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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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

driven has a blind spot, doesn't it?
A. They do.
Q. And every -- have you driven big trucks? Have you ever -- like 18-wheelers and that?
A. No, sir.
Q. Okay. But even your car has a blind spot, doesn't it?
A. Yes.
Q. There's not a vehicle on earth that doesn't have a blind spot, is there?
A. Correct.
Q. That's why you, as you told us, you were looking in the mirrors, but you're also rocking and rolling to make sure; right?
A. Yes.
Q. And that blind spot is really for a split-second, isn't it? Because if you're driving and you get past somebody, you're no longer in a blind spot at all, is it?
A. Correct.
Q. Just -- just a split-second, there might be a blind spot; right?
A. Correct.
Q. All right. So I want to ask you -- I'm going to put the bus at 250 -- at 250. And I'm -- and the

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angle isn't meant to be an angle. It's just the way I've set it down. Okay?

At 250, you, I presume, would be looking forward in your mirrors and doing the rock and roll?

A. Yes.

Q. All right. And you did not see a bicyclist?

A. No, sir.

Q. Clearly, when you passed him, he was in the bike lane, but, after that, you really don't know what he did; isn't that fair?

A. That's correct.

Q. And am I too close to you? I don't mean to get too close. I promise you I don't have the flu.

A. All right.

Q. So you drive on to 200, and you do not see the bicyclist; correct?

A. Correct.

Q. And without being repetitious, you're still watching, rocking, rolling, and looking in the mirrors?

A. Yes, sir.

Q. And you don't see him anywhere behind you, and you're going over twice as fast as he is; right?

A. Correct.

Q. So he's not catching up to you at all, is he?

A. I really don't know what he's doing. I know

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lawyers present in front of -- we will download these so we can take a print.

THE COURT: Okay.

BY MR. BARGER:

Q. And I'm going to ask you if you can come with me if you don't mind, sir.

Now, the bicycle here is not -- I mean, that's not where it was at the time. So I'm going to have you move the bicycle out of the way. We're just talking about where the bus was. I'm going to take a picture. Okay? All right?

Thank you.

Now what I want you to do next is show me where the bicycle -- put the bicycle in there, if you will, because you said what you did out of your -- was it your peripheral vision you saw the bicycle come in and hit you?

A. No. Right here.

Q. Somewhere in there?

A. Yes, sir.

Q. This happened pretty fast; fair?

A. Very fast.

Q. I mean, faster than we want to realize, didn't it?

All right. So, when you saw the bicycle come

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in, you don't know where it came from, do you?
A. No, sir.
Q. And what you told Mr. Christiansen was that you didn't see him in the bicycle lane and you would have if he had been in the bike lane because of your looking in the mirrors and your rocking and rolling and your doing that; right?
A. Yes, sir.
Q. All right. So is it your testimony -- I'm going to move this back.
Is it your testimony that, at some point back here, you never saw Dr. Khiabani in the bike lane?
A. No, sir.
Q. Is that correct?
A. That's correct.
Q. All right. And then up -- again, I'm going to ask you to move it back so --
A. I should have turned this because it was more like -- it was more like this than it was straight. You understand?
Q. Yes, sir?
A. It was more like (witness indicating).
Q. What I want you to do now is move the bus back where it was and put the bicycle at the -- where you thought it was. And you say it's kind of more

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turned. I don't want to use any words. I want you to show --

A. Yeah, because he -- he was -- and he was coming in. He wasn't straight. He was coming in.

Q. All right. I'm going to take a picture of that as well.

That's when you immediately turned to the left; right?

A. Correct.

Q. All right. And we've seen the videos and all the pictures, that the bus ended up across over here; right?

A. Yes.

Q. Right. You can take your seat, sir. Thank you.

THE MARSHAL: Thank you, sir.

BY MR. BARGER:

Q. As you drive the MCI bus -- or any bus, but let's talk about this MCI bus. As you drive that, do you now -- do you now remember seeing the photographs that there -- the right front door where the passengers come in, there are windows there; right?

A. Yes.

Q. And you can see out; right?

A. Yes.

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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 WEDNESDAY, MARCH 7, 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:
Richard Stalnaker, Ph.D.	6	12	70	84
Robert Cunitz, Ph.D.	94	100	114	132
Brad Ellis	134			
David Dorr	191			

E X H I B I T S

Number:	Marked:	Admitted:	Joint:
7A		7	
412		69	
514-1		138	
514-2		138	
514-3		138	

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expert on warnings.

MR. TERRY: I have no objection to his qualifications, Your Honor.

BY MR. KEMP:

Q. Now, Doctor, have you had an opportunity to review materials from Dr. Breidenthal regarding the subject of whether or not a bus causes air displacement or air blasts?

A. Yes.

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

A. I do have an opinion about that.

Q. And what is your opinion?

A. A, that it needed a warning, and they did not provide one.

Q. Now, are there other types of things that can provide warnings that are electrical in nature?

A. Yes. There are warnings that are -- just to distinguish, there are warnings that are printed. You know, they're on a sheet of paper or a label or sign. But that's one class of warnings.

But we have -- my field always have had for

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Q. Okay. So it would apply to all delivery vans that have that kind of front, all FedEx trucks that have that kind of front?

A. I don't know, sir.

Q. Have you looked to see how many different vehicles have the same characteristics and require the same warning?

A. No, sir, I have not.

Q. You have not developed a warning?

A. Correct.

Q. So you haven't developed a sticker or a warning or a print warning that satisfies what you think should have been done?

A. I was not asked to -- usually, manufacturers provide those, not me, unless they come and hire somebody like myself, which hasn't happened.

Q. And you have been retained in the case?

A. But I was not retained by a manufacturer. I wasn't retained by your client, for instance, so, no, I haven't been asked to do the job. There are other people in my field who are more than competent at doing the job as well. So --

Q. But you were retained in this case to offer an opinion about the MCI information communication?

A. Yes, that it needed a warning.

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Q. And you did not draft a warning that you thought we should have given?

A. Right.

Q. And you have not drafted or come up with any training that you thought we should have given?

A. Again, that wasn't my -- A, wasn't my assignment; B, there are -- I could have done the work had I been assigned the work. Most likely, that work would be paid for and -- paid for by the manufacturer who has developed the need for that warning.

Q. Now --

A. So that's -- that's how it usually happens. And, again, they're playing -- I'm almost done. Then everybody -- any number of people in my field. There are several hundreds more than competent to do the work.

Q. Are you of the opinion that professional drivers are not aware of air displacement around the front of their bus?

A. I've not surveyed large numbers of professional drivers. I have reviewed the documents provided to me in this case, and they all revealed that those people in the bus industry, including a driver, didn't have this information. Whether that's universal or not, I can't tell you. I didn't survey the industry

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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; 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

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

Defendant Motor Coach Industries, Inc. ("MCI") supplements its motion for a new trial with the following section I.D, which was inadvertently omitted from the version filed yesterday.

I.

THE JURY'S VERDICT IS UNRELIABLE BECAUSE THE ERRONEOUS VERDICT FORM ENABLED THE JURY TO FIND LIABILITY FOR "FAILURE TO WARN" WITHOUT CONSIDERATION OF CAUSATION OF THE ACCIDENT

* * *

D. The Verdict Did Not Submit the Failure-to-Warn Claim to the Jury

In a very real sense, the district court did not submit the failure-to-warn claim to the jury, at all. Over the defense objection, the district court submitted interrogatories on only some of the elements of a failure to warn case, leaving out causation. This violates NRCP Rule 49(a), which provides that "[t]he court may require a jury to return only a special verdict in the form of a special written finding ***upon each issue of fact***." (Emphasis added.) "It is essential that all material factual issues in the case should be covered by the questions submitted to enable the trial judge to enter a judgment on the entire dispute on the basis of the jury's responses." 9B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2506. By not submitting a verdict on the issue of causation, the district court erred, and a new trial is required.

The verdict form was fundamentally flawed by not including "each issue of fact" and all the elements of the failure-to-warn claim. The first four questions were so carefully worded. They each spoke about whether MCI was "liable" for the particular theory, and then explained that that conclusion required a finding both that the particular aspect of the design was "unreasonably dangerous" and a "legal cause." For the fifth question, however, all the verdict asked was "Did MCI fail to provide an adequate warning that

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would have been acted upon?" No mention of "liability" or "unreasonable danger," and certainly no requirement for the jury even to respond about causation. The jury no doubt noted the difference, limiting their response to the narrow question asked and not considering causation.

This is not merely an issue of discretion in choosing to use special verdicts. While the court has the discretion to do special interrogatories on only some factual issues under Rule 49(b), as opposed to special verdicts under Rule 49(a), those interrogatories must be accompanied by a general verdict. NRCP Rule 49(b). For all we know from this incomplete verdict form, the jury would have returned a general defense verdict on the failure-to-warn claim because they found no causation on this claim. Under either subsection of Rule 49, by not having a complete verdict form on all the issues in the failure-to-warn claim, the district court committed error, and a judgment cannot be entered on this incomplete verdict.

The Court, therefore, needs to order a new trial on the failure-to-warn claim. The jury was inquired about causation on the other four claims and returned defense verdicts.

* * *

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Dated this 8th day of May, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of May, 2018, a true and correct copy of the foregoing Supplement to Motor Coach Industries, Inc.'s Motion for a Limited New Trial was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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Attorney for Defendants Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard

Michael J. Nunez, Esq.
MURCHISON & CUMMING, LLP
350 S. Rampart Blvd., Suite 320
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mnunez@murchisonlaw.com

Attorney for Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery

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William J. Mall, Esq.
SELMAN BREITMAN LLP
6 Hutton Centre Dr., Suite 1100
Santa Ana, CA 92707
pstephan@selmanlaw.com
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wmall@selmanlaw.com

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Attorney for Defendants Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard

/s/Adam Crawford
An Employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP

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WILL KEMP, ESQ. (#1205)
ERIC PEPPERMAN, ESQ. (#11679)
e.pepperman@kempjones.com
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
-and-
CHRISTIANSEN LAW OFFICES
PETER S. CHRISTIANSEN, ESQ. (#5254)
KENDELEE L. WORKS, ESQ. (#9611)
810 South Casino Center Blvd.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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

PLAINTIFFS' SUPPLEMENTAL VERIFIED MEMORANDUM OF COSTS AND DISBURSEMENTS PURSUANT TO NRS 18.005, 18.020, AND 18.110

Plaintiffs, by and through their counsel of record, KEMP, JONES and COULTHARD, LLP and CHRISTIANSEN LAW OFFICES, hereby submit a Supplemental Verified Memorandum of Costs and Disbursements pursuant to NRS 18.005, 18.020, and 18.110 setting forth all of the reasonable costs necessarily incurred in this action, together with new expenses. These costs are supported by the accompanying back-up documentation and declaration of Will Kemp, Esq., who, along with Peter Christiansen, Esq., is co-lead counsel for Plaintiffs. The

total amount of costs and disbursements that the Plaintiffs seek to tax against Defendant is **$619,888.71**. Supplemental expenses are identified as follows:

1. Clark County Eighth Judicial District Court invoice in the amount of $406.88 representing overtime paid to Marshall/Bailiff. Attached hereto as Exhibit 1.
2. Clark County Eighth Judicial District Court invoices totalling $515.33 for meals provided to the jury. Attached hereto as Exhibit 2.

These costs are summarized as follows:

Summary of Costs and Disbursements Under NRS 18.005

Ex.	NRS	Definition of Cost	KJC Amount	Christiansen Amount	Taxable Amount
1A	18.005(1)	Filing/Clerk Fees	$ 1,956.00		$ 1,956.00
2A&B	18.005(2)	Reporter's Fees for Depositions/Deposition Transcript	$ 70,272.93	$ 17,588.84	$ 87,861.77
3A	**18.005(3)**	**Jurors' Fees**	**$ 15,828.82**		**$ 15,828.82**
4A&B	18.005(4)	Witness Fees	$ 386.18	$ 905.00	$ 1,291.18
5A	18.005(5)	Expert Witness Fees	$ 237,076.61		$ 237,076.61
6A&B	18.005(6)	Interpreter Fees	$ 300.76	$ 320.00	$ 620.76
7A&B	18.005(7)	Process Server Fees	$ 2,469.50	$ 625.00	$ 3,094.50
8A&B	18.005(8)	Official Reporter Fees	$ 3,115.74	$ 46,509.68	$ 49,625.42
9	18.005(9)	Cost of Bond			
10A	**18.005(10)**	**Bailiff Overtime**	**$ 406.88**		**$ 406.88**
11A	18.005(11)	Telecopies (Faxes)	$ 61.80		$ 61.80
12A	18.005(12)	Photocopies/Printing/Scans	$ 44,301.61		$ 44,301.61
13A&B	18.005(13)	Long Distance Telephone	$ 890.41	$ 18.75	$ 909.16
14A	18.005(14)	Postage/Fed Ex	$ 1,812.48		$ 1,812.48
15A&B	18.005(15)	Travel Expense (Air, Hotel, Car, Meals)	$ 6,671.96	$ 7,364.69	$ 14,036.65

KEMP, JONES & COULTHARD, LLP
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Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

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16	18.005(16)	Fees Charged Pursuant to NRS 19.0335			
17i	Other	Legal Research	$ 28,977.77	$ 1,041.00	$ 30,018.77
17ii	Other	Run Service	$ 1,590.00	$ 297.00	$ 1,887.00
17 iii	Other	Trial Support	$ 120,094.30	$ 9,005.00	$ 129,099.30
		TOTAL	**$ 536,213.75**	**$ 83,674.96**	**$ 619,888.71**

Dated this 5th day of May, 2018

KEMP, JONES & COULTHARD, LLP

WILL KEMP, ESQ. (#1205)
ERIC PEPPERMAN, ESQ. (#11679)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
-and-
CHRISTIANSEN LAW OFFICES
PETER S. CHRISTIANSEN, ESQ. (#5254)
KENDELEE L. WORKS, ESQ. (#9611)
810 South Casino Center Blvd.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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Las Vegas, Nevada 89169
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kic@kempjones.com

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DECLARATION OF WILL KEMP, ESQ.

I, WILL KEMP, ESQ, declare under penalty of perjury as follows:

1. I am a partner in the law firm of Kemp, Jones & Coulthard, LLP ("KJC"). KJC and Christiansen Law Offices (CLO) are counsel of record for Plaintiffs in this action. I make this declaration in support and verification of Plaintiffs Verified Memorandum of Costs and Disbursements pursuant to NRS 18.005, 18.020, and 18.110.

2. I have personal knowledge of the costs and disbursements incurred and paid by Kemp, Jones and Coulthard, LLP in this action, and KJC's supplemental costs and back-up documentation presented in this memorandum are true and correct to the best of my knowledge and belief.

3. The Clark County Eighth Judicial District Financial Department produced an invoice in the amount of $406.88 representing overtime paid to Marshall/Bailiff. See Exhibit 1 and also invoices in the amount of $515.33 for meals provided to jury during trial. See Exhibit 2.

4. The attached supplemental invoices were recently produced by the Clark County Eighth Judicial District Court Financial Department totalling $922.21. Therefore, Plaintiffs' Total Costs and Disbursements under NRS 18.005 has increased from $618,966.50 to **$619.888.77**.

5. I have personally reviewed the supplemental invoices set forth herein, and I believe that all of the costs and disbursements were actually, reasonably, and necessarily incurred in order to prosecute this action. I further believe that these costs and disbursements represent customary charges in this community for the related materials and services.

. . . .

. . . .

. . . .

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 9th day of May, 2018.

WILL KEMP, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2018, the **PLAINTIFFS' SUPPLEMENTAL VERIFIED MEMORANDUM OF COSTS AND DISBURSEMENTS PURSUANT TO NRS 18.005, 18.020, and 18.110** 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

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kempjones.com

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Exhibit 1

5/7/2018

Khiabani/MCI

2114.2 Expenses

Court Bailiff Overtime

Client	Mtr	Date	Exp Code	Description	Amount
02114	2	04/20/18	JURY	Jury Fees - 03/20/18 - 03/23/18 Marshal/Bailiff Overtime Jury Fees for Khiabani Trial (Clark County Treasurer)	$ 406.88
					$ 406.88
				Total Court Bailiff Overtime Billed	**$ 406.88**

012025

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Page 1 of 1
04/20/2018 15:23:10

INVOICE

Remit and Make Check Payable To:
CC Eighth Judicial District Court
TAX ID - 88-6000028
200 Lewis Avenue, 2nd Floor
Las Vegas NV 89155

Document Number	90227861
Date	04/20/2018
Customer No.	10002344
Amount	$406.88
Terms of Payment	Net 30 days
Invoice Period From	
Invoice Period To	04/20/2018
Reference	

KEMP JONES & COULTHARD LLP
FL 17
3800 HOWARD HUGHES PKWY
LAS VEGAS NV 89169-0925

Contact Person: SHEILA SCOTT
Phone: (702)671-4490

DETACH HERE AND RETURN UPPER PORTION

ATTORNEY: WILL KEMP, ERIC PEPPERMAN
CASE NO: A755977
KHIABANI, BARIN VS. MOTOR COACH INDUSTRIES
JURY OVERTIME
3/20-23/2018

Item	Material/Description	Quantity	Unit Price	Total
000010	Jury Fees	10.500 EA	38.75	406.88
		Invoice Amount		$ 406.88

Balance Due $406.88

012026
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Exhibit 2

5/7/2018

Khiabani/MCI
2114.2 Expenses
Juror's Fees

Client	Mtr	Date	Exp Code	Description	Amount
02114	2	03/26/18	JURY	Jury Fees - 02/22/18 - 03/23/18 Jury Fees for Khiabani Trial (Clark County Treasurer)	$ 12,320.00
02114	2	04/12/18	JURY	Jury Fees - KJC 1/2 Portion 2/26-3/23 Venetian Jurors Compensation Agreement	$ 2,993.49
02114	2	04/18/18	JURY	Jury Fees - 03/21/18 Jury Meal for Khiabani Trial (Jason's Deli)	$ 191.38
02114	2	04/18/18	JURY	Jury Fees - 03/23/18 Jury Meals for Khiabani Trial (Anthony's New York Pizza & Deli)	$ 167.55
02114	2	04/18/18	JURY	Jury Fees - 03/22/18 Jury Meals for Khiabani Trial (Anthony's New York Pizza & Deli)	$ 156.40
					$ 15,828.82
				Total Juror's Fees Billed	**$ 15,828.82**

012028

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EIGHTH JUDICIAL DISTRICT COURT

April 18, 2018

Kemp, Jones & Coulthard
3800 Howard Hughes Pkwy
17th Floor
Las Vegas, NV 89169

Re: A755977 – Khiabani vs. Motor Coach Industries

Dear Counsel,

012029

Please remit to this office individual checks made payable to the vendors below.

012029

Jason's Deli, in the amount of **$191.38** for the jury meal provided on 3/21/18.
Anthony's Pizza, in the amount of **$156.40** for the jury meal provided on 3/22/18.
Anthony's Pizza, in the amount of **$167.55** for the jury meal provided on 3/23/18.

Please forward the payments to me at District Court Administration, 200 Lewis Avenue 2nd Floor, Las Vegas, NV 89155. If you have any questions, feel free to contact Sheila Scott at 702-671-4490.

Thank you,

Jennifer M. Garcia

Jennifer Garcia
District Court Administration
Fiscal Services Manager

EIGHTH JUDICIAL DISTRICT COURT
ADMINISTRATION
REGIONAL JUSTICE CENTER
JURY MEAL VOUCHER

VENDOR NAME Jason's Deli DATE March 31, 2019

DEPARTMENT NUMBER 14 CASE NUMBER A-17-755811-C CRIMINAL ☐ CIVIL ☒

BREAKFAST ☐ LUNCH ☒ DINNER ☐

AMOUNT OF RECEIPT $ 154.08 NUMBER OF JURORS 14

TAX (civil cases only) $ 12.30 MARSHAL 1

TIP (15% or less) $ 25.00 JURY ATTENDANT 1

TOTAL $ 191.38

Signature/Title

***PLEASE GIVE WHITE VOUCHER COPY TO VENDOR**
***PLEASE ATTACH ORIGINAL RECEIPT TO PINK VOUCHER COPY & SUBMIT TO DISTRICT COURT FISCAL SERVICES.**
***(VOUCHER PAID 30 DAY NET TERMS)**

REV. 4/15

012030
012030

Invoice:

Date Order Placed: 3/20/2018
Delivery Date Time: **3/21/2018** **11:30 AM**
Deliver To: 200 Lewis #14 Floor
(No City), NV 89101
Driver's Name: DULCE MEZA
Delivery Instructions:
Customer PO #: POS Ticket #: 120001
Ordered By: Powell, Diana (702) 671-4419

Invoice Number: 180320218060079

Questions or Comments
409-838-1976
customer.service@jasonsdeli.com

EIGHTH JUDICIAL DISTRICT COURT (CN: 17312TE)
Attn: Powell, Diana
200 LEWIS AVE
LAS VEGAS, NV 89101

LVD #218
100 N City Pkwy Ste 110
Las Vegas, NV 89106
702-366-0130

Customer Name: **EIGHTH JUDICIAL DISTRICT COURT**

Menu Items Purchased:

Qty	Item	Description	Each	Amount
7	CALI BOX (7 CALI X)	California Club Box (7 CALI X)	8.99	62.93
	Options:	(N)ToGo Baked Lays Pickle		
7	CROIS CLUB BOX (7 CRO	Croissant Club Box (7 CROIS X)	8.99	62.93
18	CAN SODA (18 Can Soda	Bulk Can Soda (18 Can Soda)	1.29	23.22

*** Item list continued on next page ***

012031

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Subtotal	**$154.08**
Tax	$12.30
Delivery Fee	$0.00
Order Total	**$166.38**
Added Tip	25.00
Grand Total	191.38

Please initial tip ___

Customer Signature

Actual Delivery Time
(Customer enter & initial)

Printed Name

Thank you for being a Jason's Deli Customer

Due upon receipt --- Please detach and return

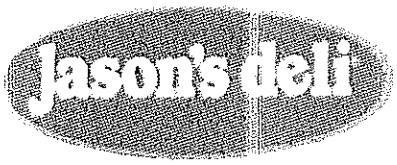
Payment Method:
Corporate Account **Charged Amount Due** $166.38

Site: LVD #218
Date: 3/21/2018
Invoice #: 180320218060079
Customer PO #:
Customer Account No.17312TE

Visit aronline.jasonsdeli.com for online payment, invoice copies, account history, or questions.
To pay by check: Jason's Deli
P. O. Box 4869 Dept 271
Houston, Texas 77210-4869

Invoice:

Date Order Placed:	3/20/2018	
Delivery Date Time:	**3/21/2018**	**11:30 AM**
Deliver To:	200 Lewis #14 Floor (No City), NV 89101	
Driver's Name:	DULCE MEZA	
Delivery Instructions:		
Customer PO #:		Customer Ticket #: 120001
Ordered By:	Powell, Diana	(702) 671-4419



Invoice Number: 180320218060079

Questions or Comments
409-838-1976
customer.service@jasonsdeli.com

Customer Name: **EIGHTH JUDICIAL DISTRICT COURT**

Menu Items Purchased (Continued):

Quantity	Item	Description	Each	Amount
1	Utensils (1 Utensils)	Plates, Forks, Napkins (1 Utensils)	0.00	0.00
	Options:	No Plates Forks & Napkins		
1	DELIVERY FEE	DELIVERY FEE	5.00	5.00
	Options:	Delivery AM		

012032

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EIGHTH JUDICIAL DISTRICT COURT

April 18, 2018

Kemp, Jones & Coulthard
3800 Howard Hughes Pkwy
17th Floor
Las Vegas, NV 89169

Re: A755977 – Khiabani vs. Motor Coach Industries

Dear Counsel,

Please remit to this office individual checks made payable to the vendors below.

Jason's Deli, in the amount of **$191.38** for the jury meal provided on 3/21/18.
Anthony's Pizza, in the amount of **$156.40** for the jury meal provided on 3/22/18.
Anthony's Pizza, in the amount of **$167.55** for the jury meal provided on 3/23/18.

Please forward the payments to me at District Court Administration, 200 Lewis Avenue 2nd Floor, Las Vegas, NV 89155. If you have any questions, feel free to contact Sheila Scott at 702-671-4490.

Thank you,

Jennifer M. Garcia

Jennifer Garcia
District Court Administration
Fiscal Services Manager

012033
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EIGHTH JUDICIAL DISTRICT COURT
ADMINISTRATION
REGIONAL JUSTICE CENTER
JURY MEAL VOUCHER

VENDOR NAME Anthony's New York Pizza DATE 02/28/2018

DEPARTMENT NUMBER 14 CASE NUMBER A-17-753917-C CRIMINAL ☐ CIVIL ☒

BREAKFAST ☐ LUNCH ☒ DINNER ☐

AMOUNT OF RECEIPT $ 130.13 NUMBER OF JURORS 14

TAX (civil cases only) $ 10.77 MARSHAL 1

TIP (15% or less) $ 19.00 JURY ATTENDANT 1

TOTAL $ 159.40

Signature/Title

***PLEASE GIVE WHITE VOUCHER COPY TO VENDOR**
***PLEASE ATTACH ORIGINAL RECEIPT TO PINK VOUCHER COPY & SUBMIT TO DISTRICT COURT FISCAL SERVICES.**
***(VOUCHER PAID 30 DAY NET TERMS)**

REV. 4/15

012034

012034

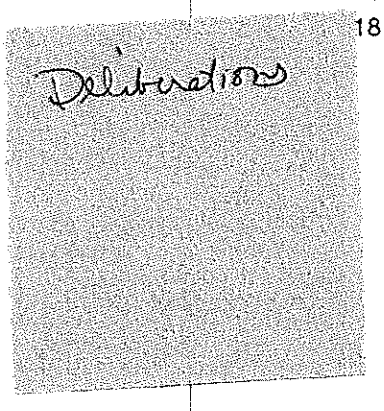
Invoice

ANTHONY'S NEW YORK PIZZA & DELI
321 S CASINO CENTER BLVD #125
LAS VEGAS, NEVADA 89101

Bill To:
Clark County Nevada 500 S Grand Central Parkway PO Box 551220 Las Vegas, NV 89155-1220

Date	Invoice No.	Terms	Contact	Phone	Floor	Department
03/22/18	136	VOUCHER	DIANNA	702-671-4419	14	14

Item	Description	Quantity	Rate	Amount
PIZZA	LG PEPPERONI	2	16.99	33.98T
PIZZA	LG CHEESE	1	14.99	14.99T
CHICKEN FINGERS	BUCKET- HOT	1	29.99	29.99T
APPETIZER	LG FRIES	1	3.99	3.99T
SALAD	LG CHEF	1	12.99	12.99T
SALAD	LG GREEK	1	12.99	12.99T
SODA	ASSORTED CANS	18	1.00	18.00T
	Sales Tax		8.25%	10.47
THANK YOU FOR YOUR BUSINESS!!!			Total	$137.40



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EIGHTH JUDICIAL DISTRICT COURT

April 18, 2018

Kemp, Jones & Coulthard
3800 Howard Hughes Pkwy
17th Floor
Las Vegas, NV 89169

Re: A755977 – Khiabani vs. Motor Coach Industries

Dear Counsel,

012036

Please remit to this office individual checks made payable to the vendors below.

012036

Jason's Deli, in the amount of **$191.38** for the jury meal provided on 3/21/18.
Anthony's Pizza, in the amount of **$156.40** for the jury meal provided on 3/22/18.
Anthony's Pizza, in the amount of **$167.55** for the jury meal provided on 3/23/18.

Please forward the payments to me at District Court Administration, 200 Lewis Avenue 2nd Floor, Las Vegas, NV 89155. If you have any questions, feel free to contact Sheila Scott at 702-671-4490.

Thank you,

Jennifer M. Garcia

Jennifer Garcia
District Court Administration
Fiscal Services Manager

EIGHTH JUDICIAL DISTRICT COURT
ADMINISTRATION
REGIONAL JUSTICE CENTER
JURY MEAL VOUCHER

VENDOR NAME Anthony's Nut Work Pizza DATE 03/23/2013

DEPARTMENT NUMBER 11 CASE NUMBER A-12-[illegible]-C CRIMINAL ☐ CIVIL ☒

BREAKFAST ☐ LUNCH ☒ DINNER ☐

AMOUNT OF RECEIPT $ 125.94 NUMBER OF JURORS 12

TAX (civil cases only) $ 11.33 MARSHAL 1

TIP (15% or less) $ 20.39 JURY ATTENDANT 1

TOTAL $ 157.66

[illegible] / Deputy

Signature/Title

***PLEASE GIVE WHITE VOUCHER COPY TO VENDOR**
***PLEASE ATTACH ORIGINAL RECEIPT TO PINK VOUCHER COPY & SUBMIT TO DISTRICT COURT FISCAL SERVICES.**
***(VOUCHER PAID 30 DAY NET TERMS)**

REV. 4/15

012037

012037

Invoice

ANTHONY'S NEW YORK PIZZA & DELI
321 S CASINO CENTER BLVD #125
LAS VEGAS, NEVADA 89101

Bill To:
Clark County Nevada 500 S Grand Central Parkway PO Box 551220 Las Vegas, NV 89155-1220

Date	Invoice No.	Terms	Contact	Phone	Floor	Department
03/23/18	137	VOUCHER	DIANNA	702-671-4419	14	14

Item	Description	Quantity	Rate	Amount
PIZZA	LG PEPPERONI	1	16.99	16.99T
PIZZA	LG CHEESE	1	14.99	14.99T
CHICKEN FINGERS	BUCKET- HOT	1	29.99	29.99T
CHICKEN FINGERS	BUCKET-BBQ	1	29.99	29.99T
SALAD	LG CHEF	1	12.99	12.99T
SALAD	LG GREEK	1	12.99	12.99T
SODA	ASSORTED CANS	18	1.00	18.00T
	Sales Tax		8.25%	11.22

THANK YOU FOR YOUR BUSINESS!!!

Total $147.16

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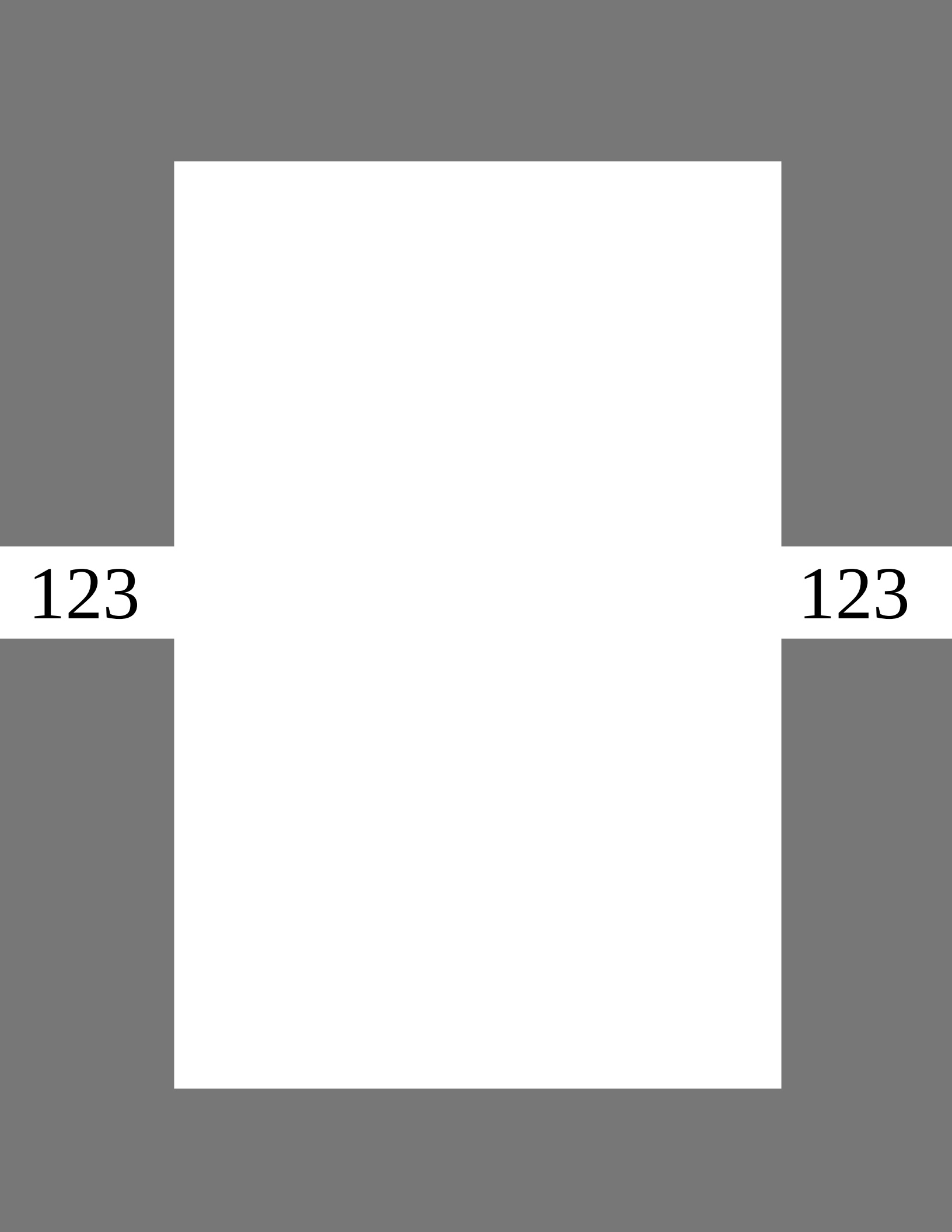
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WILL KEMP, ESQ. (#1205)
ERIC PEPPERMAN, ESQ. (#11679)
e.pepperman@kempjones.com
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3800 Howard Hughes Parkway, 17th Floor
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KENDELEE L. WORKS, ESQ. (#9611)
810 South Casino Center Blvd.
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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 DEFENDANT'S MOTION TO RETAX COSTS

Plaintiffs, by and through their counsel of record, hereby oppose the Motion to Retax Costs filed by Defendant Motor Coach Industries, Inc. ("MCI").

/ / /

/ / /

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kemnjones.com

012039

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012039

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

012040

I

INTRODUCTION

In **two invoices** dated 10/26/17 and 12/1/17, MCI paid Michael Carhart, one of its two biomechanical experts, nearly **$135,000.00**. The 10/26/17 and 12/1/17 invoices are attached as Exhibit 1. In another **two invoices** dated 9/11/17 and 10/10/17, MCI paid its accident reconstruction expert, Robert Rucoba, nearly **$92,000.00**. The 9/11/17 and 10/10/17 invoices are attached as Exhibit 2. In **four invoices** relating to a mere **two** of its **eight** experts, MCI spent more than **$226,000.00** in litigation costs.

Plaintiffs' make no claim that MCI's costs were not reasonably or necessarily incurred. But, as this small peek at a tiny fraction of MCI's expenses demonstrates, this was a costly case—for both parties. More than **50 witnesses**, including experts, were deposed. Many of these depositions were taken outside of the state and country. Collectively, the parties produced **tens of thousands** of documents, including expert job files that contained voluminous color photographs of various evidence inspections and testing. The parties conducted extensive discovery and motion practice in advance of a jury trial that lasted six full weeks. Under these circumstances, it should come as no surprise that both parties reasonably, necessarily, and actually incurred significant litigation expenses.

Nevertheless, MCI feigns shock at Plaintiffs' request for $619,888.71.[1] Although its own costs likely dwarfed those that Plaintiffs seek to recover, MCI disingenuously calls Plaintiffs' requested costs "grossly excessive" and "unreasonable." Mot., 2:11. Despite spending more than **$226,000.00** on the work of a mere two experts over two months time, MCI brazenly asks the Court to slash Plaintiffs' claimed costs by more than 80% to approximately $113,000.00. Mot., 15:18. In other words, MCI contends that Plaintiffs' "reasonable" costs for the **entire case** should be capped at **less than half** of what MCI spent on **two expert experts**

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[1] In their 4/24/18 memorandum of costs, Plaintiffs set forth $618,966.50. After the filed their memorandum, however, Plaintiffs received additional invoices from the Court relating to $406.88 for Marshall overtime and $515.33 for meals provided to the jury. Plaintiffs supplemented their memorandum with these costs on May 9, 2018. The total amount of costs that Plaintiffs seek to tax against MCI is $619,888.71.

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for two months. In light of its own documented expenditures, MCI's overarching argument that Plaintiffs' costs are "grossly excessive, unreasonable, and unrecoverable" simply isn't credible.

The Court should ignore MCI's hollow, self-serving attacks on the reasonableness of Plaintiffs' requested costs. Every cost and disbursement that Plaintiffs seek to tax against MCI is recoverable under NRS 18.020 and 18.005. These requested costs are fully supported by more than **1300 pages** of documentation, which prove that the costs were reasonable, necessary, and actually incurred in connection with this case. In addition to these voluminous back-up materials, Plaintiffs' costs are further supported by the declarations of their co-lead attorneys, Will Kemp, Esq. and Pete Christiansen, Esq. Both Mr. Kemp and Mr. Christiansen attest to their belief that these costs were actually, reasonably, and necessarily incurred in order to prosecute this action, and that the costs and disbursements represent customary charges in this community for related materials and services.

This was a difficult and costly case. Plaintiffs invested a significant amount of money into successfully prosecuting their claims. Now, as the prevailing party, they should be able to recoup the reasonable expenses set forth in their 4/24/18 Memorandum of Costs and Disbursements.

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II

ARGUMENT

A. NRS 18.020 provides for a mandatory award of costs to Plaintiffs.

In an action for the recovery of money damages that exceed $2,500, "[c]osts **must** be allowed of course to the prevailing party against whom judgment is rendered." NRS 18.020(3) (emphasis added). The district court retains sound discretion in determining the reasonableness of the amounts and the items of costs to be awarded. *Schwartz v. Estate of Greenspun*, 881 P.2d 638, 643 (Nev. 1994). MCI bears the burden of showing that Plaintiffs' claimed costs are unauthorized and/or unreasonable in their amount; otherwise, the Nevada Supreme Court will not presume error in the exercise of discretion in awarding costs. *See, e.g., Schwartz*, 881 P.2d

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at 643-644. MCI cannot meet this burden because all of Plaintiffs' claimed costs are authorized and reasonable.

B. All of Plaintiffs' requested costs were reasonable, necessary, and actually incurred.

MCI baldly asserts that Plaintiffs seek more than $500,000.00 in costs "that are unreasonable or not specifically authorized by statute." Contrary to this incorrect assertion, every single item of costs that Plaintiffs ask the Court to tax against MCI is recoverable under one of the 17 categories of NRS 18.005. **Significantly, Plaintiffs incurred nearly $400,000.00 in additional costs that they do not seek to recover**. Plaintiffs limited their requested costs to those that are plainly authorized under NRS 18.005. In compliance with Nevada law, all of these **requested costs** were reasonably and necessarily incurred; they reflect customary charges for the services in this community; and they are fully supported by voluminous documentation and the sworn declarations of counsel.

1. Filing/Clerk Fees

MCI argues that "[t]he $70.00 charge for 'clerical paralegal services' for the filing of the subpoena for Porcia Hubbard is not taxable." Mot., 2:27-3:1. But this charge was reasonable, necessary, and actually incurred to file an out-of-state subpoena for a relevant witness. The Court should reject MCI's conclusory argument for eliminating this valid cost.

2. Reporters' Fees for Depositions/Deposition Transcripts

NRS 18.005(2) permits costs for reporters' fees for depositions, including a reporter's fee for one copy of each deposition. MCI seeks to preclude Plaintiffs from recovering more than $45,000.00 in costs that were reasonably, necessarily, and actually incurred in connection with the significant number of depositions taken in this case. These costs related to critical materials and services, such as rough drafts of transcripts, expediting fees, videography services, synchronized DVDs of the depositions, conference rooms and amenities for out-of-state depositions, and video-conference services. The need and reasonableness of these costs are fully supported by the extensive documentation attached as Exhibits 2A&B to Plaintiffs' memorandum of costs, as well as the declaration of counsel. *See* 4/25/18 Amended Declaration of Pete Christiansen, Esq., ¶ 7.

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Nevertheless, MCI argues that this category of costs "is excessive and includes fees for products and services not authorized for recovery under Nevada law." Mot., 3:5-6. MCI is wrong. To the extent that Plaintiffs' more than $45,000.00 in costs are not recoverable under NRS 18.005(2), which Plaintiffs believe that they are, these costs are undoubtedly permitted by NRS 18.005(17), as they are all "reasonable and necessary expense[s] incurred in connection with [this] action."

In light of the preferential trial date, discovery was expedited. In certain situations, Plaintiffs reasonably and necessarily required expedited deposition transcripts or rough drafts to meet deadlines. Although there were **53 depositions** in this case, Plaintiffs incurred expediting fees for **four** transcripts. They incurred costs for rough drafts on only nine occasions. The sparsity of these costs demonstrates that Plaintiffs only utilized the accompanying services when **necessary**.

Like MCI, Plaintiffs videotaped the majority of their depositions. The costs for these videography services, including fees for synced DVDs,[2] are reasonable and necessary in a case like the present one. Because many of the deposed witnesses reside outside of Plaintiffs' subpoena power, it was a foregone conclusion that these videotaped depositions would be played at trial. Additionally, most of the local deponents were fact witnesses unrelated to either party in the case. At the time of these depositions, it was far from certain that any of these witnesses would be available or appear at trial. In a case of this magnitude and significance, especially considering the parties' vociferous factual disputes, it is not unreasonable to incur costs to ensure that the jury can see the witnesses' manner and conduct while testifying. Both parties recognized the need for these services, and Plaintiffs should be allowed to recoup their costs relating to the same.

[2] As the Court observed during the trial, the sound quality of the deposition is not always clear. For the benefit of both the jury and the record, it is reasonable (and highly common) to sync the video with the transcript, so the words scroll across the screen as the video deposition is played at trial. This service also provides critical other benefits, such as making it easier to edit the videos to reflect courts' evidentiary rulings, which saves valuable time and judicial resources.

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For any out-of-state fact depositions, Plaintiffs were required to reserve local conference rooms. They also provided basic amenities, such as bottled water, coffee, and other beverages, which were available to the witnesses and all parties' counsel. As there were no cost-free locations to take these out-of-state depositions, Plaintiffs' conference room expenses were plainly necessary and reasonable. The associated costs for amenities were equally necessary and reasonable, as many of these depositions lasted several hours.

The majority of times, Plaintiffs took out-of-state depositions over video-conference. As a result, they incurred various costs associated with the video-conference deposition, such as videoconference fees, connection charges, room expenses, etc. It is surprising that MCI even challenges these costs as unreasonable or unnecessary because the video-conference charges pale in comparison to the travel expenses that Plaintiffs would have occurred had they taken all of the out-of-state depositions in person. In any event, these expenses were not only reasonably and necessarily incurred in this action, they substantially reduced Plaintiffs' taxable travel costs under NRS 18.005(15). Accordingly, these costs, and all of Plaintiffs' requested costs in this category, should be awarded.

3. Expert Witness Fees

In this case, Plaintiffs disclosed **14** expert witnesses and incurred expert fees totalling more than **$550,000.00**. In accordance with NRS 18.005(5), however, they only seek to recoup **$237,076.61** in fees paid to **five** of their experts: (1) Robert Caldwell, P.E., an accident reconstructionist, (2) Joshua Cohen, a 3D visualization and photogrammetry expert, (3) Robert Cunitz, Ph.D., CHFP, a human factors/warning expert, (4) Richard Stalnaker, Ph.D., a biomechanical expert, and (5) Larry Stokes, Ph.D., an expert economist.

Despite retaining its own extremely high-paid and reputable experts to **defend** this action, MCI contends that Plaintiffs' expert fees are "grossly excessive" and "unreasonable." Mot., 7:19. But, while Plaintiffs' requested sum of $237,000.00 covers the total fees paid to **five experts** for the **entire case**, MCI spent nearly the same amount (**$226,000.00**) on **four invoices** relating to **two experts**. *See* Exhibits 1 and 2. In light of MCI's costs for **defense** experts, Plaintiffs' expert expenses are hardly unreasonable.

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Regardless of MCI's spending, NRS 18.005(5) allows "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, **unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.**" (Emphasis added). While MCI self-servingly asserts that Plaintiff's experts should all be limited to the $1500 statutory minimum, the circumstances surrounding each expert's testimony were of such necessity as to require the larger fee. Accordingly, Plaintiffs should be awarded all of their requested expert costs.

This result is supported by Plaintiffs' back-up documentation, the declarations of counsel, the Court's observations at trial, and the factors identified in *Frazier v.* Drake, 357 P.3d 365, 377-78 (Nev. App. Ct. 2015)—namely, (i) the importance of the expert's testimony to the case; (ii) the aid that the expert's testimony provided to the jury; (iii) whether any of the expert's testimony was duplicative to other experts; (iv) the extent and nature of the work performed, including investigation or testing; (v) the amount of time that the expert spent in court, preparing the report, or preparing for trial; (vi) the expert's education, training, and area of expertise; and (vii) the amount of the expert's fee in relation to such factors as fees charged by comparable experts. Although these factors are fully demonstrated by the more than 130 pages of expert invoices, time entries, and receipts attached as Exhibit 5A to their memorandum of costs, Plaintiffs will emphasize them again as follows:

a. Accident Reconstruction Expert, Robert Caldwell, P.E.

This case arose from a bus accident, and Caldwell's accident reconstruction was a critical component of establishing what happened. Caldwell's testimony helped the jury understand the intricacies of the accident and Plaintiffs' theories of liability. Caldwell was Plaintiffs' only accident reconstruction expert, so his testimony was not duplicative to any other experts. As his billing entries and invoices demonstrate, Caldwell spent a significant amount of time and effort on this case. He performed thorough investigations of the accident scene and evidence; he prepared a lengthy, complex report regarding his reconstruction; he spent significant time preparing for both his deposition and trial testimony, for which he traveled from

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Colorado; and he testified for nearly a full-day at trial. Caldwell is highly educated, experienced, and revered in his area of expertise. His fees were reasonable and customary for the work that he provided, and they were substantially less than those charged by MCI's accident reconstruction expert, Rucoba. *See* Exhibit 2. Caldwell's fees should not be limited to the statutory minimum of $1,500, and Plaintiffs should be allowed to recover the full amount paid to Caldwell.

b. 3D Visualization and Photogrammetry Expert, Joshua Cohen

Cohen is one of the foremost 3d visualization and photogrammetry experts in the United States and has extensive experience creating digital 3d modeling and computer-generated animations for demonstrative or illustrative use in litigation. His digital modeling, photogrammetry, and testimony were extremely important and helpful to the jury. At trial, **both parties** were able to manipulate Cohen's 3d model to highlight different evidence or measurements, to recreate a given eyewitness' version of events, to illustrate the opinions of different experts, and to visualize the different theories and versions of events, all of which aided the jury. Additionally, Cohen created aerial photomaps of the scene. To **both parties'** benefit, these maps were used in all of the relevant depositions and at trial to allow the witnesses to explain what they saw at the various reference points leading up to the accident. Through video editing and analysis, Mr. Cohen also created various exhibits from the Red Rock surveillance footage. These exhibits were used to bolster and explain critical elements of the footage that were otherwise too difficult to discern. Cohen offered substantive opinions about the speed of the bus and the location and measurement of other physical evidence as well.

As his billing entries and invoices demonstrate, Cohen spent a significant amount of time and effort on this case. He performed thorough investigations of the accident scene and evidence; he prepared a complex 3d model of the scene; he created numerous demonstrative maps and other exhibits; he provided substantial assistance during discovery; he drafted a comprehensive report on his processes and opinions; he spent significant time preparing for both his deposition and trial testimony, for which he traveled from Oregon; and he testified for nearly a full-day at trial. Cohen has degrees from Brown University and the University of

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Oregon. He has more than a decade of experience as an industry-leading expert in his field and has testified numerous times. In light of the substantial benefits provided by his work and testimony, which were not duplicative to other experts, Cohen's fees should not be limited to $1,500, and Plaintiffs' should be awarded all of the costs related to Cohen.

c. Human Factors and Warnings Expert, Robert Cunitz, Ph.D.

Robert Cunitz, Ph.D., is a Certified Human Factors Professional and Plaintiffs' Warnings Expert in this products liability case. Since becoming a psychologist in 1972, Dr. Cunitz has taken a career path that has given him specialized knowledge in the risks inherent in a product, the need to warn against those risks, and how to make effective warnings and instructions. He has worked for private companies and United States governmental agencies, including the National Bureau of Standards, NASA, and the U.S. Army in the field of human factors. In 1972, Dr. Cunitz became the head of the Human Factors Section of the Center for Consumer Product Technology of the National Bureau of Standards.

Dr. Cunitz's testimony was critical to Plaintiffs' successful failure to warn claim and necessary to rebut the testimony of MCI's warnings expert. Dr. Cunitz clearly provided substantial aid to the jury, which found in Plaintiffs' favor on this claim. He was Plaintiffs' only warnings expert and, thus, not duplicative to any other expert in this case. Dr. Cunitz performed extensive work in a highly-specialized field. Although it did not take as long as Plaintiffs' other experts, Dr. Cunitz's trial testimony arguably had the greatest impact on the result. Moreover, Dr. Cunitz dedicated a significant amount of time to drafting a comprehensive report, assisting Plaintiffs throughout the discovery process, and preparing for his deposition and trial testimony, for which he traveled from Maryland. Given his extensive experience in the field of human factors, Dr. Cunitz's rates compare favorably to less knowledgeable experts. For these reasons, especially considering the impact of his testimony on the verdict, Dr. Cunitz's fees should not be limited to the statutory minimum of $1,500, and Plaintiffs should be allowed to recover the full amount paid to Dr. Cunitz.

d. Biomechanical Expert, Richard Stalnaker, Ph.D.

Dr. Stalnaker's testimony was vital to explaining Plaintiffs' positions on various biomechanical issues, including but not limited to the manner in which Dr. Khiabani sustained

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his fatal injuries, the impact forces suffered by Dr. Khiabani during the accident, and the opinions of MCI's opposing experts. Dr. Stalnaker's testimony assisted the jury in understanding how Dr. Khiabani's injuries were related to, consistent with, and supported by Plaintiffs' liability theories.

Dr. Stalnaker is one of the country's foremost biomechanical experts. He was personally involved in many of the world's most foundational skull fracture studies. His published, peer-reviewed work was even cited and relied upon by MCI's biomechanical expert, Dr. Carhart. Dr. Stalnaker was Plaintiffs' only biomechanical expert, so his testimony was not duplicative to any other experts. His academic credentials, training, and experience were invaluable to Plaintiffs' successful prosecution of this matter.

Dr. Stalnaker spent a significant amount of time and effort on this case. He performed thorough inspections of the physical evidence; he made complex calculations to formulate his opinions; he prepared a lengthy, comprehensive report regarding those opinions; he spent significant time preparing for both his deposition and trial testimony; he traveled from Ohio for his trial testimony; and he testified for several hours over two separate days of trial. Dr. Stalnaker's fees were reasonable and customary for the work that he provided, and they were substantially less than those charged by MCI's biomechanical expert, Dr. Carhart. *See* Exhibit 1. Dr. Stalnaker's fees should not be limited to the statutory minimum of $1,500, and Plaintiffs should be allowed to recover the full amount paid to Dr. Stalnaker.

e. Expert Economist, Larry Stokes, Ph.D.

Dr. Stokes is a highly educated, experienced, and revered expert economist. He was essential to proving a large portion of Plaintiffs' damages. His testimony regarding Dr. Khiabani's future wage losses, including the present value of these amounts, aided the jury in awarding nearly $3,000,000.00 in damages for loss of probable support. Without Dr. Stokes, Plaintiffs would not have been able to establish a foundation for this significant award of damages.

Dr. Stokes was Plaintiffs' only expert economist, so his testimony was not duplicative of any other experts. As his billings and invoices demonstrate, Dr. Stokes dedicated an extensive

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amount of time and effort to this case. He prepared multiple reports that covered a wide range of potential damages issues. In formulating his opinions, he catalogued and reviewed voluminous, complex financial documents and disclosures. He spent a considerable amount time preparing to testify both in his deposition and at trial, for which he traveled from Arizona. He also provided invaluable assistance to Plaintiffs during discovery and in preparing for the trial testimony of MCI's expert economist. Accordingly, Dr. Stokes' fees should not be limited to the statutory minimum of $1,500, and Plaintiffs should be allowed to recover the full amount paid to Dr. Stokes.

4. Interpreter Fees

Plaintiffs incurred costs paying for a court interpreter. As part of the fee, the interpreter charged Plaintiffs a "parking fee" of $12.00 and a "credit card processing fee" of $8.76. Although MCI contends (at 9) that these fees "are not taxable," they are part of the reasonable fee charged by a necessary interpreter. These fees are recoverable under NRS 18.005(6).

5. Process Server Fees

NRS 18.005(7) permits the recovery of fees relating to the service of any summons or subpoena used in the action. MCI argues that several related fees, such as fees for service of a temporary restraining order, attempted service, person searches, and rush services are not recoverable under NRS 18.005(7). While Plaintiffs disagree, MCI fails to argue that any of the requested costs under this category were not reasonable, necessary, or actually incurred. Thus, even if these costs fall outside of NRS 18.005(7), which they don't, the costs are equally recoverable under NRS 18.005(17), as they are all "reasonable and necessary expense[s] incurred in connections with [this] action."

6. Official Reporter Fees

NRS 18.005(8) allows for the recovery of costs paid to the official reporter for transcription services. These costs are based on a price per page transcribed. And the price per page depends on the delivery time. For instance, if the transcript is delivered within 24 hours, the price per page will be more than when the transcript is delivered within two days.

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MCI concedes that Plaintiffs are entitled to recover their transcription fees on a price per page basis, but it argues that Plaintiffs' incurred costs of $49,625.42 should be reduced by more than $16,800.00 to reflect a price per page of $3.65 instead of the $8.03 that Plaintiffs actually paid. MCI contends that "[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." Mot., 10:2-4. While no such rate is set forth in this provision, there is no reason to look to federal law on this issue.

NRS 3.370 provides the per-page compensation for reporters transcribing civil proceedings in a **Nevada state court**. Under this provision, when transcripts are delivered within 24 hours, as they were to **both parties** in this case, the official reporter is entitled to receive "$8.03 per page." NRS 3.370(c)(1)(I). This **Nevada** statutory compensation should not be reduced by more than half based on an inapplicable federal statute, as MCI contends.

In addition to the statutory fee, Plaintiffs incurred additional charges for expediting daily transcripts and real time feeds (with these additional charges, Plaintiffs paid a total of $9.50 per page). Although MCI argues that these additional costs were not reasonably necessary, this is another example of MCI's actions contradicting its words. Upon information and belief, MCI incurred similar costs for identical services, which are reasonable and necessary in a case of this magnitude and significance. This was a hotly-disputed trial against highly competent and experienced attorneys. As the Court can recall, the real time feeds were repeatedly utilized by **both parties** to address the numerous factual and legal issues that arose throughout the trial. Moreover, the parties were in trial most of everyday for six weeks straight. They had limited time, mostly nights and weekends, to prepare for the next day's testimony or draft/respond to the many bench briefs that were filed during trial. The daily transcripts were critical to competently perform these tasks. Accordingly, Plaintiffs should be awarded the full amount of their requested $49,625.42[3] in official reporter fees.

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[3] This amount reflects the payment of two deposits of $5,000.00, as these deposit amounts were credited toward Plaintiffs' subsequent payments on two invoices. *See* APP000357-58. MCI contends that these deposits are "not a taxable cost and should be reduced to $0." Mot., 10, fn.

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7. Faxes

NRS 18.005(11) expressly permits reasonable costs for telecopies (faxes). Included in Exhibit 11A of Plaintiffs' Verified Memorandum of Costs is an itemization of all of Plaintiffs' telecopy costs, which amount to $61.60. MCI alleges that this documentation is insufficient to support any reimbursement of these costs.

KJC's fax machines and logs track all incoming and outgoing faxes by the case and matter numbers. To support their necessarily incurred facsimile costs, Plaintiffs provided a complete itemization of the user sending the fax, the date of the fax, the time of the fax, a description of the materials faxed, the number/destination (where applicable), the number of pages faxed, the gross and net charges, and confirmation that these charges were actually billed. *See* APP000361. This documentation is in addition to the declarations of Plaintiffs' counsel. Plaintiffs' request for telecopy costs in the amount of $61.60 is reasonable, properly documented, and should be awarded.

8. Copying Expenses

NRS 18.005(12) permits reasonable costs for photocopies. Attached as Exhibit 12A to Plaintiffs' Memorandum of Costs is ample documentation supporting Plaintiffs' requested copying expenses, which amount to $44,301.61.

MCI asserts that many of these costs are "excessive" because "Plaintiffs have not demonstrated why it was necessary to print in excess of 100,000.00 pages or have a vendor charge above-average costs for prints/scans." Mot., 11:13; 12:3-5. But Plaintiffs attached more than **450 pages** of documentation demonstrating the reasonableness and necessity of these expenses. This documentation includes, but is not limited, a complete itemization of all copies showing the date and time of each copy, the number of copies charged, the cost per copy, a description of the material copied, and whether the copy was in color.

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3 and 4. Reducing these deposits to $0 here, however, would result in a windfall to MCI because Plaintiffs' paid invoices already reflect these reductions.

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If this documentation is actually reviewed, it is easy to see "why it was necessary to print so many pages worth of documents." This was a document-intensive case. Tens of thousands of pages of documents were exchanged between the parties, including lengthy product manuals. Many of MCI's experts disclosed job files that were in excess of a thousand pages. These job files contained hundreds of pages of high-resolution color photos, testing data, literature, and other materials. There were also 53 depositions, many involving lengthy transcripts and voluminous exhibits. Moreover, this was a hotly-litigated case. The parties filed numerous pretrial and trial motions, which often attached hundreds of pages of exhibits and/or resulted in hundreds of more pages in hearing transcripts. Plaintiffs also incurred significant copying expenses related to the large-scale demonstrative maps and photographs that were used in many of the depositions and throughout trial. All of these materials were reasonably scanned or printed to deliver to Plaintiffs' 14 experts, to use during depositions, to use during trial and other pretrial hearings, to help prepare witnesses, to bring to hearings, and for a multitude of other necessary reasons that are too numerous to name. In a case like this, Plaintiffs' copying and associated costs were highly reasonable. *See* Am. Decl. of Pete Christiansen, Esq., ¶ 10.

With respect to MCI's claim that Plaintiffs' "vendor charge[d] above-average costs for prints/scans," it is nearly impossible to respond because MCI offers nothing but this conclusory assertion. To Plaintiffs' knowledge, both Plaintiffs and MCI used the same vendor for printing and copying—HOLO Discovery. Plaintiffs believe that they were charged HOLO's regular rates, which, in Plaintiffs' experience, are comparable or favorable to the rates charged by other vendors in the community. HOLO is a well-known vendor that is commonly used in the legal community for the exact same services that Plaintiffs paid for in this case. There is no basis to conclude that Plaintiffs were charged above-average rates or that their requested costs were unreasonable.

MCI's final argument against Plaintiffs' photocopying expenses is that scanning costs are not recoverable under this category. Mot., 12:5 ("Scanning costs are not provided for under statute [NRS 18.005(12)]…."). MCI provides no authority for its assertion, which is directly contradicted by Nevada law. *See Matter of DISH Network Derivative Litigation*, 401 P.3d

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1081, 1093 (Nev. 2017) (affirming an "award of costs for photocopying **and scanning** under NRS 18.005(12).") (Bold added). As their photocopying **and scanning** costs are equally supported by the more than 450 pages of back-up documentation, Plaintiffs should be awarded the entire requested amount of $44,301.61.

9. Long-Distance Phone Calls

NRS 18.005(13) expressly permits reasonable costs for long-distance telephone calls. Included in Exhibits 13A&B of Plaintiffs' Verified Memorandum of Costs is an itemization of all of Plaintiffs' long-distance phone calls and invoices documenting conference call costs, which amount to total long-distance phone costs of $909.16.[4] Despite this documentation, MCI contends that "Plaintiffs provide no explanation why the costs were necessary." Mot., 12:13-14, citing *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1054 (Nev. 2015).

In *Cadle*, Woods & Erickson did not submit any documentation in support of several categories of costs, other than the affidavit of counsel stating that the requested costs were necessary and reasonable. *Id.* Here, unlike *Cadle*, Plaintiffs' submitted ample "justifying documentation" **in addition to** the declarations of counsel. KJC's telephone system does not allow an employee to make a long-distance telephone call without entering the associated case and matter numbers. KJC provided an itemization of each long-distance telephone call associated with its internal case number in this action. This documentation identifies that date of the long-distance call, the duration of the call, the person making the call, the telephone number, the city/state called to, and the amount of the charge. All long-distance telephone calls were necessary to communicate with out-of-state witnesses, including Plaintiffs' numerous out-of-state experts, to facilitate out-of-state depositions, to pursue other out-of-state discovery, for counsel to communicate with their out-of-state clients, and to conduct teleconferences with multiple experts. Plaintiffs' request for costs in the amount of $909.16 is reasonable, properly documented, and should be awarded.

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[4] MCI erroneously states that Plaintiffs seek an award of $890.41 for long-distance calls but erroneously excludes $18.75 in costs incurred by CLO.

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(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

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10. Postage Fees

NRS 18.005(14) permits reasonable costs for postage. Included in Exhibit 14A of Plaintiffs' Verified Memorandum of Costs is an itemization of all of Plaintiffs' postage/shipping expenses, which amount to $1,812.48. MCI asks the Court to strike $1,681.61 because the items were shipped through FedEx, as opposed to the U.S. Postal Service. Shipping packages through FedEx, however, does not mean that the postage/shipping costs are unrecoverable. MCI provides no support for a contrary rule. KJC maintains an account with FedEx and used FedEx to securely ship various items, including, but not limited to, large batches of documents to various deponents in advance of their depositions, evidence for inspection by experts for **both parties**, and materials to be reviewed by Plaintiffs' experts. MCI makes no argument that the U.S. Postal Service would have charged anything different than FedEx for the same services. Plaintiffs' request for postage/shipping costs in the amount of $1,812.48 is reasonable, properly documented, and should be awarded.

11. Travel Expenses

NRS 18.005(15) permits reasonable costs related to travel for depositions and discovery. Included in Exhibits 15A&B of Plaintiffs' Verified Memorandum of Costs is an itemization of all of Plaintiffs' travel-related expenses, which amount to $14,036.65. This amount is highly reasonable.

To avoid the significant expense of air travel, Plaintiffs took the majority of their out-of-state depositions over video-conference from Las Vegas. Moreover, Plaintiffs incurred significant fees paying to bring several of their experts to Las Vegas for their depositions. This limited the travel expenses of **both parties** related to these depositions, and Plaintiffs are unable to recoup much of the experts' fees because they are only allowed to recover fees relating to five experts. *See* NRS 18.005(5).

Most of the travel costs that Plaintiffs seek to recover were incurred as a result of **MCI's insistence** to travel and take the depositions of Plaintiffs' experts who were unable to travel to Las Vegas. Still, even though Plaintiffs were separately represented by KJC and CLO, counsel typically had only one attorney from one law firm cover each deposition. This practice further

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limited the travel expenses incurred by Plaintiffs, making the requested sum all the more reasonable.

Despite the forgoing, MCI argues that the Court should reduce Plaintiffs' more than $14,000.00 in travel expenses to an amount between $1,710.49 and $2,672.54. Mot., 14:1. This argument is absurd on its face. Plaintiffs' costs relate to travel for expert and fact witness depositions in Illinois (two tickets), Ohio, Minnesota, North Carolina, Massachusetts, Washington D.C., and California. MCI has not and cannot identify any **reasonable** (i.e., daytime, regular class, with no more than one stop) airfare options to any of these locations (let alone lodging) in which Plaintiffs' travel expenses could have been anywhere close to $3,000.00. Its contention that Plaintiffs seek "an unreasonable and unjustifiable amount [for travel]" is simply belied by MCI's ridiculously self-serving view about what costs are supposedly "reasonable."

MCI also argues that the credit card statements of Pete Christiansen, Esq. and Kendelee Works, Esq. "lack the itemization and detail needed to determine the reasonableness and necessity of [$7,364.69 in travel] costs. Mot., 13 at fn. 8. But these credit card statements itemize the travel, food, and lodging costs related to the depositions of Pears and Plantz in Illinois, Dr. Hubbard in Minnesota, Jim Green in North Carolina, Dr. Desai in Massachusetts, and Brian Sherlock in Washington D.C. *See* APP1014-17. This is more than enough information to demonstrate the reasonableness and necessity of these costs.

MCI further contends that flying Business Select on Southwest was an "impermissible [] luxury." Mot., 13:6-9, fn. 6. But Business Select/Anytime flights were sometimes the only flights that were available and, regardless, they are the only Southwest Flights that are **non-refundable**. Depositions are often rescheduled or cancelled, which frequently happened in this case. As a result, KJC's policy, which most law firms share, is that it only books travel that is refundable. Plaintiffs' counsel was not traveling in first class or in some lap of luxury; they simply booked the most reasonable, refundable flight that would timely get them to the deposition.

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Finally, MCI argues that Plaintiffs' remaining travel-related costs (i.e., rental cars, meals, witness travel, and in-flight Wi-Fi) cannot be recovered under NRS 18.005(15). Even if this were true, which it is not, these expenses are still recoverable under NRS 18.005(17), as they are all "reasonable and necessary expense[s] incurred in connection with [this] action." Accordingly, Plaintiffs' request for travel costs in the amount of $14,036.65 is reasonable, properly documented, and should be awarded.

12. Expenses Recoverable under NRS 18.005(17)

MCI argues that Plaintiffs' reasonable, necessary, and actually incurred costs for legal research, runner services, and trial support are "not recoverable under NRS 18.005" and that "[these] costs should be reduced to $0." Mot., 14:3-4. Contrary to MCI's unsupported and self-serving contention, however, these requested costs were all "reasonable and necessary expense[s] incurred in connection with this action," and they are therefore recoverable under the plain language of NRS 18.005(17).

a. Legal Research

NRS 18.005(17) expressly allows a prevailing party to recover "reasonable and necessary expenses for computerized services for legal researeh." MCI asserts that Plaintiffs' itemized costs of computerized legal research and supporting declarations of counsel fail to demonstrate that the requested sum of $30,018.77 was reasonably and necessarily incurred. Mot., 14:6-11, citing *Waddell v. L.V.R.V., Inc.*, 122 Nev. 15, 25-26 (2006).

First, MCI's reliance on *Waddell* is misplaced. While the *Waddell* Court held that the legal research costs "were not sufficiently itemized" **in that case**, the Court's fact-specific ruling has no application here. In the *Waddell* opinion, there is no description of the supporting documentation that was determined to be insufficient. If it is inclined to review the underlying briefs, however, the Court will find that there was actually **no documentation** submitted in support of the legal research costs; there was merely a line item requesting legal research fees in the memorandum of costs. *See* 11/19/04 Answering Brief of L.V.R.V., Inc., Nev. Sup. Ct. Case No. 43149. Moreover, the costs award in *Waddell* was limited to certain successful causes of action, and Waddell offered no evidence that the legal research costs related to the appropriate

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claims. *See id.* Unlike *Waddell*, Plaintiffs' legal research costs are itemized, documented, and fully supported by the declaration of counsel. *See* APP1018-24 and 4/25/18 Am. Decl. of Pete Christiansen, Esq., ¶ 8.

As this Court is well aware, the most up to date and efficient mode of legal research available is through online services such as Westlaw and/or LexisNexis, which Plaintiffs utilized in this case to provide the Court with the most recent applicable caselaw on various points of dispute throughout pre-trial motions and during the course of trial with respect to the admissibility of numerous pieces of evidence, including expert witness testimony in addition to resolving the correct statements of the law in order to so instruct the jury. Plaintiffs also utilized computerized legal research services to investigate potential claims, plan for discovery, prepare for depositions, and a multitude of other case-related purposes throughout this entire action.

Plaintiffs' attorneys have computerized legal research plans with Westlaw. KJC, who incurred the bulk of Plaintiffs' legal research costs, annually reviews and renews its plan with Westlaw to select a plan that encompasses various resources to research. *See* Declaration of Eric Pepperman, Esq., attached as Exhibit 3. To recoup its costs, KJC charges its clients a rate of $4.00 per minute while KJC timekeepers are conducting their legal research on the specific case. *Id.* Every KJC case has a unique client and matter number. To track their legal research costs, and to ensure that the costs relate to the case in which the research is required, KJC timekeepers must enter the unique client and matter number in order to log in to Westlaw. *Id.* They do not log in to Westlaw unless they are conducting legal research that is necessary to a case. *Id.* KJC's timekeepers are informed and, upon information and belief, are well aware of the time and costs associated with their legal research and do not stay logged into Westlaw when they are not actively conducting legal research. *Id.*

In support of their requested legal research fees, Plaintiffs attached documentation confirming that all of these costs were incurred in this case. This documentation shows the unique client and matter number for this case (02114.2), the date of the legal research, the computerized legal research account (i.e., Westlaw, Pacer, or Accurint), and the amount charged for the research. If the amount charged for Westlaw research is divided by four, the resulting

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number is the number of minutes that were spent researching. Between April 2017 and March 2018, Plaintiffs logged approximately 120 hours of computerized legal research through Westlaw (roughly ten hours of legal research per month).

In this approximately 12-month period, Plaintiffs, *inter alia*, investigated their claims, drafted a complaint, engaged in substantial, expedited discovery, prepared for and deposed 53 witnesses, retained 14 experts, drafted and opposed dozens of pretrial motions, and conducted a six-week, complex jury trial. Given the substantial activities and complexities of this case, a mere ten hours of research per month is extremely reasonable. Indeed, as Plaintiffs' co-lead counsel attests, "[f]or a case of this magnitude, a grand total of $30,018.77 in fees for online legal research is not only reasonable and necessary, but conservative within the legal profession." 4/25/18 Am. Decl. of Pete Christiansen, Esq., ¶ 8. Plaintiffs' computerized legal research costs in the amount of $30,018.77 are reasonable, properly documented, and recoverable under Nevada law. Accordingly, they should be awarded in their entirety.

b. Run Service

KJC employs full-time runners to perform delivery services because it is much cheaper than hiring outside delivery services each time a delivery is needed. KJC charges its clients $15 for this service if via car and $5 if via foot, which is believed to be below the market rate for third-party delivery services. The KJC runner logs, which are included as part of Exhibit 17(ii) to Plaintiffs' memorandum of costs, document these charges with accompanying runner slips. These runner slips describe everything about the delivery, including the date, time, type of item, delivery location, and name of employee completing the delivery. KJC also tracks these delivery expenses by case and matter numbers.

MCI apparently failed to review this voluminous supporting documentation, as it erroneously argues that Plaintiffs "provide no explanation as to why their runner/messenger costs were necessary to and incurred in this action." Mot., 14:25-27. Plaintiffs' run costs in the amount of $1,887.00 costs were reasonable, properly documented, and they should be awarded in their entirety.

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c. Trial Support

In Exhibit 17(iii) to their memorandum of costs, Plaintiffs provide and itemization of all of their trial support costs, which amount to $129,099.30, and include all of the necessary documentation supporting an award of this amount. In addition to this catalogue and back-up of invoices, logs, receipts, and other documentation, Plaintiffs further support their requested trial support costs with the declaration of their co-lead attorney:

> Plaintiffs incurred a grand total of $129,099.30 for trial support services. The jury trial in this matter lasted six weeks, which is much longer than the average trial length. These services are all substantiated by supporting documentation and encompass numerous services that were reasonable and necessary to the prosecution of this case. Particularly significant, Plaintiffs paid for an information technologies consultant, specializing in litigation and trial support, to be present throughout the trial in order to assist with the presentation of opening and closing PowerPoint presentations, the display of various exhibits throughout all witness examinations, the playing of numerous video depositions and substantial editing of video deposition presentations to comport with the agreements of counsel and orders of this Court. Defendant likewise utilized the services of a technical trial support consultant throughout the duration of trial, which only further evidences the reasonableness and necessity of such consultant(s). Additionally, there were hundreds of jury questionnaires completed in this case in order to streamline and expedite the already lengthy jury selection process. Plaintiffs utilized an outside service to synthesize the information provided in those hundreds of questionnaires in order to better prepare counsel to narrow the scope of necessary voir dire questioning. Plaintiffs also had made various exhibit boards, the largest of which was a to scale drawing of the subject intersection, complete with to scale models of the at issue bus and bicycle, all of which was put to use by both sides throughout the duration of trial. These trial support services were all reasonable in amount based on the industry and my experience as a lawyer and necessary to the prosecution of this case given that they better enabled the jury to understand this case and assisted Plaintiffs, Defendant and this Court in presenting to the jury a more streamlined and understandable case in an efficient manner, which saved all involved additional time. 4/25/18 Amended Declaration of Peter S. Christiansen, Esq., at ¶ 9.

Although MCI acknowledges that these trial support "services are desirable"—likely because it incurred its own significant expenses for many of the same or similar services—MCI nevertheless contends that Plaintiffs' costs were not really necessary and should be reduced to $0. Mot., 15:9-10. This argument is another example of MCI's "do as I say, not as I do" stance on Plaintiffs' award of costs. Like all of the other items of expenses that Plaintiffs seek to recover, however, their trial support costs were reasonably and necessarily incurred; they reflect customary charges for the services in this community; and they are fully supported by

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voluminous documentation and two sworn declarations by Plaintiffs' co-lead counsel. Accordingly, Plaintiffs should be awarded their trial support costs in the amount of $129,099.30.

III

CONCLUSION

As the prevailing party, Plaintiffs are allowed to recover their reasonable costs in this action. Every cost and disbursement that Plaintiffs seek to tax against MCI is recoverable under Nevada law. Plaintiffs' requested costs are fully supported by more than **1300 pages** of documentation, which prove that the costs were reasonable, necessary, and actually incurred in connection with this case. In addition to these voluminous back-up materials, Plaintiffs' costs are further supported by the declarations of their co-lead attorneys, Will Kemp, Esq. and Pete Christiansen, Esq. Both Mr. Kemp and Mr. Christiansen attest to their belief that these costs were actually, reasonably, and necessarily incurred in order to prosecute this action, and that the costs and disbursements represent customary charges in this community for related materials and services. Accordingly, and for all of the foregoing reasons, Plaintiffs should be awarded costs in the requested amount of $619,888.71.

Dated this 14th day of May, 2018

KEMP, JONES & COULTHARD, LLP

/s/ Eric Pepperman

WILL KEMP, ESQ. (#1205)
ERIC PEPPERMAN, ESQ. (#11679)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
-and-
CHRISTIANSEN LAW OFFICES
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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2018, the foregoing Opposition to Defendant's Motion to Retax Costs 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.

/s/ Alisa Hayslett
An Employee of Kemp, Jones & Coulthard

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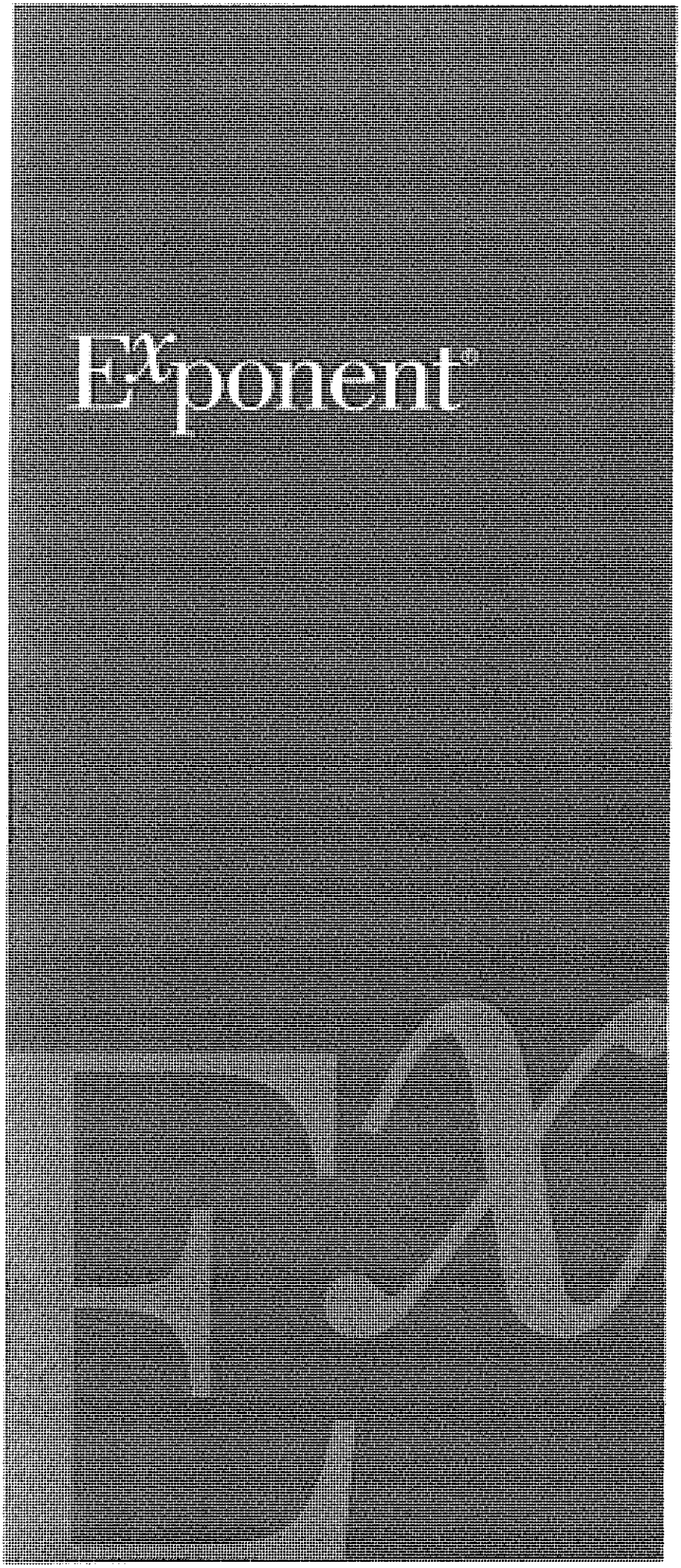
EXHIBIT 1



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October 26, 2017
Project No: 1707496.000
Invoice No: 344346

Davis Dial
Weinberg Wheeler Hudgins Gunn & Dial LLC
3344 Peachtree Road, NE
Suite 2400
Atlanta, GA 30326

Khiabani v MCI (MRC)

Tim.Nalepka@MCICoach.com
Professional Services through September 29, 2017

012064

Task C0T0 Consulting

Professional Personnel

	Hours	Rate	Amount	
Principal				
Michael R Carhart	25.10	495.00	12,424.50	
Sr. Associate				
Bruce Miller	45.30	220.00	9,966.00	
Sr. Scientist				
Kathy Carey	6.00	200.00	1,200.00	
Associate				
Christina Garman	.80	200.00	160.00	
Totals	77.20		23,750.50	
Total Labor				23,750.50

Reimbursable Expenses

Travel, Lodging & Other	897.79	
Meals	3.56	
Misc Project Costs	44.24	
Total Reimbursables	945.59	945.59

Total this Task	$24,696.09
Total this Invoice	**$24,696.09**

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Project 1707496.000 Khiabani v MCI (MRC) Invoice 344346

Exponent

Billing Backup **October 26, 2017**

Project 1707496.000 Khiabani v MCI (MRC)

Task C0T0 Consulting

Professional Personnel

			Hours	Rate	Amount
Principal					
02335	Michael R Carhart	9/7/2017	2.10	495.00	1,039.50
	File Review; Client Discusison				
02335	Michael R Carhart	9/14/2017	2.80	495.00	1,386.00
	Review of Case Materials; Injury Analysis				
02335	Michael R Carhart	9/22/2017	1.00	495.00	495.00
	Review of File Materials				
02335	Michael R Carhart	9/25/2017	5.50	495.00	2,722.50
	Review of Incident Information and Photographs; Review and Analysis of Injury Pattern; Review of Testimony				
02335	Michael R Carhart	9/26/2017	12.00	495.00	5,940.00
	Meeting; Bus, bicycle, helmet and site inspections; Analysis of Inspection Findings; Test Planning				
02335	Michael R Carhart	9/28/2017	.70	495.00	346.50
	Analysis; Test Preparation				
02335	Michael R Carhart	9/29/2017	1.00	495.00	495.00
	Test Planning				
Sr. Associate					
10263	Bruce Miller	9/11/2017	.60	220.00	132.00
	Discussion with A. Dunning; review file materials				
10263	Bruce Miller	9/13/2017	4.30	220.00	946.00
	Review file materials; review and summarize deposition transcripts and exhibits of Andrew Louis and Shaun Harney				
10263	Bruce Miller	9/14/2017	2.40	220.00	528.00
	Review and summarize deposition transcripts and exhibits of Samantha Kolch; biomechanical analysis; discussion with M. Carhart				
10263	Bruce Miller	9/15/2017	3.00	220.00	660.00
	Review and summarize depositon transcripts and exhibits for Luis Fernando Sacarias Pina and Roberts Pears				
10263	Bruce Miller	9/18/2017	1.00	220.00	220.00
	Review and summarize depositon transcripts and exhibits for Luis Fernando Sacarias Pina and Robert Pears				
10263	Bruce Miller	9/19/2017	4.30	220.00	946.00
	Review and summarize deposition transcript and exhibits of Robert Pears; review medical records; prepare case summary; prepare injury diagram				
10263	Bruce Miller	9/22/2017	.70	220.00	154.00
	Prepare for inspection				
10263	Bruce Miller	9/25/2017	8.40	220.00	1,848.00
	Prepare and review deposition summaries; analysis; discussion with M. Carhart; travel to inspection				

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10263	Bruce Miller	9/26/2017	10.00	220.00	2,200.00	
	Meeting with client; inspections; review and analysis of inspection findings					
10263	Bruce Miller	9/27/2017	7.50	220.00	1,650.00	
	Meeting with client; review and analysis of inspection findings; travel from inspection					
10263	Bruce Miller	9/28/2017	3.10	220.00	682.00	
	Review and analysis of inspection findings; testing preparations					
Sr. Scientist						
03654	Kathy Carey	9/13/2017	1.00	200.00	200.00	
	Begin review of medical records					
03654	Kathy Carey	9/14/2017	5.00	200.00	1,000.00	
	Review medical records and prepare medical summary					
Associate						
10776	Christina Garman	9/28/2017	.80	200.00	160.00	
	Technical review of case summary					
	Totals		77.20		23,750.50	
	Total Labor					**23,750.50**

Reimbursable Expenses

Travel, Lodging & Other					
EX 00119949	9/25/2017	Miller, Bruce / Hotel / Hotel stay - Fairfield Inn & Suites (transferred to Hampton Inn due to room availability), 2 nights	360.56		
EX 00119949	9/25/2017	Miller, Bruce / Flight / American Airlines 9/25 - PHX to LAS 9/27 - LAS to PHX	418.40		
EX 00119949	9/25/2017	Miller, Bruce / Uber / Uber between Hampton Inn and Four Seasons and to client's office	60.83		
EX 00119949	9/27/2017	Miller, Bruce / Airport Parking / Parking at PHX airport	58.00		
Meals					
EX 00119949	9/27/2017	Miller, Bruce / Coffee / Coffee at LAS	3.56		
Misc Project Costs					
EX 00119453	9/19/2017	Miller, Bruce / Exemplar helmet "UT" / Exemplar Giro Trinity helmet	41.44		
EX 00119707	9/19/2017	Miller, Bruce / Exemplar helmet UT	2.80		
	Total Reimbursables		**945.59**	**945.59**	
			Total this Task	**$24,696.09**	
			Total This Invoice	**$24,696.09**	

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December 1, 2017
Project No: 1707496.000
Invoice No: 347290

David Dial
Weinberg Wheeler Hudgins Gunn & Dial LLC
3344 Peachtree Road, NE
Suite 2400
Atlanta, GA 30326

Khiabani v MCI (MRC)

Tim.Nalepka@MCICoach.com
Professional Services through October 27, 2017

012067

Task C0T0 Consulting

Professional Personnel

	Hours	Rate	Amount	
Principal				
Michael R Carhart	44.80	495.00	22,176.00	
Managing Engineer				
Alan T Dibb	12.10	260.00	3,146.00	
Sr. Associate				
Bruce Miller	69.20	220.00	15,224.00	
Sr. Scientist				
John McGann, PhD	3.30	250.00	825.00	
Associate				
Christina Garman	40.70	200.00	8,140.00	
Technical Assistant	31.50		5,197.50	
Totals	201.60		54,708.50	
Total Labor				54,708.50
Reimbursable Expenses				
Misc Project Costs			36.08	
Equip & Inst. Rental			806.55	
Total Reimbursables			842.63	842.63
Unit Billing			1,260.00	1,260.00

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Project 1707496.000 Khiabani v MCI (MRC) Invoice 347290

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Total this Task	$56,811.13

Task S0T0 Surrogate work

Professional Personnel

	Hours	Rate	Amount	
Principal				
Michael R Carhart	13.50	495.00	6,682.50	
Managing Engineer				
Alan T Dibb	4.90	260.00	1,274.00	
Sr. Associate				
Andrew J Dobson	15.30	200.00	3,060.00	
Bruce Miller	20.80	220.00	4,576.00	
Associate				
Christina Garman	29.90	200.00	5,980.00	
Jonathan Kirschman	12.30	200.00	2,460.00	
Technical Assistant	22.50		2,855.00	
Non-Technical Assistant	4.30		473.00	
Totals	123.50		27,360.50	
Total Labor				27,360.50

Reimbursable Expenses

Material & Tech Supplies	1,111.64	
Freight & Communications	21.31	
Misc Project Costs	96.00	
Total Reimbursables	1,228.95	1,228.95
Total this Task		$28,589.45

Task T0T0 Sled Test

Professional Personnel

	Hours	Rate	Amount	
Principal				
Michael R Carhart	7.20	495.00	3,564.00	
Technical Assistant	102.70		14,554.00	
Totals	109.90		18,118.00	
Total Labor				18,118.00

Reimbursable Expenses

Misc Project Costs	343.57	
Total Reimbursables	343.57	343.57
Unit Billing	6,150.00	6,150.00
Total this Task		$24,611.57
Total this Invoice		**$110,012.15**

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Project	1707496.000	Khiabani v MCI (MRC)	Invoice	347290

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Project 1707496.000 Khiabani v MCI (MRC) Invoice 347290

Exponent

Billing Backup **December 1, 2017**

Project 1707496.000 Khiabani v MCI (MRC)

Task C0T0 Consulting

Professional Personnel

			Hours	Rate	Amount
Principal					
02335	Michael R Carhart	10/9/2017	4.80	495.00	2,376.00
	Analysis; Preparation for Testing; Review of Expert Reports and Additional Materials				
02335	Michael R Carhart	10/10/2017	2.00	495.00	990.00
	Discusison with Co-Experts; Case Analysis				
02335	Michael R Carhart	10/11/2017	6.80	495.00	3,366.00
	Review and Analysis of Test Results; Analysis of Head Injury and Helmet Damage; Call with Dr. Funk; Call with Clients; Geometric Analysis; Review of Additional Materials				
02335	Michael R Carhart	10/12/2017	9.60	495.00	4,752.00
	Analysis of Helmet Damage and Engagement; Analysis of S-1 GARD Geometry relative to head/tire engagement; Discussion with Co-Expert; Physical (ATD) geometric analysis of S-1 Gard; Digital geometric regarding S-1 GARD; Report Work; Review of Additional Materials				
02335	Michael R Carhart	10/13/2017	8.40	495.00	4,158.00
	Analysis; Report Preparation; Helmet Damage and Engagement Analysis;Prep for coach/bicycle testing; Prep for Disturbance testing				
02335	Michael R Carhart	10/17/2017	2.00	495.00	990.00
	Analysis of Evidence and S-1 Gard; Analysis of Test Data				
02335	Michael R Carhart	10/18/2017	5.50	495.00	2,722.50
	Analysis and Report Preparation				
02335	Michael R Carhart	10/19/2017	4.80	495.00	2,376.00
	Analysis; Report Preparation				
02335	Michael R Carhart	10/25/2017	.40	495.00	198.00
	Review of Additional Materials				
02335	Michael R Carhart	10/27/2017	.50	495.00	247.50
	Review of Additional Materials				
Managing Engineer					
03182	Alan T Dibb	10/9/2017	.40	260.00	104.00
	Discussion with Dr. Carhart				
03182	Alan T Dibb	10/10/2017	2.40	260.00	624.00
	Surrogate evaluation preparations				
03182	Alan T Dibb	10/13/2017	3.50	260.00	910.00
	Technical review and update Carhart report				
03182	Alan T Dibb	10/18/2017	2.40	260.00	624.00
	Technical review and update Carhart report				
03182	Alan T Dibb	10/19/2017	3.40	260.00	884.00
	Technical review and update Carhart report				

012070

012070

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PAYMENT DUE UPON RECEIPT

012070

Exponent

Sr. Associate					
10263	Bruce Miller	10/2/2017	2.80	220.00	616.00
	Review and analysis of inspection findings; review and summarize depostion of Dale Horba; testing preparations				
10263	Bruce Miller	10/3/2017	4.50	220.00	990.00
	Testing preparations; prepare Carhart report; review file materials; analysis				
10263	Bruce Miller	10/4/2017	1.20	220.00	264.00
	Testing preparations				
10263	Bruce Miller	10/5/2017	1.00	220.00	220.00
	Testing preparations; review scan data				
10263	Bruce Miller	10/6/2017	2.70	220.00	594.00
	Analysis; prepare Carhart report				
10263	Bruce Miller	10/9/2017	7.20	220.00	1,584.00
	Prepare for testing; analysis; teleconference				
10263	Bruce Miller	10/10/2017	8.80	220.00	1,936.00
	Prepare for and conduct testing; analysis				
10263	Bruce Miller	10/12/2017	7.30	220.00	1,606.00
	Analysis; review case materials; exhibit preparation; prepare Carhart report				
10263	Bruce Miller	10/13/2017	6.20	220.00	1,364.00
	Analysis; discussion with client; prepare for testing				
10263	Bruce Miller	10/16/2017	1.40	220.00	308.00
	Review plaintiff expert reports; prepare Carhart report				
10263	Bruce Miller	10/17/2017	7.20	220.00	1,584.00
	Prepare Carhart report; analysis; technical review of test data				
10263	Bruce Miller	10/18/2017	7.00	220.00	1,540.00
	Prepare and review exhibit graphics; analysis; prepare Carhart report				
10263	Bruce Miller	10/19/2017	7.80	220.00	1,716.00
	Teleconference; review deposition transcripts; prepare and review Carhart report; call with client				
10263	Bruce Miller	10/26/2017	2.80	220.00	616.00
	Prepare exhibit graphics				
10263	Bruce Miller	10/27/2017	1.30	220.00	286.00
	Review deposition testimony; prepare test report				
Sr. Scientist					
03692	John McGann, PhD	10/16/2017	1.20	250.00	300.00
	CT Processing				
03692	John McGann, PhD	10/17/2017	2.10	250.00	525.00
	CT Processing				
Associate					
10776	Christina Garman	10/2/2017	2.50	200.00	500.00
	Review of Witness Testimony;Prepare summaries				
10776	Christina Garman	10/5/2017	5.50	200.00	1,100.00
	Prepare Carhart report				
10776	Christina Garman	10/6/2017	13.50	200.00	2,700.00
	Review of Witness Testimony; Prepare summaries				

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PAYMENT DUE UPON RECEIPT

012071

Exponent

10776	Christina Garman Prepare Carhart report	10/10/2017	6.00	200.00	1,200.00	
10776	Christina Garman Analysis/QC/Report work	10/12/2017	5.50	200.00	1,100.00	
10776	Christina Garman Analysis/QC/Report work	10/17/2017	1.00	200.00	200.00	
10776	Christina Garman Analysis/Data Analysis	10/18/2017	4.50	200.00	900.00	
10776	Christina Garman Analysis/Data Analysis	10/19/2017	2.20	200.00	440.00	
Technical Specialist						
02689	Kathleen Pittman Prepare exhibit graphics	10/12/2017	7.00	170.00	1,190.00	
02689	Kathleen Pittman Prepare exhibit graphics	10/13/2017	4.50	170.00	765.00	
02689	Kathleen Pittman Prepare exhibit graphics	10/17/2017	3.50	170.00	595.00	
02689	Kathleen Pittman Prepare exhibit graphics	10/18/2017	4.00	170.00	680.00	
02689	Kathleen Pittman Prepare exhibit graphics	10/19/2017	2.00	170.00	340.00	
Technical Assistant						
03178	Isaac Dosch Prepare Trial Graphics	10/6/2017	4.50	155.00	697.50	
03178	Isaac Dosch 3D Scanning and Scan Data Registration	10/11/2017	2.00	155.00	310.00	
03178	Isaac Dosch 3D Scanning and Scan Data Registration	10/12/2017	4.00	155.00	620.00	
	Totals		201.60		54,708.50	
	Total Labor					**54,708.50**

Reimbursable Expenses

Misc Project Costs					
EX 00121117	10/6/2017	Miller, Bruce / Additional Exemplar Helmets / Giro Trinity Helmet (x1)	33.96		
EX 00121198	10/6/2017	Miller, Bruce / Additional Exemplar Helmets Use Tax	2.12		
Equip & Inst. Rental					
AP 10250397	10/5/2017	HTS Advanced Solutions LLC / Inv RI003551 - PO 00029604 - RENTAL-Faro Focus X330 9/26/17	747.50		
AP 10250397	10/5/2017	HTS Advanced Solutions LLC / Inv RI003551 - PO 00029604 - Use Tax	59.05		
	Total Reimbursables		**842.63**		**842.63**

Unit Billing

3D Scanner - MV4D					
Single Day Rental Ike Dosch			510.00		

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PAYMENT DUE UPON RECEIPT

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Exponent

X - CT Scanner

CT Scanner		750.00	
Total Units		**1,260.00**	**1,260.00**
	Total this Task		**$56,811.13**

Task S0T0 Surrogate work

Professional Personnel

			Hours	Rate	Amount
Principal					
02335	Michael R Carhart	10/11/2017	2.00	495.00	990.00
	Surrogate Work - Riding Evaluations during turning				
02335	Michael R Carhart	10/14/2017	11.50	495.00	5,692.50
	Preparation & Testing				
Managing Engineer					
03182	Alan T Dibb	10/12/2017	4.90	260.00	1,274.00
	Review plaintiff reports; Technical review and update Carhart report				
Sr. Associate					
01856	Andrew J Dobson	10/13/2017	2.90	200.00	580.00
	Test support				
01856	Andrew J Dobson	10/14/2017	11.90	200.00	2,380.00
	Test support				
01856	Andrew J Dobson	10/16/2017	.50	200.00	100.00
	Test support				
10263	Bruce Miller	10/11/2017	9.00	220.00	1,980.00
	Analysis; bicycle demonstration; prepare Carhart report				
10263	Bruce Miller	10/14/2017	11.80	220.00	2,596.00
	Prepare for and conduct testing				
Associate					
10776	Christina Garman	10/9/2017	1.00	200.00	200.00
	Riding Evaluation Preparation				
10776	Christina Garman	10/10/2017	1.00	200.00	200.00
	Riding Evaluation Preparation				
10776	Christina Garman	10/11/2017	7.00	200.00	1,400.00
	Riding Evaluations / Data Processing				
10776	Christina Garman	10/12/2017	2.00	200.00	400.00
	Data Processing & Analysis				
10776	Christina Garman	10/13/2017	3.00	200.00	600.00
	Riding Evaluation Preparation				
10776	Christina Garman	10/16/2017	6.30	200.00	1,260.00
	Test report; data processing				
10776	Christina Garman	10/17/2017	6.80	200.00	1,360.00
	test report; data processinig				
10776	Christina Garman	10/18/2017	2.80	200.00	560.00
	test report; data processinig				

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PAYMENT DUE UPON RECEIPT

012073

Exponent

10963	Jonathan Kirschman Riding Evaluation Preparation	10/13/2017	.50	200.00	100.00	
10963	Jonathan Kirschman Riding Evaluations	10/14/2017	11.50	200.00	2,300.00	
10963	Jonathan Kirschman Riding Evaluations Analysis	10/16/2017	.30	200.00	60.00	
Technical Assistant						
02580	Jonah L Tripp prep for testing	10/13/2017	1.70	125.00	212.50	
02580	Jonah L Tripp Support Riding Evaluations	10/14/2017	5.80	125.00	725.00	
02580	Jonah L Tripp Support Riding Evaluations	10/14/2017	5.00	125.00	625.00	
02968	Kevin M Bray Riding Evaluation Setup	10/13/2017	2.50	130.00	325.00	
02968	Kevin M Bray test support	10/14/2017	5.00	130.00	650.00	
02968	Kevin M Bray test breakdown	10/16/2017	1.00	130.00	130.00	
10573	Kyle Miller surrogate evaluation preparations	10/13/2017	1.50	125.00	187.50	
Non-Technical Assistant						
03577	Paul Terry test supply acquisition	10/13/2017	3.30	110.00	363.00	
03577	Paul Terry test breakdown	10/16/2017	1.00	110.00	110.00	
	Totals		123.50		27,360.50	
	Total Labor					**27,360.50**

Reimbursable Expenses

Material & Tech Supplies					
AP 10251634	10/19/2017	MovieWork Now LLC / Inv 995 - PO 00030083 - Surrogate Study	1,035.00		
AP 10252081	10/27/2017	Lowe's Business Account / Inv October 2017 - PO 00030081 - wood test supplies	76.64		
Freight & Communications					
AP 10251610	10/23/2017	Fedex Express / KEVAN GRANAT	21.31		
Misc Project Costs					
EX 00121707	10/9/2017	Garman, Christina / Riding gear	96.00		
	Total Reimbursables		**1,228.95**	**1,228.95**	
			Total this Task	**$28,589.45**	

Task T0T0 Sled Test

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PAYMENT DUE UPON RECEIPT

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Project 1707496.000 Khiabani v MCI (MRC) Invoice 347290

Exponent

Professional Personnel

			Hours	Rate	Amount
Principal					
02335	Michael R Carhart	10/10/2017	7.20	495.00	3,564.00
	Sled Testing; Review and Analysis of Results				
Technical Specialist					
02034	Jeffrey S Lindsay	10/4/2017	1.20	150.00	180.00
	sled test prep				
02034	Jeffrey S Lindsay	10/5/2017	1.50	150.00	225.00
	sled test prep				
02034	Jeffrey S Lindsay	10/9/2017	4.10	150.00	615.00
	sled test prep				
02034	Jeffrey S Lindsay	10/10/2017	7.50	150.00	1,125.00
	sled test prep				
02034	Jeffrey S Lindsay	10/11/2017	3.40	150.00	510.00
	sled test prep				
02034	Jeffrey S Lindsay	10/12/2017	1.10	150.00	165.00
	sled test prep				
02034	Jeffrey S Lindsay	10/13/2017	3.30	150.00	495.00
	sled test prep				
02034	Jeffrey S Lindsay	10/16/2017	1.90	150.00	285.00
	sled test prep				
00822	Mark F Ordway	10/9/2017	1.00	150.00	150.00
	prep cameras for testing				
00822	Mark F Ordway	10/10/2017	3.80	150.00	570.00
00822	Mark F Ordway	10/10/2017	6.50	150.00	975.00
	set up, test photography, process video				
00822	Mark F Ordway	10/11/2017	1.00	150.00	150.00
	cleanup equipment				
00822	Mark F Ordway	10/11/2017	3.00	150.00	450.00
	process video, set up,				
00822	Mark F Ordway	10/12/2017	2.00	150.00	300.00
	testing breakdown				
Technical Assistant					
02628	Darren Williams	10/9/2017	7.50	130.00	975.00
	Support sled test.				
02628	Darren Williams	10/10/2017	8.50	130.00	1,105.00
	Support sled test.				
01805	Hector E Torres	10/3/2017	.70	145.00	101.50
	project support - setup				
01805	Hector E Torres	10/4/2017	4.20	145.00	609.00
	project support - setup				
01805	Hector E Torres	10/4/2017	1.60	145.00	232.00
	project support - setup				
01805	Hector E Torres	10/5/2017	1.30	145.00	188.50
	project support - setup				

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PAYMENT DUE UPON RECEIPT

012075

Project	1707496.000	Khiabani v MCI (MRC)			Invoice	347290

Exponent

01805	Hector E Torres project support - setup	10/5/2017	2.10	145.00	304.50	
01805	Hector E Torres project support - setup	10/5/2017	.60	145.00	87.00	
01805	Hector E Torres project support - setup	10/6/2017	.60	145.00	87.00	
01805	Hector E Torres project support - setup	10/10/2017	5.80	145.00	841.00	
01805	Hector E Torres project support - testing	10/11/2017	1.80	145.00	261.00	
01805	Hector E Torres project support - breakdown	10/12/2017	1.80	145.00	261.00	
01805	Hector E Torres project support - breakdown	10/16/2017	.70	145.00	101.50	
01805	Hector E Torres data processing support	10/17/2017	.70	145.00	101.50	
01805	Hector E Torres project support - breakdown	10/18/2017	3.50	145.00	507.50	
01805	Hector E Torres project support - breakdown	10/19/2017	1.80	145.00	261.00	
02968	Kevin M Bray sled test setup	10/4/2017	2.00	130.00	260.00	
02968	Kevin M Bray sled test setup	10/5/2017	1.00	130.00	130.00	
02968	Kevin M Bray sled test setup	10/5/2017	2.50	130.00	325.00	
02968	Kevin M Bray sled test setup	10/10/2017	3.50	130.00	455.00	
02968	Kevin M Bray sled test setup	10/11/2017	3.00	130.00	390.00	
10573	Kyle Miller sled test preparations	10/9/2017	.50	125.00	62.50	
10573	Kyle Miller sled test preparations	10/9/2017	.70	125.00	87.50	
10573	Kyle Miller sled test preparations	10/10/2017	1.50	125.00	187.50	
01718	Robert W Hunzinger, Jr. Data reduction	10/10/2017	1.40	125.00	175.00	
01718	Robert W Hunzinger, Jr. Test preparation	10/10/2017	1.20	125.00	150.00	
01718	Robert W Hunzinger, Jr. Data reduction	10/12/2017	.90	125.00	112.50	
	Totals		109.90		18,118.00	
	Total Labor					**18,118.00**

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PAYMENT DUE UPON RECEIPT

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Project 1707496.000 Khiabani v MCI (MRC) Invoice 347290

Exponent

Reimbursable Expenses

Misc Project Costs				
EX 00121117	10/6/2017	Miller, Bruce / Additional Exemplar Helmets "UT" / Giro Trinity Bicycle Helmets (x6)	329.40	
EX 00121198	10/6/2017	Miller, Bruce / Additional Exemplar Helmets UT	14.17	
	Total Reimbursables		**343.57**	**343.57**

Unit Billing

Aluminum Honeycomb (Test)				
	Aluminum Honeycomb		1,500.00	
ATD Charge (HII,HIII,SID)				
	ATD Charge		750.00	
ATD Charge Non-Impact - Day				
	ATD Charge Non-Impact - Day		300.00	
Calibrated Sensor				
	Calibrated Sensor		1,200.00	
Data Logger (9-32 Channels) - Day				
	Data Logger (9-32 Channels)		200.00	
Data Processing Systems				
	Data Processing Systems		250.00	
Impact Sled				
	Impact Sled		1,000.00	
Instrumentation Lab - Day				
	Instrumentation Lab - Day		150.00	
Mechanical Lab - Level 1 - Day				
	Mechanical Lab - Level 1 - Day		300.00	
Track Use Non-Exclusive (per vehicle) -				
	Track Use Non-Exclusive (per vehicle)		500.00	
	Total Units		**6,150.00**	**6,150.00**

Total this Task **$24,611.57**

Total This Invoice **$110,012.15**

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PAYMENT DUE UPON RECEIPT

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EXHIBIT 2

Carr Engineering, Inc.
12500 Castlebridge Drive
Houston, TX 77065-
Tel: 281-894-8955 Fax: 281-894-5455
info@ceimail.com

Invoice

Invoice Date: Sep 11, 2017
Invoice Num: CEI10887
Billing Through: Sep 1, 2017

Client ID: HARTLINE DACUS

Mr. John Dacus
Hartline Dacus Barger & Dreyer, LLP
8750 North Central Expressway, Suite 1600
Dallas, TX 75231

Khiabani v MCI (8020:) - Managed by (RR)

Professional Services	Hours	Rate	Amount
Analyze/Review Case Materials			
▸ Robert Rucoba	12.10	$395.00	$4,779.50
▸ Amanda Duran	1.00	$270.00	$270.00
▸ Dan Barnes	8.40	$270.00	$2,268.00
Prepare/Research materials for client			
▸ Kasey Moore	2.00	$125.00	$250.00
Review/Prepare Deposition Analysis			
▸ Robert Rucoba	16.50	$395.00	$6,517.50
▸ Kasey Moore	2.50	$125.00	$312.50
Telephone Consultation with Client			
▸ Robert Rucoba	0.90	$395.00	$355.50

Total Service Amount: **$14,753.00**

Amount Due This Invoice: **$14,753.00**

This invoice is due upon receipt

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Tax ID: 76-0142053

012079

Carr Engineering, Inc.

12500 Castlebridge Drive
Houston, TX 77065-
Tel: 281-894-8955 Fax: 281-894-5455
info@ceimail.com

Mr. John Dacus
Hartline Dacus Barger & Dreyer, LLP
8750 North Central Expressway, Suite 1600
Dallas, TX 75231

Invoice

Invoice Date: Oct 10, 2017
Invoice Num: CEI10993
Billing Through: Sep 30, 2017

Client ID: HARTLINE DACUS

Khiabani v MCI (8020:) - Managed by (RR)

Professional Services	Hours	Rate	Amount
3D Alignment of Data Sets			
Norm Nissen	4.60	$185.00	$851.00
3D Damage Profile			
Scott Holt	1.10	$185.00	$203.50
3D Detailed Scene Modeling			
Nicholas Foret	10.90	$185.00	$2,016.50
3D Scene Camera Matching			
Nicholas Foret	31.40	$185.00	$5,809.00
3D Vehicle Analysis			
Norm Nissen	5.20	$185.00	$962.00
3D Vehicle Modeling			
Norm Nissen	8.40	$185.00	$1,554.00
Analyze/Review Case Materials			
Robert Rucoba	3.30	$395.00	$1,303.50
Amanda Duran	4.50	$270.00	$1,215.00
Dan Barnes	35.20	$270.00	$9,504.00
Attend Meeting with Client			
Robert Rucoba	8.50	$395.00	$3,357.50
Amanda Duran	7.00	$270.00	$1,890.00
Graphic Design-Exhibits			
Scott Holt	1.20	$185.00	$222.00
Preparation for Inspection			
Robert Rucoba	11.20	$395.00	$4,424.00
Amanda Duran	7.00	$270.00	$1,890.00
Prepare 3D exhibits			
Nicholas Foret	4.30	$185.00	$795.50
Prepare Detailed 3D Crash Reconstruction			
Norm Nissen	2.80	$185.00	$518.00
Prepare Detailed Crash Reconstruction			
Amanda Duran	16.50	$270.00	$4,455.00
Prepare for Deposition			
Robert Rucoba	2.50	$395.00	$987.50
Prepare for Meeting with Client			
Amanda Duran	13.50	$270.00	$3,645.00

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Carr Engineering, Inc.

12500 Castlebridge Drive
Houston, TX 77065-
Tel: 281-894-8955 Fax: 281-894-5455
info@ceimail.com

Invoice

Invoice Date: Oct 10, 2017
Invoice Num: CEI10993
Billing Through: Sep 30, 2017

Client ID: HARTLINE DACUS

Mr. John Dacus
Hartline Dacus Barger & Dreyer, LLP
8750 North Central Expressway, Suite 1600
Dallas, TX 75231

Khiabani v MCI (8020:) - Managed by (RR)

Professional Services	Hours	Rate	Amount
Prepare/Research materials for client			
▸ Kasey Moore	4.00	$125.00	$500.00
Prepare/Review Inspection Documentation & Photographs			
▸ Amanda Duran	10.50	$270.00	$2,835.00
Process 3D Scan Materials			
▸ Nicholas Foret	5.40	$185.00	$999.00
▸ Norm Nissen	6.90	$185.00	$1,276.50
Process Photographic Documentation			
▸ Kasey Moore	1.00	$125.00	$125.00
Review/Prepare Deposition Analysis			
▸ Robert Rucoba	28.90	$395.00	$11,415.50
▸ Kasey Moore	5.50	$125.00	$687.50
Scene Inspection			
▸ Robert Rucoba	5.00	$395.00	$1,975.00
▸ Amanda Duran	5.00	$270.00	$1,350.00
Telephone Consultation with Client			
▸ Robert Rucoba	1.00	$395.00	$395.00
Vehicle Inspection			
▸ Robert Rucoba	4.40	$395.00	$1,738.00
▸ Amanda Duran	5.50	$270.00	$1,485.00
		Total Service Amount:	**$70,384.50**

Reimbursable Expenses: Description	Amount
Delivery/Freight/Shipping Charges	$67.64
Equipment Rental - Total Station	$850.00
Equipment Rental-HTS equip	$703.63
Miscellaneous Supplies - Billable & Taxable	$20.37
Parking Fees	$40.00
Publications/Research	$366.71
Travel - Air Fare	$3,764.80
Travel - Airport transfer	$380.00
Travel - Booking Agent Service	$100.00
Travel - Rental Car	$331.68
Total Expenses:	**$6,624.83**
Amount Due This Invoice:	**$77,009.33**

This invoice is due upon receipt

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Carr Engineering, Inc.
12500 Castlebridge Drive
Houston, TX 77065-
Tel: 281-894-8955 Fax: 281-894-5455
info@ceimail.com

Invoice

Invoice Date: Oct 10, 2017
Invoice Num: CEI10993
Billing Through: Sep 30, 2017

Client ID: HARTLINE DACUS

Mr. John Dacus
Hartline Dacus Borger & Dreyer, LLP
8750 North Central Expressway, Suite 1600
Dallas, TX 75231

Khiabani v MCI (8020:) - Managed by (RR)

Accounts Receivable

Inv Num	Inv Date	Bill Amt	Last Pay Date	Amt Paid	Inv Balance
CEI10887	9/11/2017	$14,753.00	10/5/2017	$14,753.00	$0.00
				Past Invoice Balance:	**$0.00**

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Tax ID: 76-0142053

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EXHIBIT 3

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Attorneys for Plaintiffs

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

DECLARATION OF ERIC PEPPERMAN, ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO RETAX COSTS

/ / /

/ / /

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I, ERIC PEPPERMAN, ESQ, declare under penalty of perjury as follows:

1. I am a partner in the law firm of Kemp, Jones & Coulthard, LLP ("KJC"). KJC and Christiansen Law Offices (CLO) are counsel of record for Plaintiffs in this action. I make this declaration in support of Plaintiffs' opposition to MCI's motion to retax costs.

2. I have personal knowledge of the matters set forth in this declaration, and the same are true and correct to the best of my knowledge and belief.

3. Plaintiffs' attorneys have computerized legal research plans with Westlaw. KJC, who incurred the bulk of Plaintiffs' legal research costs, annually reviews and renews its plan with Westlaw to select a plan that encompasses various resources to research. To recoup its costs, KJC charges its clients a rate of $4.00 per minute while KJC timekeepers are conducting their legal research on the specific case. *Id.* Every KJC case has a unique client and matter number. To track their legal research costs, and to ensure that the costs relate to the case in which the research is required, KJC timekeepers must enter the unique client and matter number in order to log in to Westlaw. *Id.* They do not log in to Westlaw unless they are conducting legal research that is necessary to a case. *Id.* KJC's timekeepers are informed and, upon information and belief, are well aware of the time and costs associated with their legal research and do not stay logged into Westlaw when they are not actively conducting legal research. *Id.*

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 10th day of May, 2018.

ERIC PEPPERMAN, ESQ.

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Additional Counsel Listed on
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,

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

NOTICE OF APPEAL

012086

NOTICE OF APPEAL

Please take notice that defendant Motor Coach Industries, Inc. hereby appeals to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Judgment," filed April 17, 2018, notice of entry of which was served electronically on April 18, 2018 (Exhibit A); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

DATED this 18th day of May, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/Joel D. Henriod*
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Attorneys for Defendant Motor Coach Industries, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2018, a true and correct copy of the foregoing "Notice of Appeal" was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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Attorney for Defendants Michelangelo Leasing Inc. d/b/a Ryan's Express and Edward Hubbard

/s/ Adam Crawford
An Employee of LEWIS ROCA ROTHGERBER CHRISTIE LLP

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EXHIBIT A

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EXHIBIT A

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Attorneys for Plaintiffs

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; et al.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

NOTICE OF ENTRY OF JUDGMENT

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that a Judgment was entered in the above entitled matter on April 17, 2018.

//

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A copy of said Judgment is attached hereto.

DATED this 18th day of April, 2018.

KEMP, JONES & COULTHARD, LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2018, the foregoing NOTICE OF ENTRY OF JUDGMENT 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.

Alisa Hayes

An Employee of Kemp, Jones & Coulthard.

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Steven D. Grierson
CLERK OF THE 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

JUDGMENT

The above-captioned action having come before the Court for a jury trial commencing on February 12, 2018, the Honorable Adriana Escobar, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its special verdict,

Case Number: A-17-755977-C

012093

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that, pursuant to the jury's verdict, judgment is entered in favor of Plaintiffs, KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian MARIE-CLAUDE RIGAUD, and SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent) and as Executor of the Estate of Katayoun ("Katy") Barin, DDS (Decedent), and against Defendant MOTOR COACH INDUSTRIES, INC. ("MCI"), as follows:

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
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.34
TOTAL	$9,533,333.34

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
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$7,333,333.33

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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:	$1,000,000.00
Loss of Probable Support before her October 12, 2017 death33	$500,000.00
Pain and Suffering of Decedent, Dr. Kayvan Khiabani:	$333,333.33
TOTAL	$1,833,333.33

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses	$46,003.62

PLAINTIFFS' COMBINED TOTAL DAMAGES AWARD:	**$18,746,003.62**

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, under Nev. Rev. Stat. § 18.020, Plaintiffs shall also recover all costs reasonably and necessarily incurred in this action in an amount to be determined.

///

///

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IT IS FURTHER ORDERED, ADJUDGED, and DECREED that, pursuant to Nev. Rev. Stat. § 17.130, Plaintiffs shall receive prejudgment interest, accruing from June 1, 2017, at the rate provided by law, on $4,546,003.62 of the combined total damages award, as this amount represents past damages for: (i) the grief and sorrow and loss of companionship, society, and comfort suffered by Keon Khiabani ($1,000,000.00); (ii) the grief and sorrow and loss of companionship, society, and comfort suffered by Aria Khiabani ($1,000,000.00); (iii) the grief and sorrow and loss of companionship, society, comfort, consortium, and probable support suffered by Katy Barin before her October 12, 2017 death ($1,500,000.00); (iv) the pain and suffering of Decedent Dr. Kayvan Khiabani ($1,000,000.00); and (v) the medical and funeral expenses incurred by Decedent Dr. Kayvan Khiabani ($46,003.62). As of April 11, 2018, the total amount of accrued prejudgment interest is $246,480.55.[1]

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' total judgment shall bear post-judgment interest at the rate provided by law, which is currently 6.5%/year, until satisfied.

IN SUM, judgment upon the verdict in favor of Plaintiffs is hereby given for Eighteen Million Seven Hundred Forty-Six Thousand Three and 62/100 Dollars ($18,746,003.62) against Defendant MCI, with prejudgment interest, as described above, and with post-judgment interest continuing to accrue on the total judgment amount from the date this Judgment is entered until it is fully satisfied.

Dated this 17th day of April, 2018.

DISTRICT COURT JUDGE

[1] 06/01/2017 - 06/30/2017 $21,484.53(30 days @ $716.15/daily @ 5.750%/year);
07/01/2017 - 12/31/2017 $143,230.23(184 days @ $778.43/daily @ 6.250%/year);
1/01/2018 - 04/11/2018 $81,765.78(101 days @ $809.56/daily @ 6.500%/year)

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Respectfully Submitted by:

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Additional Counsel Listed on
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, 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 **CASE APPEAL STATEMENT**

012098

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:

Defendant MOTOR COACH INDUSTRIES, INC.

2. Identify the judge issuing the decision, judgment, or order appealed from:

THE HONORABLE ADRIANA ESCOBAR

3. Identify each appellant and the name and address of counsel for each appellant:

Attorneys for Appellant Motor Coach Industries, Inc.

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ABRAHAM G. SMITH
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4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Attorneys for Respondents 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

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Barin, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent)

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5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained counsel

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court, *e.g.*, date complaint, indictment, information, or petition was filed:

"Complaint and Demand for Jury," filed May 25, 2017

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is a strict-liability action arising from the death of a bicyclist who swerved into the path of a moving motor coach in traffic. The jury returned a verdict in favor of plaintiffs. Defendant appeals from the judgment on the jury verdict.

11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.

N/A

12. Indicate whether this appeal involves child custody or visitation:

This case does not involve child custody or visitation.

13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

Undersigned counsel is not aware of any circumstances that make settlement impossible.

DATED this 18th day of May, 2018.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/Joel D. Henriod*
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JOEL D. HENRIOD (SBN 8492)
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of May, 2018, a true and correct copy of the foregoing "Notice of Appeal" 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

PLAINTIFFS' OPPOSITION TO MCI'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID BY OTHER DEFENDANTS

Date of Hearing: July 6, 2018

Time of Hearing: 10:30 AM

Plaintiffs, by and through counsel of record, hereby oppose the motion to alter or amend judgment to offset settlement proceeds paid by other defendants filed by Defendant Motor Coach Industries, Inc. ("MCI") on the following grounds:

(1) As Plaintiffs have not yet received any of the settlement proceeds, MCI's motion for an offset is premature and should be denied as unripe;

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(2) In the event that the Court considers MCI's motion prior to Plaintiffs receiving the settlement proceeds, MCI is not entitled to an offset anyway because offsets are premised on a right to contribution, and MCI has no right to contribution from the settling defendants; and

(3) Denying an offset will not result in an impermissible or inequitable double recovery.

I

ARGUMENT

A. As Plaintiffs have not yet received any of the settlement proceeds, MCI's motion for an offset is premature and should be denied as unripe.

MCI argues that it "is entitled to an offset of all settlement proceeds **received** from the other defendants." Mot., 3:26-27 (bold added). At this time, however, Plaintiffs have not "**received**" any settlement proceeds from any other defendant. While Plaintiffs have **tentatively agreed** to separate settlements with Defendants (i) Michelangelo and Hubbard, (ii) Bell Sports, and (iii) SevenPlus Bicycle Shop, the payments under these tentative settlements have not yet become due or been made.

The Nevada Supreme Court has repeatedly held that, when the adjudication of a matter requires the trial court to guess, speculate, or assume the existence of contingent or future facts, then the matter is "not ripe for adjudication." *Knittle v. Progressive Cas. Ins. Co.*, 908 P.2d 724, 726 (Nev. 1996); *see also Hawkins v. Eighth Jud. Dist. Ct.*, 407 P.3d 766, 769, fn. 1 (Nev. 2017) (refusing to consider mandamus relief over a challenged jury instruction that had not yet been drafted). Moreover, it is well-settled that the function of Nevada courts "is not to render advisory opinions, but, rather, to resolve actual controversies []." *Personhood Nev. v. Bristol*, 245 P.3d 572, 574 (Nev. 2010).

To adjudicate MCI's present motion for an offset, the Court would have to assume that Plaintiffs will actually **receive** the agreed-upon settlement proceeds. But this is not guaranteed. Any one of the settling defendants could fail to pay all or part of the agreed-upon amounts. Plaintiffs' actual **receipt** of these funds is a contingent and future fact that renders MCI's motion for offset unripe. At this time, the most that the Court could do is offer an advisory

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opinion on how it would rule on an offset in the event that Plaintiffs' tentative settlements become final and the proceeds are paid.

Although MCI is not entitled to an offset in the first place, Plaintiffs submit that there is no point in even considering MCI's motion until the settlement proceeds are actually **received**. MCI's motion should be denied without prejudice and, after there is confirmation that the settlement proceeds have been received, the Court can consider all matters pertaining to the requested offset when this issue is fully ripe for adjudication.

B. In the event that the Court considers MCI's motion prior to Plaintiffs receiving the settlement proceeds, MCI is not entitled to an offset anyway because offsets are premised on a right to contribution, and MCI has no right to contribution from the settling defendants.

MCI's request for an offset is based on NRS 17.245. As MCI acknowledges in its motion, this "statute is part of the Uniform **Contribution** Among Tortfeasors Act (UCATA)." Mot., 4:6-7 (bold added). According to the UCATA, the reason that non-settling defendants **may** be allowed to receive **equitable** offsets **in certain circumstances** is that statutes like NRS 17.245 bar the non-settling defendants from pursuing claims of contribution or indemnity from the settling defendants. *Otak Nevada, L.L.C. v. Eighth Jud. Dist. Ct.*, 312 P.3d 491, 498 (Nev. 2013), citing UCATA § 4, 12 U.L.A. 284-85 cmt. b (2008). In other words, the non-settling defendants may **lose** their right to contribution or indemnity from the settling defendants, but they **gain** an offset based on the settlement proceeds. In effect, the offset is consideration for losing a right that they would otherwise have.

But if the non-settling defendants have no right to contribution to begin with, then they are not losing anything under NRS 17.245, and they are not entitled to an offset. In its motion, MCI concedes that this is true:

> Ordinarily, a joint tortfeasor who pays a judgment in excess of his equitable **share of liability** (as MCI does here) is entitled to seek **contribution or indemnity** from any other tortfeasors. *See* NRS 17.225 to 17.305; *Medallion Dev. v. Converse Consultants*, 113 Nev. 27, 31-34 (1997). Any joint tortfeasor in a multi-defendant tort action may, however, **obtain protection from claims of contribution** and implied indemnity under NRS 17.245 by settling with the tort claimant in good faith. *The Doctors Co. v. Vincent*, 120 Nev. 644 (2004). **This is fair only because the non-settling defendants are then able to offset the settlement monies against the judgment**. NRS 17.245(1)(a); **NRS 41.141**; Restatement Second of Torts § 885(3). Mot. at 4, fn. 2 (bold added).

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As MCI apparently recognizes, if MCI wouldn't otherwise have a right to contribution from the settling defendants, then MCI is not entitled to an equitable offset.

1. MCI has no right to contribution from Michelangelo and Hubbard because contributory negligence is not a defense to a strict products liability claim.

As recognized by this Court in multiple pretrial rulings and throughout trial, it is well-settled Nevada law that "**contributory negligence is not a defense in a strict products liability action.**" *Andrews v. Harley Davidson*, 796 P.2d 1092, 1094 (Nev. 1990) (bold added). For this reason, defendants that are liable for strict products liability have no right to contribution from any other defendants. *Norton Co. v. Fergestrom*, 2001 WL 1628302, *5 (Nev. Nov. 9, 2001).

In *Norton*, the plaintiff (Fergestrom) was injured when a grinding wheel exploded while he was sharpening a knife on the wheel. *Id.* at *1. The grinding wheel was made by Norton Co. and owned by Timothy Matthews. *Id.* Fergestrom sued Matthews for negligence and Norton for strict products liability. *Id.* In the early stages of the litigation, Norton asserted a cross-claim against Matthews for contribution. *Id.* But the district court entered summary judgment on the cross-claim against Norton, "concluding that Norton was not entitled to contribution as a matter of law." *Id.*

The matter proceeded to trial. *Id.* At the close of Fergestrom's case-in-chief, Matthews was dismissed. *Id.* The jury returned a $2 million verdict against Norton, who appealed. *Id.* On appeal, Norton argued that the district court erred in granting Matthews' motion for summary judgment on its cross-claim for contribution. *Id.* at *5. The Nevada Supreme Court rejected this argument and held that the district court correctly entered summary judgment:

> **We conclude that Norton was not entitled to contribution from Matthews because contributory negligence is not a defense in a products liability action.** *Id.* (bold added), citing *Andrews*, 796 P.2d at 1094; *Central Telephone Co. v. Fixtures Mfg.*, 738 P.2d 510, 511 (Nev. 1987); and NRS 17.225 (Nevada's contribution statute) and NRS 41.141 (Nevada's comparative negligence statute).

Thus, defendants found liable in strict products liability are not entitled to contribution from allegedly negligent joint offenders.

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These rules are dispositive here. Plaintiffs' judgment against MCI is based on strict products liability failure to warn. The alleged liability of Michelangelo and Hubbard was based on negligence. To the extent that MCI would have otherwise been able to assert contribution claims against Michelangelo and Hubbard, those claims would have necessarily been premised on contributory negligence. But because contributory negligence is **not** a defense to a product liability claim, MCI has no right to receive contribution from Michelangelo or Hubbard.

2. MCI also has no right to contribution from Michelangelo and Hubbard because it is impossible for them to be "jointly and severally" liable on the strict liability judgment entered against MCI.

NRS 41.141 is Nevada's comparative fault statute. Under this law, defendants are responsible for 100% of a plaintiff's injuries if their liability arises from a claim based upon strict liability, an intentional tort, or any of the other categories listed in NRS 41.141(5). *See Café Moda v. Palma*, 272 P.3d 137 (Nev. 2012).

In *Café Moda*, the plaintiff was stabbed by another patron at a restaurant. *Id.* at 138. The plaintiff asserted an intentional tort claim against the patron and a negligent security claim against the restaurant. *Id.* The Nevada Supreme Court held that the negligent security claim against the restaurant was a "several" claim, as opposed to a "joint and several" claim under NRS 41.141, meaning that the intentional tort defendant was responsible for 100% of the plaintiff's injuries. *Id.* at 141. Although *Café Moda* involved an "intentional tort" under NRS 41.141(5)(b), strict liability is listed immediately above "intentional tort" in NRS 41.141(5)(a). Thus, the rule is the same in either case, i.e., there is no joint and several liability for a strictly liable defendant, who is responsible for 100% of the plaintiff's injuries.

In this case, Plaintiffs judgment against MCI is based on strict liability failure to warn. MCI was found liable for failing to provide its bus with adequate and suitable warnings concerning the bus's safe and proper use. Any alleged fault on the part of the settling defendants had nothing to do with this failure to warn, and MCI is not entitled to apportion any percentage of its 100% responsibility to the settling defendants. Like the negligent security claim against the restaurant in *Café Moda*, the claims that Plaintiffs settled with the settling defendants were "several" claims (as opposed to joint and several claims under NRS 41.141).

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Accordingly, based on the strict liability failure to warn claim in which it was found liable, MCI is responsible for 100% of Plaintiffs' injuries and has no right to contribution from any of the settling defendants.[1]

3. MCI cannot enforce a non-existent right to contribution under the guise of an offset.

In *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043 (Nev. 2000), the Nevada Supreme Court **reversed** the district court's decision to grant an offset to a non-settling defendant that was otherwise not entitled to contribution from the settling defendants. The issue in *Evans* was whether non-settling intentional tortfeasors were entitled to offsets based on settlement proceeds paid by their settling co-defendants. The Nevada Supreme Court concluded that, "as a matter of law, intentional tortfeasors… may not apply credits from settlements by their joint tortfeasors [] in reduction of judgments against them arising from the[ir] intentional misconduct." *Id.* at 1050.

The *Evans* Court premised this ruling on two grounds: (1) offsets are a form of "equitable relief" and principles of equity weigh against intentional tortfeasors, and (2) equitable offsets are based on a right to contribution, and intentional tortfeasors have no right to contribution under NRS 17.255 ("Intentional tort bars right to contribution"). *Id.* 1050-51. As aptly explained by the Nevada Supreme Court, equitable offsets are not a vehicle to enforce contribution rights that don't exist:

> [T]he prohibition against contribution in favor of persons liable in tort for intentional misconduct would make no sense if intentional tortfeasors were entitled to an equitable offset for settlements made by joint offenders. **This is because the credit under NRS 17.245(1) would indirectly provide the non-settling intentional tortfeasor the same protection against overpayment that a direct right of contribution would provide.** *Id.* at 1051 (bold added).

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[1] To be clear, Plaintiffs are not arguing that no non-settling defendant is ever allowed to an offset under NRS 17.245. They acknowledge that 17.245 often operates to reduce a plaintiff's claim against the remaining defendants. If, for example, Bell Sports or SevenPlus hadn't settled and were found liable under Plaintiffs' breach of implied warranty claim, then any judgment amounts entered in favor of Plaintiffs would arguable have been offset by the settlement proceeds paid to each Plaintiff by Michelangelo and Hubbard. Based on the way the case ended up, however, the only judgment entered was against MCI for strict liability failure to warn. Under these circumstances, which were unknown at the time of settlement, an offset under NRS 17.245 is not appropriate.

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Although *Evans* involved an intentional tort (as opposed to strict liability failure to warn), the rule and rationale rendered by the Nevada Supreme Court is equally relevant—equitable offsets are not a vehicle to enforce contribution rights that do not otherwise exist.

Evans applies here. Just like the intentional tortfeasor in *Evans*, MCI has no right to contribution from the settling defendants. *See Andrews, Norton Co., Café Moda,* and NRS 41.141, *supra*. As in *Evans*, MCI has no right to receive contribution from the settling defendants—either directly through a contribution claim or **indirectly** through a post-judgment offset. MCI was never entitled to seek contribution or indemnity from any other tortfeasor; NRS 17.245 cannot and did not bar MCI from pursuing contribution or indemnity claims that never existed in the first place; and MCI is not entitled to indirectly receive a non-existent right to contribution under the guise of an "offset."

C. Denying an offset will not result in an impermissible or inequitable double recovery.

MCI asserts (at 4) that the Court must award it an **equitable** offset or Plaintiffs will impermissibly or inequitably receive a "double recovery." As demonstrated by *Evans*, however, the Court is under no such mandate. If anything, inequity will result if the Court grants MCI an offset in any amount. MCI was found liable for failing to provide its bus with suitable and adequate warnings concerning the bus's safe and proper use. Any alleged fault on the part of the settling defendants had nothing to do with this failure to warn. Under *Café Moda* and NRS 41.141, MCI is 100% responsible and not entitled to contribution from the settling defendants. As it stands, MCI will not have to pay more than "its equitable share of liability." If it is given an equitable offset, however, then MCI will receive a windfall by paying less than the amount that it would otherwise have to pay. Giving such a windfall to the party that is 100% responsible for the wrongful death of Dr. Khiabani would hardly be an equitable result.

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II

CONCLUSION

As Plaintiffs have not yet received any of the settlement proceeds, MCI's motion for an offset is premature and should be denied as unripe. After there is confirmation that the settlement proceeds have been actually received, the Court can more fully consider all matters pertaining to the requested offset when this issue is ripe for adjudication. In the event that the Court considers MCI's motion prior to Plaintiffs receiving the settlement proceeds, MCI is not entitled to an offset anyway because offsets are premised on a right to contribution, and MCI has no right to contribution from the settling defendants. Accordingly, and for all of the forgoing reasons, MCI's motion to alter or amend judgment to offset settlement proceeds should be denied.

DATED this 6 day of June, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of June, 2018, the **PLAINTIFFS' OPPOSITION TO MCI'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID BY OTHER DEFENDANTS** 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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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

COMBINED OPPOSITION TO MOTION FOR A LIMITED NEW TRIAL AND MCI'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM

Date of Hearing: July 6, 2018
Time of Hearing: 10:30 a.m.

OPPOSITION TO MOTION FOR A LIMITED NEW TRIAL

NOW APPEAR Plaintiffs, by and through counsel of record, and hereby file this opposition to MCI's motion for a "limited" new trial (hereinafter Mot. LNT) on the following grounds: (1) the jury instruction on failure to warn causation (JI 31) and the verdict form on the failure to warn claim both contained a causation component and were drafted and submitted by MCI; (2) the Court correctly excluded MCI's warnings expert from discussing Nevada driving statutes; (3) the Court correctly ruled in its May 23, 2018 order that MCI cannot claim that

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there is newly discovered evidence because MCI did not undertake employment discovery; and (4) theoretical future income taxes are inadmissible to reduce future wage loss.

I. STATEMENT OF FACTS

A. The J4500 Has An Extreme Hazard That Required A Warning

Plaintiffs' bus safety expert (Sherlock) examined the Red Rock surveillance camera pictures and explained the general aerodynamic issue presented in this case:

> Q. And what does that [the still pictures of Dr. Khiabani alongside of the bus from the Red Rock surveillance video] indicate as concerning whether the doctor was traveling horizontal or parallel?
> A. Roughly parallel.
> Q. And why is that important?
> A. **The question boils down to did the doctor steer into the bus or was he pulled in by aerodynamic forces? And the fact that they're both going roughly parallel argues strongly that the fundamental cause of this was bad aerodynamic design.** (3/2 TT 17:20 to 18:4) (Bold added)

MCI and its experts had no explanation whatsoever for the bike wobble towards the bus.[1]

In stark contrast to MCI's complete and total failure to prove why the bike wobbled to the left into the bus, Plaintiffs' aerodynamic expert testified that the J4500 produced 10 pounds of push force and **20 pounds of pull force** when passing within 3 feet of a bicycle. He also

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[1] MCI conceded in pre-trial motions that MCI had no evidence supporting any theory as to why the bike wobbled or was drawn into the bus. (Mot.Lim.#7, 7:23; "To this day, no one-not Plaintiffs, nor their counsel, and not their experts-can explain with any probability why Dr. Khiabani [sic] bicycle moved into the coach's travel lane. There are myriad possibilities, but **no one will ever be able to determine this to a degree of what is more likely than not**.") (Bold added) MCI's accident reconstruction expert (Rucoba) admitted that MCI had no physical evidence that the doctor steered into the bus.

> Q. Okay, Mr. Rucoba. And I want to focus you specifically on the wobble. Okay? Specifically on the wobble. Isn't it true you have no evidence whatsoever of human error with regards to being a cause for the wobble?
> A. True.
> Q. No evidence?
> A. True.

(3/13 TT 61:22 to 62:5) Rucoba also admitted that MCI had no explanation whatsoever as to why the doctor's bike was pulled left into the bus. (3/13 TT 60:16-19; "Q. You do not have an opinion, as we sit here today, as to what caused the wobble; correct? A. Correct. I do not.")

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testified that an aerodynamically safe bus like the Mercedes Setra 500 would only produce 3 pounds of push force and absolutely no pounds of pull force under like conditions:

> Q. So if -- if a Mercedes was -- well, strike that. If a CJ3 or J4500 was passing a bike, you said the side force would be what?
> A. 10 pounds.
> Q. Okay. And if a Mercedes was passing a bus, the push force would be what?
> A. 3.
> Q. **Now, if a CJ3 or a J4500 is passing a bike, the pull force is what?**
> A. **About double 10, or about 20.**
> Q. **And if a Setra Mercedes bus is passing a bike, the pull force is what?**
> A. **Zero.** There's no reattachment, so there's no reattachment force.
> Q. So we go -- **good aerodynamic design can take us from 20 pounds of pull into the bus to 0 pounds of pull into the bus. Is that what you're saying.**
> A. **I am.** (3/9 TT 63:14 to 64:5) (Bold added)

Dr. Briedenthal also explained that the 20 pound pull force generated by a J4500 was "the more sinister" hazard "because it's pulling the cyclist towards the bus":

> Q. So, the J4500 could have been designed aerodynamically safer?
> A. Oh, yes.
> Q. Okay. And if they had done that, what happens?
> A. A lot of good things happen. The things that happen pertinent to this case are the push force drops -- I estimate by about a factor of 3 -- and pull force essentially vanishes. **And the pull force I regard as the more sinister of the two because it's pulling the cyclist towards the bus**. (3/9 TT 26:15-25) (Bold added)

This extremely damning testimony that a J4500 moving 25 mph produees a 20 pound pull force on objects within 3 feet while the competing Mercedes bus produces no pull force whatsoever was not rebutted because MCI did not present an aerodynamic engineer. Instead of calling their own opposing aerodynamics expert, MCI ridiculed Dr. Briedenthal's expertise despite his 40 years in aerodynamics and his specific experience with bus aerodynamic problems. MCI denigrated him as an "airplane" expert because Briedenthal works at the William E. Boeing Department of Aeronautics & Astronautics. (3/22 TT 239:2; MCI attorney Barger saying "he's an airplane guy")

The Briedenthal testimony about the "sinister" 20 pound pull generated by a passing J4500 bus was reinforced by testimony from Bus Safety Expert Sherlock:

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> A. And as it does that, it has momentum. And when it tries to go around the corners, that momentum carries it wide. So the air on the side doesn't go around like in a well-designed vehicle; it shoots out to the sides. And that creates a pressure wave where that jet of air is coming off, and that would push a bicyclist away. This is well studied. There's a Kato paper that you'll probably see that goes into this in detail. **So it pushes the rider away, and then it sucks them in, because right behind that pressure wave is an area that's a partial vacuum**. And that's what led to these problems I was talking about with air quality, all these other things. (3/2 TT 171:1-14) (Bold added)

The Breidenthal and Sherlock testimony was scientifically supported by the landmark 1981 paper by Dr. Kato. Kato, "Aerodynamic Effects to a Bicycle Caused by a Passing Vehicle, SAE (1981) The key finding by Dr. Kato was that the passing bus first caused an outward air blast from bus to bicycle followed by a strong pulling tug when the bus is even with the vehicle that "tends to pull the bicycle toward the vehicle":

> The first peak of force Fy occurs just as the front of the vehicle is even with the rear wheel of the bicycle and the negative value indicates that the force is in a direction away from the vehicle. The second peak occurs when the vehicle is approximately even with front of the bicycle, and **the positive value tends to pull the bicycle toward the vehicle**. (T Ex. 139) (Bold added)

The three primary conclusions by Dr. Kato were as follows:

> 1. The force acting on stationary body (bicycle) in a direction away from the moving body (vehicle) occurs for the first time as the passing begins.
>
> 2. **The force which pulls the stationary body (bicycle) toward the moving body (vehicle) is at a maximum when the two bodies come closest.**
>
> 3. **The maximum pulling force increases markedly** with the decreasing of the distance between the two bodies (bicycle and vehicle).

(Bold added) In layman's terms, Dr. Kato documented that when a bus first passes a bike an air blast causes the bike to "wobble by a passing vehicle" and then when the bus and bike are even with one another there is a "force which pulls the stationary body (bicycle) toward the moving body (vehicle) . . . ." The Kato paper was peer reviewed and published in the Society of Automotive Engineers Journal. It was admitted as T Ex. 139 and was referenced hundreds of times during the trial by both parties. Even MCI's experts acknowledged that the Kato paper was a ground breaking study. (3/15 TT 44:15-18)

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The Breidenthal and Sherlock expert opinions and the Kato paper were supplemented by testimony from veteran bus drivers that a passing J4500 creates a suction effect.[2]

The 20 pounds of pull force extending to objects within 3 feet of the bus that is generated by a J4500 moving 25 mph explains why Dr. Khiabani and his bike were pulled into the passing bus and struck its side. The Red Rock still pictures demonstrated that Dr. Khiabani and the bike were at the exact location predicted by Dr. Kato to encounter the pull force. The general danger predicted 37 years ago by Dr. Kato was magnified by the very large pull force (20 pounds) that Dr. Briedenthal testified that a J4500 moving 25 mph generates. A key MCI J4500 designer confessed that MCI failed to consider the safety implications of aerodynamic forces. (Lamothe, (3/5 TT 157:23 to 158:1; "Q. So as far as you know, when the J4500 was designed, no one looked at the aerodynamics as a safety factor? As far as you know? A. Not to my knowledge.")

The 10 pounds of push force and the 20 pounds of pull force was generically referred to during the trial as an "air blast." Again, an aerodynamically efficient bus like the Mercedes Setra has absolutely **no pull force whatsoever** when moving 25 mph. There is no valid argument that the drastic difference between a 20 pound pulling force from a passing J4500 and no pulling force from a safer bus going the same speed is not an extreme hazard that demanded a warning.

B. The Complete Failure Of MCI To Provide Any Warnings

1. The Only Warning Was That The Air Conditioning Refrigerant In The Bus AC Would Damage The Ozone Layer

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[2] Long time bus driver Mary Witherell testified:

> Q. Now, what is your understanding as to whether or not there's some sort of pulling effect or suction from the rear wheels of buses?
> A. Just my personal opinion and what I've experienced, there is, like, a draft. And, again, that's why you have to be mindful when you're passing pedestrians and bicycles.
> Q. And when you say "a draft," are you referring to a draft out from the rear wheels or suction into them?
> A. Sucking in. (2/27 TT 55:15-25)

MCI did not offer any contravening evidence.

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This was a relatively rare case where the product manufacturer provided absolutely no warnings of any hazards of the bus. As the MCI salesperson confessed to the jury, the only warning provided in the "warnings" section of the sales documentation concerned damage to the ozone layer:

> Q. And the warning says, "This vehicle may contain HCFC R-134A refrigerant, a substance which harms public health and the environment by destroying ozone in the upper atmosphere." Did I read that right?
> A. Yes.
> Q. And that is the only warning I see in Exhibit 2.
> Do you see any other warning?
> A. No. (Dorr; 3/7 TT 215:11-19)

This "warning" did not discuss general air displacement much less warn users of the vehicle that the J4500 had a 20 pound pulling force when passing bikes while other buses had none.

During closing, MCI misleadingly implied that the operators' manual had a warning. (3/22 TT 239:18-22) During rebuttal, Plaintiffs pointed out that the operators manual did not have any warnings and identified the specific exhibit number for the jury:

> And then he said to you that, well, if you look at the manual, there's a warning in the manual. Take a look at the manual, ladies and gentlemen. It's Exhibit 135. It's about 300 pages long. It goes on and on about the bus. Not one single warning in that manual. And the point is there's no warning in this case. (3/22 TT 285:25 to 286:6)

For these reasons, the evidence before the jury was that there was no warning from MCI period.

2. Hubbard's Testimony That It Was His "Personal Habit" To Follow Safety Directives And That He Would "Heed" An Air blast Warning Met The Requirements For Proof Of Heeding

In Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991) [hereinafter Sims], the Court held that merely showing that the actor had a history of following warnings was adequate proof to support a failure to warn claim:

> . . . the trier [of fact] may also find that, "but for" GTE's breach of this duty, Robert would not have entered the tank. In that regard, **trial evidence may indicate that historically Robert had strictly heeded directions concerning his duties and safety responsibility**. If so, the trier may conclude that in the face of proper warnings, Robert would have maintained his consistent attitude of compliance with instructions.

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Id. (Bold added) See also Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (approving Sims and stating: Sims "stated that the evidence [of historic compliance] could demonstrate that he would have adhered to an adequate warning.")

Unlike Sims, wherein there was no testimony from the actor that he would "take into account in how you" act if provided a warning, bus driver Hubbard explicitly testified that it was his "personal habit" to "heed" safety directives:

> 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. Had you ever been trained as to 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. (3/1 TT 154:5-10; 154:15-24) (Bold added)

The response "absolutely" fully satisfies all elements needed to prove a warnings claim under Sims.[3]

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[3] MCI's argues that this Court should apply a different test than the Sims and Rivera holdings that heeding is the only thing required and that heeding can be established by proof of historical compliance with warnings. More fully, MCI argues that Indiana law requires a "two-step inquiry" and that "[f]irst, the plaintiff must prove that user [sic] of the product would have read and heeded the warning" and "[t]hen he must prove that heeding the warning would have avoided the injury." (Mot. LNT, 4:13 to 5:2) In response, Nevada law applies -- not Indiana law.

Rivera did not discuss a two-step inquiry but instead held that "the 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." Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (Bold added) MCI cites only the second alternative to prove causation (Mot. LNT, 4:28) and adds to it another requirement that the plaintiff must prove that "the defect caused the plaintiff's injury." (Mot. LNT, 4:28) Rivera is clear on "the burden of proving" warning" failure to warn causation; either Plaintiff can prove that a "different warning would have altered the way the plaintiff used the product" or, alternatively, Plaintiff can prove that a "different warning would have "prompted plaintiff to take precautions to avoid the injury." There can be no valid argument that JI 31 (crafted by MCI) was more onerous than with Rivera

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A warning was critical because the bus driver also testified that he did not know that the J4500 could produce an air blast:

> Q. Let me ask you a question. Is it your understanding that, if a bus is moving at 30 or 35 miles an hour, that that will cause air blast or air displacement at the front of the bus? Have you ever heard that?
> A. No, sir. (3/1 TT 193:14-19)

The foregoing testimony in and of itself satisfied the causation requirement of failure to warn.

During the trial, MCI argued that all bus drivers already knew that the J4500 caused air displacement. First, MCI disingenuously confuses air displacement in general with the actual hazard posed by a J4500 moving 25 mph (a 20 pound suction that its streamlined competitor does not generate). Second, Plaintiffs offered evidence from MCI's lead west coast salesman; Dorr (a 20 year driver that formerly owned a tour company). Dorr testified unequivocally that, like Hubbard, Dorr did not know that the J4500 created an air blast:

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because JI 31 required Plaintiff to prove both that the product user "**acted in accordance with the warning, and that doing so would have prevented the injury in this case.**" JI 31 provided:

> 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.**

JI 31 arguably put a more strenuous burden on Plaintiffs to prove both that the driver "would have acted in accordance with the warning" **and**, in addition, "that doing so would have prevented the injury in this case" than Rivera. This is so because Rivera only required that a "different warning would have altered the way the plaintiff used the product" or, alternatively, Plaintiff can prove that a "different warning" would have "prompted plaintiff to take precautions to avoid the injury." MCI cannot complain about MCI's JI 31 where it imposed a more stringent test on warnings causation than Rivera.

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Q. Okay. What is your understanding, if you have an understanding, as to whether or not -- when a 2007 vintage J4500 is traveling 35 to 40 miles an hour, what is your understanding as to whether or not it causes air blasts or air displacements from the front of the bus?
A. I don't know.
Q. Okay. You don't know one way or the other whether it would cause air blasts or air displacement?
A. No, I don't. (3/7 TT 202:24 to 203:5)

MCI did not call one single bus driver as a witness. Hence, there was no evidence that bus drivers like Hubbard or Dorr realized that the J4500 generates a 20 pound suction when closely passing a bicyclist.

I. ARGUMENT

A. MCI Prepared The Jury Instruction And Verdict Form Regarding Failure To Warn Causation And Both JI 31 And The Verdict Form Incorporated Causation

1. MCI Prepared The Jury Instruction And Verdict Form Regarding Failure To Warn Causation

MCI specifically criticizes the language "would have been acted upon" as supposedly not incorporating whether the user would have heeded the warning and "avoided the injury." (MCI Mot.LNT, 5:11-14 "the following paragraph required the jury to find Defendant liable and determine the amount of damages, without even considering whether heeding the warning would have avoided the injury.") However, MCI crafted both JI 30 and JI 31 -- the warnings instruction and the heeding component (heeding changed to "acted in accordance" and "that doing so would have prevented the injury in this case").

JI 30 was given regarding the requirement for a warning:

> 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.

This instruction (referenced as MCI "25" in the transcript) was proposed by MCI -- Plaintiffs proposed another instruction that MCI objected to and was not given. (3/21, TT 389:24 to 391:5; "MR. KEMP: I think it was 25 replaced the Sea Ray because that's the one about warnings. In any event, Your Honor, we don't have an objection to 25. I'm sorry. THE COURT: All right. Mr. Henriod? MR. HENRIOD: No objection.")

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As for the warning causation instruction, MCI first proposed the following instruction on March 13, 2018:

> 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 evidence that the individual who might have acted on any alternative warning would have understood and heeded the alternative wording, **and that doing so would have prevented the injury in this case**.

(Ex. 1; March 13, 2018 Henriod email and attachments) (Bold added) Plaintiffs proposed a standard warning instruction on the heeding element. Plaintiffs also proposed a simple warnings jury question.[4]

At the first instruction conference on Sunday, March 18, 2018, MCI demanded that the term "heeded" be removed and replaced with the language "acted in accordance." The record is clear that MCI engineered the change from "heeded" to "acted in accordance" and that JI 31 was offered by MCI:

> MR. KEMP: So Mr. Polsenberg on Sunday said he didn't like the word heeded. He wanted to change to acted in accordance or whatever.
> MR. HENRIOD: So esoteric.
> MR. KEMP: Yeah, it's a little esoteric, so --
> THE COURT: Although Mr. Hubbard said he would have heeded it.
> MR. KEMP: Yeah.
> THE COURT: On the -- on the stand; right?
> MR. KEMP: Maybe that's why Mr. Polsenberg -- anyway, so they say, Did MCI fail to provide an adequate warning that would have been acted upon? I'm fine with that. You know, I think heeded would be better, but I'm fine with that.
> MR. HENRIOD: I think we still need a separate question, but I think that this gets us much closer. (TT 3/21, 24:25 to 25:17)

As Plaintiffs remarked and the Court noted, MCI's aversion to "heeding" was apparently motived by MCI's appreciation that the bus driver had already explicitly testified that he would have "heeded" a warning and MCI's desire to provide the jury with a more demanding causation

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[4] "MR. KEMP: And then the warning thing is really a heeding thing. It's not a legal cause thing. So we can change the wording on that to say, Is MCI liable for failure to warn? And then a parenthetical saying (Did MCI fail to provide an adequate warning that would have been acted upon?) And if they didn't want -- I -- I would rather have heeded personally." (TT 3/21 24:10-16)

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test than mere heeding by adding "that doing so would have prevented the injury in this case" in JI 31.

On March 20, 2018, MCI forwarded the revised instruction with the Polsenberg changes:

> 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 ~~alternative~~ warning have would have ~~understood and heeded the alternative~~ acted in accordance with the warning, and that doing so would have prevented the injury in this case.

(Ex. 2; March 20, 2018 Henriod email and attachments)

MCI's March 20, 2018 warning causation instruction proposal -- enumerated as JI 31 in the final set -- was given verbatim as follows:

> 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.** (Bold added)

MCI crafted the key causation parts of the instruction: removing "understood and heeded" from MCI's first proposal and inserting "acted in accordance with the warning." MCI kept "that doing so would have prevented the injury in this case" from MCI's first proposal.

Instead of Plaintiffs proposed simply verdict form where the jury would check yes or no on whether MCI failed to warn, MCI demanded that the jury question on warnings be crafted to exclude reference to heeding and instead use MCI's preferred terminology of "acted upon." (TT 3/21 p.m.) In addition, MCI added the causation component: "that **would have been** acted upon." (Bold added) The warnings question on the verdict form read as follows:

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

Yes _____ No _____

The jury checked yes. Because MCI generated the language for both the applicable warnings instructions (JI 31 and JI 32) and the verdict form, MCI cannot argue error on these points.

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This is especially true where the language "that doing so would have prevented the injury in this case" in JI 31 (drafted by MCI) explicitly incorporates the causation requirement for failure to warn liability that MCI now wrongfully argues was missing.

2. There Is No Requirement To Repeat the Warning Causation Test In JI 31 In The Verdict Form

Boiled away, MCI's real argument is that, although JI 31 did in fact instruct the jury on the requirement of warning causation and did so in words selected by MCI, MCI believes that warning causation should have been repeated as a special interrogatory using the term "legal cause" in the warnings portion of the special verdict form. (Mot. LNT, 6:8 to 8:2; citing proposed special verdict form) MCI miscites Allstate Ins. Co. v. Miller, 125 Nev. 300, 306, 322, 212 P.3d 318, 323, 333 (Nev. 2009) [hereinafter Allstate] for this contention.

Allstate holds that separate liability theories should be differentiated in verdict forms so that appellate courts are informed which liability theory was accepted or rejected:

> . . . we are holding that district courts should follow Skender by submitting timely and properly proposed special verdicts or interrogatories when a plaintiff presents claims of tort and contractual liability or multiple theories of liability under a single claim.
>
> . . . .
>
> Where special verdicts or interrogatories are timely and properly submitted in a case involving multiple claims or multiple theories giving rise to a single claim, the district court should give the special verdicts or interrogatories or explain on the record the reason for refusing them.

Allstate, 212 P.3d at 333. Allstate also explains that the purpose for differentiating between prevailing relief claims is to allow appellate courts to determine if there is substantial evidence to support a claim:

> If parties submit special verdicts or interrogatories, this court can focus on a legally valid theory and determine if there is substantial evidence supporting that theory. If there is substantial evidence supporting the theory, then this court will uphold the jury's verdict.

The verdict form in this case fully complied with Allstate because it required the jury to differentiate between the unreasonably dangerous determination and the failure to warn determination. In addition, it broke down the unreasonably dangerous determination into 4

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different subparts. This verdict form clearly allowed the parties and the court to determine which of the multiple theories of liability was resolved in favor of plaintiff and MCI does not dispute that there is no confusion (as in Allstate) concerning the prevailing liability theory.

Neither Allstate nor any Nevada court has held that, in addition to differentiating liability theories, that Defendants are entitled to verdict forms that repeat elements of instructions that Defendants believe should be highlighted. Where JI 31 accurately stated Nevada law regarding warnings causation and was drafted by MCI, there is no valid argument that refusing MCI's preferred verdict form constitutes legal error.

Plaintiffs also note that the warnings question did incorporate MCI's preferred "acted upon" language; "Did MCI fail to provide an adequate warning **that would have been acted upon**." (Mot. LNT; Special Verdict) (Bold added) As noted above, Plaintiff favored the phrase the term "understood and heeded" instead of "acted upon" but MCI insisted upon the substitute language. Importantly, the verdict form did contain a jury finding that the warning would have been "heeded," i.e., the language "that would have been acted upon." This satisfies even the most draconian view of the heeding requirement under Nevada law and is certainly far, far more proof than required under Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991) (holding proof of history of compliance alone satisfied heeding requirements).

3. Putting The Substantial Factor Instruction ("Legal Cause") In A Special Verdict Form For Failure To Warn Liability Is Inappropriate

Plunging into a whirlpool of revisionism, MCI claims that it tendered a special verdict form asking "the next question: `If an adequate warning were heeded, would Dr. Khiabani's death been avoided.'" (Mot. LNT, 6:4-6) Not only did MCI fail to propose a verdict form with this "next question", the verdict form actually proposed by MCI added the substantial factor instruction, i.e., "legal cause": whether "the defect was a **legal cause** of Dr. Khiabani's Death?" (Mot. LNT, 6:14-15) (Bold added) This is a completely different inquiry than what MCI now argues should have been included. MCI's failure to offer a verdict form with "the next question: "If an adequate warning were heeded, would Dr. Khiabani's death been avoided," precludes

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MCI from now arguing to the Court that a new trial should be ordered because the verdict form did not include the "next question."

Turning to the "substantial factor" instruction that MCI did propose adding to the failure to warn portion of the verdict form under the phrase "legal cause", MCI's hypocrisy is unbridled. MCI argued for nearly an hour at the Sunday, March 18, 2018 charging conference that the "substantial factor" test did not apply. Over MCI's vehement objections, the Court allowed JI 24, which provided as follows:

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

MCI's objections to JI 24 was noted on the record on the evening of March 21, 2017. (3/21 TT 46: 11 to 48: 15) MCI cannot argue that the verdict form was flawed because the substantial factor test that MCI previously objected to was not included as a separate determination in the verdict form.

Adding the term "legal cause" to the warning portion of the verdict form would be imprudent because it does not define warning causation -- as does JI 31. Again, JI 31 provided as follows:

> 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**. (Bold added)

The phrase "and that doing so would have prevented the injury in this case" is the "next question" that MCI now claims to have been missing from the verdict form. Again, MCI **never** proposed that this phrase be added to the verdict form. MCI instead proposed "legal cause" be in the verdict form.

Regarding warning causation, as discussed in note 3, Supra Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009), held that "the 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

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avoid the injury." (Bold added) JI 31 was actually more stringent than what Rivera requires to prove causation because it required proof that a warning "would have prevented the injury in this case." More importantly, the "legal cause" instruction given to the jury (which MCI belatedly contends should have been added to the warning portion of verdict form) varies from the Rivera warning causation standard and JI 31.

Even if MCI had proposed a special verdict form that included a term such as "would have prevented the injury in this case", it was not required to repeat this on the verdict form because JI 31 gave the jury appropriate instruction on what Plaintiffs had to provide to establish warning causation. In addition, because MCI did not in fact tender the "next question" for the special verdict form and the addition of "legal cause" would not be appropriate, MCI's proposed special verdict form was rightfully rejected. Finally, the complaints about the verdict form that MCI now levels stand in stark contrast to how pleased MCI was to get its proposed language in JI 31. (TT 3/21, 24:25 to 25:17; MR. HENRIOD: I think we still need a separate question, but **I think that this gets us much closer**.") Again, MCI never proposed the "next question" raised for the first time in the motion. (Mot. LNT, 6:5-6)

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B. The Driver Could Have "Acted Upon" An Adequate Warning

MCI argues that the fact that Hubbard lost track of the bicyclist after initially seeing the doctor and following him slowly down Charleston before turning on Pavilion Center conclusively disproves that a warning could have been "acted upon" in this case. (Mot. LNT, 5:16 to 6:7) In response, "changing lanes" **at the last second** is not the only way that the driver could have heeded a warning. MCI's constricted view of possible reactions if fully informed of the J4500's extreme aerodynamic hazard is unwarranted.

1. Hubbard Could Have "Acted In Accordance With The Warning" By Immediately Taking The East Thru Lane Instead Of The West Thru Lane When First Turning On To Pavilion Center (When He Observed Dr. Khiabani Cornering)

Hubbard saw and slowly followed Dr. Khiabani down Charleston without passing him. Hubbard turned into the right travel lane on Pavilion Center after Dr. Khiabani turned onto Pavilion Center. (TT 3/1, 139:16-21; Q. So you -- you did observe the bicyclist turn south onto

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southbound Pavilion Center? A. Yes. Q. After he turned right, or southbound, did you turn right? A. Correct., 140:3-9; 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.", 178:21-23; "Q. All right. Now, as you turn the corner and the bicycle is out in front of you, you saw it; right? A. Correct.")

Hubbard could have taken the left thru lane on Pavilion Center instead of the right thru lane. The jury could reasonably conclude that Hubbard would have done so if adequately warned because this would have eliminated any potential for adverse interaction with the bicyclist that he saw in front of him. If Hubbard had taken the left turn lane when entering Pavilion Center and thereby "acted upon" the warning, the accident would not have occurred. MCI focuses solely on the last minute vehicle placement and ignores the likelihood that a well-informed driver would have taken the safer of two travel lanes at the outset.

2. Hubbard Could Have "Acted In Accordance With The Warning" By Continuing To Follow Dr. Khiabani Down Pavilion Center Without Passing (Just As Hubbard Did On Charleston)

If warned of the serious aerodynamic flaw of the J4500 compared to buses with safer streamlined features (i.e., the J4500's dangerous 20 pound pulling force compared to no pull force in safe buses), the jury could reasonably have concluded that Hubbard would have continued to slowly follow the doctor down Pavilion Center without passing. Hubbard did in fact follow Dr. Khiabani slowly down Charleston; suggesting that Hubbard would have continued to do so if warned of the J4500's extreme pulling danger. If Hubbard did not pass Dr. Khiabani, there would have been no accident.

3. Hubbard Could Have "Acted In Accordance With The Warning" By Giving The Bicycle Lane Wider Berth On Pavilion Center

If warned of the aerodynamic problems of the J4500 compared to buses with safer streamlining, Hubbard could have moved to the extreme east of the right thru lane (if he still took the right thru lane instead of the left thru lane) to create more distance between the bus and the bike lane. The Red Rock video shows the J4500 in the middle of the right thru lane -- not

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hugging the east side of the right thru lane. The jury could reasonably conclude that Hubbard could have "acted in accordance with the warning" by moving to the east side of the right thru lane. Again, this would have avoided the accident. For the foregoing reasons, there were multiple actions that Hubbard could have taken that would have resulted in no accident if Hubbard had been adequately warned of the aerodynamic danger.

C. The Court Correctly Excluded MCI's Warnings Expert From Discussing Nevada Driving Statutes

1. MCI Did Not Offer Any Evidence Either That MCI Forecast The Yet Enacted Nevada Statute And/Or That The 2011 Nevada Statute Was The Reason That MCI Did Not Provide A Warning When It Sold The Bus In 2007

MCI makes the fanciful claim that MCI did not provide a warning of the aerodynamic hazard because MCI gave "appropriate consideration of **existing law** when selecting issues about which to warn." (MCI Mot. LNT, 7:4-5) (Bold added) Likewise, MCI proclaims that "[i]n determining whether to issue a warning, it is appropriate for a manufacturer to consider what conduct is **already illegal**" and that "it is reasonable for a manufacturer to consider what conduct is **already against the law**." (MCI Mot. LNT, 8:4-5; 8:14-15) (Bold added) Finally, MCI admits that Dr. Krauss' proposed opinion regarding Nevada law was tendered entirely upon the theory that the manufacturer did not provide a warning because of existing Nevada law:

> Dr. Krauss' opinion was not based on or about whether Dr. [sic] Hubbard was negligent. Rather, his opinion was about what a manufacturer thinks when deciding to issue a warning. (MCI Mot. LNT, 7:22-24)

This assertion that MCI did not provide a warning because of the "existing law" in Nevada regarding the 3 foot rule cannot withstand the slightest scrutiny.

MCI sold the bus on September 4, 2007. (Tr. Ex. 128) NRS 484B.270 was passed by the legislature in May 2011 -- almost 4 years after the bus was sold. Unless Nostradamus was an MCI employee in 2007, there is no possible claim that MCI could have foreseen that the Nevada legislature was going to enact a new law creating a 3 foot rule when passing bikes in 2011 that would obviate the need for MCI to issue a warning.

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No MCI employee testified that this was the reason that MCI did not provide warning of the aerodynamic hazard. To the contrary, Hoogestraat was tendered as the 30(b)(6) witness on the following subject:

> 21. The methods used by MCI to reduce, mitigate, or eliminate identified hazards for all buses provided by MCI . . . .

Neither Hoogestraat nor any other employee testified that MCI's failure to provide any warning was motivated about the possibility that the Nevada legislature would enact a 3 foot rule 4 years after the bus was sold. For these reasons, MCI's claim that MCI decided not to issue a warning in 2007 because MCI somehow predicted that Nevada would enact NRS 484B.270 in 2011 is utter hogwash. Because this was the supposed foundation for the Krauss "opinion" that a warning was not needed because of "existing" Nevada law, Krauss testimony was properly excluded.

2. The Bus Driver And Bus Safety Analyst Both Testified That They Did Not Know About The Nevada Statute Until After The Accident

Assuming arguendo that the Nevada law had been enacted in 2007 and the bus sold in 2011 the opposite of the actual facts and that, in addition, MCI did in fact prove that it did not give a warning because MCI knew of NRS 484B.270, Krauss "opinion" was still inadmissible because the bus driver and bus safety analyst for the bus company did not know about the Nevada law. Because of this lack of knowledge, a warning about the extreme hazard of the bus (i.e., the 20 pound pulling force when passing) was essential.

When deposed, bus driver Hubbard said that he was not aware of NRS 484B.270 until after the accident. (Ex. 3; Hubbard Dep., 119:11-13; "Prior to Monday of this week [i.e., September 18, 2017], did you know that this was the law in the state of Nevada? A. No, sir, I did not.") Likewise, the safety analyst at the bus company was also unaware of NRS 484B.270 until after the accident. (Ex. 4; Bartlett Dep., 51:16-20; "Q. You didn't know about the law? A. No, sir. Q. And you're the director of training and risk management? A. That's correct.")

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Plaintiffs explicitly pointed out in the oral argument regarding the limits to the Krauss testimony the fact that Hubbard did not know about the 3 foot law gutted the assumption upon which Krauss was basing his proposed opinion:

> MR. KEMP: You know, we excluded the evidence that Hubbard did not know about the 3-foot law. He testified that he did not know about the 3-foot law. So this is really his [Krauss's] assumption that drivers do know about the 3-foot law and the drivers do try to maintain a 3-foot separation.
>
> And the only reason to try to get this in is for negligence. If he [Krauss] was going to come on and say, "Gee, I know Mr. Hubbard testified explicitly that he would have heeded a warning," well, I don't think he would have heeded a warning for X, Y, or Z reason, I don't have any problem with that.
>
> But, here, an attempt to say what generic drivers know and do with bicycles because they can't do Hubbard, that's just -- goes into training, goes into driver negligence, goes into the 3-foot law. It's -- it's not an appropriate area, Your Honor. It's just an attempt to try to get this contributory negligence idea rolling. (3/19 TT, 16:15 to 17:8)

Therefore, a second reason to exclude any Krauss testimony that a warning was not needed because of the purported knowledge of the bus driver about the 3 foot rule was that Hubbard did not know about the rule -- making a warning from MCI vital.

3. MCI First Asserted That The Nevada Statute Did Not Apply Because There Was A Bike Lane

While the motion for limited new trial contends that NRS 484B.270 applies and was violated, MCI trial counsel admitted to the Court that "there is an interpretation of the statute" that it did not apply because:

> MR. ROBERTS: We're not talking about the portion of Nevada law that would require him to change lanes, which he [Hubbard] apparently violated, **although there is an interpretation of the statute that he didn't have to change lanes because the bicycle was not occupying his lane but a bicycle lane**, and, therefore, he was already in the next lane. (3/14 TT 9:24 to 10:5) (Bold added)

The Court properly rejected MCI's demand that its expert be allowed to parade a criminal statute before the jury that MCI itself concedes might not apply.

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4. The Argument That Krauss Could Opine That Nevada Law Set Forth A 3 Foot Rule To Rebut Plaintiffs' Expert Opinion That A 3 Foot Air Blast Warning Was Required Fails At The Outset Because Plaintiffs' Experts Did Not Render This Opinion

MCI tried to sneak in the Krauss testimony that Nevada law required 3 foot separation by arguing that it was needed to rebut the testimony by Plaintiffs' warning expert that MCI should have warned that the air blast extended 3 feet:

> MR. ROBERTS: In summary, his [Krauss's] opinion is that, based on the experts for the plaintiffs, the danger is within 3 feet of the bus. So while their expert offers no suggestion on what the appropriate warning would be, he [Krauss] surmised that the -- the most logical warning would be to stay more than 3 feet away, pedestrians and bicyclists; in this case, a bicyclist.
>
> So his opinion in there's already a Nevada law that requires bus drivers and all drivers to stay 3 feet away from a bicyclist. So, therefore, the most appropriate warning that would be given would be redundant and unnecessary and not even as effective because laws with criminal penalties are known to be much more effective than manufacturers' warnings.
>
> Therefore, any warning by MCI would be redundant, unnecessary, and less effective than the law already in place. And they have objected to -- to that testimony. (3/14 TT 6:22 to 7:14)

The temporal obstacle in this argument is addressed above, i.e., the bus was sold without a warning in 2007 and the statute was not enacted until 4 years later in 2011.

The second flaw is that Plaintiffs' warning expert (Cunitz) did not propose that the MCI warning be that the bus be driven 3 feet from bikes -- as MCI falsely asserted -- so there was no warning "opinion" or "surmise" for MCI warning expert Krauss to counter with the proposed testimony about the Nevada 3 foot law:

> MR. KEMP: First of all, as Mr. Roberts accurately said, our expert did not give an opinion that the warning should be that they should stay 3 feet away. That was not the testimony by our expert.
>
> Our expert merely said that they should give some kind of warning of the air blast, not that it should be 1 feet away, not that it should be 3 feet away, not that it should be 5 feet away, just a warning of the air blast. Mr. Roberts has constructed this 3-foot thing solely out of thin air so he can try to violate the Court's motion in limine.
>
> He wants to get this expert to testify that the bus driver was negligent because either he didn't know or didn't comply with Nevada law that he [Roberts] says has criminal penalties requiring 3 feet clearance. So, clearly, what they're trying to do is violate motion in limine No. 1 on contributory negligence. And this expert's [Krauss] report is replete with those kind of statements. (3/14 TT 7:19 to 8:12)

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Because there was no 3 foot warning opinion to rebut, there was no basis for Krauss to refer to the Nevada 3 foot law to rebut such warning.

After Plaintiffs' pointed out that Krauss could not be rebutting Cunitz opinion regarding a 3 foot warning because Cunitz did not give one, MCI changed gears and said that Krauss (not Plaintiffs' warning expert Cunitz) had determined that a "maintain 3 feet" warning was "the most appropriate warning" and that this warning was not required because NRS 484B.270 already existed:

> MR. ROBERTS: We're saying that the most appropriate warning here -- which I didn't make up; this was my expert's opinion -- that, based on his review of their experts, the most appropriate warning to give would be maintain 3 feet, **and there's already a law**. (3/14 TT 14:19 to 24) (Bold added)

There are 3 fundamental flaws to this contrived argument that MCI's warning expert could create his own 3 foot warning that was not advocated by Plaintiffs and then be allowed to criticize his own concocted warning as not needed because "there's already a law." First, the temporal problem: the law was enacted in 2011 and the bus was sold in 2007 -- there can never be a valid argument that "there's already a law" on 3 foot separation and that this was why MCI did not provide a warning. Second, MCI is partially conceding warning liability where it is uncontested that MCI gave no warning whatsoever and its warning expert believes, according to Mr. Roberts, that "the most appropriate warning to give would be maintain 3 feet . . . ." (3/14 TT 14:23) Third, the admission that MCI's proposed Krauss testimony on the 3 foot law was needed to rebut Krauss's own contrived opinion on "the most appropriate warning" -- not Plaintiffs opinion -- demonstrates in full that MCI was simply ginning up excuses to violate the ruling on Motion In Limine No. 1.

Finally, in his expert report, Krauss stated that the law already established the 3 foot rule and that this is why a 3 foot warning was not needed -- Krauss did not attempt to concoct either an opinion from Plaintiffs' expert or "the most appropriate warning" by himself to rebut. This was a spurious argument by MCI to attempt to insert the 3 foot law into the case to circumvent the ruling on Motion In Limine No. 1:

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> MR. CHRISTIANSEN: And, Your Honor, while the Court is considering this, you may just want to understand this, you may just want to understand this was his answer, Mr. Krauss's answer, in his deposition. **It's not that he got it from our expert**; he says the laws, the rules, the training already establish the quote/unquote corrective behavior that would be prescribed by the warning. That's at page 30 of his deposition. So he doesn't say, "I got this from plaintiffs' experts"; he says, "I got it from the law." (3/14 TT 19:14-23) (Bold added)

Plaintiffs submit that the varied disingenuous reasons that MCI offered to get Mr. Krauss to testify that Hubbard violated the 3 foot law were pretextual and unconvincing.

4. The Court Properly Determined That The Prejudice Of Admitting Testimony About The 3 Foot Law Was Outweighed By Any Probative Value

MCI's proposal to have Krauss testify that MCI did not provide a warning in 2007 because of the 3 foot requirement in NRS 484B.2702 (enacted in 2011) would have allowed MCI to establish that the bus driver was negligent per se for violating such law. But such third party negligence is not a defense in a product liability; as the Court ruled in granting Motion in Limine No. 1. In other words, MCI was attempting to introduce a Nevada law and violation thereof at the end of the trial that had been precluded by the Court. Worse, as set forth above, MCI's primary rationale for the Krauss NRS 484B.2702 opinion, i.e., that any warning by MCI would be redundant with Nevada law is temporally flawed. MCI can never honestly assert that MCI did not give a warning in 2007 because MCI foresaw that Nevada law would change in 2011.

Under the foregoing circumstances, the Court properly determined that the prejudice of admitting such testimony was outweighed by potential probative value:

> THE COURT: All right. I have thoroughly reviewed the motions, objections, conversations that we had a while ago concerning Dr. Krauss's testimony. And I have -- I'm going to go into -- okay.
>
> With respect for NRS 484B.270 and 211 -- wait 484B.270. Okay. So here's my analysis: This is a strict liability case. And, as stated in the motion in limine, driver negligence is foreseeable and therefore is irrelevant in a strict liability case. Here, mention of law that the driver, Mr. Hubbard, was required to follow it necessarily raises, in this Court's view, the question in the jury's mind as to whether he was negligent.

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Thus, number one, mentioning the law at all is highly prejudicial.

Two, with respect to probative value, when Mr. Hubbard has said is -- he is not aware of the law, then the expert's conclusion would be wrong because it is based upon the assumption that the driver knows the law and that he is not -- the case -- that is not the case here.

Three, these issues -- concerning all the above issues, the probative value is substantially outweighed by the risk of unfair prejudice. Dr. Krauss cannot mention the existence of the statute or any conclusion based upon the statute; however, Dr. Krauss can give opinion or discuss 3 feet is a safe distance based upon his review of plaintiffs' experts.

Now --

MR. ROBERTS: Your Honor, for -- on a point of clarification, can he testify that -- can he say that Mr. Hubbard said that he was attempting to maintain a 3- or 4-foot separation and, therefore, any warning to maintain at least 3 feet would be redundant of what he was already attempting to do?

THE COURT: No, I think that opens the door to what -- what I just enunciated, Mr. Roberts. And --

MR. ROBERTS: Well, I believe eliminating the law and what Mr. Hubbard said he was trying to do eliminates his opinion on warning and leaves us with no warnings opinion, Your Honor.

THE COURT: There-s more with Mr. -- with Dr. Krauss. So -- so --

MR. ROBERTS: Okay.

THE COURT: Let's see. Perhaps in a later -- I think I -- I -- if I'm not mistaken, I think I discuss that afterwards. Okay. So -- so Dr. Krauss can give opinions or discuss 3 feet as a safe distance based upon his review of the plaintiffs' experts. (3/14/18 TT 52:18 to 54:17)

The Court also allowed Dr. Krauss to give the ultimate opinion that MCI sought, i.e., that he did not think a warning would be either necessary or effective but only precluded Dr. Krauss from discussing NRS 484B.270:

MR. ROBERTS: And just, again, clarification, the Court's excluded two of the more significant aspects of why he rendered his warnings opinion. Would he be allowed to just say "I don't believe a warning in this case would be either necessary or effective" and not give the bases for his opinions?

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> And then I'm concerned that he gives his general opinions on his -- on -- on the subjects the Court's allowing, but if they then cross-examine him, "Well, you opinion is inconsistent with this witness, isn't it? What's your explanation for that?"
>
> I mean -- and if he says, "Well, but that -- that witness's opinion doesn't comport with the physical evidence," is he allowed to say it if they elicit it on cross?
>
> THE COURT: No, if the plaintiffs open the door on cross- examination to certain things, then the witness can testify to it. (3/14 TT 63:1 to 64:8)

When he testified, Dr. Krauss did opine that the warning was not needed and would not be effective and that "it's unclear that an instruction to stay more than 3 feet away would change what drivers are already trying to do":

> Q. Okay. What's your high-level opinion here?
> A. Sure. Any suggestion that warnings from MCI would have changed the outcome of this accident is baseless and misguided.
> Q. Okay. Can you explain that to the jury.
> A. Sure. So this largely goes back to what I was saying before, is that, first of all, if you -- and I guess I'll sort of go through -- well, I'll go through the bullets here. But first of all, plaintiffs' expert, Dr. Breidenthal, characterized the air blast hazard as effectively being with 3 feet.
>
> There's no evidence this adds anything to what drivers already do; right? So it's not like drivers are trying to cut is as close as they can to bikes. It's unclear that an instruction to stay more than 3 feet away would change what drivers are already trying to do. (3/19 TT 83:21 to 84:15)

In addition to being allowed to give this opinion that a warning was not needed because "[t]here's no evidence this adds anything to what drivers already do; right?", , the summary of the Krauss opinion set forth above was admitted and given to the jury as an exhibit. (MCI Ex. 579) Plaintiffs have attached the Krauss slide introduced by MCI hereto for the convenience of the Court. (Ex. 5)

5. Jury Instruction 33 Would Not Have Cured The Prejudice Of Allowing Krauss To Discuss NRS 484B.270

As set forth above, the Court determined that allowing Dr. Krauss to discuss NRS 484B.270 and opine that the driver committed a criminal act in not following it would be extremely prejudicial. (3/14 TT 63:1 to 64:8; "THE COURT: Here, mention of law that the driver, Mr. Hubbard, was required to follow it necessarily raises, in this Court's view, the question in the jury's mind as to whether he was negligent. Thus, number one, mentioning the

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law at all is highly prejudicial). JI 33 would not have cured this prejudice by stating that driver negligence was not a defense because the jury would already be told by Kraus that Hubbard violated a criminal statute to keep 3 feet away and this is why a warning was not needed.

6. Jury Instruction 32 On Non-Delegation Was Properly Given

Plaintiffs proposed a non-delegation instruction[5] based upon Allison v. Merck, 110 Nev. 762, 878 P.2d 948, 959 (Nev. 1994) ("Since failure to give proper warnings, under all legal theories, renders a product `defective,' we conclude that although a manufacturer may decide to assign it duty to warn of the unsafeness of its product to others, a manufacturer cannot be relieved of ultimate responsibility for assuring that its unsafe product is dispensed with a proper warning.") The Allison case was explicitly referenced by the Court during this portion of the charging conference. (3/21 TT, 357:5-16)

Plaintiffs argued that a non-delegation instruction was particularly appropriate because MCI Vice President Couch said that the Nevada Department of Motor Vehicles should have given an air blast warning -- not MCI. (3/21 TT, 358:1-8) The Couch trial testimony unequivocally claimed that DMV should provide the air blast warning:

> A. Because, as I said earlier, **MCI is not the expert in how to train people, to train drivers that operate our vehicles. So what information they should get and shouldn't get is -- we leave it up to the government body that does that.**
> Q. Okay. And in this case the government body is the State of Nevada, right?
> A. It's the commercial -- whoever governs the commercial vehicle licensing.
> Q. The Nevada Department of Motor Vehicles?
> A. Okay.
> Q. So you think the Nevada Department of Motor Vehicles knows as much or more about air blasts or air turbulence arising from the operation of a J4500 as MCI does?
> A. I don't know. I don't know that. (3/5 TT 233:8-24) (Bold added)

This was the trial testimony that was played to the jury. MCI did not object to the testimony. (3/21 TT, 360:9-12)

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[5] JI 32 provides: "A manufacturer cannot delegate its ultimate responsibility for assuring that his product is dispensed with all proper warnings."

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MCI argued that, despite the Couch trial testimony, a non-delegative instruction was unwarranted because it was not "our theory" and would be "an inappropriate comment on the evidence." (3/21 TT, 361:16-20) As to it not being MCI's "theory", Vice President Couch brought up the notion that it was the government's responsibility to warn of the air blast danger -- it was not introduced by counsel for Plaintiffs. In the motion, MCI likewise says that "MCI never introduced any evidence that it was trying to `delegate' that duty to others." (Mot. LNT, 11:27-28) While Plaintiffs played Couch in their case in chief, Couch was clearly the genesis of the DMV delegation theory. For these reasons, the non-delegation instruction was not only appropriate -- it was essential to short-circuit MCI's attempt to foist its duty to warn off on the Nevada DMV.

D. MCI Can Not Claim That There Is Newly Discovered Evidence Because MCI Did Not Consummate Appropriate Discovery

MCI's Mot. LNT repeats verbatim the argument made in its Motion For Limited Post-Trial Discovery. Plaintiffs' incorporate by reference their opposition thereto. The Court rejected MCI's argument in its lengthy May 23, 2018 Order. More specifically, the Court reasoned as follows:

> A new trial based on new evidence is only feasible if the party's "substantial rights" were materially affected due to the discovery of evidence "which the party could not, with reasonable diligence, have discovered and produced at the trial." This requirement implicitly supports the policy of finality of judgments and respect for the value of a jury's time and effort.
>
> . . . .
>
> However, under the NRCP 59 standard, the question is not whether Defendant had asked for this specific information that it now seeks, but rather whether Defendant could have uncovered these facts in the course or reasonably diligent discovery. Thus, the issue for the Court would be whether reasonably diligent discovery could have led to disclosure of the sought after information, and whether Defendant failed to conduct this reasonably diligent discovery.
>
> . . . .
>
> Knowing that Dr. Khiabani's current and future economic well-being would be a vital aspect for litigation, it would be reasonably diligent to pursue discovery of every fact that would enable the parties to accurately predict what the Plaintiffs' actual loss of support would be. This would include, at least, seeking to determine the specific terms of Dr. Khiabani's employment contract, how long the contract was going to remain in effect had Dr. Khiabani not passed away, whether the contract would have been renewed, and whether this salary or benefits would be likely to

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> change over the remainder of his foreseeable employment. Further, any inquiry into these basic facts sought from Dr. Khiabani's employer could have, and most certainly would have, produced either the very information Defendant now seeks, or a more general response that would be sufficient to spur the Defendant to investigate the issue, such as a response that Dr. Khiabani's contract would not have been renewed.
> However, Defendant here evidently did not pursue any discovery on this topic.
>
> . . . .
>
> While the above is sufficient for the Court to find a lack of diligence, the conclusion is supported by the fact that Plaintiffs provided to Defendant an authorization to obtain Dr. Khiabani's employment records on July 26, 2017, but evidently Defendant never followed through on actually requesting the very information that it now seeks to obtain. Moreover, Defendant evidently has no explanation for why this information was not actually sought after the authorization was given.
>
> . . . .
>
> However, every were this discovery allowed, the Court would not grant a motion for new trial based on "newly discovered evidence," because Defendant could have, with reasonable diligence, unearthed this evidence during the pendency of discovery.

(Ex. 6; May 23, 2018 Order) This is the law of the case. There is no need to gild the lilly. The Court should adopt the same reasoning previously applied to the exact same argument.

E. Theoretical Future Income Taxes Are Inadmissible To Reduce Future Wage Loss

1. A Majority Of Courts Have Held That Evidence Of After-Tax Income Should Be Precluded In Wrongful Death Cases

The majority rule, followed in Nevada, is that future tax income should not be considered when calculating future earnings in a wrongful death case.[6] New York's High Court

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[6] Hoyal v. Pioneer Sand Co., Inc., 188 P.3d 716, 719 (Colo Sup. Ct. 2008) ("We agree with jurisdictions that do not include the effect of future income taxes in calculating economic damages in wrongful death and personal injury actions."); Spencer v. A-1 Crane Service, Inc., 880 S.W.2d 938, 942 (Tenn. Sup. Ct. 1994) (discussing and rejecting minority rule adopted in Liepelt in favor of majority rule; reasoning that "[t]hree primary reasons have been advanced to support the majority rule: first, requiring a nontaxability instruction would open a `Pandora's box,' requiring charges to the jury on a variety of matters; second, such an instruction requires a court to assume that jurors will not confine themselves to the evidence or the instructions given; and third, a nontaxability instruction injects an extraneous collateral issue into jury deliberations, potentially leading a jury into confusion, speculation and conjecture over the effect of taxes or lack thereof."); Klawonn v. Mitchell, 105 Ill.2d 450, 475 N.E.2d 857 (Ill. Sup. Ct. 1985) (following majority rule excluding evidence of future income taxes and expressly rejecting the argument that MCI made in the present case that the minority rule adopted by the

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cogently explained the rationale for precluding evidence of after-tax income to avoid "`turning every negligence case into a trial [at least] of the future federal income tax structure'" involving `a parade of tax experts`":

> No crystal ball is available to juries to overcome the inevitable speculation concerning future tax status of an individual or future tax law itself. Trial strategies and tactics in wrongful death actions should not be allowed to deteriorate into battles between a new wave of experts consisting of accountants and economists in the interest of mathematical purity and of rigid logic over less precise common sense. Countless numbers of unknown and unpredictable variables for tax purposes alone include, as mere examples, future marital and family status, changes in rates, exemption and deduction provisions of overlapping tax codes. All sides to this issue would no doubt agree at least that this could produce much guesswork. So, a majority of jurisdictions have wisely stayed with a rule precluding evidence of after-tax income on the earnings damage issue to avoid "turning every negligence case into a trial [at least] of the future federal income tax structure" involving "a parade of tax experts." We are persuaded that the gross income standard was correctly applied with respect to calculations of lost wages in this case.

Johnson v. Manhattan & Bronx Surface Transit Operating Auth., 71 N.Y.2d 198, 204-05, 519 N.E.2d 329 (1988)

Nevada follows the majority rule except in very special circumstances "when the likelihood that the jury will consider tax consequences is magnified by discussion of tax-related issues during the trial." Otis Elevator Co. v. Reid, 101 Nev. 515, 706 P.2d 1378, 1382 (Nev. 1985) Of interest, the Reid Court explicitly discussed the minority rule in the United States Supreme Court decision of Liepelt involving an FELA case and rejected this rule for Nevada. Liepelt is the principal case relied upon by MCI. (Mot. LNT, 29:8-11)

U.S. Supreme Court in FELA cases required such instruction in a state court negligence case; "[a]lthough Liepelt has established that in FELA actions juries, upon request, must be instructed that any damages awarded are not subject to taxation, this case involves purely State law, and }fs24 Liepelt is not directly controlling."); Hinzman v. Palmanteer, 81 Wash.2d 327, 501 P.2d 1228, 1232 (Wash. Sup. Ct. 1972) (en banc) ("The majority of the courts considering items to be deducted from the decedent's gross income and fixing damages for destruction of his earning capacity have held that income tax on those probably future earnings should not be taken into consideration."); Cox v. Superior Court, 120 Cal.Rptr.2d 45, 47, 98 Cal.App.4th 670 (Ct.App.2nd 2002) (following "the settled law in California that the trier of fact is not to consider evidence of tax considerations in determining damage awards.")

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Note also that the jury award for loss of support in this case was relatively small, i.e., $1 Million for Aria, $1.2 Million for Keon and $500,000 for Katy. Pre-verdict, MCI told the Court that the loss of support award could balloon to $15 Million if an inappropriate Liepelt instruction were not given. (3/20 216:24 to 217:2; "if the jury isn't instructed on taxes and awarded 15 million, they will have awarded 5 million more than it would have been possible for Dr. Khiabani to pay them [the children] if he had paid his taxes.") Where the jury actually awarded only $2.7 million (far less than the $10 million MCI concedes was available in probable support) the dire predictions made by MCI were proven false. Regardless, the requested instruction was not appropriate under Nevada law following the majority rule.

2. The Court Correctly Concluded That The Probative Value (If Any) Of Taxation Evidence Was Substantially Outweighed By The Prejudice

In addition to following the majority rule, the Court correctly determined that "the probative value is substantially outweighed by the risk of unfair prejudice and confusing the jury with respect to the taxation issue." (3/21, 333:25 to 334:2) Plaintiffs submit that this was a wise decision given the resulting "parade of tax experts" and "Pandora's box" that various High Courts predict would occur if the minority rule were adopted.

II. NEW TRIAL OPPOSITION CONCLUSION

None of the four principal MCI arguments for new trial have merit. First, the jury was properly instructed on what Plaintiffs had to proof to establish failure to warn causation in JI 31. JI 31 was first offered by MCI and then changed from "heeded" to "acted in accordance" by MCI. MCI cannot and does not argue that the jury was not properly instructed on causation for the failure to warn theory. Instead, MCI argues that the verdict form should have included "the next question: `If an adequate warning were heeded, would Dr. Khiabani's death been avoided [sic]." (Mot. LNT, 6:4-6) First, MCI never offered a verdict form with this "next question." If MCI had done so, it was not required because it repeated JI 31. Detailed verdict forms are not required under the Nevada caselaw -- which merely suggests that the District Court require the jury to identify which of multiple theories that it found Plaintiff prevailed. The verdict form herein clearly distinguished between the multiple liability theories.

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Instead of offering the "next question" that MCI discusses in the motion, the verdict form tendered by MCI contained a "legal cause" question from 31: 1 (i.e., "legal cause" was defined as a substantial factor in JI 24). This would have been inappropriate for multiple reasons. First, there is no logic to prioritizing "legal cause" in JI 24 over the warning causation instruction (JI 31) and doing so would have been potentially confusing. Second, there is no requirement to add a special causation inquiry to the verdict form under Nevada caselaw. Third, MCI vehemently objected to JI 24 in the first place and cannot now claim that the verdict form was flawed because the warnings determination did not include the substantial factor instruction that MCI argued was not appropriate.

MCI's second principal argument is that the Court erred in precluding MCI's warning expert from discussing NRS 484B.270 and explicitly or impliedly chastising bus driver Hubbard for violating this Nevada law. The "hook" upon which MCI bases its claim that this opinion was relevant is MCI's assertion that MCI did not provide a warning of the aerodynamic hazard because MCI gave "appropriate consideration of **existing law** when selecting issues about which to warn." (MCI Mot. LNT, 7:4-5) (Bold added) Likewise, MCI says that "[i]n determining whether to issue a warning, it is appropriate for a manufacturer to consider what conduct is **already illegal**" and that "it is reasonable for a manufacturer to consider what conduct is **already against the law.**" (MCI Mot. LNT, 8:4-5; 8:14-15) It was temporally impossible for MCI to prove this nexus because the bus was sold in 2007 and the Nevada law was not enacted until 2011 -- gutting any claim that MCI knew of and relied upon "existing law when selecting issues about which to warn." (MCI Mot. LNT, 7:4-5) There are a multiple other reasons why the NRS 484B.270 opinion was properly excluded and the Court correctly ruled that the probative value, if any, was outweighed by the prejudice of allowing MCI to flaunt the ruling on Motion in Limine No. 1.

MCI's third argument was correctly resolved in the Court's lengthy May 23, 2018 order. Plaintiffs only comment thereto is that MCI still has not provided any reason why MCI did not forward the employment release executed by Plaintiffs on July 27, 2017. There is no valid argument that the supposedly "new" evidence could not have been obtained by sending the

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release that MCI had in its hand at the outset of the case. MCI's argument that "discovery was so truncated here that the parties did not have the luxury of time to turn over every conceivable stone" fails at the outset because MCI had the executed employment release in its possession for a full 7 and 1/2 months before trial. It was not "unmanageable" for MCI to forward the authorization (as MCI suggests). Mot. LNT, 23:23. The Court correctly points out that MCI "evidently has no explanation for why this information was not actually sought after the authorization was given."

MCI's fourth and last argument is that MCI should have been allowed to present a theoretical discussion about the taxes that Dr. Khiabani might have paid in the decades after his death in violation of Otis Elevator Co. v. Reid, 101 Nev. 515, 706 P.2d 1378, 1382 (Nev. 1985) and the majority rule adopted by dozens of other states. Otis precludes such speculative forays into future tax considerations and, in addition, the Court correctly determined that the prejudice from such an undertaking would far outweigh its probative value.

OPPOSITION TO RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

NOW APPEAR Plaintiffs, by and through counsel of record, and hereby file this opposition to MCI's Renewed Motion For JNOV (hereinafter 50(b) motion or Mot. 50(b)) on the following grounds: (1) the Court "must view all inferences in favor" of Plaintiffs in resolving a Rule 50 motion and MCI cannot raise arguments in a 50(b) motion that MCI did not raise in MCI's oral 50(a) motion on March 22, 2018 -- eliminating 5 new arguments that MCI has attempted to surreptitiously include in the 50(b) motion; (2) MCI's argument that Hubbard saw the doctor "too late" errs because there were multiple actions that Hubbard could have taken to heed (i.e., "act in accordance") a warning that would have prevented the accident; (3) MCI's nonpreserved argument that the aerodynamic hazard of the 20 pound pulling force generated by a J4500 was "open and obvious" errs; (4) Plaintiffs were not required either to design a warning or advocate a warning delivery mechanism; (5) MCI's nonpreserved argument that expert opinion is needed to support failure to warn liability or that the Cunitz opinion lacked foundation errs; (6) there is no "inconsistency" in the jury determination on the faulty aerodynamic design and the jury determination on warning because the jury could have (and

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did) decide the aerodynamic design claim on the basis of unreasonable dangerousness -- not causation; (7) strict liability applies to third parties injured by products and to product users; and (8) wrongful death victims can assert strict liability claims.

ARGUMENT

A. A Rule 50 Motion Can Only Be Granted If Plaintiff Has Not Presented Sufficient Evidence To Obtain Relief And The Court "Must View All Inferences In Favor Of The Nonmoving Party"

Nelson v. Heer, 123 Nev. 217, 163 P.2d 420 (Nev. 2007) provides as follows:

> 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. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion or judgment as a matter of law, the district court must view the evidence and all inferences in favor on the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party. This court applies the same standard on reviews that is used by the district court.
>
> If the district court does not grant a motion for judgment as a matter of law that is made at the close of all the evidence, then NRCP 50(b) provides that a "movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment and may alternatively request a new trial or join a motion for new trial under Rule 59.) A renewed motion for judgment as a matter of law under NRCP 50(b) is subject to the same standard as a motion filed at the close of evidence under NRCP 50(a).

The key point is that this Court "must view all inferences in favor of the nonmoving party [here Plaintiffs]" and, after doing so, determine if there is sufficient evidence to support the claims made.

B. A "Renewed" Rule 50(b) Motion Can Not Raise Issues That Were Not In The Rule 50(a) Motion -- MCI Is Precluded From Now Arguing 5 New Arguments For The First Time

MCI cannot raise issues in the "Renewed" Rule 50(b) motion that were not first raised in the Rule 50(a) motion filed at the close of evidence. Nelson v. Heer, 123 Nev. 217, 163 P.2d 420, 424 n. 9 (Nev. 2007) ("See NRCP 50 (indicating within the drafter's note to the 2004 amendment that a motion filed under subdivision (b) is the renewal of a motion filed under

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subdivision (a) and **must have been preceded** by a motion filed at the appropriate time under subdivision (a) (2)).") (Bold added)

Less than 2 years ago, the Nevada Supreme Court emphasized that a "district court should have denied the NRCP 50(b) motion for its procedural defect instead of addressing it on the merits" where arguments were not preserved in a 50(a) motion:

> Under NRCP 50(b), a party "may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of written notice of entry of judgment." **A party must make the same arguments in its pre-verdict NRCP 50(a) motion as it does in its post-verdict NRCP 50(b) motion.** See Price v. Sinnott, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969) (It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable. A party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it." (citations omitted). A pretrial motion for summary judgment is not a substitute for the NRCP 50(a) motion needed to preserve issues for review in a NRCP 50(b) renewed motion for judgment as a matter of law.

Zhang v. Barnes, 382 P.2d 878, (Nev 2016) (unpublished) (Bold added).

The Ninth Circuit has also stringently enforced the requirement that arguments must first be made in 50(a) motions to be presented:

> A Rule 50(b) motion for judgment as matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party must renew its motion under Rule 50(b). **Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion.** Thus, a party cannot properly "raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion." Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003) (citing Fed.R.Civ.P. 50 advisory committee's notes to the 1991 amendments ("A post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion."); Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990) ("[J]udgment notwithstanding the verdict] is improper is based upon grounds not alleged in a directed verdict [motion]." (brackets in original); see also Fed.R.Civ.P. 50 advisory committee's notes to the 2006 amendments ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."). See E.E.O.C. v. Go Daddy Software, Inc., 581 F.3d 951, 961 (9th Cir. 2009).

In the present case, MCI presented its Rule 50(a) argument orally the morning of March 22, 2018. The entire argument comprises 12 pages. (TT 3/22 12-24) MCI made the following

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arguments in this order: (1) strict liability is not available in wrongful death actions (3/22 12:24 to 20:4); (2) the evidence was insufficient to establish a product defect because "it was too late at that point for Mr. Hubbard to make an evasive maneuver" (3/22 20:5 to 22:9); (3) Plaintiffs did not propose language for a warning (3/22 22:10 to 22:20); (4) an S-1 Gard argument (3/22 22:21 to 23:10); and (5) strict liability does not extend to bystanders. (3/22 23).

Notably absent in the Rule 50(a) motion are (1) the new argument that "Hubbard did not testify about any particular warning or that a warning would have changed what he did" (Mot. 50(b), 4:24 to 5:6), (2) the new argument that Plaintiffs should have explained "how it [a warning] would have prevented Dr. Khiabani's death" (Mot. 50(b), 6:22 to 9:15 and 11:9 12:18)), (3) the new argument that Hubbard's heeding testimony "is insufficient to demonstrate causation" and that Hubbard "never testified that he would have done anything differently" (Mot. 50(b), 9:16), (4) the new "open and obvious" argument (Mot. 50(b), 10:10 to 11:8) and (5) the new attack on Cunitz (Mot. 50(b), 12:19 to 13:26)

Because the last 5 arguments were not made in the Rule 50(a) motion, they have not been preserved and should be summarily denied as procedurally improper. Plaintiffs have attached the entire transcript from the 50(a) hearing to demonstrate the pithy 50(a) arguments that were actually made compared to the new 50(b) arguments now made in a 20 page motion. (Ex. 7) MCI should not be allowed to ambush the Court with 5 new Rule 50 arguments.

C. MCI's Contention That Hubbard Could Not Have Acted Upon An Adequate Warning Because He Saw The Bike "Too Late" Errs Because There Were Multiple Ways Hubbard Could Have "Acted In Accordance" With A Warning And Avoided The Accident

MCI's jumbled warning causation argument first contends that Hubbard "did not see Dr. Khiabani until it was too late" to act in accordance with an adequate warning. (Mot. 50(b), 4:9-23; 9:2-4, "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.") This is the same "too late" argument made in the motion for new trial. (Mot. LNT, 5:16 to 6:7) As set forth in the opposition to new trial motion above, there are actually 3 different ways that Hubbard could have "acted in accordance" with the warning and prevented the accident: (1) taking the left thru

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lane when first turning on Pavilion Center; (2) continuing to follow the bike instead of passing the bike; or (3) hugging the east side of the right thru lane instead of driving in the middle of such lane. Because "all inferences" must be resolved in Plaintiffs' favor, it must be inferred that the jury decided causation based upon one or more of these scenarios to heed a warning.

D. MCI's Argument That There Was Insufficient Evidence That Hubbard Would Have Heeded The Warning Errs Because (1) MCI Failed To Raise This Argument In A Rule 50(a) Motion; or (2) MCI Proposes A Different Warning Causation Test Than Rivera

1. MCI Did Not Argue In Its Rule 50(a) Motion That There Was Insufficient Evidence To Prove That A Warning Would Have Altered Hubbard's Conduct

MCI now argues that "Mr. Hubbard's Consciousness of Safety Is Insufficient to Demonstrate Causation." (Mot. 50(b), 9:16 to 10:9) This is a brand new argument that was required to have been first raised in the 50(a) motion on March 22, 2018. [1] Because it was not made, it should be denied on procedural grounds.

2. MCI Proposes A Different Warning Causation Test Than Sims And Rivera

As discussed in n. 3 to the new trial opposition, the Nevada Supreme Court merely requires that Plaintiff prove that the warning would have been "heeded" and Sims held that proving historical compliance with warnings without more is evidence sufficient to prove

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[1] The only warning contention made in the 50(a) motion is the following pithy argument that an air blast warning was not required because NRS 484B.270 was a "law that would have told him to do exactly what the warning apparently would have told him to do":

> For the same reason, a warning about air blasts would have done no good. It would have misleadingly applied -- implied that buses, you know, cannot pass a cyclist safely within the designated bike lane, which is not -- which is not the case.
>
> And as there's no Keating [probably "heeding"] presumption, we do -- and I know this is an argument. **I'll just refer to the argument we made before about Mr. Hubbard having a law that would have told him to do exactly what the warning would have told him to do.**

(3/22/18, 21:25 to 22:9) (Bold added) Obviously, this is completely different than the new insufficiency of the evidence arguments focused on warnings to Hubbard that are made for the first time in the 50(b) motion.

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causation. Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) (Bold added), held that "the 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." MCI argues that there is a third and more demanding causation prong, i.e., that "the plaintiff must prove that the warning would have altered the instrumental party's conduct." (Mot. 50(b), 7:1-2) (Underline by MCI) Not only is this not required under Rivera, MCI proposes an impossible requirement because, since an adequate warning was not given, no failure to warn victim can conclusively prove what "would have" actually happened if a warning had theoretically been given. The warning victim can only prove that the warning would have been "heeded" or, in Rivera's language that, the warning "would have prompted plaintiff to take precautions to avoid the injury." And this is all that a plaintiff must prove.

MCI cites Riley v. American Honda Motor Co., Inc., 856 P.2d 196, 199 (Mont. 1993) [Mot. 50(b), 9:16 to 10:9] but fails to differentiate between the wishy washy causation testimony in the Riley case, where the product user testified that he "**might have** rode [sic] the motorcycle differently" if adequately warned of its propensity to wobble and the testimony herein where Hubbard stated that he would "**absolutely**" heed safety warnings. (3/1 TT 154:5-10; Q. Had you ever been trained as to 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**.") Testimony that Hubbard would have "absolutely" "heeded" an air blast warning is more than is required to prove causation. Again, Sims approved causation evidence that consisted only of historic compliance with warnings in general whereas the present case involves direct testimony from the user that he would "absolutely" have "heeded" the warning. Again, "the district court must view the evidence and all inferences in favor on the nonmoving party." Nelson v. Heer, 123 Nev. 217, 163 P.2d 420 (Nev. 2007). The foregoing evidence overwhelmingly establishes warning causation.

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D. The Aerodynamic Hazard Of A 20 Pound Pulling Force Was Not "Open and Obvious"

As noted in Section B above, MCI did not make an "open and obvious" argument in its 50(a) motion and is now precluded from making this argument. Assuming arguendo that this belated argument is allowed, as set forth above, the extreme hazard that required a warning in this case was that a J4500 traveling 25 mph produced 10 pounds of push force and 20 pounds of pull force when passing within 3 feet of a bicycle -- compared to an aerodynamically safe bus like the Mercedes Setra 500 that would only produce 3 pounds of push force and absolutely no pounds of pull force under like conditions. Not only was this hazard not "open and obvious", the various bus drivers that testified did not know anything whatsoever about air displacement generated by the J4500. For example, MCI salesman Dorr denied even knowing that a moving J4500 displaced air. (3/7 TT 202:24 to 203:5; Q. Okay. You don't know one way or the other whether it would cause air blasts or air displacement? A. No, I don't.) Hence, knowledge of air displacement in general is not "open and obvious" and knowledge of the "sinister" 20 pound pulling force was certainly not known to bus drivers like Hubbard.

E. Plaintiffs Are Not Required To Either Propose A Specific Warning Or Propose A Method Of Transmission

MCI's 50(b) argument that Plaintiffs did not propose a specific warning or warning transmission method fails for four reasons: (1) Nevada law does not require that Plaintiffs' propose a specific warning, especially in cases like the present where there was no warning whatsoever; (2) MCI did not propose a jury instruction requiring an alternative warning as an element of proof; (3) where there was no warning whatsoever, there is no basis for MCI to demand a more "adequate" alternative warning be tendered; and (4) MCI presented evidence and argued this precise issue (i.e., that Plaintiff did not draft a warning) to the jury but lost the failure to warning claim.

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1. Nevada Law Does Not Require That Plaintiffs Propose An Alternative Warning

No Nevada case has ever held that Plaintiffs must propose a specific warning -- especially where there is no warning whatsoever of the pertinent hazard. Instead, the seminal Nevada warnings case provides as follows:

> We therefore embrace the rule of law stated in the Pavlides instructions offered by appellants below, and hold that Nevada trial courts should advise juries that warnings in the context of products liability claims must be (1) designed to reasonably catch the consumer's attention, (2) that the language be comprehensible and give a fair indication of the specific risks attendant to use of the product, and (3) that warnings be of sufficient intensity justified by the magnitude of the risk.

Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 65 P.3d 245, 250 (2003) The Sea Ray Court did not hold or suggest in any way that the injured party had to provide an alternative warning as an element of proof. In fact, where there is no warning whatsoever, it automatically fails the Sea Ray test because, by definition, **if there is a complete absence of warnings** -- the warning cannot be designed to reasonably catch attention, the warning cannot have comprehensible language and the warning cannot be of sufficient intensity. Where there is no warning, the only question to be decided is whether there should have been a warning -- not the exact terminology that a warning should have used and/or how conspicuous it was required to be given the hazard involved.

In Rivera, the Court also focused on a "different warning" because there was a warning on cigarette packs -- but the smoker argued that it was not adequate. Rivera, 209 P.2d at 275 (stating plaintiff could prove that "a different warning would have altered the way the plaintiff used the product.") Where there is no warning in the first place, the prime inquiry is to warn or not -- as opposed to whether the language or placement of an existing warning is adequate. Numerous jurisdictions have held that an injured party is not required to prepare an alternative warning in a failure to warn case. The Missouri Supreme Court recently rejected the same attempt that MCI makes herein to add another element to warning liability that requires plaintiff to draft an adequate warning:

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> Ford does not cite any Missouri Law placing the burden on the plaintiff to propose the wording of an adequate warning to make a submissible case. While both Ford and the dissenting opinion note that Indiana apparently does place this burden on plaintiff, Indiana appears to be unique in this regard. Numerous jurisdictions follow the heeding presumption in failure to warn cases, not just Missouri and Indiana, **and no other state has been identified that requires proof of the specific language of an adequate warning as an element of plaintiff's claim**. Indeed Washington specifically provides that the plaintiff in a failure to warn case need not "prove the exact wording of an adequare warning." Ayers v. Johnson & Johnson B.aby Products Co., 59 Wash.App. 287, 797 P.2d 527, 531 (1990). The other cases cited by the dissent do not concern whether a plaintiff must propose specific alternative language for a warning, much less require plaintiff to do so, but rather discuss generally the type of issues that may be relevant in a failure to warn case, including the feasibility of giving a warning about the danger at issue. Missouri does not require a plaintiff to create an alternative design to prove a design defect claim; it is enough that plaintiff show that the design used was defective and unreasonably dangerous. Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 794 (Mo.App.2008) (plaintiff need not show what alternative design should be although defendant can show difficulties with alternative designs in defense). **This court rejects the suggestion that this concededly new element must be added to those required already under Missouri law to prove failure to warn.**

Moore v. Ford Motor Co., 332 S.W. 3D 749, 759-760 (MO Sup. Ct. 2011) Numerous other courts have held that plaintiffs need not craft a warning. Greiner v. Volkswagen, 540 F.2d 85, 93 n. 10 (3rd Cir. 1976) ("Nor do we find persuasive appellees' contention that, since the appellant failed to produce competent evidence on what an adequate warning would be in the circumstances of this case, she was not entitled to a no-warning charge. The appellees cite us no Pennsylvania precedent holding that the appellant had the burden of showing the particulars of proper warning.")

In Nevada, Plaintiffs are **not** required to provide proof of an alternative safe design in a design defect case. See Trejo v. Ford, 133 Nev. Adv. Op. 68, 402 P.2d 649, 654 (Nev. 2017) ("a plaintiff **may** choose to support their case" with evidence of an alternative design). (Bold added) The same rationale applies to the failure to warn claim and dictates that there is no requirement under Nevada law to propose an alternative warning. As explained in Ayers v. Johnson & Johnson Baby Products Co., 59 Wash.App. 287, 292-94, P.2d 527 (Wash. App. Ct.

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1990), aff'd, 117 Wash. 2d 747 818 P.2d 1337, 1342 (Wash. Sup. Ct. 1992)[2], different strict liability theories should have the same rules regarding proposed alternatives:

> Failure to warn liability and defective design liability are both created by RCW 7.72.030(1) and stand on the same footing. See Falk v. Keene Corp., 113 Wash.2d 645, 652,782 P.2d 974 (1989). Because plaintiffs in defective design cases are not required to show the existence of alternative safe designs (Couch v. Mine Safety Appliances Co., 107 Wash.2d 232, 239, 728 P.2d 585 (1986), it follows that the plaintiffs in a failure to warn case, involving identical liability principles, are not required to prove that a specific warning was required.

MCI provides no rationale for forcing injured victims to design warnings for manufactures and there is none. This is especially true in cases involving no warning whatsoever which renders the product defective. See Fyssakis v. Knight Equipment Corp., 18 Nev. 212, 214, 826 P.2d 570, 572 (Nev. 1992) ("Under Nevada law, a product must include a warning that adequately communicates the dangers that may result from its use or foreseeable misuse; otherwise, the product is defective."). There is no merit to MCI's underlying thesis that a product that is defective because it lacks a warning mysteriously becomes not defective because plaintiffs did not propose an alternative warning. MCI confuses the determination that a product is dangerous without warning to the mechanism (an adequate warning) to temper the danger. This Court should not defy the precedents of our High Court and hold that strict liability mandates that injured victims design and present alternative warnings.

2. Plaintiffs Are Not Required To Propose A Method To Transmit The Warning But Cunitz Set Forth Several Methods

There are multiple methods to transmit warnings that MCI could have used at its option. Most product manufacturers provide hazard information in an owner's manual that is distributed to purchasers. See, e.g., Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661, 665 (Nev. 1998) (analyzing the "adequacy of the warnings in the owner's manual" in an ATV accident).

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[2] The Washington Supreme Court explained why requiring alternative warnings is folly:

> "Moreover, requiring claimants in failure to warn cases to establish the exact wording of an alternative wording would impose too onerous a burden. The members of the jury might agree that a certain type of warning should have been provided, but they might not agree among themselves as to exactly how that warning should have been worded."

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A second warning method is to issue direct bulletins or circulars where the product is such that the manufacturer knows where it is located (such as MCI's knowledge of where the bus in this case was always headquartered) Jacobsen v. Manfredi by Manfredi, 100 Nev. 226, 679 P.2d 251, 254 (Nev. 1984) (analyzing a post-accident product label change with "stronger warnings **and a circular providing additional warnings information**.") (Bold added)

A third option is to put a sticker on the product itself or its packaging -- the classic example being the yellow and black warning stickers on appliances that Dr. Cunitz developed in the 1970s. See Robinson v. GGC, Inc., 107 Nev. 135, 808 P.2d 522, 524 (Nev. 1991) (analyzing "warning decals on the [box crushing] machine"); Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271 (Nev. 2009) (warnings on cigarette packaging). A warning sticker on a motor vehicle has been expressly approved as a viable warning mechanism by our Supreme Court. Jeep Corp. v. Murray, 101 Nev. 640, 708 P.2d 251, 301 (Nev. 1985) (approving admissibility of fact that manufacturer "sent [post-accident] warning stickers to all known owners of Jeep CJ-5 vehicles" discussing lack of occupant protection and possible loss of control from sharp turns)

A fourth option is to educate the sales staff and have them convey the warning at time of purchase either orally or in writing. In General Electric Company v. Bush, 88 Nev. 360, 369, 498 P.2d 366, 367 (1972), the defective product was a "giant vehicle specifically designed for use in open pit mining" and the strict liability failure to warn claim was based on the assertion that the manufacturer did not warn that rigging should be kept at a 45 degree angle. Our High Court held that proof that "[n]o rigging diagram or warning was given by any of the manufacturers" supported liability despite the fact that the rig assembly crew were "professionals" and explicitly rejected the manufacturer's argument that "such notice and warning is not required when the reassembly crew consists of professionals who not only know how to rig but also know the dangers attendant therewith." Id., 498 P.2d at 369.

A fifth option is to provide the warning in the sales documentation. Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 56 P.3d 245, 246 (Nev. 2003) ("Two warnings regarding carbon monoxide poisoning accompanied the sale of this type of boat in 1981, one written by ONAN,

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the generator manufacturer, and the other by the National Marine Manufacturers' Association (NMMA).") None of the foregoing Nevada cases held that the Plaintiff must go over and above the Searay requirements and prove the type specific of warning that a manufacturer should provide.[3]

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[3] MCI has cited 8 cases which MCI claims hold that warning claims must be dismissed absent a proposed alternative warning. (Mot. 50(b), 11:19 to 12:18) The truth is that not one single cited decision so holds and several actually say exactly the opposite. MCI first miscites two federal decisions applying Louisiana law where summary judgment motions were granted. Broussard v. Procter & Gamble Co., 463 F.Supp.2d 596, 609-610 (W.D. La. 2006) (Mot. 50(b), 11:17-24) did not hold that plaintiff must provide an alternative warning to prove a failure to warn case. The product labeling therein "expressly warns of the product's potential to cause skin irritations or burns" and the Broussard Court merely held that the plaintiff before it had not met the burden to oppose a summary judgment because "Plaintiffs have not offered evidence of what warning Procter & Gamble should have provided **or** how such a warning would have prevented Ms. Broussard's injuries." MCI next cites Thompson v. Nissan N. Am., Inc., 429 F.Supp.2d 759, 781 (E.D. La. 2006) (Mot. 50(b), 11:20-23), involving an automobile manual with an express warning on the hazard involved which both of Plaintiffs' experts stated that that were either not addressing or had no opinions regarding warnings. It was in this context that the Thompson Court said: "Plaintiffs have presented no evidence, from either of its experts Wallingford or Breen, of an inadequate warning, nor do they present any language of a proposed adequate warning." It is regrettable that MCI pretends that these cases reached the issue of whether an alternative warning is a required element of proof when they did not even discuss this question.

MCI then runs from Louisiana to New York; citing Derienzo v. Trek Bicycle Corp., 376 F.Supp.2d 537, 566 (S.D.N.Y. 2005), which MCI claims holds that "one element of a failure to warn claims" is a "proposed alternative warning." (Mot.50(a), 11:25-26) The truth is that the language cited by MCI is actually the Court's summary of **Defendants' assertions** that Plaintiff's expert was not qualified: "Defendant attacks Allen's qualifications, specifically claiming that his opinions are inadmissible because: . . . and (vi) Allen does not address the conspicuousness of Defendant's existing warning and offers no alternative." Id. It is not a holding by the Court that an alternative warning is an element of a failure to warn. In fact, the Derienzo Court held the exact opposite under New York law -- stating that a plaintiff was not required to show that an adequate warning would have prevented his injury because Defendant was required to rebut the inference that a warning would be effective. Id. ("Where the type of injury suffered by plaintiff is `exactly the kind of injury' that a warning might have prevented, rather than require the plaintiff to bring in more evidence to demonstrate that his case if of the ordinary kind, the law presumes normality and requires the defendant to bring in evidence tending to rebut the strong inference, arising from the accident, that defendant's negligence was in fact a but for cause of the plaintiff's injury."

The language MCI cites in Demaree v. Toyota Motor Corp., 37 F.Supp.2d 959, 967 (W.D. Ky. 1999) is dicta -- as evidenced by the Court's extensive discussion of whether a "general warning", a "specific warning", a "generic warning" or a "horn-specific warning"

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Although not required, there was some testimony by Dr. Cunitz about how a warning could theoretically be delivered in this case, i.e., training, a sticker or a label. (3/7 TT 101:3-7; Q. You think training was needed? A. That's one way to deliver a warning. Q. Okay. A. I -- you can deliver a warning with a sticker or any number of other ways; you know, with a label.") As set forth below, MCI contested the warning claim by arguing that no warning whatsoever was needed period since there was no warning. This case was not a debate about the adequacy of an existing warning or delivery mechanisms.

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would have been effective. No such discussion would have been required if the Court had actually held that Plaintiff's failure to offer an alternative warning was fatal -- as MCI pretends the Court held. White v. Caterpillar, Inc., 867 P.2d 100, 107 (Colo. Ct. App. 1993), focused on an "open and obvious" jury instruction -- not on whether an alternate warning was a required element of proof. Campbell v. Boston Scientific Corp., 882 F.3d 70 (4th Cir. 2018) is the Court of Appeals opinion that affirmed the failure to warn verdict against a drug manufacturer. The issue of whether an alternative warning was a required element of proof was **not** an issue on appeal -- instead the Court held that expert testimony is **not** required to prove a failure to warn claim. The quotation cited by MCI is from the district court opinion in Campbell v. Boston Scientific Corp., 2016 WL 5796906 (S.D. W. Va. Oct. 3, 2016) In that case, the District Court upheld a failure to warn verdict where proximate causation was established by a doctor testifying that he would not have prescribed a drug if he had been provided with a Material Safety Data Sheet ("MSDS") regarding one of the chemicals in the drug. **There was no alternative warning proposed or discussed in the case**. In short, Campbell actually held exactly the opposite of what MCI claims in that it found that a hazard set forth in an MSDS could prove proximate cause in a warnings case despite there being no alternative warning proposed.

In Weilbrenner v. Teva Pharmaceuticals USA, Inc., 696 F.Supp. 2d 1329, 1340 (M.D. Ga. 2010), the district court actually held that expert testimony "that the minocycline label should have contained specific information" alone "created an issue of fact as to whether the warnings Teva provided were sufficient under Georgia law." The expert identified "four ways in which Teva's minocycline label was allegedly inadequate and defective" -- he did not present an alternative label. Id., at 1339. Where the Weilbrenner plaintiff did not present an alternative drug label and the court did not hold that an alternative warning was a necessary element in a warnings claim, this case does not support MCI's position in the slightest.

MCI ends with a citation to a 1998 Missouri district court case applying Missouri law. (Mot. 50(b), 12:15-18) But MCI fails to advise this Court that the Missouri Supreme Court expressly held in 2011 that Missouri law does **not** require proof of an alternative warning. The controlling holding in Moore v. Ford Motor Co., 332 S.W. 3d 749, 759-60 (Mo. Sup. Ct. 2011) appears above. Plaintiffs also note that 6 of the 7 decisions that MCI cites (.e., Broussard, Thompson, Derienzo, Demaree, Campbell and Wellbrenner) are federal district court decisions applying the laws of states other than Nevada. Not only are they not binding precedents in their own states, they give absolutely no guidance on Nevada law.

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3. MCI Did Not Request A Jury Instruction Either That Plaintiffs Had To Propose An Alternative Warning Or That Plaintiffs Had To Prove A Method To Transmit The Warning

As set forth above, MCI crafted both of the warning instructions given to the jury, i.e., JI 30 and JI 31. MCI did not offer an instruction that Plaintiffs were required to propose an alternative warning or that Plaintiffs had to prove a method to transmit a warning. Having failed to do so, MCI cannot now argue that an alternative warning designed by Plaintiffs was a legal requirement for which a JNOV should be granted.

4. This Is Not A Case Involving A Warning That Was Alleged To Be Inadequate

There were no warnings given whatsoever by MCI. Hence, this is not a case where Plaintiffs could propose an "alternative" warning because there was no warning whatsoever. Both Sea Ray and Rivera were "alternative" warning cases because the boat manufacturer did in fact provide a warning (but plaintiffs argued it was inadequate) and the cigarette manufacturers provided a warning (and plaintiffs argued it was inadequate). Even in cases where there was some warning, the Nevada Supreme Court has not required Plaintiffs to prepare an alternative warning. There is certainly no reason to do so when there was no warning whatsoever.

5. MCI Argued That There Was No Warning Whatsoever Required Because Of "Information Overload" But The Jury Rejected This Contention

When Plaintiffs' warning expert was cross-examined, MCI emphasized that an alternative warning was not proffered. (TT 3/7, 103:9-16, 104:1-3) MCI had its warning's expert (Krauss) comment on the fact that Cunitz did not offer an alternative warning. (TT 3/19 85:2-8) Krauss then opined that MCI's decision to provide no warning whatsoever was justified to avoid "over warning" or "providing information overload" to drivers:

> Furthermore, if you do look at it, the likelihood that the ones that really are important will stand out from all that other noise is reduced. So adding more and more warnings, warning about these really minor hazards, tends to be counter-productive and, in fact, tends to undermine the warnings that you do want the user to have.

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Q. And, in fact, in -- human factors even has a word for that, right, if you over warn? What's that called?

A. That's information overload -- information overload or over warning. But it's -- but they're sort of used interchangeably. But if you're just bombarded with so much information about something that, again, isn't a major hazard, it's just -- you just say "stop it" and you sort of purge and you just don't listen to any of it.

(TT 3/19, 87:8-24) As the forgoing emphasizes, where there are no warnings whatsoever provided by a manufacturer (a relatively rare occurrence), the focus is on the need to warn -- not on the specifics of an alternative warning.

During closing, MCI argued to the jury that no warning was required:

MR BARGER: "So Mr. Hubbard is who they say should give a warning to that there could be air displacement or an air blast as you're driving down the road. I assure you bus drivers who had 30 years' experience know that." (TT 3/22 240: 9-13)

MCI clearly tendered this issue to the jury and lost. As the Nevada Supreme Court said in Zhang, just 2 years ago, "[a]party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it."

F. Cunitz Had An Adequate Foundation To Testify And Gave An Appropriate Warnings Opinion

MCI waived the 50(b) Cunitz arguments by failing to make them in the 50(a) motion.

MCI filed and lost a motion in limine challenging the Cunitz warning opinion. The Court disagreed regarding failure to warn. (See February 2, 2018 Findings of Fact, Conclusions of Law, and Order, 14: 4-19)

MCI now claims that the Cunitz opinion was "too conclusory" and that "he did not explain what warning should have been given." (Mot.50(b), 12:19-21) As set forth above, where no warning whatsoever is provided, there is little to say other than that there should have been a warning given the pertinent hazard. The typical criticisms about type size and whether or not a warning should have been bigger, bolded or in color do not apply when there is no warning.

Dr. Cunitz succinctly opined that MCI did not provide a warning and should have done so. (3/7 TT, 99:17-18; "Q. And what is your opinion? A. A, that it needed a warning, and they

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did not provide one.") In a case where absolutely no warning whatsoever was provided, this was the only warning opinion needed. While there are other cases where there was some warning but it was obscure, a warnings expert could theoretically provide more nuance. However, where there was a complete and total failure to provide any warning, including no warnings on other subjects, there was nothing more to say.

G. There Is No "Inconsistency" In the Aerodynamic Defective Design Determination And The Failure To Warn Determination

MCI's wild speculation that the jury rejected the aerodynamic design claim on causation grounds is both factually wrong and legally infirm:

> 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.**

(Mot. 50(b), 14:9-15) (Bold added) MCI's speculation that the jury answered no to both questions (unreasonably dangerous **and** legal cause) instead of merely the first question has no merit and defies common sense. Because the word "and" required two findings for an affirmative answer, the jury could have decided either issue against Plaintiffs and checked no. If the jury decided against Plaintiffs on unreasonably dangerous, there was no need to continue to decide causation.

Unless MCI is conceding that MCI lost the first inquiry as to whether the aerodynamic design was unreasonably dangerous, MCI cannot credibly argue that the jury continued to consider causation. Plaintiffs suspect that MCI counsel will never formally state on the record that the jury found the aerodynamic design was unreasonable dangerous (which would require it to next consider the second question; legal cause) because this would mean MCI counsel is conceding that the tens of thousands of other J4500s on the road have aerodynamic defects. In this regard, the Court should focus on how the Rule 50(b) motion dexterously leap frogs over this key point by arguing that the jury found no causation on design defect but remaining deathly silent on the aerodynamic unreasonably dangerous finding. (Mot 50(b), 14:13-15)

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As set forth below, the jury did in fact decide only the first issue. However, there is no factual or logical basis for MCI to claim that the jury also decided that the defective design was not a "legal cause" of damage.

1. The Jury Did Not Find MCI Liable For An Aerodynamic Defect Because It Found That The Bus Was Not Unreasonably Dangerous Since It Complied With Federal Regulations

Over Plaintiffs' vehement objections (3/19 TT 193- 226), MCI presented an expert "opinion" from lay witness Virgil Hoogestraat on the last day of testimony that the MCI coach complied with federal regulations. This expert "opinion" testimony should have been precluded for five different reasons: (1) Hoogestraat was a lay witness and should not have been allowed to give expert opinions; (2) Plaintiffs could not present an expert to rebut the Hoogestraat opinion because Hoogestraat did not file an expert report; (3) Hoogestraat's federal regulation opinion was inconsistent with his 30(b)(6) testimony; (4) no federal regulation opinion was appropriate because there is no federal regulation regarding the specific defects identified by Plaintiffs; and (5) MCI violated the exclusionary rule by discussing the prior trial testimony of other witness with Hoogestraat. Id. The Court granted Plaintiffs a continuing objection on the foregoing grounds to the Hoogestraat testimony (3/21 TT 6: 8-11) but allowed Hoogestraat to opine that the J4500 was not unreasonably dangerous because it met federal regulations.

During closing, MCI counsel repeatedly argued that the J4500 was not unreasonably dangerous because it complied with all federal regulations:

> And I want to talk to you about something I think is very important. Remember the discussion about federal government standards and regulations? Federal Motor Carrier Safety Administration. NHTSA, National Highway Trade – National Highway Traffic Safety Administration. And remember the testimony from Mr. Hoogestraat.
>
> There are no -- there were not in 2007, and there are not today, any requirements by the federal government, who study these things and make rules that manufacturers have to comply with, no requirement of a proximity sensor device. Absolutely none. The federal government has said we are not going to make you put one on.
>
> Number two, there are no factors for aerodynamics drag factor. There are factors for length of a bus, width of a bus, and all kinds of what they call FMBSS standards. There are no studies -- excuse me -- there are no requirements by the federal government to say you should put on an S-1 Gard. (3/23 TT 253:21 to 254:8)

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The ultimate result of admitting this inappropriate federal regulation "opinion" was that the jury found against Plaintiffs on the aerodynamic defect question (and also the right side blind spot, the proximity sensor and the S-1 Gard questions) by determining that these defects did not make the bus unreasonably dangerous.[4]

MCI did not present any evidence that the **warning** was subject to federal regulations. For this reason, the warning liability could not be torpedoed by the same inadmissible federal regulation opinion that infected the liability determination of defect. Because federal regulation was a factor that the jury considered in determining unreasonable dangerousness of a product but federal regulation does not apply to the warning issues, this differentiation by itself demonstrates that the jury determinations were not "inconsistent."

2. This Court "Must" Presume That The Jury Decided The Aerodynamic Design Claim By An Unreasonable Dangerous Determination -- Not A Causation Determination

MCI submitted an aerodynamic design inquiry to the jury that required the jury to answer two questions with the same yes or no, i.e., the first question being whether the aerodynamic design of the coach made it unreasonably dangerous and the second question being whether this was a legal cause of the injury. Nelson v. Heer, 123 Nev. 217, 163 P.2d 420 (Nev. 2007) (Bold added) held:

> "In applying that standard and deciding whether to grant a motion for judgment as a matter of law, **the district court must view the evidence and all inferences in favor on the nonmoving party**."

Hence, the Court "must" presume that the jury resolved the aerodynamic design claim on the basis of unreasonable dangerous as opposed to causation.

3. The "Legal Cause" Definition In JI 24 Differed From Warning Causation In JI 31 -- Meaning That Even A No "Legal Cause" Determination Would Not Be Inconsistent With A Warning Causation Determination

[4] See Affidavit of Peter S. Christiansen.

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Plaintiffs have discussed at length above the definition of legal cause ("substantial factor") in JI 24 and the difference in the definition of warning causation in JI 31. Again, Plaintiffs emphasize that MCI drafted JI 31. Because there is such a difference between the two causation related instructions, assuming arguendo that the jury had in fact answered the "legal cause" inquiry in the negative in deciding the aerodynamic design defect liability, this is not dispositive of how the jury would address the warning causation because warning causation in JI 31 is a different inquiry.

H. Strict Liability Applies To Third Parties Injured By Products ("Bystanders") And To Product Users

This same issue was briefed by MCI and Plaintiffs in the Motion For Summary Judgment On Product Defect filed by MCI and the opposition thereto filed by Plaintiffs. Plaintiffs incorporate by reference such opposition but repeats the central portion thereof herein. The Court correctly ruled that bystanders can bring strict liability claims. January 23, 2018 Court Minutes (denying MSJ On All Claims Alleging A Product Defect).

MCI's fallacious MSJ argument was that only the "user" of the product can bring a product liability claim as opposed to a bystander injured by the defective product. (MSJ Product Defect, 9:3 to 10:12) MCI repeats this argument in the 50(b) Motion, 15:3 to 16:3, wherein it relies primarily upon a 2001 California appellate court decision. The seminal case holding that bystanders can recover where defective motor vehicles cause them injury is Codling v. Paglia, 32 N.Y.2d 330, 335 (N.Y.Ct.App. 1973) ("We hold today the manufacturer of a defective product may be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect.")

Virtually every jurisdiction that has expressly considered this issue has also applied strict liability to bystanders.

Arizona - "[T]he doctrine of strict tort liability against the manufacturer and retailer should be available to the bystander as well as to the user or consumer." Caruth v. Mariani, 11 Ariz. App. 188, 189, 463 P.2d 83, 84 (1970).

Colorado - "[W]e hold that, in a products liability case, privity of contract is not a prerequisite to recovery under the strict liability theory." Bradford v. Bendix-Westinghouse Auto. Air Brake Co., 33 Colo. App. 99, 108, 517 P.2d 406, 411-12 (1973).

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Connecticut - "The likelihood of injury from [the use of a defective automobile] exists not merely for the passengers therein but for the pedestrian upon the highway. The public policy which protects the user and consumer should also protect the innocent bystander." Mitchell v. Miller, 26 Conn. Supp. 142, 150, 214 A.2d 694, 699 (Super. Ct. 1965).

Florida - "I find no precedent for the proposition that these plaintiffs must be limited to a negligence action, and would also reject the novel principle that the warranty remedy extends only to those using the product in question." Toombs v. Fort Pierce Gas Co., 208 So. 2d 615, 618 (Fla. 1968).

Indiana - "There is nothing inherent in the status of bystander that requires the denial of the right to sue the manufacturer in strict liability. It would be unjust to deny plaintiff a recovery because of the purely fortuitous circumstance that he was standing by rather than using. The zone of liability is commensurate with the zone of foreseeable risk." Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 782 (N.D. Ind. 1969) citing to RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment o at 356 (1965).

New Jersey - "Lamendola v. Mizell, 115 N.J. Super. 514, 524, 280 A.2d 241, 246 (Law. Div. 1971).

MCI previously admitted that "it is true that many jurisdictions have extended the right to bystanders to pursue claims in strict liability for injuries caused by defects." (MSJ Product Defect, 10:2-3) The truth of the matter is that the majority of jurisdictions have done so.

The only case cited by MCI is De Veer v. Landrover, 2001 WL 23254945, * 2 (Cal.App. 2001), which MCI claims is "particularly instructive." (Mot 50(b), 15:16, 4:4) De Veer was decided by a California court of appeals. The California Supreme Court has expressly held that bystanders are entitled to even greater protection than users of defective products:

> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchasers to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. **In short, the bystander is in greater need for protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.**

Elmore v. Am.Motors Corp., 70 Cal.2d 578, 586, 451 P.2d 84, 88 (Cal. Sup. Ct. 1969) (Bold added) (drive shaft fell off car and hit car following) Hence, any suggestion that California

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holds that bystanders do not merit product liability protection is error given the California Supreme Court decision in Elmore.

I. Wrongful Death Victims Can Asserts Strict Liability Claims

Less than one year ago, the Nevada Supreme Court issued a lengthy opinion regarding a "strict liability design defect" case that involved a wrongful death case. See Ford Motor Company v. Trejo, 133 Nev.Adv. Opin. 68 (Sept. 27, 2017) The Nevada Supreme Court previously addressed strict liability in other death cases. See, e.g., Young's Mach. Co. v. Long, 100 Nev. 692, 693, 692 P.2d 24, 24 (Nev. 1985). While MCI suggests that these cases did not "squarely" address the issue (Mot.50(b), 18:9), Plaintiffs disagree.

Numerous other courts have also held that strict liability claims are proper under similar wrongful death statutes. Barrett v. Superior Court, 272 Cal. Rptr. 304 (Ct. App. 1990) Even MCI admits Barrett is contrary authority. (Mot.50(b), 18:8) See also Prasad v. City of Sutter, 958 F.Supp.2d 1101 (ED Ca. 2013) (holding that the term "wrongful act" in the California wrongful death statute "means any kind of tortious act, including not only acts of negligence, but also acts of intentional or willful misconduct.")

II. RENEWED MOTION FOR JNOV CONCLUSION

The Court "must view all inferences in favor" of Plaintiffs in resolving a Rule 50 motion and MCI cannot raise arguments in a 50(b) motion that MCI did not raise in MCI's oral 50(a) motion on March 22, 2018. Hence, the first inquiry is which arguments MCI raised in the oral 50(a) motion. MCI did **not** raise (1) the new argument that "Hubbard did not testify about any particular warning or that a warning would have changed what he did" (Mot. 50(b), 4:24 to 5:6), (2) the new argument that Plaintiffs should have explained "how it [a warning] would have prevented Dr. Khiabani's death" (Mot. 50(b), 6:22 to 9:15 and 11:9 12:18)), (3) the new argument that Hubbard's heeding testimony "is insufficient to demonstrate causation" and that Hubbard "never testified that he would have done anything differently" (Mot. 50(b), 9:16), (4) the new "open and obvious" argument (Mot. 50(b), 10:10 to 11:8) and (5) the new attack on Cunitz (Mot. 50(b), 12:19 to 13:26) None of these arguments were raised and should be denied on procedural ground.

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MCI's argument that Hubbard saw the doctor "too late" errs because there are multiple other actions that Hubbard could have taken to heed (i.e., "act in accordance") with a warning that would have prevented the accident. These actions are discussed in the opposition to motion for limited new trial above.

MCI's argument that the aerodynamic hazard of the 20 pound pulling force generated by a J4500 was "open and obvious" was not raised in the Rule 50(a) motion. In addition, it is wrong because even the MCI salesperson (Dorr) denied knowing of this hazard.

This is a case where there was no warning whatsoever provided. Nevada law does not require that Plaintiff propose an alternative warning, especially in cases involving a complete failure to warn. MCI also submitted the no alternative warning issue to the jury by offering testimony on it from its expert and arguing it during closing. MCI gambled and lost.

MCI's argument that expert opinion is needed to support failure to warn liability or that the Cunitz opinion lacked foundation was also not made in the Rule 50(a) motion. If considered, the Court properly denied the motion in limine filed regarding the Cunitz testimony.

There is no "inconsistency" in the jury determination on the faulty aerodynamic design and on warning because the jury could have (and did) decide the aerodynamic design claim on the basis of unreasonable dangerousness -- not on causation. MCI's suggestion that the jury decided only the legal causation issue on aerodynamic design or that the jury decided both unreasonably dangerous and legal cause when it did not have to decide both questions defies common sense. Regardless, the Court "must view all inferences in favor" of Plaintiff – not MCI. Hence, it must be presumed that the jury did **not** decide "legal cause" when determining defective aerodynamic design liability. Finally, assuming arguendo that the jury did decide "legal cause", this is different than warning causation as defined in JI 31.

A majority of courts have held that strict liability applies to third parties injured by products and to product users. The Court already denied MCI's motion for summary judgment making this exact same argument and its previous ruling was correct.

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As the Nevada Supreme Court held less than a year ago, wrongful death victims can assert strict liability claims. MCI's desperate argument to the contrary was already expressly rejected by this Court and such ruling was sound.

DATED this 8th day of June, 2018

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EIGHTH JUDICIAL 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.: A-17-755977-C
Dept. No.: XIV

DECLARATION OF PETER S. CHRISTIANSEN, ESQ. IN SUPPORT OF PLAINTIFFS' COMBINED OPPOSITION TO MCI'S MOTION FOR A LIMITED NEW TRIAL AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM

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I, Peter S. Christiansen, Esq., declare under penalty of perjury as follows:

1. I am the managing attorney for Christiansen Law Offices. Christiansen Law Offices and Kemp, Jones & Coulthard, LLP are counsel of record for Plaintiffs in this action. I make this declaration in support of Plaintiffs' combined opposition to MCI's motion for a limited new trial and renewed motion for judgment as a matter of law regarding failure to warn claim. The matters stated in this declaration are based on my personal knowledge, information, and belief.

2. After the jury rendered its verdict and was discharged, several of the jurors were discussing the verdict with Plaintiffs, Plaintiffs' friends or family members, and Plaintiffs' counsel, including me. During these discussions, multiple jurors advised that the jury decided against Plaintiffs on all four defect claims because the bus complied with federal regulations.

3. I make this declaration under penalty of perjury.

DATED this 8th day of June, 2018.

PETER S. CHRISTIANSEN, ESQ.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2018, the foregoing **COMBINED OPPOSITION TO MOTION FOR A LIMITED NEW TRIAL AND MCI'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM AND SUPPORTING AFFIDAVIT** 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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Exhibit 1

Eric Pepperman

From: Henriod, Joel D. <JHenriod@lrrc.com>
Sent: Tuesday, March 13, 2018 6:00 PM
To: 'PowellD@clarkcountycourts.us'; 'dept14lc@clarkcountycourts.us'; 'pete@christiansenlaw.com'; 'kworks@christiansenlaw.com'; 'wbarrett@christiansenlaw.com'; 'candice@christiansenlaw.com'; 'jcrain@christiansenlaw.com'; Pat Stoppard; Eric Pepperman; Monica Jacobs; 'lroberts@wwhgd.com'; 'hrussell@wwhgd.com'; 'ddial@wwhgd.com'; 'abonney@wwhgd.com'; 'rmacalma@wwhgd.com'; Polsenberg, Daniel F.; Henriod, Joel D.; Smith, Abraham; Helm, Jessica; Crawford, Adam; 'dbarger@hdbdlaw.com'; 'mterry@hdbdlaw.com'; 'dmatthews@hdbdlaw.com'
Subject: MCI's Proposed Instructions and Verdict Forms
Attachments: MCI General Vedict Form.pdf; MCI Special Verdict Form (v. 2).pdf; MCI Special Verdict Form.pdf; Proposed Stock Instructions.pdf; Proposed Special Jury Instructions.pdf

Importance: High

Attached are MCI's initial proposed stock instructions, proposed special Instructions, and (alternative) proposed verdict forms.

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Additional Counsel Listed on
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,

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 PROPOSED SPECIAL JURY INSTRUCTIONS

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JURY INSTRUCTION NO. ___

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 alternative warning have would have understood and heeded the alternative warning, and that doing so would have prevented the injury in this case.

Source: *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 275-76 (2009), *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 993-95 (C.D. Cal. 2001); *Sosna v. Am. Home Prods.*, 748 N.Y.S.2d 548, 549, 298 A.D.2d 158, 159 (N.Y. App. Div. 2002); *Kauffman v. Manchester Tank & Equip. Co.*, 1999 U.S. App. LEXIS 32173, *10 (9th Cir. 1999)("failure to warn is not a proximate cause of an injury when it is clear that a warning would have made no difference"); *Demaree v. Toyota Motor Corp.*, 37 F. Supp. 2d 959, 967-69 (W.D. Ky. 1999) (holding that to establish causation a plaintiff must present evidence that he would have specifically modified his behavior in light of a different warning such that the eventual injuries would have been different); *Riley v. Am. Honda Motor Co.*, 259 Mont. 128, 134-35, 856 P.2d 196, 199-200 (Mont. 1993) (rejecting the presumption that a plaintiff would have heeded a different warning if it had been given in part because warnings are everywhere in the modern world and often go unread or, where read, ignored.).

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JURY INSTRUCTION NO. ___

The designer of an automobile has no duty to create a vehicle that will not cause harm to an object with which, or person with whom, it may collide.

Source: *See De Veer v. Land Rover*, No. B141538, 2001 WL 34354946, at *3 (Cal. Ct. App. Aug. 14, 2001).

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JURY INSTRUCTION NO. ___

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.

Source:

First paragraph: *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 842–43, 102 P.3d 52, 66 (2004) (recognizing that an award of pain and suffering is only appropriate if it is consciously perceived and upholding jury's verdict because there was evidence to support a finding of consciousness).

Second paragraph: *Cf.* 5PID.4 ("Where plaintiff's injury or disability is clear and readily observable, no expert testimony is required for an award of future pain, suffering, anguish and disability. [However, where an injury or disability is subjective and not demonstrable to others, expert testimony is necessary before a jury may award future damages.]")

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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.

012175

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).

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JURY INSTRUCTION NO. ___

The mere fact there was 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 substantial evidence.

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Source: *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962) ("The mere fact there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Liability is never presumed but must be established by substantial evidence."); *accord Cook v. Sunrise Hospital and Medical Center, LLC*, __ Nev. __, 194 P.3d 1214, 1218 (2008).

The doctrine is as applicable to product defect actions as it is in negligence. *See, e.g., Vineyard v. Empire Machinery Co.*, 581 P.2d 1152, 1154 (Ariz. Ct. App. 1978) (" ... merely because the use of a product results in injury does not necessarily impose liability upon the manufacturer"); *Shramek v. General Motors Corp.*, 216 N.E.2d 244, 247 (Ill. Ct. App. 1966); *Franov v. Exxon Co.*, 577 N.Y.S.2d 392 (App. Div. 1991); *Farr v. Wheeler Manufacturing Corp.*, 180 N.W.2d 311, 315 (Mich. Ct. App. 1970) ("merely proving that an injury would not have occurred had a particular product been differently designed

does not necessarily establish a breach of duty as to design"); *Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492 (R.I. 1997); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006); *R.W. Bass v. General Motors Corp.*, 491 S.W.2d 941, 947 (Tex. Ct. App. 1973) ("It is fundamental that in order to recover in a cause of action based upon strict liability or negligence, more than the accident itself must be proved.")

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JURY INSTRUCTION NO. ___

If you find that Motor Coach Industries, Inc. complied with all applicable federal regulations and all relevant industry standards, you may consider this as evidence that the motor coach was not defective.

Source: *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 142, 808 P.2d 522, 526 (1991) ("Legislative or administrative regulatory standards are admissible as evidence of a product's safety."); *Hohlenkamp v. Rheem Mfg. Co.*, 655 P.2d 32, 36 (Ariz. Ct. App. 1982) ("Industry standards have also been found to be admissible in strict liability cases on the ground that these standards often constitute substantive evidence on the strict liability issue of whether a product is in a defective condition, unreasonably dangerous to the user.").

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JURY INSTRUCTION NO. ___

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

Source: *Van Duzer v. Shoshone Coca Cola Bottling Co.*, 103 Nev. 383, 385, 741 P.2d 811, 813 (1987) (a manufacturer or distributor of a product is liable for injuries resulting from a defect in the product "that was present when the product left its hands").

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JURY INSTRUCTION NO. ___

Evidence that a large number of defendant's motor coaches have been used without causing injury may be considered in determining whether the defendant's product is reasonably safe. This evidence alone, however, is not conclusive proof that the product is reasonably safe.

Source: *Farr v. Wheeler Manufacturing Corp.*, 180 N.W.2d 311, 315 (Mich. Ct. App. 1970) (" ... it is persuasive evidence that the duty to design safely was not breached, to show that a large number of the products were used without injury. This evidence is not, however, conclusive proof that the product is reasonably safe").

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JURY INSTRUCTION NO. ___

A manufacturer is under no obligation to guard against injury from a patent peril or from a source manifestly dangerous, or to render a machine or other article "more" safe, as long as the danger to be avoided is obvious and patent to all.

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Source: *Bradshaw v. Blystone Equip. Co. of Nevada*, 79 Nev. 441, 445, 386 P.2d 396, 398 (1963) ("the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out...so he is under no duty to guard again injury from a patent peril or from a source manifestly dangerous" * * * "...the manufacturer in under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all."); *see also Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7th Cir. 1975) ("In determining the reasonableness of design, certain factors which should be examined include...the open and obvious nature of the alleged danger").

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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.

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Source: *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).

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JURY INSTRUCTION NO. ___

To demonstrate causation with respect to an alleged defective condition, Plaintiffs must to prove that, but for alleged defect, the harm would not have occurred.

Source: *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), overruled *in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P .3d 11 (2001).

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JURY INSTRUCTION NO. ___

In determining the reasonableness of a product's design, or the sufficiency of warnings, you may consider whether the alleged danger is the open and obvious.

Source: *Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7th Cir. 1975) ("In determining the reasonableness of design, certain factors which should be examined include...the open and obvious nature of the alleged danger"); *see also Bradshaw v. Blystone Equip. Co. of Nevada*, 79 Nev. 441, 445, 386 P.2d 396, 398 (1963) ("the manufacturer is under no obligation, in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out...so he is under no duty to guard again injury from a patent peril or from a source manifestly dangerous").

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JURY INSTRUCTION NO. ___

In determining the reasonableness of design you may consider the extent of the plaintiff's use of products presenting the same alleged danger, and the period of time involved in such use by the plaintiff and others prior to the injury without any harmful incident.

Source: *Collins v. Ridge Tool Co.*, 520 F.2d 591, 594 (7th Cir. 1975) ("In determining the reasonableness of design, certain factors which should be examined include...the extent of the plaintiff's use of the very product alleged to have caused the injury and the period of time involved in such use by the plaintiff and others prior to the injury without any harmful incident")

JURY INSTRUCTION NO. ___

To establish proximate cause, a plaintiff must show why and how the accident happened, and if that is left to conjecture, guess or random judgment, the plaintiff cannot recover.

Source: *Doe v. Terry*, 273 Va. 3, 9, 639 S.E.2d 197, 200 (2007); *Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 624 S.E.2d 55, 62 (Va. 2006) (quoting *Weddle v. Draper*, 130 S.E.2d 462, 465 (Va. 1963)).

JURY INSTRUCTION NO. ___

A conjecture is an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. If there are two or more plausible explanations about how an event happened or what produced it but the evidence does not apply to one explanation more than the others, then the explanations remain conjectures only.

Source: *Ex parte Mobile Power & Light Co., Inc.*, 810 So. 2d 756, 760 (Ala. 2001) ("As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions but not deducible from them as a reasonable inference. *There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only.*" (emphasis in original) (quoting *Southern Ry. v. Dickson*, 100 So. 665, 669 (Ala. 1924))); *Bergman v. United States*, 579 F. Supp. 911, 921-22 (W.D. Mich. 1984) (same); *City of Bessemer v. Clowdus*, 74 So.2d 259 (Ala. 1954) (same).

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JURY INSTRUCTION NO. ___

A mere possibility of causation does not satisfy the requirement of proximate cause.

Source: *Bergman v. United States*, 579 F. Supp. 911, 921 (W.D. Mich. 1984) ("A 'mere possibility' of causation does not satisfy the requirement of proximate cause." (citing *Brown Mechanical Contractors, Inc. v. Centennial Insurance Company*, 431 So.2d 932, 942 (Ala.1983); *Ex parte Travis*, 414 So.2d 956 (Ala.1982))).

JURY INSTRUCTION NO. ___

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.

There are significant differences between a standard based on the expectations of an ordinary consumer and a standard based on the expectations of an ordinary bystander. The consumer contemplation test was developed in recognition of the fact that it is reasonable for users and consumers of products to hold certain expectations regarding the products they use and the products they buy.

Source: *Horst v. Deere & Co.*, 769 N.W.2d 536, 551 (Wis. 2009); *Ewen v. McLean Trucking Co.*, 706 P.2d 929, 932-33 (Or. 2009)

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Punitive Damages

(Phase 1)

Defendant disputes that there is a sufficient basis for punitive damages in this case. If the jury is nonetheless permitted to consider this issue, then the following instructions must be provided.

JURY INSTRUCTION NO. ____

For purposes of determining whether to impose punitive damages, the designer of a product who is not aware that the product is unreasonably dangerous cannot deemed to have consciously disregarded any other party's rights. Mere possession of data from which the designer might deduce the existence of a dangerous condition cannot justify a finding of conscious disregard. So-called "constructive notice" of a dangerous condition also cannot substantiate a finding of conscious disregard.

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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); *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").

JURY INSTRUCTION NO. ___

Clear and convincing evidence

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.

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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

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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 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.").

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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.

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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)).

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JURY INSTRUCTION NO. ___

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.

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80, (1996); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Boerner v. Brown v. Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

JURY INSTRUCTION NO. ___

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.

Source: See Nev. Civ. J.I. 1GI.7 ("No statement, ruling, remark or comment which I may make during the course of trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.").

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Punitive Damages

(Phase 2)

Defendant disputes that there is a sufficient basis for punitive damages in this case. If the jury is nonetheless permitted to consider this issue, then the following instructions must be provided.

JURY INSTRUCTION NO. ___

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

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992).

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JURY INSTRUCTION NO. ___

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

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); B*MW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80, (1996); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Boerner v. Brown v. Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

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JURY INSTRUCTION NO. ___

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 injury(ies).

Source: Nev. Civ. J.I. 12 PD.2 (modified) ("Your award cannot be more than otherwise warranted by the evidence in this case merely because of the wealth of the defendant. Your award cannot either punish the defendant for conduct injuring others who are not parties to this litigation or financially annihilate or destroy the defendant in light of the defendant's financial condition. * * * [Evidence has been presented concerning [the] [a] defendant's conduct outside Nevada and/or conduct injuring others who are not parties to this litigation. You cannot use such evidence to award plaintiff[s] punitive damages for conduct outside Nevada, or conduct injuring others who are not parties to this litigation, or conduct that does not bear a reasonable relationship to the conduct injuring plaintiff[s] that warrants punitive damages in this case."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522-23 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . ."; "conduct must have a nexus to the harm suffered by the Plaintiff." "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for

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being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . "); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); *see also Bongiovi v. Sullivan*, 122 Nev. 556, 582-83, 138 P.3d 433, 452 (2006) (adopting the "federal standard's three guideposts" set forth in *State Farm* and *BMW of N. Am.*); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1268, 969 P.2d 949, 962 (1998) (reducing punitive damage award that were "excessive and disproportionate to [defendants'] degree of blameworthiness").

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JURY INSTRUCTION NO. ___

If you decide to award plaintiff punitive damages, there will be a second phase of trial wherein you will hear evidence relevant to the amount of punitive damages to be awarded.

Source: NRS 42.005(3)

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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.

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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.

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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.

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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.

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Exhibit 2

Eric Pepperman

From: Henriod, Joel D. <JHenriod@lrrc.com>
Sent: Tuesday, March 20, 2018 9:14 PM
To: Eric Pepperman; 'Bonney, Audra R.'; Helm, Jessica; Polsenberg, Daniel F.; Roberts, Lee; Smith, Abraham
Cc: Kendelee Works (kworks@christiansenlaw.com); Pete Christiansen (pete@christiansenlaw.com); Whitney Barrett (wbarrett@christiansenlaw.com); Pat Stoppard; Alisa Hayslett
Subject: RE: Revised Jury Instructions
Attachments: MCI's Special Instructions (Agreed to).pdf

Eric,

Here are our special instructions that I believe you agreed to include, provided certain changes (that are attached in redline) were made.

Joel D. Henriod
Las Vegas Office Managing Partner
702.474.2681 office
702.743.0212 mobile
jhenriod@lrrc.com

Lewis Roca
ROTHGERBER CHRISTIE

Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
lrrc.com

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From: Eric Pepperman [mailto:e.pepperman@kempjones.com]
Sent: Tuesday, March 20, 2018 12:53 PM
To: Henriod, Joel D.
Cc: Kendelee Works (kworks@christiansenlaw.com); Pete Christiansen (pete@christiansenlaw.com); Whitney Barrett (wbarrett@christiansenlaw.com); Pat Stoppard; Alisa Hayslett
Subject: Revised Jury Instructions

Joel:

Attached are the revised stocks, as discussed yesterday. I also changed our bus driver special to match yesterday's curative instruction. Please let me know if I have your approval to submit to the Court. Thanks,

Eric M. Pepperman, Esq.

Kemp, Jones & Coulthard, LLP
Wells Fargo Tower, 17th Floor | Las Vegas, NV 89169
(P) 702-385-6000 | (F) 702 385-6001 | e.pepperman@kempjones.com

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JURY INSTRUCTION NO. ___

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 ~~alternative~~ warning have would have ~~understood and heeded the alternative~~acted in accordance with the warning, and that doing so would have prevented the injury in this case.

Source: *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192, 209 P.3d 271, 275-76 (2009), *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 993-95 (C.D. Cal. 2001); *Sosna v. Am. Home Prods.*, 748 N.Y.S.2d 548, 549, 298 A.D.2d 158, 159 (N.Y. App. Div. 2002); *Kauffman v. Manchester Tank & Equip. Co.*, 1999 U.S. App. LEXIS 32173, *10 (9th Cir. 1999)("failure to warn is not a proximate cause of an injury when it is clear that a warning would have made no difference"); *Demaree v. Toyota Motor Corp.*, 37 F. Supp. 2d 959, 967-69 (W.D. Ky. 1999) (holding that to establish causation a plaintiff must present evidence that he would have specifically modified his behavior in light of a different warning such that the eventual injuries would have been different); *Riley v. Am. Honda Motor Co.*, 259 Mont. 128, 134-35, 856 P.2d 196, 199-200 (Mont. 1993) (rejecting the presumption that a plaintiff would have heeded a different warning if it had been given in part because warnings are everywhere in the modern world and often go unread or, where read, ignored.).

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JURY INSTRUCTION NO. ___

The mere fact ~~there was~~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 ~~substantial~~ a preponderance of the evidence.

Source: *Gunlock v. New Frontier Hotel Corp.*, 78 Nev. 182, 185, 370 P.2d 682, 684 (1962) ("The mere fact there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Liability is never presumed but must be established by substantial evidence."); *accord Cook v. Sunrise Hospital and Medical Center, LLC*, __ Nev. __, 194 P.3d 1214, 1218 (2008).

The doctrine is as applicable to product defect actions as it is in negligence. *See, e.g., Vineyard v. Empire Machinery Co.*, 581 P.2d 1152, 1154 (Ariz. Ct. App. 1978) (" ... merely because the use of a product results in injury does not necessarily impose liability upon the manufacturer"); *Shramek v. General Motors Corp.*, 216 N.E.2d 244, 247 (Ill. Ct. App. 1966); *Franov v. Exxon Co.*, 577 N.Y.S.2d 392 (App. Div. 1991); *Farr v. Wheeler Manufacturing Corp.*, 180 N.W.2d 311, 315 (Mich. Ct. App. 1970) ("merely proving that an injury would not have occurred had a particular product been differently designed does not necessarily establish a breach of duty as to design"); *Plouffe v. Goodyear Tire & Rubber Co.*, 373 A.2d 492 (R.I. 1997); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006); *R.W. Bass v. General Motors Corp.*, 491 S.W.2d 941, 947 (Tex. Ct. App. 1973) ("It is fundamental that in order to recover in a cause of action based upon strict liability or negligence, more than the accident itself must be proved.")

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JURY INSTRUCTION NO. ____

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.

~~There are significant differences between a standard based on the expectations of an ordinary consumer and a standard based on the expectations of an ordinary bystander. The consumer contemplation test was developed in recognition of the fact that it is reasonable for users and consumers of products to hold certain expectations regarding the products they use and the products they buy.~~

Source: *Horst v. Deere & Co.*, 769 N.W.2d 536, 551 (Wis. 2009); *Ewen v. McLean Trucking Co.*, 706 P.2d 929, 932-33 (Or. 2009)

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JURY INSTRUCTION NO. ___

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.

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80, (1996); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Boerner v. Brown v. Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

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JURY INSTRUCTION NO. ___

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.

Source: See Nev. Civ. J.I. 1GI.7 ("No statement, ruling, remark or comment which I may make during the course of trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.").

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Punitive Damages

(Phase 2)

Defendant disputes that there is a sufficient basis for punitive damages in this case. If the jury is nonetheless permitted to consider this issue, then the following instructions must be provided.

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JURY INSTRUCTION NO. ___

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

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Kemezy v. Peters*, 79 F.3d 33, 36 (7th Cir. 1996); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992).

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JURY INSTRUCTION NO. ____

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

Source: *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 420-24 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80, (1996); *Carter v. Kansas City S. Ry. Co.*, 456 F.3d 841, 847 (8th Cir. 2006); *Boerner v. Brown v. Williamson Tobacco Co.*, 394 F.3d 594, 604 & n.4 (8th Cir. 2005); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

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JURY INSTRUCTION NO. ___

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 injur~~y(ies)~~ies.

Source: Nev. Civ. J.I. 12 PD.2 (modified) ("Your award cannot be more than otherwise warranted by the evidence in this case merely because of the wealth of the defendant. Your award cannot either punish the defendant for conduct injuring others who are not parties to this litigation or financially annihilate or destroy the defendant in light of the defendant's financial condition. * * * [Evidence has been presented concerning [the] [a] defendant's conduct outside Nevada and/or conduct injuring others who are not parties to this litigation. You cannot use such evidence to award plaintiff[s] punitive damages for conduct outside Nevada, or conduct injuring others who are not parties to this litigation, or conduct that does not bear a reasonable relationship to the conduct injuring plaintiff[s] that warrants punitive damages in this case."); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522-23 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred. . . ."; "conduct must have a nexus to the harm suffered by the Plaintiff." "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for

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being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . "); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."); *see also Bongiovi v. Sullivan*, 122 Nev. 556, 582-83, 138 P.3d 433, 452 (2006) (adopting the "federal standard's three guideposts" set forth in *State Farm* and *BMW of N. Am.*); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1268, 969 P.2d 949, 962 (1998) (reducing punitive damage award that were "excessive and disproportionate to [defendants'] degree of blameworthiness").

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Exhibit 3

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; 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

VIDEOTAPED DEPOSITION OF EDWARD HUBBARD
LAS VEGAS, NEVADA
WEDNESDAY, SEPTEMBER 20, 2017

REPORTED BY: KAREN L. JONES, CCR NO. 694
JOB NO.: 417421

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Q. Do you have any other understanding?
A. No, sir.
Q. And more specifically, do you know whether or not you are also required to get into the far left lane when there's two lanes of travel by a bike lane?
A. I don't know that.
Q. Don't know? This is the first you've heard of that?
A. I'm sorry?
Q. You don't know if that's the law?
A. I don't know if that's the law.
Q. So let me read you a Nevada Revised Statute and tell me if this is the first you've heard of that.

Okay. This would be NRS 484B.270, Section 2. Quote, "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," unquote.

Is this the first you've heard that

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that's the law in Nevada?

A. Yes.

Q. Yes, this is the first you've heard of that?

A. As far as what you're reading there.

Q. So you've never heard that before?

A. I mean, we've discussed it, but that's the first I've heard of it.

Q. Don't tell me what you've talked to your attorney about. Let me ask it differently.

Prior to Monday of this week, did you know that this was the law in the state of Nevada?

A. No, sir, I did not.

Q. And so Michelangelo or Ryan's Express did not provide you information that this was the law in Nevada?

A. I did not know that.

Q. All right. So if you had known this was the law, would you have gotten into the left-hand lane?

MR. STEPHAN: Objection; form and foundation.

THE WITNESS: Where do you mean at?

BY MR. KEMP:

Q. If you had known prior to this accident,

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Exhibit 4

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; 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

VIDEOTAPED DEPOSITION OF WILLIAM BARTLETT

LAS VEGAS, NEVADA

FRIDAY, SEPTEMBER 8, 2017

REPORTED BY: HOLLY LARSEN, CCR NO. 680, CA CSR 12170
JOB NO.: 416787

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Rock is, say, where that water bottle is (indicating).

So assuming, for the sake of argument, that the bus proceeded to overtake a bicyclist and stayed in the right-hand lane the entire time and that the left-hand lane was available to it, first of all, would you agree with me that that violates the law in the state of Nevada?

MR. STEPHAN: I make an objection it lacks foundation, calls for an expert opinion, calls for a legal conclusion on the part of the witness. Can I just make this a continuing so I don't interrupt?

MR. KEMP: Well, usually what we do is just say form and foundation and it incorporates all that stuff.

MR. STEPHAN: Okay.

MR. KEMP: Yeah, you can have a continuing objection --

MR. STEPHAN: Thank you very much.

MR. KEMP: -- to this area.

MR. STEPHAN: Yes.

BY MR. KEMP:

Q. All right. Go ahead.

A. Could you repeat?

Q. Let me read you the law in the state of

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Nevada first. This is NRS 484B.270. 2(a), quote, "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's 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," unquote. That's the law in the state of Nevada.

Would you agree with me that it would be a violation of the law for a bus to continue all the way up the right-hand lane for 300 feet and overtake a bicyclist?

A. Yes.

Q. And --

A. What was your question again? I want to make sure I answer it correctly.

Q. Whether that would violate the law as I just read.

A. No. I don't believe it would violate the law.

Q. Why is that?

A. I don't know if he can get over or not.

Q. You don't know if it's reasonably safe?

A. Exactly.

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Q. Okay. Assuming it's reasonably safe, it would be a violation of the law?

A. No. That's in the opinion of the person driving the bus. I wasn't there.

Q. You think the person driving the bus should interpret whether or not the law was violated?

A. If he's aware of the law, he should follow it.

Q. Okay. And since you didn't train him as to the law, how would he become aware of the law?

A. Well, it's part of the traffic code. Drivers who hold driver's licenses are required to be knowledgeable of the traffic codes.

Q. Do you hold a driver's license?

A. Yes, sir.

Q. You didn't know about the law?

A. No, sir.

Q. And you're the director of training and risk management?

A. That's correct.

Q. So you expect all of the other drivers to know more about the law than you, the teacher, does?

A. Some of them do.

Q. But that's what you expect?

A. Yes, sir.

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Exhibit 5

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Opinions

- 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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Exhibit 6

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Steven D. Grierson
CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL 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., MICHELANGELO EXPRESS; EDWARD HUBBARD; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN; and SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY

Defendant(s).

CASE NO.: A-17-755977-C
DEPT. NO.: XIV

ORDER

Defendant's objection to Special Master's Order Staying Post-Trial Discovery Including May 2, 2018 Depositions and alternatively Motion for Limited Post-Trial Discovery came on for a hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on May 4, 2018. After considering the pleadings and argument of counsel, the Court OVERRULES the objection, and DENIES the alternative motion, according to the following:

First, Defendant objects to the decision of the special master staying discovery. Special Master Hale was correct in observing that no post-trial motions had been filed, and this Court had not authorized any post-trial discovery, thus the conclusion that the scheduled

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

Case Number: A-17-755977-C

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deposition should not go forward was correct, regardless of whether Plaintiffs had standing to object on behalf of the deponent. Parties are not allowed to continue discovery beyond the close of discovery, much less after a judgment has been entered, without leave of court. Defendant's objection is therefore OVERRULED.

Defendant in the alternative has requested leave to conduct limited post-trial discovery in the form of a subpoena for Dr. Khiabani's employment records. No clear standard is articulated in the NRCP or Nevada case law for determining when post-trial discovery should be allowed. However, Defendant's motion admits that the request for post-trial discovery is intrinsically linked to NRCP 59's allowance for a motion for new trial based upon "newly discovered evidence," and argues that the parties must be allowed to discover any such new evidence. Therefore, the standard for a motion for new trial based on newly discovered evidence is relevant to the Court's determination here of whether post-trial discovery should be allowed. This approach is supported by Defendant's proffered case law on the subject, specifically *In re Wyatt, Inc.*, 168 B.R. 520, 524 (Bankr. D. Conn. 1994).

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Defendant is not, at this moment, arguing the validity of the verdict based on the evidence presented or the Court's legal rulings, but rather arguing that the jury did not hear vitally relevant evidence that could have resulted in a different verdict. The Court is required to follow the law, and due to the importance of finality in litigation, the law provides very narrow exceptions to the rule that judgments are to be final, and that jury verdicts are to be given great respect. A jury's role as the finder of fact is the cornerstone of our justice system, and thus it is no simple feat to persuade this Court that the jury's verdict was unjust.

A new trial based on new evidence is only feasible if the party's "substantial rights" were materially affected due to the discovery of evidence "which the party could not, with reasonable diligence, have discovered and produced at the trial." This requirement implicitly supports the policy of finality of judgments and respect for the value of a jury's time and effort. It bears noting that this trial lasted for six weeks including jury selection, and thus constituted a considerable hardship on the jurors and necessarily required a large amount of

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resources of the parties and the court system. In reverence for these policy considerations, a court will not discard a jury verdict when the requesting party's own lack of diligence caused the alleged injustice. Similarly, this Court will not allow post-trial discovery to seek out facts which could have, with reasonable diligence, been discovered before trial.

The facts Defendant now seeks to discover are surprising and the Court would not expect a reasonably diligent party to specifically ask for this information—in other words, to ask whether Dr. Khiabani had been accused of billing errors, compliance issues, or medicare fraud, or whether Dr. Khiabani had been informed he was going to be terminated. However, under the NRCP 59 standard, the question is not whether Defendant had asked for this specific information that it now seeks, but rather whether Defendant could have uncovered these facts in the course of reasonably diligent discovery. Thus, the issue for the Court would be whether reasonably diligent discovery could have led to disclosure of the sought after information, and whether Defendant failed to conduct this reasonably diligent discovery.

It is beyond question that, from the inception of this case, Dr. Khiabani's future income was clearly going to be a material issue for trial. A plaintiff's damages in a wrongful death action are made up of, primarily, emotional damages and damages consisting of lost support from the decedent. The particular facts of this case certainly highlight the importance of lost support as a measure of the Plaintiffs' damages, as the decedent happened to be an extremely well-payed individual who still had numerous years ahead of him before retirement. Thus, the Plaintiffs' damages depended largely on the estimation of Dr. Khiabani's lost income after his death. Indeed, the parties spent considerable effort obtaining expert opinions on how long Dr. Khiabani would have likely provided monetary support to his family, what his economic situation would have been in future years, and what portion of his income would have been available to his family.

Knowing that Dr. Khiabani's current and future economic well-being would be a vital aspect for litigation, it would be reasonably diligent to pursue discovery of every fact that would enable the parties to accurately predict what the Plaintiffs' actual loss of support would

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be. This would include, at least, seeking to determine the specific terms of Dr. Khiabani's employment contract, how long the contract was going to remain in effect had Dr. Khiabani not passed away, whether the contract would have been renewed, and whether this salary or benefits would be likely to change over the remainder of his foreseeable employment. Further, any inquiry into these basic facts sought from Dr. Khiabani's employer could have, and most certainly would have, produced either the very information Defendant now seeks, or a more general response that would be sufficient to spur the Defendant to investigate the issue, such as a response that Dr. Khiabani's contract would not have been renewed.[1]

However, Defendant here evidently did not pursue any discovery on this topic. The sole discovery request Defendant cites to as evidence of due diligence[2] is interrogatory number 17 to Dr. Barin, which requests the reasons Dr. Khiabani's employment was terminated by any former employers over the last ten years. Defendant's motion acknowledges that Plaintiffs may not have known about the information which has been recently reported on, and moreover the interrogatory is only incidentally related to this information—it does not show an effort to obtain information relating to the details or extent of Dr. Khiabani's future employment. Dr. Barin was not likely to know the details of the internal audit, nor even that Dr. Khiabani was told the day before he died that he was being terminated, and no discovery will ever be able to confirm Dr. Barin's knowledge due to her untimely death. Regardless, this single interrogatory does not constitute diligence into this area, as there was evidently no discovery propounded to Dr. Khiabani's employer, who would

[1] The other possible outcome would be an untruthful response from the employer, which the Court addresses below.

[2] Although not included in the motion, Defendant's counsel mentioned at the hearing that a subpoena was sent to the Board of Medical Examiners, presumably in the pursuit of any information pertaining to medical malpractice allegations against Dr. Khiabani. The Board would not have any information on Dr. Khiabani's employment status or any awareness of the issues presented by the media because that information was beyond the scope of the Board's involvement with the daily life of a physician and moreover, as the Defendant asserts, was held in confidence by the employer. Further, the very emails Defendant relies on in this motion show that the individuals who were aware of the alleged misdeeds by Dr. Khiabani had not informed the Board. Because a subpoena to the Board is not an effort to discover the details of Dr. Khiabani's future employment, this effort does not change the Court's analysis of reasonable diligence here.

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be the only party likely to have relevant information on Dr. Khiabani's future employment. Additionally, Defendant is now seeking post-judgment discovery on Dr. Khiabani's non-confidential employment records. Even if the information Defendant now seeks would have been considered confidential at the time and Dr. Khiabani's employer would have thus resisted disclosing this information, the fact remains that Defendant did not attempt to get the information. Further, confidentiality concerns could have been addressed by motions to compel and/or stipulated protective orders. To argue that this information could not have been discovered even with reasonable diligence requires an assumption that the employer would not have given the requested information and that the Court could not have provided relief to the Defendant in such a case.

While the above is sufficient for the Court to find a lack of diligence, the conclusion is supported by the fact that Plaintiffs provided to Defendant an authorization to obtain Dr. Khiabani's employment records on July 26, 2017, but evidently Defendant never followed through on actually requesting the very information that it now seeks to obtain. Moreover, Defendant evidently has no explanation for why this information was not actually sought after the authorization was given.

If the Court were to allow this post-trial discovery, the sole scenario in which the Court may be persuaded to grant a new trial based on the "new" information Defendant now seeks would be if the Defendant had asked Dr. Khiabani's employer for information on his employment records, and had received untruthful responses. In such a case, reasonable diligence would not require any additional pursuit of the subject. However, Defendant has made no allegation that it asked Dr. Khiabani's employer anything, that Plaintiffs were aware of the confidential information that has now been revealed, nor any allegation (much less evidence) that any party withheld information in response to such a discovery request. Without at least some evidence of such deceit, the Court will not permit Defendant to now seek information that it should have asked for during discovery. *See, e.g. Jones v. Illinois*

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Central Railroad Co., 617 F.3d 843 (6th Cir. 2010) (holding that a district court may require a party to show some evidence of the deceit which the party seeks post-trial discovery to prove).

Finally, the Court disagrees with Defendant's insinuation that its discovery efforts were diligent in light of the expedited discovery schedule in this case. Defendant was represented by a veritable army of gifted and seasoned attorneys, including several attorneys admitted to practice on a pro hac vice basis, and Defendant was able to complete extensive discovery on every other aspect of the case. There is no explanation for why such a strong legal team did not try to discern an accurate picture of Dr. Khiabani's future income, which was a critical factual issue in this case, even when the Defendant hired economists specifically to try to predict Dr. Khiabani's economic future.

The Court does not disagree that, without the requested discovery, Defendant would have a much harder time justifying a new trial based only on the information presented in the media reports. Further, Plaintiffs do not dispute that the new information would at least be relevant to the case. However, even were this discovery allowed, the Court would not grant a motion for new trial based on "newly discovered evidence," because Defendant could have, with reasonable diligence, unearthed this evidence during the pendency of discovery. Therefore, the Court DENIES Defendant's request for post-trial discovery. Further, the subpoena issued by the Defendant for the custodian of records of NSHE is QUASHED.

DATED this 23rd day of May, 2018.

A. Escobar

ADRIANA ESCOBAR
DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronic Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by United States mail to the proper parties as follows:

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Exhibit 7

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 22, 2018

RECORDED BY: SANDY ANDERSON, COURT RECORDER

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

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

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

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

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

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

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

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

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

MR. ROBERTS: Thank you, Your Honor.

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

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

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

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

THE COURT: Okay.

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

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

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

MR. HENRIOD: So you want to close?

THE COURT: You're stipulating?

MR. HENRIOD: We close.

MR. KEMP: Are we stipulating to close?

THE COURT: Okay. Go on.

MR. SMITH: Good morning, Your Honor.

THE COURT: Good morning.

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

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

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

THE COURT: Understood.

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

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

THE COURT: Go on.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Also within Chapter 41 itself.

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

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

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

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

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

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

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

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