

In order to establish a claim of strict liability for a defective product, the Plaintiffs must prove the following elements by a preponderance of the evidence;

1. That the coach was defective;
2. That the defect existed when the coach was sold; and
3. That the defect was a legal cause of the damage or injury to the Plaintiffs and/or the decedent.

Plaintiffs need not prove that the Defendant was negligent.

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JURY INSTRUCTION NO. 24

A legal cause of injury, damage, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss, or harm.

JURY INSTRUCTION NO. 25

A product is defective in its design if, as a result of its design, the product is unreasonably dangerous.

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JURY INSTRUCTION NO. 26

A product is unreasonably dangerous if it failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.

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JURY INSTRUCTION NO. 27

The mere fact that an accident occurred and that someone was injured does not of itself prove that the product was unreasonably dangerous. Liability is never presumed but must be established by a preponderance of the evidence.

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JURY INSTRUCTION NO. 28

In a product liability suit, the relevant time period for determination of liability is the date a the product left the control of the seller rather than at any later time such as the date of injury

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JURY INSTRUCTION NO. 29

For purposes of determining whether the motor coach is unreasonably dangerous, the expectations of bystanders, such as the decedent in this case, are not relevant.

JURY INSTRUCTION NO. 30

A product, though faultlessly made, is defective for its failure to be accompanied by suitable and adequate warnings concerning its safe and proper use if the absence of such warnings renders the product unreasonably dangerous.

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JURY INSTRUCTION NO. 31

If you find that warnings provided with the motor coach were inadequate, the defendant cannot be held liable unless Plaintiffs prove by a preponderance of the evidence that the individual who might have acted on any warning would have acted in accordance with the warning, and that doing so would have prevented the injury in this case.

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JURY INSTRUCTION NO. 32

A manufacturer cannot delegate its ultimate responsibility for assuring that its product is dispensed with all proper warnings.

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JURY INSTRUCTION NO. 33

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. So, you are not to consider any alleged negligence on the part of the bus driver. However, you should consider all of the evidence to determine if there was a defect and, if so, whether the defect caused the collision.

JURY INSTRUCTION NO. 34

Any alleged negligence by Dr. Khiabani is not a defense to ~~Plaintiffs~~' product defect claims, so you are not to consider any alleged negligence on the part of Dr. Khiabani. However, you should consider all of the evidence to determine if there was a defect and, if so, whether the defect caused the collision.

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JURY INSTRUCTION NO. 35

Plaintiffs Keon Khiabani and Aria Khiabani are the heirs of Dr. Kayvan Khiabani, deceased. Plaintiff, the Estate of Katy Barin, DDS, was an heir of Dr. Khiabani from April 18, 2017, until Dr. Barin's death on October 12, 2017.

In determining the amount of losses, if any, suffered by one or more of the heirs as a legal result of the death of Dr. Khiabani, you will decide upon a sum of money sufficient to reasonably and fairly compensate each such heir for the items listed in the following two instructions.

JURY INSTRUCTION NO. 36

The heir's loss of probable support, companionship, society, comfort and consortium. In determining the loss, you may consider the financial support, if any, which the heir would have received from the deceased except for his death, and the right to receive support, which the heir has lost by reason of his death.

The right of one person to receive support from another is nor destroyed by the fact that the former does not need the support, nor by the fact that the latter has not provided it.

You may also consider:

1. The age of the deceased and of the heir;
2. The health of the deceased and of the heir;
3. The respective life expectancies of the deceased and of the heir;
4. Whether the deceased was kindly, affectionate or otherwise;
5. The disposition of the deceased to contribute financially to support the heir;
6. The earning capacity of the deceased;
7. His habits of industry and thrift; and
8. Any other facts shown by the evidence indication what benefits the heir might reasonably have been expected to receive from the deceased had he lived.

With respect to life expectancies, you will only be concerned with the shorter of two, that of the heir whose damages you are evaluating or that of the decedent, as one can derive a benefit from the life of another only so long as both are alive.

JURY INSTRUCTION NO. 37

Any grief or sorrow suffered by the heir and any grief or sorrow reasonably certain to be experienced by the heir in the future.

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JURY INSTRUCTION NO. 38

According to U.S. Department of Health and Human Services standard mortality table, the life expectancy of a person aged 51 is 31 years.

This fact should be considered by you in arriving at the amount of damages if you find that the plaintiff is entitled to a verdict.

Life expectancy shown by the mortality table is an estimate of the probably average remaining length of life of all persons in our country of a given age and it is for you to determine the probable life expectancy of plaintiff from the evidence in this case, taking into consideration all other evidence bearing on the same issue, such as his occupation, health, habits and activities.

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JURY INSTRUCTION NO. 39

If, under the court's instructions, you find that one or more of the heirs is entitled to a verdict, you must also award to such heirs as damages an amount representing the pain and suffering and disfigurement, if any, experienced by the decedent and legally caused by the act or omission upon which you base your finding of liability.

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JURY INSTRUCTION NO. 40

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for the heirs' grief or sorrow or the decedent's pain and suffering and disfigurement. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for the heirs' grief or sorrow and the decedent's pain and suffering and disfigurement you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

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JURY INSTRUCTION NO. 41

Where Plaintiff's injury or disability is clear and readily observable, no expert testimony is required for an award of pain, suffering, anguish and disability.

To grant an award for the pain and suffering of a decedent, you must find, by a preponderance of the evidence, that the decedent was conscious and aware.

If it is not readily observable that a decedent consciously experienced pain and suffering, expert testimony is necessary to establish that the decedent was conscious and aware.

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JURY INSTRUCTION NO. 42

One of the plaintiffs is the personal representative of the estate of Dr. Kayvan Khiabani. Damages recoverable by the personal representative of the decedent on behalf of his estate include:

1. Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, funeral expenses, burial expenses; and

2. Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if he had lived.

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JURY INSTRUCTION NO. 43

If you find that plaintiffs are entitled to compensatory damages for actual loss caused by MCI's breach of an obligation [not arising from a contract], then you may consider whether you should award punitive damages against MCI.

You may award punitive damages against a defendant only if plaintiffs prove by clear and convincing evidence that the wrongful conduct upon which you base your finding of liability for compensatory damages was engaged in with malice on the part of that defendant. You cannot punish a defendant for conduct that is lawful, or which did not cause actual loss to the plaintiffs, or which occurred and caused loss in other states. For the purposes of your consideration of punitive damages only:

"Malice" means conduct which is intended to injure the plaintiffs or despicable conduct which is engaged in with a conscious disregard of the rights or safety of the plaintiffs.

"Despicable conduct" means conduct that is so vile, base or contemptible that it would be looked down upon and despised by ordinary, decent people.

"Conscious disregard" means knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to avoid these consequences.

The purposes of punitive damages are to punish a wrongdoer that acts with malice in harming a plaintiff and deter similar conduct in the future, not to make the plaintiffs whole for their injuries. Consequently, a plaintiff is never entitled to punitive damages as a matter of right and whether to award punitive damages against a defendant is entirely within your discretion.

At this time, you are to decide only whether one or more defendants engaged in wrongful conduct causing actual harm or loss to the plaintiffs with the requisite state of mind to permit an award of punitive damages against that defendant, and if so, whether an award of punitive damages against that defendant is justified by the punishment and deterrent purposes of punitive damages under the circumstances of this case. If you decide an award of punitive damages is justified, you will later decide the amount of punitive damages to be awarded, after you have heard additional evidence and instruction.

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JURY INSTRUCTION NO. 44

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 is proof of every factual element which persuades the jury that the truth of the contentions is highly likely.

JURY INSTRUCTION NO. 45

To find that the defendant acted with implied malice, or with conscious disregard for the rights of others, you must determine that the defendant's conduct was worse than gross negligence or recklessness.

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JURY INSTRUCTION NO. 46

You may not allow your decision regarding punitive damages to be affected by the fact that Motor Coach Industries, Inc. is a company, a profitable company, or a company with the ability to pay punitive damages.

JURY INSTRUCTION NO. 47

You may only award punitive damages to plaintiffs based on specific conduct that caused harm to them. You may not base your decision to award punitive damages on any other conduct.

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JURY INSTRUCTION NO. 48

You may not award any punitive damages based on conduct that has no nexus or connection to the specific harm suffered by plaintiffs.

You may not award punitive damages to punish defendant for lawful conduct. Therefore, you may not award punitive damages for the purpose of punishing defendant for conduct unrelated to plaintiffs' specific injuries.

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JURY INSTRUCTION NO. 49

The fact that I am instructing you about punitive damages does not mean that I believe such an award is appropriate in this case. Whether to award punitive damages is for you – and you alone – to decide.

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JURY INSTRUCTION NO. 50

The court has given you instructions embodying various rules of law to help guide you to a just and lawful verdict. Whether some of these instructions will apply will depend upon what you find to be the facts. The fact that I have instructed you on various subjects in this case [including that of damages] must not be taken as indicating an opinion of the court as to what you should find to be the facts or as to which party is entitled to your verdict.

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JURY INSTRUCTION NO. 51

When you retire to consider your verdict, you must select one of your number to act as foreman, who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. If your verdict is in favor of the plaintiffs, you are directed to make special findings consisting of written answers to the questions in a form that will be given to you. You shall answer the questions in accordance with the directions in the form and all of the instructions of the court. As soon as six or more of you have agreed upon every answer in the special findings, you must have the verdict and special findings signed and dated by your foreman, and then return with them to this room.

JURY INSTRUCTION NO. 52

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any questions submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.

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JURY INSTRUCTION NO. 53

If, during your deliberation, you should desire to be further informed on any point or law or hear again portions of the testimony, you must reduce your request to writing signed by the foreman. The marshal will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys.

Read backs of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a read back, you must carefully describe the testimony to be read back so that the court reporter can arrange her notes. Remember, the court is not at liberty to supplement the evidence.

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JURY INSTRUCTION NO. 54

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

Dated 22nd, March 2018

GIVEN: J. Escobar

DISTRICT COURT JUDGE

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EXHIBIT G

FILED UNDER SEAL

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EXHIBIT G

EXHIBIT H

FILED UNDER SEAL

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EXHIBIT H

EXHIBIT I

FILED UNDER SEAL

EXHIBIT I

EXHIBIT J

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EXHIBIT J

EXHIBIT K

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EXHIBIT L

FILED UNDER SEAL

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EXHIBIT L

EXHIBIT M

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EXHIBIT M

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

MOTOR COACH INDUSTRIES, INC.'S FIRST SET OF INTERROGATORIES TO PLAINTIFF KATAYOUN BARIN, AS EXECUTRIX OF THE ESTATE OF KAYVAN KHIABANI, M.D.

TO: Katayoun Barin, as Executrix of the Estate of Kayvan Khiabani, M.D.; Plaintiff; and

TO: Will Kemp, Esq. and Eric Pepperman, Esq., KEMP, JONES & COULTHARD, LLP and Peter S. Christiansen, Esq. and Kendelee L. Works, Esq., CHRISTIANSEN LAW OFFICES; Attorneys for Plaintiffs.

Defendant **MOTOR COACH INDUSTRIES, INC. (hereinafter "MCI")** propounds to Plaintiff, Katayoun Barin, as Executrix of the Estate of Kayvan Khiabani, M.D., the following First Set of Interrogatories pursuant to NRCP 33.

Each Interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. Responses shall be served upon counsel for MCI within 30 days after service.

You are under a duty to seasonably supplement your responses to the Interrogatories with respect to the identity and location of persons having knowledge of discoverable matters and the identity of persons expected to be called as expert witnesses as well as the subject matter on which they are expected to testify and the substance of their testimony.

You are under a duty to seasonably amend a prior response if you obtain information upon the basis of which you know that the response was incorrect when made, or you know that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response would be, in substance, a knowing concealment.

If a complete answer to a particular Interrogatory is not possible, the Interrogatory should be answered to the extent possible and a statement should be made indicating why only a partial answer is provided. If you contend that an answer to an Interrogatory is privileged, in whole or in part, or otherwise object to any part of any Interrogatory, or contend that any document shall be immune from production during discovery, the following information should be supplied:

1. The reason or reasons for such objection or ground for exclusion; and

2. The identity of each person having knowledge of the factual basis, if any, on which the privilege, objection, or other ground is based.

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DEFINITIONS

The words listed below, as used in these Interrogatories, are defined as follows:

1) **"Incident"** means the incident described in Plaintiffs' Complaint, and includes the circumstances and events surrounding the April 18, 2017, incident, injury, or other occurrence giving rise to this action or proceeding.

2) **"You"** or **"Your"** or **"anyone acting on your behalf"** includes Plaintiff Katayoun Barin, as Executrix of the Estate of Kayvan Khiabani, M.D., your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

3) **"Person"** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

4) **"Document"** means the original or any copy thereof and any non-identical copy, whether different from the original because of notations made on or attached to such copy, or otherwise, of any written (including handwritten, printed, mimeographed, lithographed, duplicated, typed, or graphic, photographic, or electronic) matter of any kind or nature, and shall include, without limiting the generality of the foregoing, all letters, telegrams, correspondence, contracts, agreements, notes, reports, memoranda, mechanical or electronic sound recordings or transcripts thereof, memoranda of telephone or personal conversations or of meetings, conferences, minutes, board of directors' minutes, studies, reports, analyses, interoffice communications, books of account, ledgers, work sheets, vouchers, receipts, canceled checks, money orders, invoices, purchase orders, and bills of any nature whatsoever. In lieu of identifying a document, you may attach a copy of same to your answers to these First Continuing Interrogatories.

5) **"Identify"** means that:

A) With respect to a natural person, the answer shall state the person's name, present or last known home address, and business address, including street name and number, city or town, state, zip code, and home and business telephone numbers. Once a person has been thus identified in an answer to an Interrogatory, it shall be sufficient thereafter when identifying that person merely to state his or her name;

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B) With respect to a person other than a natural person, the answer shall state the person's full name and type of organization, the address of its principal place of business, including street name and number, city or town, state, zip code, telephone number, your contact there, and the jurisdictions and place of its incorporation and organization. Once a person has been thus identified in an answer to an Interrogatory, it shall be sufficient thereafter when identifying that person to state its full name only;

C) With respect to a document, the answer shall state the type of document (e.g., insurance policy, business record, letter, memorandum, handwritten note, list, report, transcript of testimony), its date, title, and contents, the identification of the person who prepared the document, each person for whom it was delivered, each person who has possession, custody, or control over each copy of the document. If any document was, but is no longer in your possession, custody, or control, the answer shall state the disposition that was made of it, and the reason for such disposition and the date thereof.

6) **"Address"** means the street address, including the city, state, and zip code.

7) **"Subject Motor Coach"** or **"Product"** means the motor coach which Plaintiff alleges was defective in this action.

8) **"Complaint"** means the Complaint filed on your behalf in this action, including any and all amendments thereto.

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INTERROGATORIES

INTERROGATORY NO. 1:

Please provide the name, address, phone number, and employer of each person who contributed to the preparation or formulation of the responses to these Interrogatories and the accompanying Requests for Production of Documents.

INTERROGATORY NO. 2:

Please provide Your full legal name, current address, social security number and any other names by which You have been known.

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INTERROGATORY NO. 3:

Please identify any statement, whether oral, recorded or written, received from any person claiming to have knowledge of any facts or circumstances relevant to the Incident or the allegations contained in your Complaint.

INTERROGATORY NO. 4:

Please state the names, addresses, and telephone numbers of all persons, including witnesses to the Incident, known to You, Your attorney, Your agents, any investigator or detective employed by You or Your attorney or anyone acting on Your behalf, having knowledge of facts relevant to the Incident, the injuries or damages alleged, or the allegations contained in Your Complaint.

INTERROGATORY NO. 5:

Please state in detail the basis for Your claims of Strict Liability against MCI, including the precise defect which You contend existed at the time the Subject Motor Coach left MCI's control.

INTERROGATORY NO. 6:

In the event You claim MCI failed to warn of any alleged dangerous condition or defect which You contend existed at the time the Subject Motor Coach left MCI's control, please state in detail the basis for such claim including the precise dangerous condition or defect for which a warning was not provided, to whom You allege the warning should have been provided, the basis on which You claim the warning was not communicated to the party or entity You contend should have received the warning, and the basis on which You contend the alleged failure to warn caused Your alleged damages.

INTERROGATORY NO. 7:

In the event You claim that the Subject Motor Coach was defective in design at the time it left MCI's control, please state in detail the basis for such claim including the precise defect in the design of the Subject Motor Coach, the nature of the alleged defective design, and the basis on which You contend the alleged defect caused Your alleged damages.

INTERROGATORY NO. 8:

In the event You claim that the Subject Motor Coach was defective in manufacture at the time it left MCI's control, please state in detail the basis for such claim including the precise defect

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in the manufacture of the Subject Motor Coach, the nature of the alleged defect, how the alleged defect differed from any similar make and model motor coach sold by MCI, and the basis on which You contend the alleged defect caused Your alleged damages.

INTERROGATORY NO. 9:

With respect to Your claims for monetary relief in this action, please state the amount of relief You seek on behalf of the Estate of Kayvan Khiabani, M.D., describe the nature of such relief, and describe the computation used to calculate such relief for the Estate of Kayvan Khiabani, M.D.

INTERROGATORY NO. 10:

Please specify each and every act or omission of MCI which You contend caused or contributed to Your injuries.

INTERROGATORY NO. 11:

Please list each and every claim You made or intend to make against MCI and describe in detail Your contentions related to MCI's liability thereunder.

INTERROGATORY NO. 12:

Please itemize all expenses and special damages which You claim resulted from the events alleged in the Complaint, including but not limited to, medical and hospital expenses, funeral expenses, and any economic damages alleged to arise from the Incident.

INTERROGATORY NO. 13:

Please list the name and address of each hospital, clinic or institution, including mental health facilities, at which Kayvan Khiabani, M.D. was hospitalized or received treatment during the past ten (10) years, and further state:

(a) The reason for and period of each such hospitalization or treatment;

(b) The names and addresses of all consulting and treating doctors and their medical specialties;

(c) If any period of hospitalization or any treatment was necessitated in whole or in part by reason of injuries relating to the Incident, list the itemized total amount of hospital charges you claim resulted from the Incident.

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INTERROGATORY NO. 14:

Please provide the full name, address and telephone number of each and every doctor, therapist, rehabilitation specialist, psychologist, mental health professional, chiropractor, healthcare provider, or medical personnel who has seen or treated Kayvan Khiabani, M.D. at any time, either before or after the Incident alleged in the Complaint, for any time from ten (10) years preceding the Incident up to the time of his death.

INTERROGATORY NO. 15:

If the Estate of Kayvan Khiabani, M.D. was compensated by any third-party, including any insurance company, for the expenses, losses or damages incurred as a result of the Incident alleged in the Complaint, please provide the name and address of the entity, as well as the policy number, the date, nature and substance of the claim, and an itemization of all payments received from the third-party.

INTERROGATORY NO. 16:

If there are any photographs, videos, diagrams, statements, reports, x-rays, or other documentary or tangible evidence relating to or depicting the Incident alleged in the Complaint, please describe each such item, the nature and form of each item, the present location of such item, the person who gave the statement or created the item, and the name, address and telephone number of the person with custodial control over the item.

INTERROGATORY NO. 17:

Please provide the name, address, and telephone number of each of Kayvan Khiabani's employers over the last ten (10) years, and the name of his immediate supervisor for each employer identified, his annual salary for said employment and, for any former employers, please provide the reason for the end of his employment with that entity.

INTERROGATORY NO. 18:

In the ten (10) years prior to the Incident, did Kayvan Khiabani, M.D. file an action or make a written claim or demand for compensation for personal injuries? If so, for each action, claim or demand, state the date, time and place of the incident; the name, address and telephone number or each person against whom the claim was made or action filed; the court, names of the parties and

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case number of any action filed; the name, address and telephone number of any attorney representing him; and whether the claim or action was resolved or is pending.

INTERROGATORY NO. 19:

Was Kayvan Khiabani, M.D. married previously? If so, please identify the name and present address of each prior spouse, the inclusive dates of each marriage and the inclusive dates when he lived with a prior spouse.

INTERROGATORY NO. 20:

Please state in detail the basis for Your claims of Punitive Damages against MCI, including identifying any and all witnesses you contend will offer evidence to support such a claim.

INTERROGATORY NO. 21:

Please provide the URL or web address for all social media accounts maintained by Kayvan Khiabani, M.D., whether active or inactive, from April 18, 2015, to the present, including, but not limited to, Facebook, Instagram, Twitter, Google+, MySpace, YouTube, Keek, and LinkedIn. As to all social media accounts listed above, please provide the following:

(a) User name;

(b) Password;

(c) Last time accessed; and

(d) List of names and addresses of all other parties or individuals who have access to the account.

INTERROGATORY NO. 22:

If Kayvan Khiabani, M.D. subscribed to any internet, live-streaming or cloud-based radio, media, or music services, including but not limited to Pandora, Google Play, Spotify, Slacker Radio, or similar service, please provide the user name for such subscription.

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INTERROGATORY NO. 23:

If Kayvan Khiabani, M.D. was involved in any bicycle accidents or collisions prior to the Incident, please describe the circumstances of any such accident, including the time and date of the prior accident, the location, a description of how the accident occurred, and any injuries sustained by Kayvan Khiabani, M.D.

DATED this 25th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2017, a true and correct copy of the foregoing **MOTOR COACH INDUSTRIES, INC.'S FIRST SET OF INTERROGATORIES TO PLAINTIFF KATAYOUN BARIN, AS EXECUTRIX OF THE ESTATE OF KAYVAN KHIABANI, M.D.** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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An Employee of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

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EXHIBIT N

EXHIBIT N

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

PLAINTIFF KATAYOUN BARIN AS EXECUTRIX OF THE ESTATE OF KAYVAN KHIABANI, M.D.'S RESPONSE TO MOTOR COACH INDUSTRIES, INC.'S FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1:

Please provide the name, address, phone number, and employer of each person who contributed to the preparation or formulation of the responses to these Interrogatories and the

accompanying Requests for Production of Documents.

RESPONSE NO. 1:

Katy Barin
11546 Morning Grove Dr.
Las Vegas, NV 89135
#702-353-1094

INTERROGATORY NO. 2:

Please provide Your full legal name, current address, social security number and any other names by which You have been known.

RESPONSE NO. 2:

Katayoun Katy Barin
11546 Morning Grove Dr.
Las Vegas, NV 89135
SSN: 622-29-8850

Plaintiff's maiden name is Barin and she has never been known by any other names.

INTERROGATORY NO. 3:

Please identify any statement, whether oral, recorded or written, received from any person claiming to have knowledge of any facts or circumstances relevant to the Incident or the allegations contained in your Complaint.

RESPONSE NO. 3:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Subject to and without waiving these objections, Plaintiffs respond that they are in possession of a recorded statement from Luis Sacarias and written statements produced by or to other parties in this action. Plaintiffs contend that the recorded statement of Luis Sacarias is protected from disclosure under the work product doctrine.

INTERROGATORY NO. 4:

Please state the names, addresses, and telephone numbers of all persons, including witnesses to the Incident, known to You, Your attorney, Your agents, any investigator or detective employed by You or Your attorney or anyone acting on Your behalf having knowledge of facts relevant to the Incident, the injuries or damages alleged, or the allegations contained in Your Complaint.

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RESPONSE NO. 4:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs further object to the extent that it seeks to impose obligations on Plaintiffs that exceed those under Nevada's Rules of Civil Procedure. Plaintiffs also object on grounds that this Interrogatory calls for the premature disclosure of expert witnesses. Subject to and without waiving these objections, please see Plaintiffs' NRCP 16.1 Disclosures and all supplements thereto. Discovery is continuing, and Plaintiffs reserve the right to supplement their 16.1 disclosures in accordance with Nevada law.

INTERROGATORY NO. 5:

Please state in detail the basis for Your claims of Strict Liability against MCI, including the precise defect which You contend existed at the time the Subject Motor Coach left MCI's control.

RESPONSE NO. 5:

Plaintiffs object to this contention interrogatory on grounds that it is vague, ambiguous, over broad, calls for expert testimony from a lay person, and prematurely calls for the disclosure of expert opinions. Subject to and without waiving these objections, Plaintiff responds as follows:

Under Nevada law, corporations that place upon the market defective products that are unreasonably dangerous are subject to strict liability for physical harm caused by any defect. MCI was responsible for making the defective and unreasonably dangerous 2008 J4500 bus that killed Dr. Khiabani.

Plaintiffs contend that, when the subject 2008 J4500 bus left MCI's hands, it contained numerous defects that–taken separately or together–rendered the bus unreasonably dangerous. The bus lacked a simple safety device to protect pedestrians and cyclists who fall either near the rear wheel well or underneath the bus from being run over by the multi-ton bus' rear wheels. Prior to 2008, MCI knew or should have known that its J4500 bus would be driven in populated areas near pedestrians and cyclists. Prior to 2008, MCI knew or should have known that, for several reasons, pedestrians or cyclists may either fall near the rear wheel well or underneath the bus as the bus is moving and that, as made, there was nothing to prevent the bus' rear wheels from running over

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pedestrians or cyclists who either fall near the rear wheel well or under the bus. Prior to 2008, MCI was aware of a safety device known as an S-1 Gard that is designed to protect the lives of pedestrians and cyclists in this foreseeable circumstance. The S-1 Gard attaches to the bus' undercarriage and provides a protective barrier at the wheel well in front of the bus' rear wheels. If a pedestrian or cyclist falls underneath the bus, as Dr. Khiabani did in this case, the S-1 Gard will prevent the pedestrian or cyclist from being run over by the heavy bus' rear wheels and protects against other wheel well injuries. The S-1 Gard acts similar to a cow catcher and pushes the pedestrian or cyclist away from the rear wheels. Upon information and belief, in or around 1998, the S-1 Gard was specifically marketed to MCI and, since that time, the S-1 Gard has been consistently made available to MCI. Even though it has always been commercially feasible for MCI to incorporate the S-1 Gard on its buses, including but not limited to the 2008 J4500, MCI has repeatedly made the conscious decision not to equip its buses with this well-known, life-saving device.

MCI's 2008 J4500 was also defective when it left the hands of MCI because, as made, the moving bus causes wind blasts, suction, and turbulence that are unreasonably dangerous to nearby pedestrians and cyclists. Prior to 2008, MCI knew or should have known that its J4500 bus would be driven in populated areas near pedestrians and cyclists and that these pedestrians and cyclists would encounter the wind blasts, suction, and turbulence caused by the aerodynamics of the bus. Prior to 2008, MCI knew or should have known of the potentially dangerous aerodynamic effects of its buses, including the 2008 J4500, and that these dangerous aerodynamic effects were compounded by a minimal curve of the bus' front windshield and by overly square corners on the bus' front edges. Even though it would have been technologically possible and commercially feasible to make a bus that protected pedestrians and cyclists, like Dr. Khiabani, from the unreasonably dangerous aerodynamic effects of the 2008 J4500 bus, MCI made the conscious decision to reject these simple engineering fixes.

MCI's 2008 J4500 was also defective and unreasonably dangerous when it left the hands of MCI because it had right side blind spots and/or visibility issues that hindered the view of persons on the front right and right side of the bus. Blind spots have been a serious problem with buses for

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decades. Even though it would have been technologically possible and commercially feasible for MCI to minimize and/or reduce the blinds spots and visibility issues with its 2008 J4500 bus, MCI failed to make a reasonably safe bus.

MCI's 2008 J4500 bus was also defective and unreasonably dangerous because it lacked proximity sensors to alert the driver of nearby cyclists. Proximity sensors are commercially feasible safety devices that are commonly found on all types of vehicles. These critical safety devices are even commonly equipped on small cars, let alone massive buses littered with blind spots and visibility issues.

MCI's 2008 J4500 was further unreasonably dangerous because MCI failed to provide suitable and adequate warnings concerning the bus' safe and proper use. Specifically, the bus failed to include any warning to any user that adequately communicates the dangers that result from its use or foreseeable misuse, especially as it relates to (i) the lack of an S-1 Gard, (ii) dangerous aerodynamic effects, including severe wind blasts, suction, and turbulence for adjacent pedestrians and cyclists, (iii) blind spots and visibility issues relating to the bus, and (iv) the lack of proximity sensors.

Each of these defects, and all of them, caused or substantially contributed to the death of Dr. Khiabani and Plaintiffs' injuries alleged herein. MCI's failure to provide suitable and adequate warnings concerning the bus' safe and proper use, as described above, also caused or substantially contributed to the death of Dr. Khiabani and Plaintiffs' injuries alleged herein.

Discovery is continuing, and Plaintiffs reserve the right to supplement this response in accordance with Nevada law.

INTERROGATORY NO. 6:

In the event You claim MCI failed to warn of any alleged dangerous condition or defect which You contend existed at the time of the Subject Motor Coach left MCI's control, please state in detail the basis for such claim including the precise dangerous condition or defect for which a warning was not provided, to whom You allege the warning should have been provided, the basis on which You claim the warning was not communicated to the party or entity You contend should have received the warning, and the basis on which You contend the alleged failure to warn caused Your

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alleged damages.

RESPONSE NO. 6:

See Response to Interrogatory No. 5.

INTERROGATORY NO. 7:

In the event You claim that the Subject Motor Coach was defective in design at the time it left MCI's control, please state the detail the basis for such a claim including the precise defect in the design of the Subject Motor Coach, the nature of the alleged defective design, and the basis on which You contend the alleged defect caused Your alleged damages.

RESPONSE NO. 7:

See Response to Interrogatory No. 5.

INTERROGATORY NO. 8:

In the event You claim that the Subject Motor Coach was defective in manufacture at the time it left MCI's control, please state in detail the basis for such claim including the precise defect in the manufacture of the Subject Motor Coach, the nature of the alleged defect, how the alleged defect differed from any similar make and model motor coach sold by MCI, and the basis on which You contend the alleged defect caused Your alleged damages.

RESPONSE NO. 8:

See Response to Interrogatory No. 5.

INTERROGATORY NO. 9:

With respect to Your claims for monetary relief in this action, please state the amount of relief You seek on behalf of the Estate of Kayvan Khiabani, M.D., describe the nature of such relief, and describe the computation used to calculate such relief for the Estate of Kayvan Khiabani, M.D.

RESPONSE NO. 9:

Plaintiff objects to the extent that this Interrogatory calls for expert testimony from a lay person or seeks the premature disclosure of expert witnesses. Plaintiff further objects on grounds that it is vague, ambiguous, over broad, compound, and calls for legal conclusions. Subject to and without waiving these objections, Plaintiff responds as follows:

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Medical Expenses of Dr. Khiabani

University Medical Center: Plaintiffs have requested all billings from UMC

American Medical Response: $1,458.61

Wage Loss of Dr. Khiabani

See Expert Report of Dr. Larry Stokes

Funeral and Memorial Expenses:

Air Canada Flight Receipts: $5686.49 (P02200-04, P02205-08, P02210-18)

Receipt from Montreal Gazette-

Notice of Posting Obituary: $862.08 (P02209)

Receipt for Celebration of Life: $5,043.36 (P02198-P02199)

The Mount Royal Cemetery-Burial: $7,939.02 (P02221)

Mount Royal Commemorative

Services-Products and Services: $5,173.88 (P02222-P02224)

Mount Royal Commemorative

Services-Monument Inscription: $2,926.11 (P02225-P02227)

Palm Southwest Mortuary: $12,316.16 (P02231-P02237)

Punitive Damages:

The amount of punitive damages imposed against a defendant falls completely within the province of the jury. Under Nevada law, the jury is not permitted to impose an amount of punitive damages that would annihilate or financially destroy the defendant. For the amount of punitive damages that Plaintiffs contend would not annihilate or financially destroy MCI/New Flyer, please see the Expert Report of Dr. Larry Stokes.

Wage Loss of Dr. Barin

See Expert Report of Dr. Larry Stokes

Medical Expenses of Aria and Keon Khiabani

Steven Kalas Counseling & Consultation: Billings expected soon

Household Services

Reasonable value

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General Damages

Plaintiffs Keon and Aria Khiabani each have been deprived of their father's comfort, support, companionship, society, and consortium, and further, each has suffered great grief, sorrow, and extreme emotional distress as a result of the wrongful death of their father. Plaintiff Katy Barin has been deprived of her husband's comfort, support, companionship, society, and consortium, and further, has suffered great grief, sorrow, and extreme emotional distress as a result of the death of her husband. Plaintiff Katy Barin has also suffered personal injuries, including pain and suffering, as a result of the exasperation of her cancer caused by the stress of her husband's wrongful death. Plaintiffs further seek to recover for the pain, suffering, and disfigurement of their father/husband, Dr. Kayvan Khiabani (Decedent). Plaintiffs are seeking the recovery of attorneys' fees and costs incurred, all applicable interest, and such other relief deemed to be proper by the Court.

To the extent that these damages amounts rely on expert opinions, they will be timely disclosed in accordance with Nevada law and the Case Management Order. Discovery is ongoing. Plaintiffs have complied, and they will continue to comply, with their disclosure obligations under the Nevada Rules of Civil Procedure and Case Management Order. Plaintiffs reserve their right to supplement this response in accordance with Nevada law.

INTERROGATORY NO. 10:

Please specify each and every act or omission of MCI which You contend caused or contributed to Your injuries.

RESPONSE NO. 10:

See Response to Interrogatory No. 5.

INTERROGATORY NO. 11:

Please list each and every claim You made or intend to make against MCI and describe in detail Your contentions related to MCI's liability thereunder.

RESPONSE NO. 11:

See Amended Complaint and Response to Interrogatory No. 5.

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INTERROGATORY NO. 12:

Please itemize all expenses and special damages which You claim resulted from the events alleged in the Complaint, including but not limited to, medical and hospital expenses, funeral expenses, and any economic damages alleged to arise from the Incident.

RESPONSE NO. 12:

See Response to Interrogatory No. 9.

REQUEST NO. 13:

Please list the name and address of each hospital, clinic or institution, including mental health facilities, at which Kayvan Khiabani, M.D. was hospitalized or received treatment during the past ten (10) years, and further state:

(a) The reason for and period of each such hospitalization or treatment;

(b) The names and address of all consulting and treating doctors and their medical specialities;

(c) If any period of hospitalization or any treatment was necessitated in whole or in part by reason of injuries relating to the Incident, list the itemized total amount of hospital charges you claim resulted from the Incident.

RESPONSE NO. 13:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs also object on grounds that this Interrogatory is vague, ambiguous, over broad, unduly burdensome, seeks information that is equally available to Defendants, and seeks confidential medical information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Plaintiff responds with the following:

Primary Physician: Dr. Elissa Palmer, 2410 Mesa Street #180, Las Vegas, NV 89128

03/23/17 University Medical Center Visit: left lower flank pain and CT scan\

01/11/17 University Medical Center Visit: After performing surgery on a patient, for a wrist fracture, Dr. Khiabani noticed that the glove he was wearing was perforated and he left index finger

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was bleeding from the K-wire.

01/06/14 University Medical Center Visit: blood work for gout.

04/08/13 University Medical Center Visit: blood work for gout.

06/26/13 University Medical Center Visit: blood work for gout.

02/08/12 University Medical Center Visit: Dr. Khiabani ordered chest x-rays on himself for a cough, but was not evaluated.

Discovery is continuing and Plaintiffs reserve the right to supplement this response in accordance with Nevada law.

INTERROGATORY NO. 14:

Please provide the full name, address and telephone number of each and every doctor, therapist, rehabilitation specialist, psychologist, mental health professional, chiropractor, healthcare provider, or medical personnel who has seen or treated Kayvan Khiabani, M.D. at any time, either before or after the Incident alleged in the Complaint, for any time from ten (10) years preceding the Incident up to the time of his death.

RESPONSE NO. 14:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs also object on grounds that this Interrogatory is vague, ambiguous, over broad, unduly burdensome, seeks information that is equally available to Defendants, and seeks confidential medical information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Plaintiff responds with the following:

Pre-accident medical providers, see Response No. 13.

Post-accident providers:

Dale Horba, Paramedic
Kevin May
Michael Martin
Jesse Gomez
c/o Clark County Fire Department

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Shaun Harney
Andrew Louis
c/o American Medical Response
Las Vegas, NV 89101

Raina Flores, RN
Stacy Whipple, Unit Clerk
Jay Coates, DO
Nancy Rivera, M.D.
Elliott Welder, M.D.
Tamora Locke, SW
Purvi Patel, M.D.
Patricia Archer
Neil Kaura
c/o University Medical Center Hospital
1800 W. Charleston Blvd.
Las Vegas, NV 89102

Discovery is continuing and Plaintiffs reserve the right to supplement this response in accordance with Nevada law.

INTERROGATORY NO. 15:

If the Estate of Kayvan Khiabani, M.D. was compensated by any third-party, including any insurance company, for the expenses, losses or damages incurred as a result of the Incident alleged in the Complaint, please provide the name and address of the entity, as well as the policy number, the date, nature and substance of the claim, and an itemization of all payments received from the third-party.

RESPONSE NO. 15:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs also object on grounds that this Interrogatory seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to, and without waiving these objections, Plaintiff responds that their was a $25,000.00 life insurance policy with Dr. Khiabani's employer, Board of Regents NSHE, but no other third-party payments.

INTERROGATORY NO. 16:

If there are any photographs, videos, diagrams, statements, reports, x-rays, or other documentary or tangible evidence relating to or depicting the Incident alleged in the Complaint, please describe each such item, the nature and form of each item, the nature and form of each item,

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the present location of such item, the person who gave the statement or created the item, and the name, address and telephone number of the person with custodial over the item.

RESPONSE NO. 16:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs further object to the extent that it calls for the premature disclosure of expert witnesses, seeks to impose obligations on Plaintiffs that exceed those under Nevada's Rules of Civil Procedure, or seeks information that is equally accessible to Defendants. Subject to, and without waiving these objections, See Plaintiffs' Early Case Conference Disclosures and all supplements thereto. Discovery is continuing, and Plaintiffs reserve the right to supplement their 16.1 disclosures in accordance with Nevada law.

INTERROGATORY NO. 17:

Please provide the name, address, and telephone number of each of Kayvan Khiabani's employers over the last ten (10) years, and the name of his immediate supervisor for each employer identified, his annual salary for said employment and, for any former employers, please provide the reason for the end of his employment with that entity.

RESPONSE NO. 17:

Dr. Khiabani's only employer for the last ten years was:

Board of Regents NSHE
2601 Enterprise Road
Reno, Nevada 89512

All salary information is set forth in Dr. Khiabani's W2s, which are being produced in conjunction with Plaintiffs' responses to requests for admission.

INTERROGATORY NO. 18:

In the ten (10) years prior to the Incident, did Kayvan Khiabani, M.D. file an action or make a written claim or demand for compensation for personal injuries? If so, for each action, claim or demand, state the date, time and place of the incident, the name, address and telephone number or each person against whom the claim was made or action filed; the court, names of the parties and case number of any action filed; the name, address and telephone number of any attorney

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representing him; and whether the claim or action was resolved or is pending.

RESPONSE NO. 18:

To the best of Plaintiff's knowledge, there were no prior actions, claims, or demands.

INTERROGATORY NO. 19:

Was Kayvan Khiabani, M.D. married previously? If so, please identify the name and present address of each prior spouse, the inclusive dates of each marriage and the inclusive dates when he lived with a prior spouse.

RESPONSE NO. 19:

No prior marriages.

INTERROGATORY NO. 20:

Please state in detail the basis for Your claims of Punitive Damages against MCI, including identifying any and all witnesses you contend will offer evidence to support such a claim.

RESPONSE NO. 20:

Plaintiffs incorporate their response to Interrogatory No. 5, including all objections, as though fully set forth herein. Subject to, and in addition to, these objections and answers, Plaintiffs further respond as follows:

In making the subject 2008 J4500 bus, MCI acted with conscious and reckless disregard for the safety of the public, including Dr. Khiabani. MCI repeatedly and intentionally refused to equip its buses with well known, commercially feasible safety devices, including but not limited to the S-1 Gard and proximity sensors. Although the costs of these potentially life-saving devices would have been minimal, MCI apparently preferred profits over safety. MCI also consciously rejected simple engineering fixes that would have minimized and/or eliminated the dangerous and life threatening blind spots, visibility issues, wind blasts, suction, and turbulence caused by its bus. MCI has thus been guilty of oppression, fraud or malice, express or implied, as contemplated under Nevada's punitive damages law.

INTERROGATORY NO. 21:

Please provide the URL or web address for all social media accounts maintained by Kayvan Khiabani, M.D., whether active or inactive, from April 18, 2015, to the present, including, but not

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limited to, Facebook, Instagram, Twitter, Google+, MySpace, YouTube, Keek, and LinkedIn. As to all social media accounts listed above, please provide the following:

(a) User name;

(b) Password;

(c) Last time accessed; and

(d) List of names and addresses of all other parties or individuals who have access to the account.

RESPONSE NO. 21:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs further object to the extent that it seeks to impose obligations on Plaintiffs that exceed those under Nevada's Rules of Civil Procedure or seeks information that is equally accessible to Defendants. Plaintiffs also object on grounds that this Interrogatory is over broad, unduly burdensome, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence.

INTERROGATORY NO. 22:

If Kayvan Khiabani, M.D. subscribed to any internet, live-streaming or cloud-based radio, media, or music services, including but not limited to Pandora, Google Play, Spotify, Slacker, Radio, or similar service, please provide the user name for such subscription.

RESPONSE NO. 22:

Plaintiffs object to this Request to the extent that it seeks information protected from disclosure by the attorney client privilege, the attorney work product doctrine, or any other applicable privilege. Plaintiffs further object to the extent that it seeks to impose obligations on Plaintiffs that exceed those under Nevada's Rules of Civil Procedure or seeks information that is equally accessible to Defendants. Plaintiffs also object on grounds that this Interrogatory is over broad, unduly burdensome, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence.

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INTERROGATORY NO. 23:

If Kayvan Khiabani, M.D. was involved in any bicycle accidents or collisions prior to the Incident, please describe the circumstances of any such accident, including the time and date of the prior accident, the location, a description of how the accident occurred, and any injuries sustained by Kayvan Khiabani, M.D.

RESPONSE NO. 23:

To the best of Plaintiffs' knowledge and belief, Dr. Khiabani was not involved in any such accidents or collisions prior to the Incident.

DATED this 5th day of September, 2017.

KEMP, JONES & COULTHARD, LLP

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ERIC PEPPERMAN, ESQ. (#11679)
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-and-
PETER S. CHRISTIANSEN, ESQ. (#5254)
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2017, the foregoing PLAINTIFF KATAYOUN BARIN AS EXECUTRIX OF THE ESTATE OF KAYVAN KHIABANI, M.D.'S RESPONSES TO MOTOR COACH INDUSTRIES, INC.'S FIRST SET OF INTERROGATORIES was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

An Employee of Kemp, Jones & Coulthard

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VERIFICATION

I, Katayoun Katy Barin, as Executrix of the Estate of Kayvan Khiabani, M.D., declare and state under penalty of perjury that:

I am a party to this action. The information necessary to prepare the responses to MOTOR COACH INDUSTRIES, INC.'S FIRST SET OF INTERROGATORIES includes information personally known to me and matters which I believe to be true, and the responses were prepared with the advice and assistance of legal counsel. Accordingly, I rely on my own knowledge, information, and belief, and upon my attorneys and their agents for the accuracy of some of the information stated in the responses, and on that basis, I am informed and believe that the matters stated herein are true and correct.

I declare under penalty of perjury that the forgoing is true and correct.

Dated this 4 day of September, 2017.

By: _____
Katayoun Katy Barin, as Executrix of
the Estate of Kayvan Khiabani, M.D.

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EXHIBIT O

FILED UNDER SEAL

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EXHIBIT O

EXHIBIT P

EXHIBIT P

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident, et al.,

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED TUESDAY, MARCH 20, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

APPEARANCES:

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

BY: WILLIAM S. KEMP, ESQ.
BY: ERIC PEPPERMAN, ESQ.
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For the Plaintiffs Aria Khiabani and Katayoun Barin:

BY: PETER CHRISTIANSEN, ESQ.
BY: KENDELEE WORKS, ESQ.
BY: WHITNEY J. BARRETT, ESQ.
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For the Defendant Motor Coach Industries, Inc.:

BY: D. LEE ROBERTS, ESQ.
BY: JOEL. D. HENRIOD, ESQ.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL
6385 South Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
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lroberts@wwhgd.com
- AND -

For the Defendant Motor Coach Industries, Inc.:

BY: DARRELL BARGER, ESQ.
BY: MICHAEL G. TERRY, ESQ.
BY: HOWARD RUSSELL, ESQ.
HARTLINE DACUS BARGER DREYER
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Suite 1600
Dallas, Texas 75231
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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
ROBERT ANTHONY PEARS	118			

(Video Deposition played)

E X H I B I T S

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

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done.

MR. ROBERTS: Your Honor, it's not never done. We've given the Court case law that shows it's the majority rule under a loss of support statute. And I'd like to be able to say here's how you can reconcile all of the cases out there, but they can't all be reconciled.

THE COURT: That's happening quite often in this case, isn't it? No seriously. I'm not complaining. I'm just --

MR. ROBERTS: But if you have a loss of support case --

THE COURT: It's an observation.

MR. ROBERTS: -- that specifically addresses the issue, the clear majority rule is the taxation comes in. And the reason it comes in is a loss of support has to come in after personal consumption.

Personal consumption doesn't come in in a wage loss case. So that wouldn't come in. Income taxes wouldn't come in in a wage loss case. But if it's loss of support, that's why it comes in.

And the fact is, if the jury isn't instructed on taxes and awarded 15 million, they

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will have awarded 5 million more than it would have been possible for Dr. Khiabani to pay them if he had paid his taxes.

Mr. Kemp argues it's speculated that he would have stayed in the 35 percent bracket. Well, we have undisputed evidence that his last full year, he paid 35 percent. It is no more than speculative that he'll continue to be taxed at 35 percent than it would be that he'll continue to make a million a year for 20 years. That's just as speculative, but that comes in. It would be highly speculative to suggest that somehow he's going to -- the tax deductions and tax shelters that he didn't use the last full year of his life.

So we think, under the case law, it would be highly prejudicial to not allow the jury to consider taxes when considering, not his lost income, but how much he would have had available to give to his children.

MR. KEMP: Your Honor, when I said it was always the case that it doesn't come in, I meant under Nevada law. I agree there's some case in Alaska somewhere. But if you take a look at the Otis case, that's the Nevada Supreme Court.

MR. ROBERTS: All that says is you don't

EXHIBIT Q

EXHIBIT Q

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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

000181
011934

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 AE

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

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

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 (7th 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 in-tended. 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

000186
011939

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.

000187
011940

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

ed. 1987) ("'Clear proof' is convincing, unequivocal proof; proof by a substantial margin. It means proof by more than the mere preponderance of the evidence, as defined in these instructions. The standard for 'clear proof', however, is not so strict as the standard of 'proof beyond reasonable doubt' used in criminal cases."); 3A KEVIN F. O'MALLEY, JAY E. GRENIG & HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 157.32 (5th ed. 2000) ("'Clear proof' is convincing, unequivocal proof or proof by a substantial margin. It means proof by more than the mere preponderance of the evidence. The standard for 'clear proof,' however, is not so strict as the standard of '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

G

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).

000190
011943

Proposed and rejected
H

Refused

000190
011943

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*).

Refused

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. ___

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

K

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. ___

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

000195
011948

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. ___

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.

Proposed and rejected
N

000196
011949

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. ___

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

0

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.

000198

Proposed and rejected

P

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.

(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.

000199
011952

Proposed and rejected

Q

Refused

000199
011952

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

000201
011954

000201
011954

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.

000203
011956

Proposed and rejected

Refused

000203
011956

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.

000204
011957

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 V

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

011960
000207

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
2

000208
011961

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

000208
011961

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.7 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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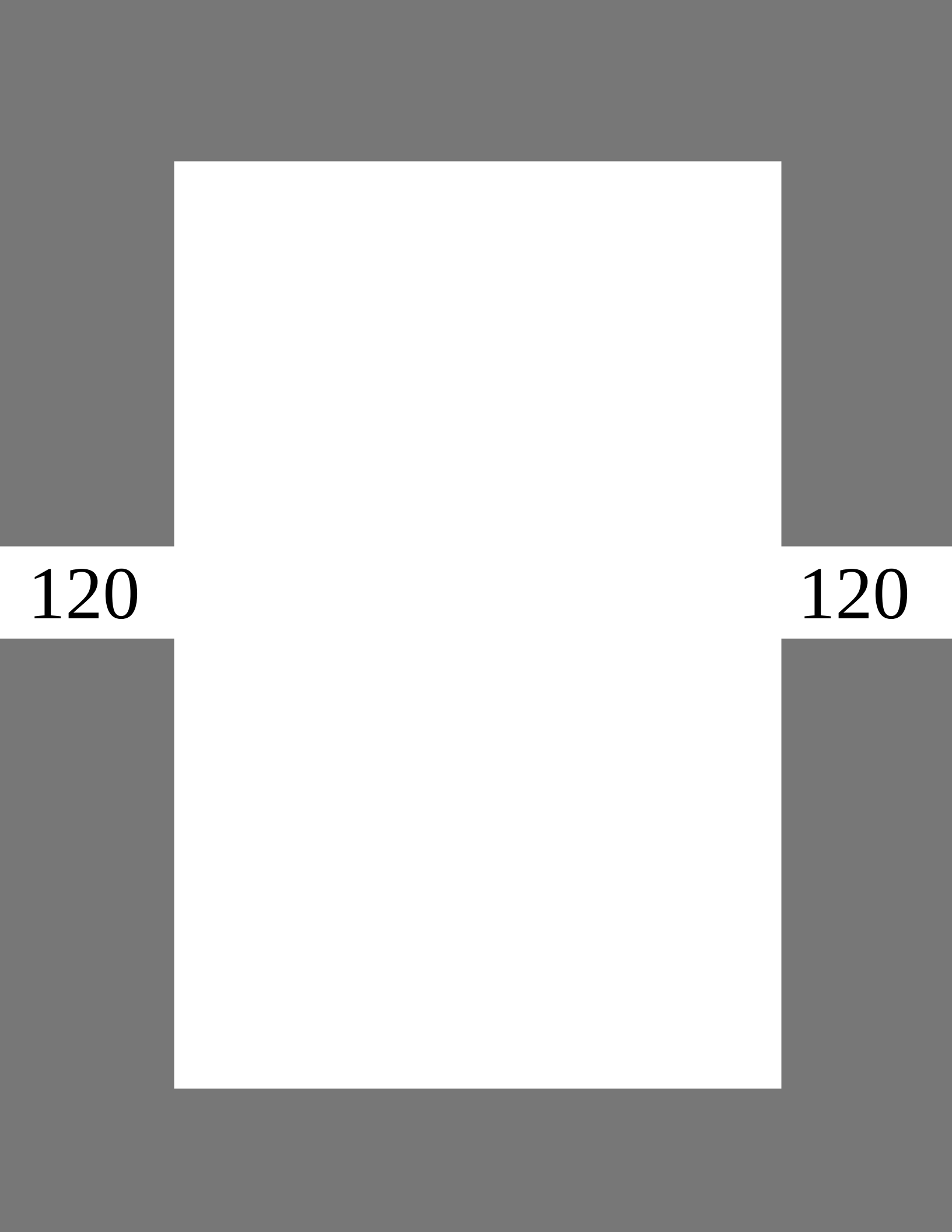
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DISTRICT COURT

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,

v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

MOTOR COACH INDUSTRIES, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM

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Defendant Motor Coach Industries, Inc. ("MCI") renews its motion for judgment as a matter of law. NRCP 50(b).

NOTICE OF MOTION

PLEASE TAKE NOTICE that MCI will bring the foregoing motion for hearing before the Court on the **12th** day of **June**, 2018, at **9:30 a**.m., in Department XIV of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Court should enter judgment as a matter of law in favor of Motor Coach Industries, Inc. under NRCP 50(b) because plaintiffs did not meet their burden to demonstrate that a warning would have made a difference. Rather, the evidence conclusively demonstrates that, even if MCI had given a warning, Mr. Hubbard did not have time to heed it before the collision between the motor coach and Dr. Khiabani. A failure to warn could not have been the cause of the accident because the accident would have happened even if a warning had been given.

Plaintiffs also failed to meet their burden to establish causation because they did not propose a specific warning that should have been given, or demonstrate that any such warning would have prevented Dr. Khiabani's death.

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Further, judgment as a matter of law is appropriate because MCI was not required to manufacture a motor coach that would prevent injury to bicyclists.

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And plaintiffs did not prove that Dr. Khiabani's death was the result of a "wrongful act or neglect," as required by the wrongful death statute. Plaintiffs opted to pursue a strict liability theory, which does not require any proof of wrongdoing.

STANDARD FOR JUDGMENT AS A MATTER OF LAW

"'Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law.'" *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 470, 306 P.3d 360, 368 (2013) (quoting *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007)). "To overcome a motion brought pursuant to NRCP 50(a), 'the nonmoving party must have presented sufficient evidence such that the jury could grant relief to

that party.'" *Id.* Judgment as a matter of law should be entered when a party fails to present testimony to support an element of its case. *Id.* (court properly granted JMOL where there was no testimony to demonstrate that charges for medical services and goods rendered were unreasonable).

THE RELEVANT EVIDENCE

Even construing the evidence in a light most favorable to the plaintiffs, the evidence at trial demonstrates the following.

The Motor Coach Driver Testified that He Did Not See Dr. Khiabani Until It Was Too Late

The evidence at trial showed that Mr. Hubbard was driving south in a motor coach that passed Dr. Khiabani at the cutout for the city bus on South Pavilion Center, just south of Charleston Blvd. (March 1, 2018 Tr. at 140-41, Ex. A.) After passing Dr. Khiabani, Mr. Hubbard said that he didn't see him while driving 450 feet, even though he was constantly checking his mirrors. (*Id.* at 150, 156, 182-84.) He didn't see Dr. Khiabani again until just before he reached the Griffith Peak intersection. At the intersection, he saw a bicycle drift into his lane in his peripheral vision. (*Id.* at 151, 166, 180.) The moment he saw the bicycle drift into his lane, he immediately turned the steering wheel to the left in an attempt to avoid a collision. (*Id.* at 155, 191.) In his words, he immediately took "evasive action." (*Id.* at 155.)

It happened "very fast." (*Id.* at 189.) He didn't know where Dr. Khiabani came from. (*Id.* at 189-90.)

Mr. Hubbard Did Not Testify About Any Particular Warning or That a Warning Would Have Changed What He Did

In response to a single question from counsel, Mr. Hubbard testified that if he was "trained about something relative to safety, [he] heed[s] those training warnings[.]" (*Id.* at 154.) He was not asked if he would have changed his

conduct on the day of the accident if had received a warning. He was not asked if he would have taken additional precautions if he was given a warning. He was not asked a single question about any specific warning. Because plaintiffs never proposed a specific warning or explained how it should have been delivered to Mr. Hubbard, they never explained what additional information Mr. Hubbard should have been given.

The Jury Finds No Design Defect Relating to Aerodynamics and Does* Not *Find That the Failure to Warn Was the Cause of Dr. Khiabani's Death

The jury found that there was no right-side blind spot that made the coach unreasonably dangerous and a legal cause of Dr. Khibani's death. (*See* "Special Verdict," filed March 23, 2018 at 2:9.) It found that the lack of proximity sensors and lack of rear-wheel protective barriers did not make the coach unreasonably dangerous and a legal cause of Dr. Khiabani's death. (*Id*. at 2:14.) And it found that the aerodynamic design of the coach did not make it unreasonably dangerous and a legal cause of Dr. Khiabani's death. (*Id*. at 2:19.)

With regard to the failure to warn claim, the jury was asked only whether MCI failed to "provide an adequate warning that would have been acted upon." (*Id*. at 2:25.) It was not asked whether the failure to provide an adequate warning was the cause of Dr. Khiabani's death. And it was not asked whether Mr. Hubbard *could have* avoided colliding with Dr. Khiabani if he had been provided with a warning.

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ARGUMENT

I. PLAINTIFFS FAILED TO PROVE CAUSATION BECAUSE IT WAS TOO LATE FOR MR. HUBBARD TO AVOID THE COLLISION WHEN DR. KHIABANI SUDDENLY APPEARED IN MR. HUBBARD'S PERIPHERAL VISION

A. Plaintiffs Had the Burden to Prove Causation

"In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187, 209 P.3d 271, 273 (2009). Unlike in many states, there is no presumption that a person would have heeded a warning in Nevada. *Id.*

The plaintiff must prove causation. *See Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991), *overruled on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997). As the Court instructed the jury in this case, the plaintiff in a product-liability case must prove at least "legal" causation, which means the defect must have been "a substantial factor in bringing about the injury, damage, loss or harm." NEV. J.I. 7.02 (listing elements of claim, including "the defect was a [proximate] [legal] cause of the damage or injury to the plaintiff"); NEV. J.I. 4.04A (definition of legal cause). (*See* Jury Instruction No. 24.)

B. Plaintiffs Failed to Present Any Evidence That a Warning Would Have Made a Difference

A failure to warn is not a cause of injury when it is clear that a warning would have made no difference. *Kauffman v. Manchester Tank & Equip. Co.*, 203 F.3d 831 (9th Cir. 1999) (unpublished). The plaintiff "must prove that he or she would not have suffered the harm in question if adequate warnings or instructions had been provided." *See* AMERICAN LAW OF PRODUCTS LIABILITY

§ 32:4 (3d ed.). To meet that burden, the plaintiff must prove that the warning would have altered the instrumental party's conduct. *See id.* § 34:48 (plaintiff must provide testimony "which indicates, in some way, that the plaintiff or another instrumental party would have altered conduct had an adequate warning been given"); *id.* § 32:4 & n.5 (citing voluminous cases holding that plaintiff must "show that an adequate warning would have altered the conduct that led to the injury").

Stated somewhat differently, a futile warning is not required. *See Afoa v. China Airlines Ltd.*, 2013 WL 12066087, at *2 (W.D. Wash. Apr. 12, 2013) (dismissing complaint and denying leave to amend because there was no warning that could have prevented collision from occurring); *Adesina v. Aladan Corp.*, 438 F. Supp. 2d 329, 338 (S.D.N.Y. 2006) ("If a failure to warn would have been futile, plaintiff cannot prove proximate causation."); *Lee v. Martin*, 45 S.W.3d 860, 865 (Ark. Ct. App. 2001) (no causation if "an adequate warning would have been futile under the circumstances").

The focus is on the actual circumstances. *See* AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.) ("In approaching the proximate cause issue in warnings cases, the focus is on the effect an inadequate warning had, or if no warning was provided, the effect an adequate warning would have had if given, on the actual circumstances surrounding the accident."); *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 193 (Mo. 1992) ("[T]he traditional approach to proximate cause in failure to warn cases focuses on the effect of giving a warning on the actual circumstances surrounding the accident."). A proposed warning must provide *additional information* that the instrumental party would have, and could have, acted on under the circumstances. *See McMurry v. Inmont Corp.*, 694 N.Y.S.2d 157, 159 (N.Y. App. Div. 1999) (summary judgment property when "a warning would not have added anything to the appreciation of this hazard").

Nevada law is in accord with these principles. *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 ("[T]he burden of proving causation can be satisfied in failure-to-warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have 'prompted plaintiff to take precautions to avoid the injury.'" (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993))); *see also Gove v. Eli Lilly & Co.*, 394 Fed. App'x 817, 818-19 (2d Cir. 2010) (causation not established unless there is evidence that adequate warning would have altered conduct); *Austin v. Will-Burt Co.*, 361 F.3d 862, 869-70 (5th Cir. 2004) (same as *Gove*); *Barnhill v. Teva Pharm. USA, Inc.*, 819 F. Supp. 2d 1254, 1261-62 (S.D. Ala. 2011) (summary judgment appropriate where there was no evidence that a warning would have avoided injury); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 497 (D.S.C. 2001) (summary judgment granted because plaintiff had burden of showing that a warning would have made a difference in the conduct of person warned and plaintiff provided no evidence); *Windham v. Wyeth Labs., Inc.*, 786 F. Supp. 607, 612-13 (S.D. Miss. 1992) (same as *Gove* and *Austin*); *Udac v. Takata Corp.*, 214 P.3d 1133, 1153 (Haw. Ct. App. 2009) (jury should not have been instructed on failure to warn theory when there was no evidence that if person had been warned, he would have "altered his behavior").

Brown v. Shiver, 358 S.E.2d 862, 864 (Ga. Ct. App. 1987), is particularly useful. In that case, the court concluded that there was no causation to support a failure to warn claim because the "plaintiff could not have seen the warning in time to avoid [a] collision."

Likewise, here, Mr. Hubbard—*the person who would need to (1) have been aware of the warning, (2) have heeded it in general,* ***and (3) applied it in the particular situation***—testified that when Dr. Khiabani suddenly appeared in his peripheral vision, it was too late for him to avoid the collision. He immediately turned away from Dr. Khiabani and stopped the bus.

Unfortunately, that did not prevent the collision. A warning wouldn't have either. Even if Mr. Hubbard had received a warning before the accident (and would have heeded it), he *did not have time to heed* the warning and avoid the collision. Mr. Hubbard did not testify that a warning would have caused him to do anything differently to avoid the accident and there was no other evidence on this issue. Thus, a failure to warn could not have been the cause of the accident. *See id.*; *Powell v. J.T. Posey Co.*, 766 F.2d 131, 134 (3d Cir. 1985) ("She would have rushed to grasp Adams, warning or no warning, when he appeared to her to be falling, because that was her instinctive reaction."); *Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 756 (3d Cir. 1987) (causation was not established when there was "no evidence to support a finding that a warning would have changed [the plaintiff's] behavior" and judgment notwithstanding the verdict was proper); *cf. Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013) (warning is meaningless when there is no time to react to it).

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C. Mr. Hubbard's Consciousness of Safety Is Insufficient to Demonstrate Causation

In response to a single question from counsel, Mr. Hubbard testified that he generally heeds safety training warnings. (March 1, 2018 Tr. at 154:18-21, Ex. A.) But he was never asked about any particular warning. He was never asked about a warning that related to "air blasts." And he was never asked if he would have (or could have) changed his conduct if he had been warned.

In a case relied on by the Nevada Supreme Court in *Rivera*, the Montana Supreme Court held that cause was not established when there was no evidence establishing that a warning relating to a motorcycle's propensity to wobble would have changed the plaintiff's conduct. *See Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 199 (Mont. 1993). Evidence that the plaintiff "respected machinery and was concerned about safety" was insufficient to establish

causation even though the plaintiff later argued that he "might have rode [sic] the motorcycle differently and might not have taken it on a long trip on the highway" if he had been warned. *Id.*

Because Mr. Hubbard never testified that he would have done anything differently if he had received a warning, his testimony that he was safety conscious is insufficient to establish cause. *See id.*; 63A Am. Jur. 2d, *Products Liability* § 1137 (2d ed. 2018) ("To establish that a proper warning would have been heeded, the plaintiff may be required to present evidence of more than the user's general concern with issues of safety.").

D. The Open and Obvious Nature of the Danger Reinforces the Conclusion that a Warning Would Have Been Superfluous.

Mr. Hubbard was a sophisticated user of motor coaches, having driven motor coaches and buses for over two decades. (March 1, 2018 Tr. at 130, Ex. A.) He knew or should have known the risk of driving next to a bicyclist. *See Johnson v. Honeywell Int'l Inc.*, 101 Cal. Rptr. 549, 556 (Ct. App. 2009) ("[A] manufacturer is not liable to a sophisticated user of its product for failure to warn, if the sophisticated user knew or should have known of the risk, whether the cause of action is for negligence or for strict liability for failure to warn."). In fact, he testified that at the precise moment he became aware that Dr. Khiabani was too close to the motor coach, he took evasive action in an attempt to avoid the collision.

The obviousness of the danger and Mr. Hubbard's immediate reaction to it highlights the fact that a warning would not have made any difference here. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 223, 955 P.2d 661 (1998) (manufacturer is "not required to warn against dangers that are generally known"); *Dorshimer v. Zonar Sys., Inc.*, 145 F. Supp. 3d 339, 354 (M.D. Pa. 2015) (no duty to warn bus driver when warning would have been meaningless

because danger was open and obvious); *Calles v. Scripto-Tokai Corp.*, 832 N.E.2d 409, 417 (Ill. Ct. App. 2005) ("The manufacturer has no duty to add pointless warnings about dangers the consumer already recognizes."); *Bazerman v. Gardall Safe Corp.*, 609 N.Y.S.2d 610, 611 (N.Y. App. Div. 1994) ("[T]here is no liability for failure to warn where such risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide or where they can be recognized simply as a matter of common sense." (citations omitted)).

II. CAUSATION IS ABSENT BECAUSE PLAINTIFFS NEVER EXPLAINED WHAT WARNING SHOULD HAVE BEEN GIVEN OR HOW IT WOULD HAVE PREVENTED DR. KHIABANI'S DEATH

Plaintiffs also failed to establish causation because they did not introduce any evidence regarding what an adequate warning should have said, how it should have been presented, or (most importantly) how a proposed warning would have prevented the accident. *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 (plaintiff may prove causation by showing that a "different warning" would have altered conduct); *Broussard v. Procter & Gamble Co.*, 463 F. Supp. 2d 596, 609-10 (W.D. La. 2006) (entering summary judgment where plaintiff had not offered "evidence of what warning Procter & Gamble should have provided or how such a warning would have prevented [plaintiff's] injuries"); *Thompson v. Nissan N. Am., Inc.*, 429 F. Supp. 2d 759, 781 (E.D. La. 2006) ("Plaintiffs have presented no evidence, from either of its experts . . ., of an inadequate warning, nor do they present any language of a proposed adequate warning."), *aff'd*, 230 Fed. App'x 443 (5th Cir. 2007); *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 566 (S.D.N.Y. 2005) (one element of failure to warn claim is that "a proposed alternative warning would have prevented Plaintiff's accident"); *Demaree v. Toyota Motor Corp.*, 37 F. Supp. 2d 959, 967 (W.D. Ky. 1999) (Rule 50 motion granted in part because "plaintiff failed to produce proof of what a

warning should or might have been"); *White v. Caterpillar, Inc.*, 867 P.2d 100, 107 (Colo. Ct. App. 1993) ("If the danger is open and obvious, there is no duty to warn unless there is a substantial likelihood that the proposed warning would have prevented injury to the ordinary user.").

Plaintiffs had to prove that a *particular* warning would have prevented Dr. Khiabani's death from occurring. *See Campbell v. Boston Scientific Corp.*, 2016 WL 5796906 (S.D. W. Va. Oct. 3, 2016) ("To establish proximate causation under a theory of failure to warn, the plaintiff must prove that a different warning would have avoided her injuries."); *Weilbrenner v. Teva Pharmaceuticals USA, Inc.*, 696 F. Supp. 2d 1329 (M.D. Ga. 2010) ("[A]s this is a failure-to-warn case, Plaintiffs must also show that a different label or warning would have avoided Katelyn's injuries."). They did not meet that burden.

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Because there is no evidence regarding a proposed warning, there is no evidence that a warning would have prevented Dr. Khiabani's death. *See id.*; *Morton v. Homelite, Inc.*, 183 F.R.D. 657, 659 (W.D. Mo. 1998) ("[W]here a warning would not have conveyed any additional information it is appropriate for the Court to enter judgment.").

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III. THE TESTIMONY OF THE HUMAN FACTORS EXPERT WAS TOO CONCLUSORY TO PROVE THAT A WARNING SHOULD HAVE BEEN GIVEN AND HE DID NOT EXPLAIN WHAT WARNING SHOULD HAVE BEEN GIVEN

Mr. Cunitz's testimony that warnings were needed did not create an issue of fact for the jury. *See Brewer v. Myrtle Beach Farms Co., Inc.*, 2005 WL 7084354, at *4 (S.C. Ct. App. Aug. 30, 2005) (expert never stated "what additional warnings are required"). His statement that MCI "needed a warning, and they did not provide one" was conclusory, perfunctory, and supported by no facts. (March 7, 2018 Tr. at 99, Ex. B.) He did not explain

what warning should have been given, how it should have been given, or how it would have avoided the accident. Plaintiffs never asked him to, and he admitted that others were more competent to do so. (*Id.* at 103-04.)

Mr. Cunitz's conclusory testimony wasn't even admissible evidence, much less evidence sufficient to support a conclusion that the lack of a warning caused harm to Dr. Khiabani. *See Hallmark v. Eldridge*, 124 Nev. 492, 501-02, 189 P.3d 646, 651-52 (2008) (expert should not have been allowed to testify when opinion was highly speculative, was not based on any reliable methodology, and had not been tested); *Rodriguez v. JLG Indus., Inc.*, 2012 WL 12883784, at *13 (C.D. Cal. Aug. 3, 2012) (expert opinion regarding warnings was inadmissible when he did not "describe the reasoning or analysis he used" to reach conclusions and testimony was "wholly conclusory"); *Dewick v. Maytag Corp.*, 324 F. Supp. 2d 894, 900 (N.D. Ill. 2004) (expert testimony was nothing more than "speculation or personal observation" because he had not tested the efficacy of a warning, "drafted alternate warnings," or offered any other reliable methodology); *Ortiz-Semprit v. Coleman Co., Inc.*, 301 F. Supp. 2d 116, 120 (D.P.R. 2004) (expert was unqualified to testify as to adequacy of warnings when he "did not perform any research or testing pertaining to the adequacy of the generator's warnings or the likely reaction of plaintiff to any additional warnings").

MCI is entitled to judgment as a matter of law because there was no evidence that Mr. Hubbard would have done anything differently and because Mr. Cunitz's testimony did not provide an adequate foundation for a finding of causation. *See Bunker v. Ford Motor Co.*, 640 Fed. App'x 661, 663 (9th Cir. 2016) (where expert testimony regarding design defect was inadmissible, there was no evidence of causation and summary judgment was properly entered).

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IV. JUDGMENT AS A MATTER OF LAW ACTUALLY IS CONSISTENT WITH THE JURY'S VERDICT

Judgment as a matter of law is consistent with the jury's verdict because it *was not asked* whether an inadequate warning was the cause of damages to the plaintiffs. The jury concluded only that (i) some warning should have been given, and (ii) a warning "would have been acted upon." The jury did *not* find that Mr. Hubbard ever saw Dr. Khiabani in time to apply that warning in this case (*i.e.*, to move left and give him wider berth).

The warning claim was tied to the allegedly defective aerodynamic design, which supposedly caused air blasts. On that defective design claim, the jury found no liability: "Is MCI liable for defective design (Did the aerodynamic design of the coach make it unreasonably dangerous and a legal cause of Dr. Khiabani's death)? Yes ___ No √" (Special Verdict #4.) In other words, when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not.

If asked, the jury would have reached the same conclusion on the failure-to-warn claim. MCI's proposed verdict form would have asked the jury that very question:

> 1. Do you find, by a preponderance of the evidence, that the motor coach was defective and that the defect was a legal cause of Kayvan Khiabani's death? (Check all boxes that apply.)
>
> | ***Allegedly defective aspect of the coach*** | ***Did this make the coach unreasonably dangerous?*** | ***Was the defect a legal cause of Khiabani's Death?*** |
> |---|---|---|
> | Right-Side Blind Spot | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Absence of Proximity Sensor | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Aerodynamic Design | ☐ Yes ☐ No | ☐ Yes ☐ No |
> | Failure to Warn | ☐ Yes ☐ No | ☐ Yes ☐ No |
>
> *If you did not answer "Yes" to both "Defect" and "Legal Cause" for any alleged defect, please sign and return this form. Do not answer any further questions.*

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(*See* Proposed Verdict Form Not Used at Trial, filed Mar. 26, 2018.)

V. MCI WAS NOT REQUIRED TO MAKE A MOTOR COACH THAT DOES NOT CREATE AIR DISTURBANCE IN THE FIRST PLACE

The warning claim presupposes that the motor coach's aerodynamics (*i.e.* the air disturbance it caused) rendered it unreasonably dangerous to nearby pedestrians or bicyclists. The jury found, however, that the aerodynamic design of the coach did not make it unreasonably dangerous and a legal cause of Dr. Khiabani's death. (Special Verdict #4.)

And MCI was not obligated to design a vehicle that would prevent injury to a bicyclist upon impact, so it was not required to provide a warning. A manufacturer is not required to protect "third parties or nonusers when the design defect is not the cause of the accident." *De Veer v. Landrover*, 2001 WL 34354946, *2 (Cal. App. 2001). The vehicle need not be "crash compatible" with bystanders. *Id*. at *5.

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De Veer is particularly instructive. In that case the plaintiff sued the manufacturer of the vehicle that collided with her vehicle. *Id.* at *1. The plaintiff contended that "the front end of the 1988 Range Rover is defective because its overly aggressive design increased the risk of serious physical injury to other motorists, beyond those normally and reasonably expected in side-impact collisions." *Id.* at *1. Specifically, she claimed enhanced injuries because the Land Rover's "front end . . . was too stiff . . . causing her vehicle to absorb too much energy," and its "front bumper was too high," making it unreasonably dangerous to smaller vehicles in a collision. *Id*.

The California Court of Appeal rejected the plaintiff's argument that a manufacturer's duty to make a vehicle crashworthy for its occupants also requires the manufacturer to make the vehicle "crash compatible" with smaller vehicles:

> Based on De Veer's theory, automobile manufacturers are liable for enhanced injuries to third parties unless they make vehicles that are crash compatible. Taken to its extreme, as noted by Land Rover, heavy trucks would be defective unless crash compatible with buses, and both would be defective unless crash compatible with pickup trucks, vans, and SUVs. In essence, De Veer seeks not only a crashworthy vehicle but a fail-proof one.

De Veer v. Landrover, 2001 WL 34354946, *3 (Cal. App. 2001). "The mere fact that enhanced injuries in a collision between an SUV and a passenger car are foreseeable is not sufficient to extend an SUV's manufacturer's duty to occupants in the struck vehicle. Foreseeability is not synonymous with duty." *Id*. at *5.

VI. NEVADA'S WRONGFUL-DEATH STATUTE REQUIRES PROOF OF FAULT, NOT STRICT LIABILITY

Although plaintiffs could have pleaded a claim alleging MCI's culpability, instead they opted for the easier route of strict liability. But unlike a common-law claim for products liability without fault, wrongful death is a statutory action, and the Nevada Legislature did not extend that action to claims based upon strict liability. Plaintiffs did not prove that Dr. Khiabani's death was "caused by [a] wrongful act or neglect." NRS 41.085(2).

A. The Harsh Common Law: Claims Expired at Death

"At common law, actions for death did not survive the death of the injured party." *White v. Yup*, 85 Nev. 527, 532, 458 P. 2d 617, 620 (1969) (citing W. PROSSER, LAW OF TORTS 920 (3d ed. 1964)). "Consequently, there was no right of action for an injury which resulted in death." *Id.* (citing *Bolton v. Boltin*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808)).

B. The Legislative Solution: A Wrongful-Death Statute

The Legislature created a cause of action where none previously existed if death was "caused by the wrongful act or neglect of another." NRS 41.085(2). This wrongful-death statute provides the exclusive path for recovery by a decedent's estate or heirs.

C. A "Wrongful Act" Requires a Finding of Fault

1. Principles of Statutory Interpretation

"Statutes in derogation of the common law must be strictly construed." *Holliday v. McMullen*, 104 Nev. 294, 296, 756 P.2d 1179, 1180 (1988) (citing SUTHERLAND STAT. CONST. § 61.01–06 (4th ed.)). Statutes must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502, 797 P.2d 946, 949 (1990), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

2. To Avoid Superfluity, "Wrongful" Must Mean More than "Negligent"

Here, the statute's reference to both "wrongful act" and "neglect" suggests that "wrongful" is used in the sense of blameworthy. Negligent acts causing harm are already contrary to law, so the word "wrongful" cannot just mean illegal. That would make "neglect" superfluous.

3. Context Shows that Wrongful is Not Merely Illegal

In fact, another section of that same chapter recognizes the distinction between "illegal" (prohibited by law) and "wrongful" (blameworthy), expressly allowing employers to disclose information about "illegal or wrongful act[s]" committed by an employee. NRS 41.755(1)(c).

4. Strict Construction Limits Wrongful-Death Claims to Negligent or Other Culpable Conduct

In *Higginbotham v. Ford Motor Co.*, the Fifth Circuit applied strict construction to predict that Georgia would not extend its wrongful-death statute to permit recovery under a strict-liability theory. 540 F.2d 762, 771–72 (5th Cir. 1976). The next year, the Georgia Supreme Court confirmed that result. *Ford Motor Co. v. Carter*, 238 S.E.2d 361, 365 (1977).

5. There Is Contrary Authority, But It Is an Undecided Question

In candor, counsel acknowledge that many of the Nevada Supreme Court's product-liability cases arise from wrongful-death claims. *See, e.g.*, *Ford Motor Co. v. Trejo*, 133 Nev., Adv. Op. 68, 402 P.3d 649, 651 (2017); *Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 24 (1984). And a California appellate court rejected a similar argument based on a similarly worded statute, although that Court applied a rule of liberal—rather than strict—construction. *Barrett v. Superior Court*, 272 Cal. Rptr. 304 (Ct. App. 1990). But counsel is unaware of any case squarely asking the Nevada Supreme Court to decide this issue.

D. By Analogy to the Statute of Limitations, Strict Products Liability is Not a Wrongful Act

That strict liability is not among the bases for a wrongful-death action is confirmed by reference to how courts interpret the identical phrase in Nevada's two-year statute limitations.

Just like the wrongful-death statute, that two-year statute of limitations applies only to actions to "recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another." NRS 11.190(4)(e) (emphasis added). For actions not otherwise provided for, the limitation period is four years. NRS 11.220.

Relying on federal cases, Judge Ellsworth concluded that strict products liability was *not* a "wrongful act" within the meaning of NRS 11.190(4)(e), so the catchall four-year limit applied. *See Williams v. Homedics-U.S.A., Inc.*, 2012 WL 7749219 (Nev. Dist. Ct. July 20, 2012). She recognized that the Nevada Supreme Court had not yet decided the issue and turned to two Nevada federal district court cases that had ruled on the issue: *Campos v. New Direction Equip. Co.*, 2009 WL 114193, at *3 (D. Nev. Jan. 16, 2009), and *Fisher v. Professional Compounding Centers of America, Inc.*, 311 F. Supp. 2d 1008 (2004). *Williams*,

2012 WL 7749219. In *Fisher*, Judge Pro concluded in a published opinion that the four-year statute of limitations applied. In *Campos*, the court concluded in an unpublished opinion that the two-year statute of limitations applied. After distinguishing the reasoning from *Campos*, Judge Ellsworth decided that based on the plain meaning of "wrongful act" the four-year statute of limitations applied. *Williams*, 2012 WL 7749219; *see also Schueler v. MGM Grand Hotel, LLC,* 2017 WL 5904446 (Nev. Dist. Ct. Oct. 23, 2017) (stating that the four year statute of limitations applies to strict products liability in accordance with *Fisher*).

It would be anomalous for the identical statutory text—death "caused by the wrongful act or neglect of another"—to carry an opposing meaning in the wrongful-death statute. *Compare* NRS 11.190(4)(e), *with* NRS 41.085(2). In both cases, the term "wrongful act" excludes actions based solely on strict liability.

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E. A Wrongful-Death Claim is Still Available against Product Manufacturers who Act Negligently, Recklessly, or Intentionally

To be clear, MCI does not argue that manufacturers of defective products can never be liable under the wrongful-death statute. But the plaintiffs in those cases need to at least show a "wrongful act or neglect"—conduct that negligently, recklessly, or intentionally causes harm. Had the jury awarded punitive damages, for example, plaintiffs might have been able to argue that the jury found that kind of culpability. The jury rejected that invitation, however, instead awarding liability only on a theory that requires no proof of wrongdoing at all. That is not a wrongful act for which the Legislature has created a remedy.

CONCLUSION

Based on the foregoing, MCI respectfully requests that the Court grant its renewed motion for judgment as a matter of law.

DATED this 7th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

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EXHIBIT A

CASE NO. A-17-755977-C

DEPT. NO. 14

DOCKET U

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident, et al.,

Defendants.

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE ADRIANA ESCOBAR
DEPARTMENT XIV
DATED THURSDAY, MARCH 1, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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I N D E X

Witness:	Direct:	Cross:	Redirect:	Recross:
Larry Stokes, PhD	66	91	113	
Edward Hubbard	130	170	197	

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
230		142	
231		142	
232		142	
233		142	
234		142	
235		142	
236		142	
237		142	
503		197	
504		197	
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507		197	

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THE WITNESS: Edward Hubbard; E-d-w-a-r-d, H-u-b-b-a-r-d.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. CHRISTIANSEN:

Q. Mr. Hubbard, what is it that you do for a living, sir?

A. I'm a bus operator.

Q. And do you work here in Las Vegas?

A. Yes.

Q. How long have you operated buses?

A. Since 1997.

Q. Where did you -- at what point in time did you come here to Las Vegas?

A. Two years ago next month, April.

Q. April the 18th, 2016?

A. April 9th, 2016.

Q. Okay. Were you operating a bus April 18th of 2017?

A. Yes.

Q. And who were you working for? Who -- who is your employer?

A. Michelangelo.

Q. What were you doing that day, sir?

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bicycle lane on South Pavilion Center?
A. Yes.
Q. And you -- which lane -- there are two travel lanes we can see on that map there to your right. Which lane were you in?
A. I was in the -- I was in this lane right here (indicating).
Q. Is that the lane closest to the bicycle lane?
A. Yes, it is.
Q. Or closest to Red Rock Casino?
A. Yes.
Q. So it would be the most western -- it would be the most western southbound lane, the one immediately adjacent to the bicycle lane on South Pavilion Center?
A. Yes.
Q. And do you see that little cutout there on the map to your right, sir --
A. Yes.
Q. -- on South Pavilion Center?
Do you know what that is?
A. I believe that's for the city bus.
Q. Okay. Is that about the -- the spot where you went past or overtook the bicycle?
A. Yeah. Yeah, on -- a little bit after that,

right near that area. Right.

Q. So between the time the bike -- you turn on Pavilion Center and the time you pass the bicycle at the city cutout, is the bicyclist always in the bicycle lane?

A. Yes.

Q. And are you always in your -- the westernmost southbound lane?

A. Yes.

Q. And from -- well, let's just say from the city cutout all the way to the intersection at Griffith Peak where the incident takes place, do you stay -- up until the moment of the incident, do you stay in that same lane?

A. Yes.

Q. Okay. Do you ever see the bicyclist before -- the cutout there north of the intersection, the city transit bus stop, from the time he turns south, do you ever see him leave the bicycle lane?

A. No -- no.

Q. All right. You pass him without incident at the city cutout?

A. Correct.

Q. And then do you remember having your deposition taken, sir?

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Q. You knew this bus had blind spots?
A. Correct.
Q. And because you knew that, you were -- you used a term, and I don't want to mess it up, but you were moving?
A. Yes. Moving in your seat, rocking, rocking to eliminate the blind spots.
Q. Okay. And you were doing that to be aware of your surroundings?
A. Right.
Q. And for 450 feet after passing the cyclist at the city cutout, you never saw the cyclist again?
A. No, sir.
Q. Okay. And then my recollection of your testimony is that you had entered the intersection. Fair?
Just from this point forward, sir, just from the zero line.
A. Oh, yes, yes.
Q. You're not stopping. I'm just -- it's kind of disjunctive because I have to do it every 50 feet. But you're just driving southbound?
A. Correct.
Q. It's a clear day?
A. Yes.

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Q. There's nothing -- no objects impeding your view of the street in front of you?
A. No.
Q. And once you got into the intersection -- and, well, I'm going to have you do that so I put it -- you put it exactly where you want it, and I'll show you the picture you showed us at your deposition.
Out of your -- my words not yours. Out of your peripheral vision, out of the side of your eye, you saw the bike -- a bicyclist drift into your lane; fair?
A. Yes.
Q. And "drift" is your word; correct?
A. Yes, sir.
Q. And you saw that out -- not out of the windshield, as I understand it?
A. No. Not the front windshield, no.
Q. Out of sort of the side of your eye?
A. Correct.
Q. And for you to be seeing something out of the side of your eye, the bicycle had to be -- the nose of the bus had to have passed the bicycle; correct?
A. Well, approaching it, yes.
Q. Okay. And I recall -- here's, let's just show -- at your deposition you placed this -- sort of

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Q. And if it was in the door, just physics would dictate that the nose of that bus had passed the bicyclist; correct?

A. Yes. Yes.

Q. All right. I remember questions being posed to you, Mr. Hubbard, in your deposition about your knowledge of aerodynamics and air blast. And my recollection is you didn't have any particularized knowledge?

A. No, sir.

Q. You never been trained relative to air blast?

MR. BARGER: Objection. Leading.

THE COURT: Sustained.

BY MR. CHRISTIANSEN:

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

A. No.

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

A. Absolutely.

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

A. No, sir.

Q. You don't know, as you sit here today, you

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know, ten-plus months later, Mr. Hubbard, what caused that bike, using your words, to drift into your lane?

A. I do not know.

Q. Do you know what a proximity sensor is?

A. I've heard of it, yes.

Q. This bus did not have a proximity sensor?

A. No.

Q. Anything that would have warned you earlier about the cyclist would have caused you to take evasive action earlier; fair?

MR. BARGER: Objection. Form.

THE COURT: Sustained.

BY MR. CHRISTIANSEN:

Q. Well, I'll ask it to you differently.

The second -- what did you do the second you saw the bicycle drifting in your peripheral vision?

A. I proceeded to (witness indicating) turn my steering wheel to the left to avoid hitting him, because he was that close to --

Q. You were --

A. -- the bus.

Q. You were close to him when you saw him?

A. Yes.

Q. You took -- I'll use your words again from your deposition -- evasive action?

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A. Yes.
Q. And had you been alerted to the cyclist earlier, you would have taken evasive action earlier?
MR. BARGER: Objection. Leading.
THE COURT: Sustained.
BY MR. CHRISTIANSEN:
Q. I'll ask it differently.
If you -- if you would have been alerted to the bicyclist earlier, earlier than your peripheral vision, would you've taken evasive action earlier?
A. Yes.
Q. And there are no proximity sensors on this bus?
A. No.
Q. But there are blind spots on this bus?
A. Yes.
Q. And so I'm understanding you correctly, sir, the bus that you were operating and driving for that 400 feet between the pink Post-it on the map and the zero line, you were -- you did not, at any point in time before this intersection, between that 450 feet that we're discussing, see the cyclist?
A. You mean from the cutoff -- cutout?
Q. Yes, sir.
A. No, sir, I did not.

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A. No, the question before that.
BY MR. CHRISTIANSEN:
Q. I don't remember. I think I said -- I'll paraphrase.
THE COURT: Would you like it read back?
MR. CHRISTIANSEN: Sure. You know what? I can read it. I got the same thing.
BY MR. CHRISTIANSEN:
Q. The question I said, "And it has been your testimony, sir, that before he drifted -- to use your words -- into your lane, he had to have been in the bike lane; correct?
A. No, I -- I never said that.
Q. You never said he was in the bike lane before you saw him?
A. No, I never said that.
Q. So we're clear, when you see him on the map that you've put the pink Post-it, he was in the bike lane at the city bus cutout.
A. Correct. Yes.
Q. And then you don't see him at all until he drifts into your peripheral vision --
A. That's correct.
Q. -- in that intersection?
A. That's correct.

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your right in that bicycle lane when you passed him?
A. How far was he to -- oh, 5, 7 feet over.
Q. Okay. In the bicycle lane as you went by?
A. Correct.
Q. Okay. And now I want to step to here if you can. Sorry. I don't mean to step in front of you. Please go ahead.
Now, at some point, you passed the bicyclist back here, right, because it's not on this map?
A. Yeah, the cutoff is somewhere in here.
Q. Okay. And I think the testimony earlier was maybe it was about 450 feet back from this intersection; right?
A. Correct.
Q. All right. So the first time -- I mean, when you went past him, did you ever see him again till we get to the very end?
A. No, sir.
Q. And you were going about 25 or 30 miles an hour at that point?
A. Yes.
Q. You know how fast the bicyclist was going?
A. I don't know.
Q. I want you to, if you can, maybe assume that there's been testimony you were going about twice as

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drive, what you do is -- you told the jury, you look forward, you look to the right, to the left, you look in your mirrors, and you do the rock-and-roll issue?

A. Correct.

Q. Okay. Now, rock and roll is not a dance when you're driving a bus, is it?

A. No, sir.

Q. Would you tell the ladies and gentlemen what you mean by rock and roll. What does that mean?

A. It means moving in your seat, moving around in your seat so that you can eliminate blind spots so that you can see more of your mirror.

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Q. Okay. Is that how -- is that how you drive buses?

A. That's how I was trained.

Q. That's how you learned? Okay.

And so, in addition to, obviously, looking ahead, which you have to do, you're looking to the right and you're looking to the left, you're looking in your mirrors, and you're doing the rock and roll just to do --

A. Yes.

Q. -- because you talk about a blind spot?

A. Yes.

Q. And you agree with me, every bus you've ever

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