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

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

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

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

THE COURT: Is the jury all here?

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

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

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

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

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

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

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

Blind spots and proximity sensors.

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

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

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

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

Air blast.

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

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

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

For the same reason, a warning about air

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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 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 apparently would have told him to do.

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

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

Finally, the S-1 Gard.

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

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

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

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

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

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

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

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

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

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

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

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motion to dismiss stage. If not then, they should have made it with the original Rule 50 motion. If not then, they should have made it when we closed our case. I don't think they can make it at this late point, this legal argument. Okay? The other arguments, I think they can make.

The other case they discussed is Fisher v. PCAA, that's Professional Compounding Association of America. That was my case. Wanda Fisher was the plaintiff in that case. That is not a wrongful death case. That was a Fen-Phen case. Mrs. Fisher suffered from primary pulmonary hypertension. And the decision he's referring to by Judge Pro did not involve whether or not there'd be no strict liability with the wrongful death statute.

So I don't know of any case law in Nevada that has ever held that. We have, you know, cases that have gone the other way. And so, for that reason, I don't think that's the law in Nevada, clearly.

Addressing the substantive arguments on evidence and causation, their right-side blind spot, their PMK, Mr. Hoogestraat, conceded during his 30(b)(6) deposition that there's a right-side blind spot. Dr. Krauss testified that it's 40 inches wide and 50 inches deep. Again, he's their expert. He

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testified that he did testing to determine that.

Plaintiffs' expert Cohen did a visual animation that showed the right-side blind spot. And with regards to causation linking it together, Mr. Sherlock testified that if there hadn't been a right-side blind spot, in his opinion, it was more likely than not that the bus driver would have taken successful evasive action rather than attempting to take evasive action.

Moving to proximity sensors, it's undisputed in this case that the Eaton sensor was available in 2005. And, actually, the patent was filed in 1998. Mr. Hoogestraat testified three different times in his PMK deposition that he knew -- he referred to it as kit, that there was kit out there for proximity sensors. That's what the Eaton system is, it's a kit that the manufacturer can use.

They presented no testimony that proximity sensors were not available in 2005, 2006, 2007. In fact, to the contrary, in their tender that they made with Mr. Hoogestraat, he tried to discuss this situation with Greyhound in 1998. So they conceded that the system was available.

He testified he knew they were available. Again, he's the PMK. He didn't -- there was no

testimony in the entire case that the proximity sensor wouldn't have worked in this case.

Mr. Sherlock testified both that it was available in 2005, that it was on the BCI bus in 2007. And he described how it works. He says it goes out 300 feet in the front, 20 feet on the side. And we have the BCI ad from the Motorcoach News that we talked about yesterday with Mr. Hoogestraat which is dated October 15th, 2007. So with regards to proximity sensors, there's really no argument today, weren't available, wouldn't have worked, and couldn't have been put on this bus.

Okay. His argument is that, oh, it would have been too quick. It couldn't have given any alert. Mr. Krauss testified that if there had been a proximity sensor, it would have given the driver 17 seconds of alert time -- 17 seconds of alert time.

And so their response to that was to bring Dr. Krauss and say, well, that doesn't matter because the driver -- you know, we shouldn't do that because it's too many warnings, the driver wouldn't pay attention. This is the same Dr. Krauss who has a proximity sensor for his wife to give him an alert -- and he says it works good -- of bikes in the garage.

So -- so, in any event, 17 seconds, Your

Honor, I think that's more than ample time. So the proximity sensor case, you know, honestly, we should be filing the Rule 50 motion on it.

The S-1 Gard, their argument is that it would not have saved Dr. Khiabani. Well, that goes into the -- the placement. You know, was it -- was it 3 or 4 inches within the tire or was it, you know, 1 or 2 inches like they theorize. And that's the pinch theory basically.

Pinch theory has been repudiated by the Clark County coroner. We had Dr. Gavin come in. They didn't like her testimony, but she gave her testimony. And her testimony can't be refuted because she said to a reasonable degree of medical probability that this -- this skull fracture was caused by a crush. Okay? By a crush, not a pinch.

And that was backed up by Dr. Stalnaker, the preeminent authority in the world on skull impacts. Dr. Stalnaker, if you recall, wrote the articles, did the monkey testing, blah blah blah. And he supported the opinion; the coroner gave his own opinion.

So with regards to whether or not they would have been saved -- and also Dr. Stalnaker expressly testified he would have been saved. You know, they criticized Dr. Stalnaker. He didn't do any testing.

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Well, they didn't do any testing either. They didn't test this pinch theory. I thought that was established pretty clearly yesterday. You know, they could have tried to test the pinch theory, but they didn't do it.

Moving to the aerodynamics, testimony from Mrs. Bradley has established there was a wobble. She said it multiple times during her trial testimony. And we went over this with Mr. Rucoba, the accident reconstruction expert.

One, he testifies that they have no alternative cause for the wobble. They don't have another cause for the wobble. Okay?

Two, he says that there's no physical evidence that the doctor turned left, which was the speculative scenario that was laid out yesterday by Dr. Carhart. So there's four fact witnesses that all placed the bike by the bus at the sidewalk -- four fact witnesses. So they are saying ignore the fact witnesses, ignore all four of them, because we think the bike was really in front of the bus. That's their argument.

In addition, there's five pictures from the Red Rock still video showing that bike side by side with the bus. Okay? That bike was not in front of the bus like Dr. Carhart speculated.

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But, in any event, since there's no alternative cause for the wobble, Dr. Breidenthal's testimony that there's a 10-pound push and a 20-pound pull -- which was not rebutted. They didn't call an aerodynamics engineer, Your Honor. He estimated that the wind force would be 40 miles an hour. They didn't even measure -- I can't believe they're running these buses up and down the desert in Phoenix for days and they didn't even put a simple device to measure the wind speed?

You know, you heard the witness yesterday. He called it longitudinal, latitudinal. He didn't know how much wind was coming off that bus. They didn't measure it. Here we have a case where you're trying to address whether or not an air blast caused the doctor's -- to wobble. And they didn't even address the amount of wind coming off the bus in their testing?

So I think there's plenty of evidence in the record with regards to the air blast, and especially when that is the only cause left. They eliminated the roadway impairment. They eliminated the bike impairment. They eliminated something wrong with the doctor, dehydration. All the other potential causes were eliminated.

So what is left, Your Honor? You know, like

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I already said, they do not have an alternative cause.

So for those reasons, with regards to the evidence -- and then on the aerodynamics, before I forget, they -- they clearly designed a better, superior bus front. They -- to this day, they don't know whether or not the drag coefficiency of this J4500 is .6, .7, whatever.

But we do know that the Mercedes Setra is .33. We do know that in their aerodynamics testing they could have gotten their alternative front down to .32. And if you remember Dr. Breidenthal's testimony, he said that if they had gotten the alternative -- the -- used the alternative front, the front push would have gone from 10 to 3, and there would be no pullback, no pullback whatsoever.

So he's got a 10 push, a 20 pullback. There would be no pullback if they had used the safer alternative front. In other words, there would have been nothing to pull the doctor into the bus, which is what happened.

They referred to Mr. Green's article. Mr. Green's article dealt with rear tire section -- suction. It did not deal with the -- the front tire -- the front part of the bus passing the bicycle.

So, for those reasons, Your Honor, we think

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the motion should be denied.

MR. SMITH: Very briefly, Your Honor.

THE COURT: Certainly.

MR. SMITH: First, I think -- addressing the last point first, he talks about the numbers, you know, the .3, aerodynamic drag coefficient. I think the problem we have is that they're throwing out these numbers without any evaluation of how that would actually impact Dr. Khiabani sitting on the bicycle. Our -- our experts are the only ones that performed that evaluation and showed that it would not have -- would not have caused him to -- to be sucked into the rear tire of the bus.

On the -- I don't have anything further on the actual -- on the substantive evidence.

On the point about the interpretation of the wrongful death statute, we do think it's important. It's a jurisdictional issue. It's not something that -- that we're -- that we've waived or can waive.

And -- and I think -- when he says, oh, well, the issue, you know, came up -- or the issue came up in Ford v. Trejo and these other cases, well, that's actually kind of the point. It did not come up in those other cases. Appellate courts only decide issues that are presented to them. In those cases, nobody

argued how to interpret the wrongful death statute in relation to a strict products liability case. So this would be where the issue is presented and where this court has an obligation to reflect and decide that issue.

Oh, my last point, just that on the -- the Judge Pro federal case that Mr. Kemp was involved in, yes, that did not involve the wrongful death statute. What it involved was the statute of limitations that used the exact same words as the wrongful death statute, wrongful act or neglect. And the court interpreted that to mean -- to -- to not include an action for strict liability.

So we believe that the same -- the legislature uses the same -- same words to mean the same thing in different parts of the law. If, in that part of the law, it did not include strict liability within the meaning of wrongful act or neglect, so too in the wrongful death statute. It doesn't -- those words do not include an action based solely on strict liability.

Thank you, Your Honor.

THE COURT: Very good. This is not going to be one of those days where I take hours and hours. I need a comfort break anyway before the jury comes in.

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MR. CHRISTIANSEN: Are they all here, Your Honor?

THE COURT: Pardon?

MR. CHRISTIANSEN: Are they all here?

THE COURT: I think they're here now. So we are going to be starting pretty soon.

MR. KEMP: Your Honor, can we start setting up?

MR. CHRISTIANSEN: Judge, can we start setting up for the closings?

THE COURT: Yes.

MR. CHRISTIANSEN: Thank you.

(Whereupon a short recess was taken.)

THE MARSHAL: All rise. Department 14 is now in session with the Honorable Adriana Escobar presiding.

Please be seated. Come to order.

THE COURT: All right. Let me just -- are we on the record?

THE COURT RECORDER: Yes.

THE COURT: Okay. Very good.

All right. So after listening to Mr. Smith's argument, which was very thoughtful, concerning the 50(a) motion, I am denying said motion as I find that there has been sufficient evidence for a reasonable

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jury to find defendant liable for punitive damages.

Concerning the particular findings and conclusions of -- I will issue a minute -- a written order at a later date so that we can continue now.

MR. CHRISTIANSEN: Great.

MR. HENRIOD: Very well. Thank you, Your Honor.

THE COURT: Okay? So I will have a record for you.

All right. Now, let's bring the jury in and move forward.

MR. CHRISTIANSEN: Yes, Your Honor.

MR. KEMP: Yes, Your Honor.

THE COURT: All right. Very good.

THE MARSHAL: Ready, Your Honor?

THE COURT: We're ready.

THE MARSHAL: All rise.

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

THE MARSHAL: Your Honor, all the jurors are present.

THE COURT: Okay. Very good.

THE MARSHAL: Please be seated. Come to order.

THE COURT: Thank you. Please call the roll.

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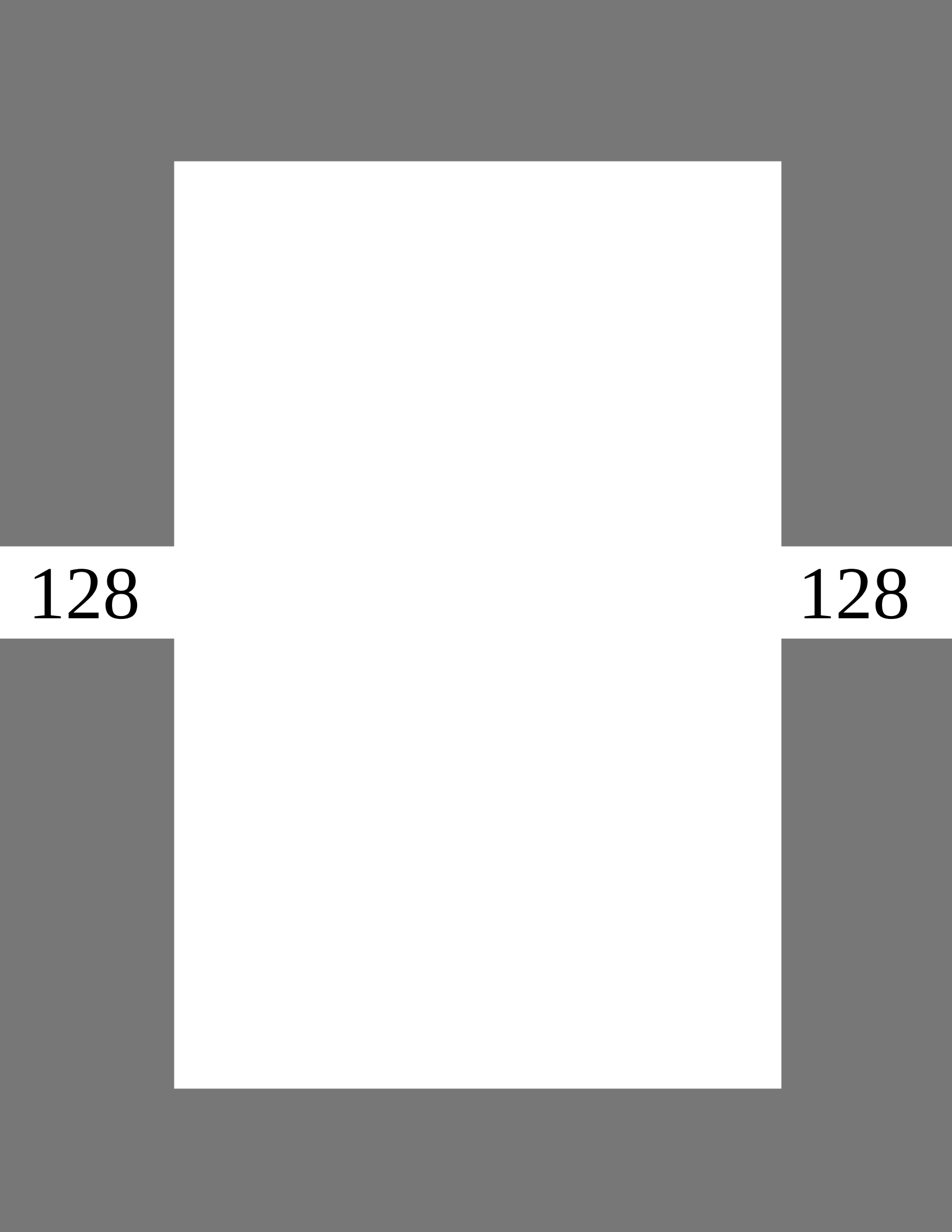
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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

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

REPLY ON
MOTION TO RETAX COSTS

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

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Plaintiffs spend the first paragraph of their opposition discussing select invoices of two of MCI's experts, Michael Carhart and Robert Rucoba. While MCI's costs have no force or effect on plaintiffs' costs, plaintiffs showcase them to distract the Court from the reality that many of their costs are excessive, unreasonable, and unsubstantiated. The "they did it, too" finger-pointing that is present throughout plaintiffs' opposition is unwarranted and ineffectual. Plaintiffs incurred extraordinary costs to prevail on a single claim—failure to provide an adequate warning that would have been acted upon.[1] Yes, MCI incurred significant costs too. It had to in order to successfully defend against 4 out of 5 of plaintiffs' claims. But this is plaintiffs' case. It is their costs that are under scrutiny, not MCI's. And despite what plaintiffs say, it is their burden to demonstrate the reasonableness and necessity of their costs. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352–53, 971 P.2d 383, 386 (1998).

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' award of costs should be reduced to an amount not to exceed the range of $113,595.52 and $114,557.57,[2] because many of their costs and disbursements are in fact grossly excessive, unreasonable, unsubstantiated, and not recoverable under Nevada law. MCI detailed each of these unrecoverable costs in its motion. The Court should reduce or exclude those costs from any award granted.

[1] As discussed in MCI's motion for new trial, the verdict form did not link failure to warn with causation. Had it properly done so, the outcome might have been different.

[2] This amount is adjusted from MCI's previously submitted range of $112,912.03 and $113,874.08 to account for an increase in its per-page transcript rate calculation under heading 6, "Official Reporter Fees," beginning on page 6 of this reply.

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A. Legal Standard

Plaintiffs cite *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 881 P.2d 638 (Nev. 1994) in an attempt to shift the burden to MCI to show that plaintiffs' costs are unauthorized or unreasonable. (Opp. at 3:25–4:1.) However, that case stands for the proposition that when a party moves to reverse a trial court's award of costs on appeal, it bears the burden to show error. *Schwartz*, 110 Nev. at 1051, 881 P.2d at 644, ("We will not reverse an order or judgment unless error is affirmatively shown."). This Court should strictly construe plaintiffs' claimed costs and ignore plaintiffs' demand that a bulk of its costs be taxed under the "catch-all" provision of NRS 18.005(17). *Gibellini v. Klindt*, 110 Nev. 1201, 1205–206, 885 P.2d 540, 542–43 (1994). The Court should also take into account plaintiffs' significant costs for a marginal victory.

B. Plaintiffs' Excessive, Unnecessary, and Non-Recoverable Costs

MCI does not dispute that plaintiffs are entitled to recovery of certain costs. The question is whether or not MCI is obligated to pay for those costs that are unreasonable, unnecessary, or not specifically authorized by statute. Plaintiffs put on an incredibly expensive case that was costly to both sides. This Court should reduce or disallow the costs that are not specifically enumerated by statute, not properly documented, or excessive in nature.

1. Filing/Clerk Fees

Plaintiffs' requested costs should be reduced to $1,886.00. Paralegal fees are akin to attorneys' fees, and are not recoverable here.

2. Reporters' Fees for Depositions/Deposition Transcripts

Plaintiffs attempt to avoid the plain language of NRS 18.005(2), which limits the recovery of reporters' fees to "[r]eporter's fees for depositions, including a reporter's fee for one copy of each deposition." Charges for videography services, expedite fees, synchronized DVDs, rough drafts, Live Note connections, Zoom fees, shipping fees, videoconference fees, after-hours

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charges, flash drives, video files, conference rooms, read and sign fees, equipment rentals, wait time, parking, cancelled services, food charges, transcripts in other cases, and shipping costs are not taxable. Plaintiffs' relentless pursuit to recover under NRS 18.005(17) simply fails. The legislature clearly intended to limit the sorts of costs recoverable by a prevailing party. "[B]ecause statutes permitting costs are in derogation of the common law, they should be strictly construed." *Albios v. Horizon Communities, Inc.*, 112 Nev. 409, 431, 132 P.3d 1022, 1036 (2006). Plaintiffs' award should not exceed $42,296.57.

3. Expert Witness Fess

Plaintiffs seek to recover expert witness fees under NRS 18.005(5) that are more than **158 times** the statutory maximum. This request is excessive, completely unreasonable and unsupported by Nevada law. There are no "circumstances surrounding each expert's testimony[] to require the larger fee." *Frazier v. Drake*, 131 Nev., Adv. Op. 64, 357 P.3d 365, 374 (2015). Plaintiffs may deem their experts' fees to be "reasonable and customary," but that does not make them necessary. Plaintiffs' expert fees should be reduced to $7,500.00.

a. Robert Caldwell

Plaintiffs suggest that Caldwell's testimony justifies an award more than 54 times the statutory limit. But a closer examination reveals that his testimony regarding speed and the nature of the accident were duplicative of more than one of plaintiffs' other experts, including Cohen and Stalnaker. Caldwell's testimony was not critical to the case. The jury arguably found MCI's expert, Rucoba, to have painted a more accurate picture of the accident. Either way, the jury did not find that the motor coach was unreasonably dangerous.

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b. Joshua Cohen

Cohen spent a significant amount of time creating a 3D model. While impressive, it was not necessary. The graphics shown to demonstrate the area that a proximity sensor would have covered did not aid the jurors. The jury determined that MCI was not liable for a defective design. There was nothing special about Cohen's testimony that would justify an award in excess of 23 times the statutory limit.

c. Robert Cunitz

Cunitz testified at trial that MCI did not provide an adequate warning about air blasts. Yet, as experienced as plaintiffs paint him to be, he could not provide a single suggestion as to how MCI should have communicated a warning on air blasts. He did not know whether coach drivers or the companies that operate the coaches need a warning, or whether or not they are already aware. Cunitz did not analyze the distance of the motor coach and Dr. Khiabani to determine whether air disturbance was even an issue. He relied heavily on other experts for critical facts. There is no foundation for an award of costs in excess of 41 times the statutory limit.

d. Richard Stalnaker

Stalnaker is an aerospace engineer that spent a lot of time opining on what an S1 Gard would have prevented if it were in place. However, he never handled an S1 Gard until taking the stand in this case and never read the product's instructions. Upon examination, it was revealed that Stalnkaer did not know the difference between transit buses and motor coaches. Again, this was of little help to the fact finders. For instance, the tests Stalnaker performed on small, anesthetized monkeys—bludgeoning their tiny heads until they died—were not relevant to determining the cause of a human skull injury. The jury ultimately concluded that the lack of a rear-wheel protective barrier did not make the motor coach unreasonably dangerous and a legal cause of Dr.

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Khiabani's death. Nothing about Stalnaker's testimony warrants an award over 22 times the statutory limit.

e. Larry Stokes

Stokes performed the work he has performed 100 times before. He utilized the methodology and statistics typically used to determine the potential earning capacity of the deceased. There was nothing extraordinary about his testimony and there were no circumstances surrounding his testimony that were of such necessity to require a larger fee, particularly one in excess of 16 times the statutory limit.

Plaintiffs' expert fees should be reduced to $7,500.00 ($1,500.00 x 5).

4. Interpreter Fess

An interpreter's fee is limited to the fee for interpreting. NRS 18.005(6). It does not include costs for parking or processing a credit card. Construing the statute strictly, these costs should be denied. Plaintiffs' request should be reduced to $600.00.

5. Process Server Fees

Recovery of costs for serving a temporary restraining order, failed service attempts, rush service attempts, duplicate services, database searches and skip traces, wait time and pre-deposition meetings are not permitted under NRS 18.005(7). Construing the statute strictly, these costs should be denied and plaintiffs should not be permitted to recover an amount exceeding $1,395.00. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543. They are not reasonable nor are they necessary.

6. Official Reporter Fees

MCI maintains its position that the $3.65 per-page rate set forth in 28 U.S.C. § 753 is a fair and reasonable rate for a reporter's official fee. It is the standard set across the board for all the federal courts. But MCI acknowledges

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that NRS 3.370 prescribes a higher per-page rate for standard transcripts. To be fair, MCI submits that plaintiffs' costs should be retaxed as follows:

KGI Court Reporting, Inc.

Fee Description	Amount	Total
Voir Dire – Invoice #434	732 pages x $1.83 (1/2 of $3.80)[3]	$1,390.80
Voir Dire – Invoice #431	120 pages x $1.83 (1/2 of $3.80)[4]	$228.00
Deposit – Invoice #414	$5,000.00[5]	$0
Transcripts – Invoice #427	642 pages x $3.80	$2,439.60
Transcripts – Invoice #433	473 pages x $3.80	$1,797.40
Transcripts – Invoice #437	652 pages x $3.80	$2,477.60
Transcripts – Invoice #439	550 pages x $3.80	$2.090.00
Transcripts – Invoice #447	67 pages x $1.00	$67.00
		$10,490.40

Organized, Inc.

Fee Description	Amount	Total
Rough Draft	$31.50	$0
Deposit	$5,000.00[6]	$0
Transcripts	1,189 pages x $3.80	$4,518.20
Transcripts	653 pages x $3.80	$2,481.40
		$6,999.60

MCI is not receiving any windfall (as plaintiffs erroneously state) by reducing the impermissible deposit fees to $0. MCI has accounted for the

[3] KJC paid 1/2 of the $7.25 per-page expedite cost reflected on the invoice. The cost is adjusted to reflect 1/2 the $3.80 per-page maximum for an ordinary transcript.

[4] KJC paid 1/2 of the $7.25 per-page expedite cost reflected on the invoice. The cost is adjusted to reflect 1/2 the $3.80 per-page maximum for an ordinary transcript.

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

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

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number of pages in each appropriate transcript and multiplied it by the standard per-page rate. Fees for daily transcripts and real time feeds are not "reasonable and necessary" costs, but are discretionary costs on the part of counsel. Plaintiffs' request should be reduced to $17,490.00.

7. Faxes

Plaintiffs' internal tracking log does not contain the detail needed to demonstrate the reasonableness of each facsimile, even assuming that no clerical errors were made and each fax was properly attributed to this case. Further, MCI should not be liable for plaintiffs' overhead. Construing the statute strictly, these costs should be denied. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543.

8. Copying Expenses

MCI performed a detailed review of plaintiffs' copying expenses and found that $7,950.57 worth of copies were reasonable and necessary. That is a fair amount for a case this size. Plaintiffs may not use this as an opportunity to seek reimbursement for vendors that charge above the market rate or for its law firms' routine overhead. If Plaintiffs felt using an outside vendor was necessary, they could have used a UPS store, which would have charged $.10 per black and white copy. As plaintiffs point out—again—MCI used some of the same outside vendors. Like plaintiffs, MCI's counsel made a discretionary choice based on convenience and preference. The fact that MCI "did it too" and that vendors, like HOLO, are commonly used in the legal industry do not make the costs incurred taxable.

Many documents in this case were exchanged electronically, and could have been maintained and reviewed electronically. Large color demonstratives may have been convenient and advantageous, but were not necessary. Because statutes permitting the recovery of costs are in derogation of common law, NRS 18.005(12) should be construed strictly, and any scanning costs should not be

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allowed. *Albios*, 112 Nev. at 431, 132 P.3d at 1036. Additionally, there is nothing about plaintiffs' scanning costs that suggests they were not part of their law firms' routine overhead.

9. Long-Distance Phone Calls

MCI disagrees with plaintiffs' assertion that their long-distance telephone calls are sufficiently documented in order for this Court to determine reasonableness. Additionally, there is no indication that these costs were actually charged to plaintiffs' law firms. Many businesses have free long-distance plans. It is very common. If KJC was actually being charged for every one of its calls, it should have had one of its many experts with a free long-distance plan initiate the phone conferences. The few invoices, including the $18.75 charge incurred by CLO, appear to be for conference calls with the special master, and are not the type of calls contemplated by NRS 18.005(13). Construing the statute strictly, these costs should be denied. *Gibellini*, 110 Nev. at 1205, 885 P.2d at 543.

10. Postage Fees

Plaintiffs do not provide a single reason why it was necessary to send via FedEx "large batches of documents." (Opp. at 16:8.) Only reasonable costs for postage are recoverable under NRS 18.005(14). Emailing or sending a flash drive of the documents would have been a cheaper alternative. Plaintiffs' costs should be retaxed to $130.87.

11. Travel Expenses

Plaintiffs seek reimbursement for travel costs that are impermissible and clearly not necessary, including hotels for witnesses. MCI has fully outlined those costs in its motion. The Business Select options KJC booked are the most expensive flights Southwest has to offer. Cheaper airfare was available. Even in the event of rescheduling, Southwest's most basic tickets would have been credited to the next flight. Deposition dates were not being set within a 24-hour

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period and all the cities traveled to have public transportation, Uber, and/or Lyft, making rental cars unnecessary.

The credit card statements provided by Mr. Christiansen and Ms. Works do not have the itemization and detail needed for this Court to determine the reasonableness of the charges. "Food" could be a $100 worth of gourmet Starbucks coffee delivered to their hotel room, as we have seen on a number of other receipts submitted by plaintiffs. The Court should reduce the amount for travel expenses between the range of $1,710.49 and $2,672.54, which amount would be both fair and reasonable.

12. Expenses Not Recoverable Under NRS 18.005

Plaintiffs crusade to recover under NRS 18.005(17) is tiresome at this point. All costs claimed under this category should properly be reduced to $0.

a. Legal Research

Plaintiffs' attempt to seek an award for its legal research costs is directly contrary to Nevada law. First, they are not "sufficiently itemized" as required by *Waddell*. *Waddell v. L.V.R.V, Inc.,* 122 Nev. 15, 25–26, 125 P.3d 1160, 1166–67 (2006). Second, nothing in the documentation provided by plaintiffs shows that the research conducted was for "electronic discovery purposes." *In re Dish Network Deriv. Litig.*, 133 Nev., Adv. Op. 61, 401 P.3d 1081, 1093 (2017). In fact, plaintiffs even admit that it utilized Westlaw and/or LexisNexis to find the "most recent applicable caselaw on various points of dispute throughout pre-trial motions and during the course of trial. . . in addition to resolving the correct statements of the law in order to so instruct the jury." (Opp. at 19:6–9.) These charges clearly "represent part of [plaintiffs'] legal fees" and are not taxable. *Id.* Computerized research expenses must be necessarily incurred, not merely helpful or advantageous. *Bergmann v. Boyce*, 109 Nev. 670, 681, 856 P.2d 560, 560 (1993). NRS 18.005 is not an appropriate vehicle for plaintiffs to pass on the cost of their law firms' expected library.

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b. Run Service

KJC's in-house runners are part of the firm's staff, like a receptionist or a legal secretary. Their salaries are part of the firm's routine overhead and charges for their daily duties are not taxable. Even assuming those costs are recoverable, the run slips do not provide enough detail for this Court to determine the reasonableness of the charges and, therefore, must be denied. *Cadle Company v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015).

c. Trial Support

Plaintiffs' demand to be reimbursed for its "trial support" costs is offensive. They have tried repeatedly to "throw everything and the kitchen sink" under NRS 18.005(17). These costs are not taxable. This portion of plaintiffs' opposition and appendix is dedicated to every other excessive, unreasonable, and unnecessary cost incurred. The documentation provided shows costs ranging from office supplies and bubble wrap to staff overtime. Clearly, these are not recoverable, even if they were properly documented. The services provided by the consultants plaintiffs engaged fell within work normally performed by attorneys, which are not taxable. *Dish Network*, 133 Nev., Adv. Op. 61, 401 P.3d at 1093. Any of KJC or CLO's lawyers or paralegals could have billed for these same projects and, if appropriate, could receive compensation for those fees in permittable circumstances. Plaintiffs' "information technologies consultant" was hired to show flashy exhibits to the jury. Nothing about this expense is necessary. Any one of plaintiffs' multiple attorneys could have set up the PowerPoint slides and shown them to their witnesses or the jury using either a laptop or an Elmo projector. Hiring outside technical support staff may have been convenient, but it certainly was not necessary to prosecute plaintiffs' case. Plaintiffs had an absolute right to hire any consultants they desired. But it is not MCI's obligation to pay for such

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discretionary costs.

CONCLUSION

Based on the foregoing, MCI's motion to retax should be granted.

Dated this 29th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2018, a true and correct copy of the foregoing "Reply on Motion to Retax Costs" was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent); the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

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 REPLY IN SUPPORT OF RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING FAILURE TO WARN CLAIM

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MCI hasn't raised any new arguments. It argued in its original Rule 50 motion at trial that Plaintiffs had not proven causation and that strict liability was not a proper cause of action under the wrongful death statute. MCI's renewed motion focuses on exactly those two issues.

Plaintiffs' argument that, if warned, the driver of the motor coach could have avoided the accident is nothing more than speculation of counsel. There is no *evidence* that the driver would have (or could have) taken any of the hypothetical actions that Plaintiffs now assert to be possible. That's because Plaintiffs never asked the driver whether he would have (or could have) done anything different if he were given a warning.

They didn't ask the question because they refused to propose a warning. They consequently made it impossible for themselves to demonstrate the *effect* that a warning would have.

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There is no evidence whatsoever to demonstrate that the driver would have (or could have) done anything different on the day of the accident that would have avoided Dr. Khiabani's death. So MCI is entitled to judgment in its favor as a matter of law.

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A. MCI's Original Rule 50 Motion Raised the Same Issues as Its Renewed Motion

1. Legal Standard

Rule 50(b) should not be applied so strictly that it prohibits a "just and efficient determination of the case." *See Anderson v. United Tel. Co. of Kan.*, 933 F.2d 1500, 1504 (10th Cir. 1991). "The fact that a party expands its reasoning and offers more specificity in its post-trial motion" does not violate Rule 50(b), "so long as the legal and factual basis for the renewed motion mirrors that presented in the Rule 50(a) motion." *Liberty Mut. Fire Ins. Co. v. JT Walker Indus, Inc.*, 554 Fed App'x 176, 185 (4th Cir. 2014). The test is

whether the original Rule 50 motion "either in written or oral argument, provided sufficient notice to his opponent of the alleged deficiencies in the opponent's case." *See Wallace v. Poulos*, 861 F. Supp. 2d 587, 595 (D. Md. 2012). Issues that are "connected to" or "inextricably intertwined with" the previously asserted grounds for judgment as a matter of law may be addressed in a renewed Rule 50 motion. *See Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 198 (8th Cir. 1995) (economic loss issue was "somewhat different from the duty-of-care" issue but the issues were "inextricably intertwined"); *Chrabaszcz v. Johnston Sch. Comm.*, 474 F. Supp. 2d 298, 310 (D.R.I. 2007). Even issues that are raised "obliquely" in the original Rule 50 motion can be raised again in a renewed Rule 50 motion. *See Parkway Garage, Inc. v. City of Phila.*, 5 F.3d 685, 691 (3d Cir. 1993), *overruled on other grounds by United Arts Theatre Circuit, Inc. v. Twp. of Warrington, Pa.*, 316 F.3d 392 (3d Cir. 2003).

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Plaintiffs include a 17-line quotation to *E.E.O.C. v. Go Daddy Software, Inc*. in their combined opposition regarding the necessary correlation between a Rule 50(a) motion during trial and a Rule 50(b) post-judgment motion (Combined Opposition at 33), but conceal essential context. Literally, the very next sentences following the quoted language are:

> However, Rule 50(b) may be satisfied by an ambiguous or inartfully made motion under Rule 50(a). Absent such a liberal interpretation, the rule is a harsh one.

Go Daddy Software, Inc., 581 F.3d 951, 962 (9th Cir. 2009) (internal quotations and citations omitted). Put simply, the unrealistic standard plaintiffs suggest is not correct.

In addition to these legal principles, the Court should interpret Rule 50 broadly to deny the Plaintiffs any benefit of their attempted gamesmanship. Plaintiffs complained about the amount of time MCI was taking to make its

Rule 50 motion at trial, objected to any "extensive legal argument" and argued that MCI should be limited to five minutes in which to make all points (besides the first that it had already made). (T. at 19.) They now complain that MCI's arguments were "pithy" and occupy only 12 pages of the trial transcript. (Combined Opposition at 33-34.)

2. MCI Raised All of Its Arguments at Trial

In its oral Rule 50(b) motion, MCI argued that plaintiffs had not proven causation:

- There was insufficient evidence "as a matter of law, to establish a product defect" because, among other things, "[b]y the time [Dr. Khiabani] veered into the bus – or, as plaintiffs would say, was sucked into the bus, the coach – it was too late at that point for Mr. Hubbard to make an evasive maneuver." (T. at 20.)
- "For the same reason, a warning about air blasts would have done no good." (T. at 21-22.)
- There is no heeding presumption under Nevada law. (T. at 22.)[1]
- "[P]laintiffs never proposed language for a warning. . . . . Since they haven't proposed how to fix our – the warning, they haven't given the jury any proposed language for a warning, it would be just speculative to say, well, here's, in the general problem, but we're giving you no guidance on how to fix it." (T. at 22.)

Plaintiffs say that MCI waived its arguments that (1) Mr. Hubbard did not testify about any particular warning or that a warning would have changed what he did; (2) Plaintiffs should have explained how a warning would have prevented Dr. Khiabani's death; (3) Mr. Hubbard's testimony that he generally heeded "safety training" did not establish causation; (4) that the danger was

[1] The transcript says "Keating presumption," but that must be an error in transcription.

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open and obvious; and (5) Mr. Cunitz's testimony did not establish causation because he did not testify that a particular warning should have been given (or how it should have been given).

These arguments were not waived because they are all about causation, just like MCI's previous Rule 50 motion. And they all intertwine with one another. The absence of testimony from Mr. Hubbard that a warning would have or could have changed his conduct demonstrates that a warning would have "done no good," as MCI previously argued. The same is true of the argument that Plaintiffs did not explain how a warning would have prevented Dr. Khiabani's death. Mr. Hubbard's testimony that he heeded "safety trainings" is also relevant to whether a warning would have "done no good." Likewise, the open and obvious nature of the hazard reinforces the conclusion that a warning would have "done no good." MCI raised the issue of Mr. Cunitz's testimony only because it anticipated that Plaintiffs would argue that his testimony established causation. Plaintiffs have done exactly that in their Opposition, including a discussion of different portions of Mr. Cunitz's testimony over three pages of their Opposition. (Opp. at 40-43.)

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Plaintiffs had ample notice of all of MCI's arguments and the deficiencies in their case. There is no "ambush." Rather, Plaintiffs are trying to profit from gamesmanship.

B. Plaintiffs' Counsel's Hypothesis About What Hubbard Could Have Done Is Not Evidence

Plaintiffs do not seem to quarrel with the concept that "where some sort of serious accident was inevitable by the time the plaintiff detected the danger, a warning would not have prevented the accident; thus, the plaintiff cannot establish the causation element of a failure to warn claim that the absence or inadequacy of a warning was a proximate cause of the injury." American Law of Products Liability § 34:54 (3d ed.); *see also Greiner v. Volkswagenwerk*

Aktiengesellschaft, 429 F. Supp. 495, 497 (E.D. Pa. 1977) (no causation where "a serious accident was inevitable, warning or no warning" and "a warning, even if read, could not have been heeded"); 2 Owen & Davis on Products Liability § 11:20 (4th ed.) ("If it is shown that the injury would have occurred regardless of whether a proper warning had been given, a failure to warn is not the cause of injury, and the plaintiff is not entitled to recover.").

Instead, their lawyers have made up some things that Mr. Hubbard might have done if he had been warned. They say that he could have (1) "tak[en] the left thru lane when first turning on Pavilion Center;" (2) "continu[ed] to follow the bike instead of passing the bike"; or (3) "hugg[ed] the east side of the right thru lane instead of driving in the middle of such lane." (Opp. at 35.)

Plaintiffs were required to "show more than speculation or possibility that the product caused the injury." *Holcomb v. Ga. Pac., LLC*, 289 P.3d 188, 197 (Nev. 2012). And arguments of counsel "'are not evidence and do not establish the facts of the case.'" *Nev. Ass'n Servs., Inc. v. Eighth Jud. Dist. Ct.*, 338 P.3d 1250, 1255 (Nev. 2014) (quoting *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993)); *see also Phillips v. State*, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) ("Facts or allegations contained in a brief are not evidence and are not part of the record."); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 309 (1990) ("A plaintiff's prima facie case should not be capable of being constructed from pure rhetoric.").

The Plaintiffs cite nothing in the record to support the three hypothetical actions that Hubbard purportedly could have taken. That's because *Hubbard was never asked* if he would have (or even could have) done those things if he had been given a warning. *See Greiner*, 429 F. Supp. at 498 (argument that plaintiff might not have bought car if she had been warned of hazard was "pure

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conjecture or guess" because witness had not been asked if she would have bought car, so causation was not established).

Plaintiffs' lawyers cannot backfill the gap in their proof simply by making up hypothetical actions that Hubbard might have taken. *See Hernandez v. Ford Motor Co.*, 2005 WL 1693945, at *2 (S.D. Tex. July 20, 2005) (where there was no evidence that warning "would have been heeded and would have changed the outcome" plaintiff could not ask the jury to speculate as to how accident could have been prevented); *Greiner*, 429 F. Supp. at 498 (noting that plaintiff had introduced no evidence "which would lend the dignity of an inference" that, if warned, purchaser of vehicle would not have bought it if warned); *Am. Motors Corp. v. Ellis*, 403 So.2d 459, 466 (Fla. Ct. App. 1981) ("Only if we were to engage in the speculation that the owner, properly warned, would not have purchased the car, or would not have allowed it to be driven on interstate highways, could we recognize a causal relationship between breach of a duty to warn and the instant injury."); *Hiner v. Bridgeston/Firestone, Inc.*, 978 P.2d 505, 511 (Wash. 1999) (speculation that tire installer "might have" read a warning was speculation that did not establish causation).

And the jury could not infer those facts from the evidence. *See Johnson v. Brown*, 77 Nev. 61, 65, 359 P.2d 80, 82 (1961) (refusing to infer negligence when court would be required to infer facts that were not supported by any evidence). "Inference is a process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." *Computer Identics Corp. v. S. Pac. Co.*, 756 F.2d 200, 204 (1st Cir. 1985). Here, there are no other proven facts that would allow a jury to conclude that Hubbard would have or could have done any of the things conjured up by the Plaintiffs' lawyers. *See Johnson*, 77 Nev. at 65, 359 P.2d at 82.

The evidence demonstrates that it was too late for Mr. Hubbard to avoid

the accident when he saw Dr. Khiabani out of his peripheral vision. The absence of a warning, therefore, did not cause the accident.

C. Plaintiffs Were Required to Prove More Than a Duty to Warn

One of Plaintiffs' primary arguments, repeated in various sections of their Opposition, is that they were required only to demonstrate that MCI should have warned Hubbard. (*See, e.g.*, Opposition at 38; *id.* at 45-46). The flaw in the argument is laid bare when Plaintiffs argue that "[t]here 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." (Opposition at 40.)

That's not MCI's thesis. MCI's thesis is that Plaintiffs failed to demonstrate causation. Showing that a warning should have been given only establishes that the product was in a defective condition. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 239, 955 P.2d 661, 665 (1998) ("'Where the defendant has reason to anticipate that danger may result from a particular use of his product, and he fails to warn adequately of such a danger, the product sold without a warning is in a defective condition.'" (quoting *Oak Grove Invs. v. Bell & Gossett Co.*, 99 Nev. 616, 624, 668 P.2d 1075, 1080 (1983))).

Plaintiffs were required to demonstrate that the product was defective (*i.e.*, that a warning should have been given) *and* that it caused the accident (*i.e.*, that an adequate warning would have made a difference). *See Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009) ("To successfully prove a failure-to-warn case, a plaintiff must produce evidence demonstrating the same elements as in other strict product liability cases: '(1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury.'" (quoting *Fyssakis v. Knight Equip. Corp.*, 108

Nev. 212, 214, 826 P.2d 570, 571 (1992))); *Finnerty v. Howmedica Osteonics Corp.*, 2016 WL 4744130, at *5 (D. Nev. Sept. 12, 2016) (under California law, "'[a] plaintiff asserting causes of action based on a failure to warn must prove not only that no warning was provided or the warning was inadequate, but also that the inadequacy or absence of the warning caused the plaintiff's injury.'" (quoting *Motus v. Pfizer, Inc.*, 196 F. Supp. 2d 984, 990-91 (C.D. Cal. 2001))). Plaintiffs cite *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245 (2003), in support of their argument, but causation wasn't an issue in that case. The court merely addressed the proper jury instructions for determining whether a warning was adequate. *Id.* at 108, 65 P.3d at 250. Again, that only goes to whether the product is defective. It says nothing about causation. And it is axiomatic that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Thus, *Sea Ray* is irrelevant.

As the Nevada Supreme Court made clear in *Wyeth v. Rowatt*, it is not enough to show that a product should have carried a warning that would have been heeded. On top of that, the jury should be charged to find that the absence of an appropriate warning (that would have been heeded) was a but-for cause of the injury—and, *in any case*, it must *at least* find that the absence of such warning was a substantial factor in causing the injury. 126 Nev. 446, 465-66, 244 P.3d 765, 779 (2010). Put simply, the particular necessity to show that a warning would have been heeded is not in lieu of ultimate proximate (or at least legal) causation. There will be circumstances where (i) a warning may have been appropriate, where (ii) it would have been heed, and yet (iii) *even adherence to the appropriate warning still would not have prevented the injury*.

D. Plaintiffs Failed to Prove Causation

Plaintiffs failed to demonstrate causation because there is no evidence that Hubbard would have or could have altered his conduct if warned, and there is no evidence that the accident would not have occurred if Hubbard had been warned.

1. There Is No Evidence That Hubbard Would Have or Could Have Altered His Conduct if Warned

i. It Is Hornbook Law that a Plaintiff Must Show That a Warning Would Have Altered the Conduct of the Person Using a Product

Plaintiffs argue that, under *Rivera*, they were not even required to prove that Hubbard would have altered his conduct if he received an adequate warning. (Opp. at 35-36, 45-46.) But *Rivera* gives two examples of how a plaintiff might establish proximate cause, and both of them require a plaintiff to show that the warning would have changed the conduct of the person being warned: "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*, 125 Nev. at 191, 209 P.3d at 275 (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993)); *see also Flowers v. Eli Lilly & Co.*, 2016 WL 4107681, at *3-4 (D. Nev. Aug. 1, 2016) (applying *Rivera* and holding that proximate cause cannot be established unless plaintiff demonstrates that warning would have altered decisions of physicians prescribing medication); *Bunker v. Ford Motor Co.*, 2013 WL 4505798, at *10 (D. Nev. Aug. 22, 2013) ("[Plaintiff] did not offer any evidence that a warning . . . would have caused her . . . to behave differently on the day of the accident or otherwise alter the way [she] operated the [vehicle].").[2]

[2] MCI cited numerous other cases on page 6-7 of its Renewed Motion. *See also Overpeck v. Chicago Pneumatic Tool Co.*, 823 F.2d 751, 755 (3d Cir. 1987)

That is hornbook law. *See* American Law of Products Liability § 34:49 (3d ed.) ("Judgment as a matter of law may be granted to defendants who present evidence that the plaintiff, or another instrumental party, would not have acted differently even if an allegedly adequate warning had been given . . . since such evidence shows that there was no reasonable possibility that disclosure of the omitted information would have prevented the injury.").

Proof is required; a guess is not enough. *Karst v. Shur-Co.*, 878 N.W.2d 604, 614 (S.D. 2016) ("'Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury.'" (quoting *Conti v. Ford Motor Co.*, 743 F.2d 195, 198 (3d Cir. 1984))). Here, there is no proof whatsoever. There is only Plaintiffs' counsel's guesswork.

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ii. Evidence of Safety Consciousness Is Insufficient

Plaintiffs attempt to distinguish *Riley v. American Honda Motor Co., Inc.*, 856 P.2d 196 (Mont. 1993) – a case that *Rivera* quoted – because the testimony in *Riley* was "wishy washy." But that wasn't the real basis for the court's decision. The court held that the plaintiff "did not testify that he would have altered his conduct had he been warned." *Id.* at 199. Likewise, here, Hubbard did not testify that he would have driven the motor coach differently on the day

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(judgment as a matter of law proper following jury trial where plaintiff did not "demonstrate that an adequate warning would have modified his or her behavior so as to avoid injury"); *Santos v. Ford Motor Co.*, 893 N.Y.S.2d 537, 538 (N.Y. App. Div. 2010) (trial court properly dismissed failure to warn claim alleging that vehicle became more unstable as it was loaded with passengers and cargo where there was no evidence that the plaintiffs would have packed the car differently if given a different warning).

of the accident if he had been warned.[3] He didn't even testify that he "might have" done something different on the day of the accident, like the plaintiff did in *Riley*. Hubbard was never asked that question.

Hubbard's testimony that he generally heeded "training warnings" does not establish that he would have (or could have) altered his conduct on the date of the accident. *See id.* (rejecting argument that causation was established based "solely on . . . general testimony that [plaintiff] respected machinery and was concerned about safety"). Establishing that a person generally heeds warnings is a necessary, but not sufficient, condition for establishing causation.

The plaintiff must go further, and prove that the person heeding a warning could have, and would have, acted differently under the particular circumstances that led to the accident. *See Riley*, 856 P.2d at 199; *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 193 (Mo. 1992) (court must focus on the "actual circumstances surrounding the accident").

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iii. The Holding in *Sims* Is Limited

Contrary to Plaintiffs' argument, *Sims* does not hold that showing that a person generally heeds safety warnings always establishes proximate cause. In fact, the court specifically acknowledge that it was "only hypothesizing, and ha[d] no impression, or suggest none, concerning what the evidence will reflect at trial." *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991). *Rivera* recognized that *Sims*' holding was limited because *Sims* stated only that the evidence at trial "*could* demonstrate that the [decedent] would

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[3] The Plaintiffs falsely state that Hubbard testified that he would have "'absolutely' 'heeded' an air blast warning." That is not what he said. He was asked "[a]nd in terms of your personal habits, if you're trained about something relative to safety, do you heed those training warnings?" He responded "absolutely." That testimony does not establish causation because Mr. Hubbard was never asked what he would have done differently on the day of the accident if he had been given a warning.

have adhered to an adequate warning." *See Rivera*, 125 Nev. at 192, 209 P.3d at 275 (emphasis added).

Sims did not hold that a single question and answer can establish causation. The Nevada Supreme Court took the causation issue seriously in *Rivera*. *Rivera*, 125 Nev. at 192, 209 P.3d at 275 ("This court has consistently stated that the plaintiff must prove the element of causation."). It cannot be so easy to establish causation that a plaintiff merely needs to ask a witness if he generally follows safety instructions.[4] Every witness will answer that question with a "yes." *See* Henderson & Twerski*, supra* at 304 ("If the plaintiff's prima facie causation case is too easy to establish, the tools available to defendants to rebut it are almost nonexistent."); 2 Owen & Davis on Products Liability § 11:20 (4th ed.) ("Some courts fear the effect of such self-serving testimony which is likely to state the obvious, i.e. 'of course, I would have heeded an adequate warning.'").

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2. Plaintiffs Were Required to Show that the Accident Would Not Have Happened if Hubbard Had Been Warned

Plaintiffs are correct that *Rivera* stops short of saying that plaintiffs must demonstrate that the accident would not have occurred. But that is a fundamental element of causation, as other cases in Nevada (including *Sims*) have recognized. *See Sims*, 107 Nev. at 156, 815 P.2d at 523 ("[I]n order to satisfy this element, plaintiff must show that *but for* defendant's negligence, his or her injuries would not have occurred."); *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998) ("To demonstrate actual cause with

[4] In *Sims*, the person to whom the warning would have been directed was dead, so proof of his having "strictly heeded directions concerning his duties and safety responsibility" would have needed to come from other witnesses and documents. 107 Nev. at 524, 815 P.2d at 156. While the decedent in *Sims* could not have been asked directly whether he would have heeded the particular warning on the particular occasion, Hubbard could have been.

respect to Dow Corning's product, the Mahlums had to prove that, but for the breast implants, Charlotte Mahlum's illnesses would not have occurred."), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001); *Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 785, 101 P.3d 792, 797 (2004) (proximate cause is "any cause which in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening case, produces the injury complained of and *without which the result would not have occurred*" (emphasis added)).

Because there is no heeding presumption in Nevada, a plaintiff in a failure-to-warn case must prove, with actual evidence, that the accident would not have happened[5] if an adequate warning had been given.[6] *See Dow Chemical*, 114 Nev. at 1481, 970 P.2d at 107; *Greiner*, 429 F. Supp. at 499 ("'If the basis for recovery under strict liability is the inadequacy of warnings or instruction about dangers, then plaintiff would be required to show that an adequate warning or instruction would have prevented the harm.'" (quoting Professor Keeton, *Products Liability*, 48 Tex. L. Rev. 398, 414 (1970))); *DeJesus v. Craftsman Machinery Co.*, 548 A.2d 736, 744 (Conn. Ct. App. 1988) (failure of manufacturer to provide warnings did not give rise to heeding presumption and plaintiff was required to prove that accident would not have occurred if warning was given). Plaintiffs are simply wrong when they argue that no such proof is

[5] While Motor Coach maintains that this case called for proof of but-for causation, *at least* plaintiffs needed to show that the absence of the warning was not just a defect in the abstract but a substantial factor in causing Dr. Khiabani's injury.

[6] Even in a jurisdiction with a heeding presumption, evidence that a warning would not have changed anything disproves causation. *See Overpeck*, 823 F.2d at 756 ("Even if we assume . . . that appellants initially benefited from a presumption that an adequate warning would have affected [the plaintiff's] action we cannot conclude that appellants met their burden of demonstrating that such a warning would have averted an accident.").

required.

3. The Open and Obvious Nature of the Hazard Reinforces the Conclusion that a Warning Would Have Done No Good

Hubbard was an experienced driver who knew that a motor coach could be dangerous if it got too close to a bicyclist. The obviousness of the danger and Hubbard's immediate reaction to it highlights the fact that a warning would not have made any difference. *See Dorshimer v. Zonar Sys., Inc.*, 145 F. Supp. 3d 339, 354 (M.D. Pa. 2015).

Plaintiffs argue that Hubbard did not know 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." That is just another way of saying that a motor coach could be dangerous if it got too close to a bicyclist. And Plaintiffs do not explain how providing that information to Hubbard would have changed anything. Dr. Khiabani appeared in Hubbard's peripheral vision after it was too late for Hubbard to avoid the accident. And Hubbard immediately took the only evasive action possible.

4. It Is Not "Impossible" to Prove Causation

Plaintiffs say that if they are required to prove that a warning would have altered Hubbard's conduct and prevented the accident, it will be impossible for any plaintiff to establish causation. (Opp. at 36.) That is untrue. In the absence of a heeding presumption, the plaintiff can "show that [the person using the product] did not have the information the warning would have imparted already and that, if she had the information, it would have affected her conduct." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762 (Mo. 2011).[7] And *Riley* (which, again, was quoted in *Rivera*) dismissed the argument that there

[7] There is a "heeding presumption" under Missouri law, but this portion of *Moore* discusses what a plaintiff must prove in the absence of a presumption.

are "perceived difficulties involved in requiring a plaintiff to establish the causation element." *Riley*, 856 P.2d at 200.

> [T]he evidence required to establish this element is not qualitatively different than other testimony given by a party in support of his or her prima facie case. Concerns that the testimony may be speculative or self-serving and that a plaintiff may die before the testimony is given are not unique to this cause of action. In any event, these concerns are a red herring in the case before us where [the plaintiff] had a full and fair opportunity to present [its] case and simply did not establish a prima facie case of failure to warn.

Id.

Just so here. Plaintiffs could have asked Hubbard if he would have acted in a way to avoid the accident if he had been warned. They didn't. So they didn't establish their prima facie case.

E. The Plaintiffs Were Required to Propose a Warning

1. The Effect of a Warning Cannot Be Determined if the Substance of the Warning Is Unknown

Causation can only be demonstrated if a plaintiff shows what effect a warning would have had on the person using the product. A plaintiff cannot do that if it does not introduce evidence to establish what information the warning should have conveyed or how the information should have been conveyed. *See* Henderson & Twerski, *supra* at 306 ("The tribunal must construct a conceptual bridge between the absence of the desired information and the injury which plaintiff suffered, in order to establish the necessary causal link. For this bridge-building process to have any meaning, the factfinder must be able to hypothesize as to how the plaintiff would have used the missing information had the defendant supplied it."). Thus, a "plaintiff should not prevail in a warnings suit if the record is bereft of evidence as to what type of warning might have prevented the accident." 1 Owen & Davis on Products Liability

§ 9:30 (4th ed.).[8]

Here, the jury could not find that Hubbard would have done something different on the day of the accident because the Plaintiffs didn't introduce any evidence of what information Hubbard should have been given in a warning. Plaintiffs contend that they were not required to propose a warning because no Nevada case has expressly required it. But *Rivera* expressly states that causation can be proven if a plaintiff shows that a "different warning" would have changed the behavior of the person who is warned. *Rivera*, 125 Nev. at 191, 209 P.3d at 275.

Plaintiffs argue that *Rivera* doesn't apply because in that case, a warning was given and here, there was no warning. That is a distinction without a difference. An inadequate warning is the equivalent of no warning at all. *See Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 87 (4th Cir. 1962) ("'An insufficient warning is in legal effect no warning.'" (quoting *Sadler v. Lynch*, 64 S.E.2d 664, 666 (Va. 1951))); *Crislip v. TCH Liquidating Co.*, 556 N.E.2d 1177, 1182 (Ohio 1990) ("An inadequate warning may make a product as unreasonably dangerous as no warning at all."); *Brown v. Sears, Roebuck & Co.*, 667 P.2d 750, 757 (Ariz. Ct. App. 1983) ("[A]n inadequate warning may be equal to no warning at all.").

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[8] The issue of what mechanism should have delivered a warning is a facet of this inquiry. Plaintiffs argue that Mr. Cunitz provided various ways a warning could have been delivered. (Opp. at 40-42.) But Mr. Cunitz did not testify that a warning should have been delivered in any one of these ways. And, more importantly, he did not testify that if a warning was delivered in one of those ways, Mr. Hubbard would have driven the motor coach differently or that the accident would not have happened. His testimony therefore does not establish causation. *See Meyerhoff v. Michelin Tire Corp.*, 852 F. Supp. 933, 947 (D. Kan. 1994) ("[A] person cannot, after suffering an accident, simply draw up a warning limited to the dangers involved in that accident and argue that that warning should have been conveyed by the manufacturer or seller without first also establishing that the warning is adequate and that it actually could have been communicated in the manner proposed.").

Under both circumstances, liability is derived from the manufacturer's failure to provide the user of the product with sufficient information about the hazard.

Many courts in other jurisdictions (and other authorities) have recognized – in insufficient-warning and no-warning cases – that causation cannot be established unless the plaintiff proposes a warning. *See, e.g.*, *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 46 (1st Cir. 2005) (rejecting argument that "it was not the plaintiff's obligation to articulate a particular suggested warning, but rather the entire duty to warn question should somehow be thrown to the jury" because that position "completely misunderstands" the plaintiff's burden to prove proximate cause); *Cuntan v. Hitachi KOKI USA, Ltd.*, 2009 WL 3334364, at *17 (E.D.N.Y. Oct. 15, 2009) (noting that even if plaintiff would have altered his behavior if an adequate warning was given, jury could not find causation when plaintiff "failed to offer any alternative[] [warnings] for the jury to consider"); *Duffee ex rel. Thornton v. Murry Ohio Mfg. Co.*, 879 F. Supp. 1078, 1084 (D. Kan. 1995) (where a plaintiff "does not even propose a particular warning that should have been given," he cannot establish whether the warning would have been effective).

MCI cited numerous other cases in its Renewed Motion. Plaintiffs say that none of those cases support MCI and attempt to distinguish them in a lengthy footnote. But they all say that causation cannot be established in a failure-to-warn case if there is no evidence demonstrating a proposed warning that would have worked. *See Broussard v. Procter & Gamble Co.*, 463 F. Supp. 2d 596, 609-610 (W.D. La. 2006) (mere allegation of inadequate warning was insufficient and causation was absent where plaintiffs did not offer "evidence of what warning Procter & Gamble should have provided or how such a warning would have prevented Ms. Broussard's injuries"); *Thompson v. Nissan N. Am., Inc.*, 429 F. Supp. 2d 759, 781 (E.D. La. 2006) (plaintiffs did not "present any language of a proposed adequate warning"); *Derienzo v. Trek Bicycle Corp.*, 376

F. Supp. 2d 537 (S.D.N.Y. 2005) ("The elements of a failure to warn claim are: (i) a danger existed to a significant portion of defendant's consumers requiring additional warning; (ii) the alleged danger was known or reasonably foreseeable; and (iii) a proposed alternative warning would have prevented Plaintiff's accident."); *Demaree v. Toyota Motor Corp.*, 37 F. Supp. 2d 959, 970 (W.D. Ky. 1999) (stating – in the "conclusion" section of opinion, and thus not in dicta – that Rule 50 motion should be granted because "the plaintiff never introduced any proof of what a warning might have been," so causation was not established); *White v. Caterpillar, Inc.*, 867 P.2d 100, 107 (Colo. Ct. App. 1993) (no duty to warn of open and obvious danger, but if "proposed warning *would have prevented injury*," there is a duty to warn (emphasis added)); *Campbell v. Boston Scientific Corp.*, 2016 WL 5796906, at *8 (S.D.W. Va. Oct. 3, 2016) (stating, consistent with *Rivera*, that "[t]o establish proximate causation under a theory of failure to warn, the plaintiff must prove that a *different warning* would have avoided her injuries," and citing specific warning in Material Safety Data Sheet that would have changed doctor's behavior if he had read it); *Weilbrenner v. Teva Pharmaceuticals USA, Inc.*, 696 F. Supp. 2d 1329, 1342-43 (M.D. Ga. 2010) (noting that "Plaintiffs must also show that a different label or warning would have avoided Katelyn's injuries" and, consequently, if doctor did not read label, causation could not be shown).

And it makes a difference, because an "adequate warning" might be one that makes no difference for causation, and the kind of warning that actually would actually avert the specific injury is not one whose absence makes the product defective. For example, the jury might have wanted the motor coach to come with some information about the coach's aerodynamic properties, even if that sort of information would have had no effect on Hubbard's behavior on the day of the accident. Elsewhere in the brief, however, plaintiffs seem to argue

that Hubbard should have been told that "a J4500 traveling 25 mph produce[s] 10 pounds of push force and 20 pounds of pull force when passing within 3 feet of a bicycle"—an ultra-specific warning that plaintiffs never proposed to the jury and that the jury could justifiably reject as unnecessary. Excusing the requirement to propose a warning impermissibly lets the plaintiffs elide these issues and thereby skate past a portion of their prima facie case.

2. Plaintiffs' Authorities Either Support MCI or Come from Jurisdictions Where the Law is Different from Nevada's in Critical Respects

None of the cases that plaintiffs cite justify eliminating the requirement for the plaintiff provide a specific warning. In *Ayers ex rel. Smith v. Johnson & Johnson Baby Products Co.*, 797 P.2d 527, 531 (Wash. Ct. App. 1990), the court interpreted a Washington statute that Nevada does not have. The court concluded that "[n]othing in the statute requires a plaintiff to prove explicit wording." *Id.* And *Ayers* did not hold that *no* proposed warning is required. It only stated that the statute does not require a plaintiff to "prove explicit wording."

Plaintiffs draw an analogy (which was also drawn by the court in *Ayers*) between "alternative design" and alternative warning. But there is a fundamental difference between those two things. In *Trejo*, the Nevada Supreme Court held that plaintiffs are not required to propose an alternative design because there are other ways to prove that a product is defective. *See Ford Motor Co. v. Trejo*, 402 P.3d 649, 654-56 (Nev. 2017) (plaintiff "may" present evidence of alternative design and jury can consider other factors identified in Restatement (Third) of Torts: Prods. Liab. § 2(b), such as "the magnitude and probability of foreseeable risks of harm; the instructions and warnings included with the product; the nature and strength of consumer expectations regarding the product, including expectations arising from product

advertising and marketing"). But, again, causation cannot be proven if there is no proposed warning because the jury cannot evaluate what effect the warning would have had on the person to whom it should have been given. In addition, the *Trejo* Court rejected the alternative-*design* requirement expressly because of the "undue burden" that would place on plaintiffs where creating such an alternative would be prohibitively expensive or where the unreasonably dangerous condition exists "even though no feasible alternative design is available." *Ford Motor Co. v. Trejo*, 133 Nev., Adv. Op. 68, 402 P.3d 649, 652, 656–57 (2017). But a proposed warning is fundamentally different. *All* it requires is precise identification of the hazard that makes the product unreasonably dangerous—just a few lines of text. It poses none of the "prohibitive barrier[s] to entry" such as engineering and design costs that motivated the *Trejo* Court. And unlike a situation where an alternative design may be impossible, there is no such thing as an impossible warning. The analogy drawn in *Ayers* doesn't hold up to scrutiny.

Another case Plaintiffs cite, *Moore v. Ford Motor Co.*, 332 S.W.3d 749 (Mo. 2011), doesn't apply here because Missouri uses a "heeding presumption" that relieves the plaintiff of its burden to establish causation. The dissenting opinion in *Moore* (which was a 4-2 decision) would have concluded that a proposed warning is required even when there is a heeding presumption. *See id.* at 770 (Price, J., dissenting) (heeding presumption "does not establish that a warning was required or what an 'adequate warning' would have been").

And the portion of *Moore* that Plaintiffs quote did not even address causation. The portion of the opinion that *does* address causation states:

> where, as here, no warning is given, then evidence of what a person would have done had a warning been given inherently is hypothetical in character. Yet, to show causation, a plaintiff must show that the absence of a warning was the proximate cause of the injury. As a matter of logic, to accomplish this a plaintiff must show

> that she did not have *the information the warning would have imparted already* and that, *if she had the information*, it would have affected her conduct.

Id. at 762 (majority opinion) (emphasis added).

Missouri's heeding presumption cures the "dilemma" that results from the implicit requirement that the plaintiff introduce speculative testimony about what he would have done if a warning had been given by eliminating the burden to prove causation. *Id.* But Nevada has no such heeding presumption. So a Nevada plaintiff must introduce evidence of what "information the warning would have imparted" and that "if she had the information, it would have affected her conduct."

The only other case that Plaintiffs cite in support of their argument that "[n]umerous other courts have held that plaintiffs need not craft a warning" is a footnote in a 40-year old case that contains no analysis whatsoever. *See Greiner v. Volkswagen*, 540 F.2d 85, 93 n.10 (3d Cir. 1976). The *Greiner* footnote did not address causation.

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And on remand, the district court in *Greiner* held that the plaintiffs could not establish proximate cause and reinstated the judgment for the defendant for essentially the same reason that MCI is entitled to judgment in its favor. *See Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F. Supp. 495 (E.D. Pa. 1977). The vehicle that the *Greiner* plaintiff was driving overturned when the plaintiff had to swerve to avoid a bridge railing. The court concluded that when the plaintiff "found herself ten feet from the railing, a serious accident was inevitable, warning or no warning, and plaintiff made no showing that one would have been less devastating than the other." *Id.* at 497. "[T]here was no conceivable way that an accident could have been avoided," so a warning would have done no good. *Id.*

The same is true here. Once Hubbard saw Dr. Khiabani, there was no conceivable way that the accident could have been avoided, so a warning would

not have changed the outcome.

F. MCI Was Not Required to Request a Jury Instruction on Alternative Warnings

Plaintiffs argue that MCI did not offer a jury instruction stating that Plaintiffs were required to propose an alternative warning or a method to transmit a warning. Jury instructions are irrelevant. *See Wolf v. Yamin*, 295 F.3d 303, 308 (2d Cir. 2002) ("[W]hether the jury instructions were proper and whether [defendant's] objection to those instructions was timely are irrelevant to the question whether [plaintiff] sustained his burden of proof by presenting evidence on each element of his claim."). The issue is not whether the jury erred or was improperly instructed, but whether there was enough evidence to allow the jury to make the findings that it did. *In re Vivendi, S.A. Secs. Litig.*, 838 F.3d 223, 247 n.15 (2d Cir. 2016) (directed verdict under Rule 60(b) "reflects the court's assessment not that the *jury* has erred, but that the evidence could not support *any* jury in reaching a verdict against the movant").[9]

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G. MCI's Rule 50 Motion Is Not Barred Simply Because It Argued to the Jury that Plaintiffs Had Not Proposed a Warning

Plaintiffs contend that because MCI emphasized to the jury that an alternative warning was not offered, the Rule 50 motion should be denied. Arguing a point to a jury does not bar a Rule 50 motion. "'When a court considers a motion for judgment as a matter of law—even after the jury has rendered a verdict—only the sufficiency of the evidence matters. The jury's findings are irrelevant.'" *Connelly v. Metro. Atlanta Rapid Transit Auth.*, 764 F.3d 1358, 1363 (11th Cir. 2014) (quoting *Hubbard v. BankAtlantic Bancorp,*

[9] In any event, the instruction contains that requirement implicitly: to show that a product lacked "suitable and adequate warnings concerning its safe and proper use," a plaintiff needs to show what kind of warning would be "suitable and adequate" for the product's "safe and proper use." (Instruction No. 30.)

Inc., 688 F.3d 713, 716 (11th Cir. 2012)). "That Rule 50(b) uses the word 'renewed' makes clear that a Rule 50(b) motion should be decided in the same way it would have been decided prior to the jury's verdict, and that the jury's particular findings are not germane to the legal analysis." *Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007).

The bar against raising sufficiency-of-the-evidence arguments applies only when a defendant has *not* moved under Rule 50(a). Plaintiffs quote *Zhang v. Barnes*, 382 P.3d 878 (Nev. 2016) (unpublished) for the proposition that 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." *Zhang* quoted that language from *Price v. Sinnott*, 85 Nev. 600, 606, 460 P.2d 837, 841 (1969). And in *Price*, the plaintiff never made a Rule 50(a) motion because she "believed that the dispositive issues were issues of fact for the jury to resolve." *Id.* MCI did make a Rule 50(a) motion because it believed that the dispositive issues were issues of law for the court.

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H. The Court Would Not Be Invading the Province of the Jury by Entering Judgment in MCI's Favor

MCI's Renewed Motion discussed the jury verdict form, but to make a different point – that the Court would not be invading the province of the jury by granting judgment as a matter of law in favor of MCI because the jury simply was not asked whether the purported failure to warn would have avoided the accident. The Plaintiffs' extensive discussion of "inconsistency" in the aerodynamic defect design verdict and the failure to warn verdict misses that point entirely. (Opp. at 46-49) Again, the jury's actual findings are totally irrelevant. *See Wolf*, 295 F.3d at 308.

The Plaintiffs strenuously argue over those four pages that the jury found only that the aerodynamic design was not unreasonably dangerous. If that is relevant, MCI's argument that the jury would not have found causation if they

had been asked is supported by "the jury's findings that . . . the [vehicle] involved was not defectively designed." *Conti*, 743 F.2d at 199.

A. The Wrongful-Death Statute Requires Some Proof of Fault; Plaintiffs Proved None

1. The Issue was Not Argued in Prior Nevada Cases

Plaintiffs offer no real response to Motor Coach's argument that Nevada's wrongful-death statute requires proof of at least some level of fault—"a *wrongful* act or neglect"—not mere strict liability. Instead, they just note their "disagree[ment]" with the notion that prior Nevada cases have not squarely addressed this question. (Opp. 51:8–9.) But that statutory question was *not* presented in either *Young's Machine Co.* or *Trejo*, and plaintiffs point to nothing to suggest that it was. This would hardly be the first case in which an assumption made by parties in earlier cases turned out to be incorrect. *See, e.g.*, *Tefft, Weller & Co. v. Munsuri*, 222 U.S. 114, 119–20 (1911) (dismissing a case for lack of jurisdiction and holding that a prior case in which jurisdiction was "merely assumed to exist"—based on those parties' common reading of the same statute—was "not controlling"); *Ind. & Mich. Elec. Co. v. Fed. Power Comm'n*, 502 F.2d 336, 341–42 (D.C. Cir. 1974) (invalidating a regulation whose validity was assumed in a prior case).

2. There is No Overwhelming Consensus that the Phrase "Wrongful Act" Includes Strict Liability

Plaintiffs also represent that "[n]umerous other courts" have upheld strict-liability claims in wrongful death actions, but then cite only the California law to which Motor Coach already directed this Court. (Opp. 51:10–15.) Plaintiffs do not address at all the Nevada decisions holding that the identical phrase—"wrongful act or neglect of another"—in the statute of limitations excludes strict liability. *See Williams v. Homedics-U.S.A., Inc.*, 2012 WL 7749219, No. 12A657795 (Nev. Dist. Ct. July 20, 2012) (interpreting NRS

11.190(4)(e)); *Fisher v. Professional Compounding Ctrs. of Am., Inc.*, 311 F. Supp. 2d 1008 (2004) (same).

3. Yes, Intentional or Willful Acts would Suffice, but Plaintiffs Did Not Prove Any

Defendants agree that "wrongful act" can include "not only acts of negligence, but also acts of intentional or willful misconduct." (Opp. 51:14–15 (quoting *Estate of Prasad ex rel. Prasad v. County of Sutter*, 958 F. Supp. 2d 1101, 1124 (E.D. Cal. 2013)).) Plaintiffs, however, proved no such thing. Instead, they relied on a theory of liability without fault, and the jury *rejected* plaintiffs' claim for punitive damages, which would have established culpable conduct. Under these circumstances, the wrongful-death act does not provide a remedy. *See Ford Motor Co. v. Carter*, 238 S.E.2d 361, 365 (Ga. 1977).

DATED this 29th day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eighth Judicial District Court.

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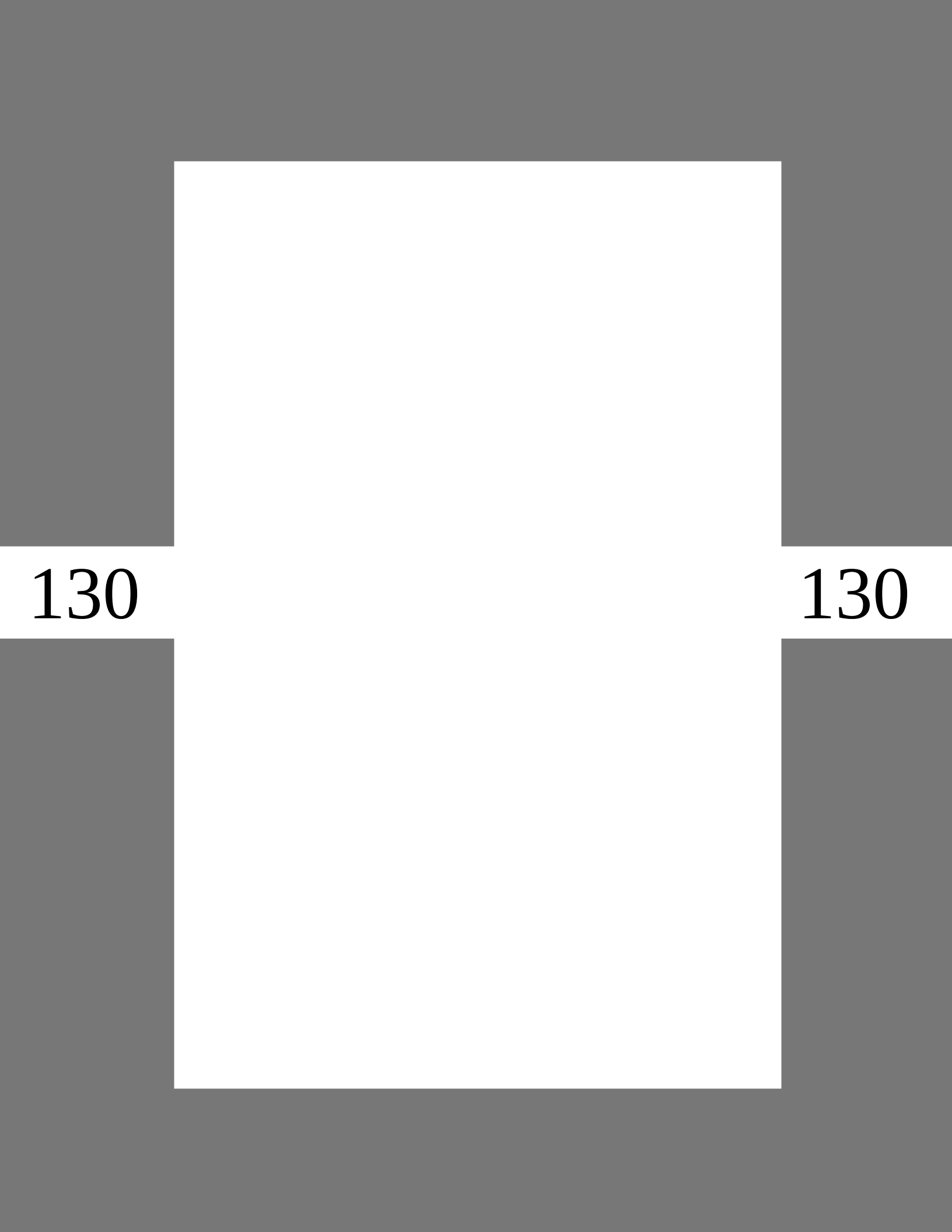
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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

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

Date of Hearing: August 28, 2018

Time of Hearing: 10:30 AM

Plaintiffs, by and through counsel of record, hereby supplements their opposition to MCI's motion to alter or amend judgment on the following grounds:

(1) As stated in Plaintiffs' opposition, strictly liable MCI is **not** entitled to any offset from the settlement proceeds paid by its allegedly negligent co-defendants;

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(2) Assuming *arguendo* that MCI is entitled to an offset, which it is not, then any such offset should be calculated by offsetting the individual settlement amount apportioned to each Plaintiff, as approved by the Court, against the individual judgment amount awarded to each Plaintiff by the jury; and

(3) Any offset should be limited to the settlement proceeds **actually received** by the individual Plaintiffs and should **not** include those amounts apportioned toward Plaintiffs' attorneys' fees and costs of suit.

I

ARGUMENT

A. MCI is not entitled to an offset because offsets arise from contribution rights, which, as a strictly liable defendant, MCI does not have.

This argument has been fully briefed in the underlying motion, opposition, and reply, and Plaintiffs will not repeat it here. It bears emphasizing, however, that the Nevada Supreme Court has consistently reaffirmed Plaintiffs' position under the same or similar circumstances. *See, e.g., Norton Co. v. Fergestrom*, 2001 WL 1628302, *5 (Nev. Nov. 9, 2001) (holding that a strictly liable defendant "was not entitled to contribution from [its allegedly negligent co-defendant] because **contributory negligence is not a defense in a product liability action**.") (Bold added).

B. In the unlikely event that the Court disagrees and grants an offset, any such offset should be based on the Plaintiff's individual settlement allocations and judgment awards.

In its motion, MCI argues that the combined judgment amounts awarded to each individual Plaintiff should be offset by the total lump sum settlement amount. This would be inappropriate. Each Plaintiff was awarded a specific amount of damages by the jury:

- Keon Khiabani: $9,533,333.34
- Aria Khiabani: $7,333,333.33
- The Estate of Katayoun Barin, DDS: $1,833,333.33[1]
- The Estate of Kayvan Khiabani, MD: $46,003.62

[1] The amounts awarded to Keon Khiabani, Aria Khiabani, and the Estate of Katy Barin include the $1,000,000.00 awarded for Dr. Khiabani's pain, suffering, and disfigurement, which was to be divided among these Plaintiffs evenly.

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A copy of the jury verdict is attached as Exhibit 1. Like the verdict, each Plaintiff was allocated a specific amount of settlement proceeds, which this Court approved in its order granting petition for minors' compromise.

These carefully-considered, separate amounts should not be combined and offset against each other in lump sums, as MCI suggests. Rather, to the extent that an offset is even considered, any offset should be based on the Plaintiff's individual settlement allocations and individual judgment awards. In other words, the Court should not offset the total settlement amount against the total judgment amount; but rather, any hypothetical amendment to the judgment should offset each Plaintiff's judgment award by the same Plaintiff's settlement allocation. A calculation of this offset is attached as Exhibit 2, which shall not be publicly filed as to preserve the confidential terms of Plaintiffs' settlements. In the unlikely event that an offset is awarded, the offset should be calculated as set forth in Exhibit 2.

C. If the Court entertains the notion of offsetting the total settlement amount against the total judgment amount, then the offset should be limited to the settlement proceeds actually received by the individual Plaintiffs.

It is well-settled that the offset of a jury award by a settlement amount is an **equitable** remedy that falls within this Court's discretion. *See Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1051 (Nev. 2000). A portion of Plaintiffs' settlement proceeds were allocated toward attorneys' fees and litigation costs and were therefore not paid to Plaintiffs. It would be highly inequitable if MCI received a credit for settlement proceeds that were not actually received by Plaintiffs. Accordingly, if it entertains the notion of offsetting the total settlement amount against the total judgment amount, the Court should exercise its equitable discretion and limit the offset to the settlement proceeds actually paid to Plaintiffs.

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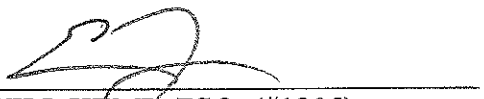
II

CONCLUSION

Since filing their original opposition, Plaintiffs have received approval on the allocation of the subject settlement proceeds. This allocation is potentially relevant to the Court's consideration and ruling regarding MCI's motion for an offset. For the reasons stated in Plaintiffs' original opposition and set forth above, MCI is **not** entitled to an equitable offset based on any of the settlement proceeds paid by the other defendants. In the unlikely event that the Court disagrees, however, any offset should be based on the Plaintiff's individual settlement allocations and individual judgment awards. To the extent that it considers the notion of offsetting the total settlement amount against the total judgment amount, the Court should exercise its equitable discretion and limit the offset to the settlement proceeds actually received by Plaintiffs and exclude those portions that were allocated towards attorneys' fees and costs of suit.

DATED this 18 day of September, 2018

KEMP, JONES & COULTHARD, LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of September, 2018, the **PLAINTIFFS' SUPPLEMENTAL 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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EXHIBIT 1

ORIGINAL

DISTRICT COURT
CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., et. al.

Defendant.

Case No. A755977

Dept. No. 14

SPECIAL VERDICT

We the jury return the following verdict:

LIABILITY

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

Yes _____ No ✓

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

Yes _____ No ✓

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

Yes _____ No ✓

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

Yes _____ No ✓

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

Yes ✓ No _____

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

COMPENSATORY DAMAGES

KEON KHIABANI DAMAGES

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

ARIA KHIABANI DAMAGES

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

THE ESTATE OF KATY BARIN DAMAGES

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

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

TOTAL $ 1,500,000.00

DAMAGES TO BE DIVIDED AMONG THE HEIRS

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

Disfigurement of Kayvan Khiabani $ 0

TOTAL $ 1,000,000.00

THE ESTATE OF KAYVAN KHIABANI COMPENSATORY DAMAGES

Medical and Funeral Expenses $ 46,003.62

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

PUNITIVE DAMAGES

Is MCI liable for punitive damages?

Yes _____ No ✓

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

1) Right-side blind spot?

Yes _____ No _____

2) Proximity sensor(s))?

Yes _____ No _____

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3) Rear-wheel protective barrier?

Yes _____ No _____

4) Aerodynamic design?

Yes _____ No _____

5) Failure to warn?

Yes _____ No _____

Dated this 23 day of March, 2018.

Foreperson

EXHIBIT 2

(Submitted for the Court's *in camera* review only)

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EXHIBIT 2

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Signature Block

DISTRICT COURT

CLARK COUNTY, NEVADA

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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

MOTOR COACH INDUSTRIES, INC.'S RESPONSE TO "PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO MCI'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID TO OTHER DEFENDANTS"

Defendant Motor Coach Industries, Inc. ("MCI") responds to plaintiffs'

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"supplemental opposition" to MCI's motion to alter or amend the judgment to reflect the offset of amounts recovered from the settling defendants.[1]

I.

PLAINTIFFS ARE ESTOPPED FROM CLAIMING THIS SELF-SERVING ALLOCATION UNDERMINES MCI'S ENTITLEMENT TO FULL OFFSET

Plaintiffs assured this Court and MCI that neither the determination of good-faith settlements nor the recent order compromising minors' claims would affect MCI's right to an offset. They cannot contend otherwise now. When moving this Court to certify their settlement with defendants Hubbard and Michelangelo Leasing to be in good faith, plaintiffs represented:

> Indeed, the proposed settlement is favorable to the remaining defendants [MCI]. Plaintiffs' remaining claims will be reduced by the settlement amounts contributed by Michelangelo and Hubbard. NRS 17.245(a).[2]

Based on that unqualified assurance, MCI did not oppose the motion. And this Court granted it. Then, in plaintiffs' petition to compromise the minors' claims against the settling defendants—which was filed after MCI had filed this motion to amend the judgment to apply the offset—plaintiffs' counsel promised the Court and MCI that,

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[1] That supplement is untimely by more than three months, and this Court need not entertain it. *See* EDCR 2.20(i).

Plaintiffs also say that they will not repeat the arguments regarding MCI's entitlement to an offset. Neither will MCI. But the plaintiffs lead their "supplemental opposition" with that argument and cite an unpublished case from 2001 for the proposition that Nevada Supreme Court has "consistently reaffirmed" Plaintiffs' position. If that were true, Plaintiffs wouldn't be relying so heavily on an unpublished, non-citable case. *See* NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016.").

[2] *See* "Plaintiffs' Motion for Determination of Good Faith Settlement with Defendants Michelangelo Leasing, Inc. d/b/a Ryan's Express and Edward Hubbard Only and Order Shortening Time," filed January 18, 2018, at 8:15 (emphasis added).

> The Court's approval of the present settlements and partial payment of attorneys' fees and costs will **not** affect the viability of any of the pending post-trial motions, Plaintiffs' judgment against MCI, or MCI's planned appeal of the same.[3]

Here, again, based on the representation that nothing in the proceedings would affect MCI's rights, MCI refrained from interfering in that private matter between plaintiffs' counsel and their minor clients. And the Court granted the petition.

Plaintiffs cannot dishonor now the representations they made to procure relief from this Court. "Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by 'intentional wrongdoing or an attempt to obtain an unfair advantage.'" *So. California Edison v. First Judicial District Court*, 127 Nev. 276, 255 P. 3d 231, 237 (2011),[4] quoting *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). This "supplemental opposition" optimizes an inconsistent position taken to obtain an unfair advantage.

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II.

THE PURPORTED ALLOCATION LACKS THE PROCEDURAL LEGITIMACY AND EVIDENTIARY BASIS NECESSARY TO BE BINDING FOR ANY PURPOSE

"The statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude

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[3] "Verified Petition to Compromise Minors' Claims Against Defendants Michelangelo Leasing, Inc., Edward Hubbard, Bell Sports, Inc., and SevenPlus Bicycles, Inc. Only and to Approve Partial Payment of Attorneys' Fees and Costs," ("Minors' Petition"), filed June 8, 2018, at 2:15 (emphasis in original), and at 3:26, 8:13, 8:26, 9:12, and 10:22.

[4] Judicial estoppel may apply when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position ...; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Id.* Each of those elements are met here.

any portion of the settlement from the setoff." *See Knox v. County of Los Angeles,* 167 Cal. Rptr. 463, 470 (Cal. App. 1980) (applying Cal.C.C.P § 877(a), the California statute that is identical to NRS 17.245(1)(a)); *L. C. Rudd & Son, Inc. v. Superior Court*, 60 Cal. Rptr. 2d 703, 707 (Cal. App. 1997).

A. This Allocation is Procedurally Illegitimate for Purposes of Affecting MCI's Right to an Offset

This allocation has no effect on MCI's entitlement to a full offset. First, plaintiffs self-servingly apportioned the settlement proceeds by themselves. As the California Court of Appeals explained, applying their statute that is identical to NRS 17.245(1)(a),

> the party seeking confirmation of a settlement . . . must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify a presumption that the valuation reached was reasonable.

Regan Roofing Co. v. Superior Court, 27 Cal. Rptr. 2d 62, 70 (Cal. App. 1994). "Collusion exists where only one of the parties cares how proceeds are allocated . . ." *Dilligham Constr., N.A., Inc. v. Nadel P'ship, Inc.*, 75 Cal. Rptr. 2d 207, 220 (Ct. App. 1998). This allocation, as opposed to the total amount, did not result from any adversarial negotiation or Court proceeding. Plaintiffs attach a spreadsheet purporting to show those allocations but do not explain (1) who determined how the allocations would be made; (2) when and why the allocations were made; or (3) whether the allocations were bargained for (or whether the defendants cared how the proceeds were allocated. Where there is collusion or inequitable manipulation of the settlement figures, as here, "the trial court must allocate in the manner which is most advantageous to the nonsettling party." *Dilligham*, 75 Cal. Rptr. 2d at 220.

Second, plaintiffs did not notify anyone of the substance of the proposed allocation to afford MCI an opportunity to be object. *See Regan Roofing Co.,* 27 Cal. Rptr. 2d at 70 ("the party seeking confirmation of a settlement must

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explain to the court and to all other parties the evidentiary basis for any allocations"). A party may not seek confirmation of a settlement agreement and at the same time withhold it from nonsettling defendants on the grounds of confidentiality. *Alcal Roofing & Insulation v. Superior Court*, 10 Cal. Rptr. 2d 844 (Cal. App. 1992).

Moreover, the Court may not bind MCI to any allocation it approved in the context of the compromise of the minors' claim, based on exhibits submitted in camera and withheld from MCI[5], as that would convert the proceeding to approve the compromise into an improper *ex parte* hearing of "substantive matters or issues on the merits" from which plaintiffs will have "gain[ed] a procedural or tactical advantage as a result of the *ex parte* communication."[6]

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[5] Exhibits were submitted in camera along with a declaration from Mr. Pepperman stating, "[a]ccordingly, at this time, the Exhibits are being submitted for the Court's in camera review only, and Plaintiffs respectfully request that the Court refrain from discussing the privileged terms of their Fee Agreement with counsel in MCI's presence." (Minors' Petition at 5:3.) The order approving the minors' settlement is redacted as to the amounts that were purportedly allocated between the plaintiffs. And MCI was never provided with the actual settlement agreements. *See J. Allen Radford Co. v. Superior Ct.*, 265 Cal. Rptr. 535, 538-39 (Ct. App. 1989) (nonsettling party was entitled to see settlement agreement before trial court could make finding of good faith settlement).

[6] NCJC Canon 3B(7) provides:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

MCI trusts the Court had no such intent.[7]

Third, all indications are that the plaintiffs attempted this allocation post-trial, after the verdict eliminated any doubt about damages.[8] "Apportionment of a settlement comes too late if done after the jury verdict[.]" *Alexander v. Seaquest, Inc.*, 575 So.2d 765 (Fla. Ct. App. 1991). "Determination of the credit issue to the extent possible cannot be deferred until after any eventual jury verdict, because the entire settlement must be determined to be in good faith as to both settling and nonsettling defendants." *Erreca's v. Superior Ct.*, 24 Cal. Rptr. 2d 156, 173 n.7 (Ct. App. 1993)"; *Nauman v. Eason*, 572 So.2d 982, 985 (Fla. Ct. App. 1990) ("[T]rial court erred in attempting to determine, after the trial and without the participation of the settling defendant, exactly how the settling parties intended the settlement to be applied to the plaintiff's causes of action."). Where, as here, the plaintiff and settling parties do not "tender a valid settlement agreement allocating between actual and punitive damages to the trial court before judgment[,]" the non-settling party is entitled to a credit for the "entire settlement amount." *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 928 (Tex. 1998).

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> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication.

[7] Even where such settlement allocations are approved by the court after a good faith settlement hearing, they are not binding on the trial court. *Gouvis Engineering v. Superior Court*, 43 Cal. Rptr. 2d 785 (Cal. App. 1995).

[8] Plaintiffs filed their motion for good faith settlement motion on January 18, 2018, which included a representation that they were submitting a petition to compromise that minors' claims "contemporaneous with this motion." Yet, the petition for minors' compromise was not filed until June 8, 2018, long after trial and after MCI's motion for offset had been filed.

B. There Is No Evidentiary Basis to Apportion More than [redacted] to the Estate

To begin with, no apportionment is appropriate because the injuries are indivisible. When a plaintiff's injury is not divisible and multiple defendants have joint and several liability, a settlement agreement cannot partition the plaintiffs' injuries to maximize recovery against nonsettling defendants. *Bobrow/Thomas & Assocs. V. Superior Court*, 58 Cal. Rptr. 2d 626, 629-30 (Ct. App. 1996).

Even if the settlement proceeds could be apportioned, however, plaintiffs cannot satisfy their burden to justify apportioning over [redacted] to the Estate. *See Regan Roofing Co.,* 27 Cal. Rptr. 2d at 70 ("The party seeking confirmation of a settlement must explain to the court and to all other parties the evidentiary basis for any allocations . . ."). Because the medical and funeral expenses were only $46,003.62, allocating [redacted] of the settlement proceeds to the Estate necessarily signifies a compromise payment by the settling defendants of approximately [redacted] in ***punitive damages***. *See* NRS 41.085(5) (under Nevada's wrongful-death statute, the estate of the deceased may recover only "special damages, such as medical expenses . . . and funeral expenses", as well as "any penalties, including, but not limited to, exemplary or punitive damages"). Yet nothing in the plaintiffs' filings even hints that punitive damages might have been an aspect of the negotiation. The petition for minors' compromise contains a description of the lawsuit and the claims at issue, listing only *negligence*-based claims against Michelangelo Leasing and Mr. Hubbard, and product liability claims against Bell Sports and SevenPlus Bicycles. (Minors' Petition at 7:11.) There is no mention whatsoever of a claim or prayer for punitive or exemplary damages, or a mention of malice or conscious disregard. Nor does it mention any proposed apportionment to the estate, although it does between the heirs and the attorneys. Likewise, the good faith settlement motion filed in January alludes only to Michelangelo's

potential liability for compensatory damages: "Plaintiffs alleged product liability claims against MCI, Bell Sports, and SevenPlus, and negligence claims against Michelangelo and Hubbard." (Motion for Good Faith Settlement, at 5:8.) And no evidence has ever been produced, moreover, that would indicate that any of the settling defendants acted with malice.

There is no basis for attributing [redacted] of the settlement proceeds to punitive damages. "If the distribution [is] unreasonably disproportionate to the comparative values, the impact upon . . . the sole remaining personal injury defendant [is] just as damaging as a collusively arranged, unreasonably low settlement." *River Gardens Farms, Inc. v. Superior Ct.*, 103 Cal. Rptr. 498, 507 (Ct. App. 1972). Put simply, this allocation has no effect whatsoever on MCI's right to a full offset.

III.

PLAINTIFFS' FEE AGREEMENT WITH THEIR ATTORNEYS IS IRRELEVANT

Plaintiffs were not entitled to recover their attorneys' fees from MCI. But that would be the effect if the offset is reduced by amounts paid to plaintiffs' attorneys. This improper fee-shifting aspect of plaintiffs' position probably is why they find no authority to support it. It is unprecedented. Nor can the Court deprive MCI of its right to an offset because settlement funds have been distributed before determination of the net-recovery amount. Any inequity resulting from premature distribution must be addressed with the fee-dispute committee of the state bar, not taxed upon the opposing party. (We hope we misunderstand this bizarre argument.)

Dated this 24th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2018, a true and correct copy of the foregoing motion was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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DISTRICT COURT
CLARK COUNTY, NEVADA
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KATAYOUN BARIN, et al, Plaintiffs, vs. MOTOR COACH INDUSTRIES INC., et al, Defendants.	CASE NO. A-17-755977-C DEPT NO. XIV **Transcript of Proceedings**

BEFORE THE HONORABLE ADRIANA ESCOBAR, DISTRICT COURT JUDGE

MOTOR COACH INDUSTRIES, INC.'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDINGS PAID BY OTHER DEFENDANTS

TUESDAY, SEPTEMBER 25, 2018

APPEARANCES:

FOR THE PLAINTIFFS: ERIC M. PEPPERMAN, ESQ.
PETER S. CHRISTIANSEN, ESQ.
WILLIAM S. KEMP, ESQ.

FOR THE DEFENDANTS: DANIEL F. POLSENBERG, ESQ.
JOEL D. HENRIOD, ESQ.
D. LEE ROBERTS, JR., ESQ.

RECORDED BY: SANDRA ANDERSON, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

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LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 25, 2018, 10:34 A.M.

(Court was called to order)

THE COURT: For the record, this is Barin v. Motor Coach.

MR. PEPPERMAN: Oh. Mr. Christiansen is in the elevator.

THE COURT: He's in the elevator?

MR. KEMP: Yeah, maybe we --

THE COURT: Okay.

MR. KEMP: -- ought to wait a minute.

THE COURT: We can wait a minute to start.

(Pause in the proceedings)

THE COURT: Okay.

MR. CHRISTIANSEN: Good morning, Your Honor.

THE COURT: Good morning.

MR. CHRISTIANSEN: I apologize. There's a giant wreck on Casino Center. A suburban ran into a bus and it's on fire, so it took me 20 minutes to get here from my office.

MR. POLSENBERG: Did you run out of cards?

MR. CHRISTIANSEN: I handed a few out.

THE COURT: Okay. Just for the record, this is Barin v. Motor Coach Industries and this is Motor Coach Industries' motion to alter or amend judgment to offset settlement proceedings paid by other defendants.

Good morning. Your appearances --

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MR. HENRIOD: Good morning.

THE COURT: -- for the record, please.

MR. HENRIOD: Joel Henriod and Dan Polsenberg on behalf MCI.

MR. ROBERTS: Good morning, Your Honor. Lee Roberts on behalf of MCI.

THE COURT: Good morning.

MR. PEPPERMAN: Good morning, Your Honor. Eric Pepperman for plaintiffs.

MR. CHRISTIANSEN: Good morning, Judge. Pete Chistiansen.

MR. KEMP: Good morning. Will Kemp.

THE COURT: Okay. Very good.

MR. POLSENBERG: Thank you, Your Honor. This is, as you say, this is our motion to alter and amend. I was a little surprised when I saw the judgment. Little did I know I would become more and more surprised as time went on.

But the judgment didn't have the offset in it. And even when I'm in plaintiff's cases, I provide for the offset for prior settlements. And, in fact, it makes sense that we expected to have the offset in the judgment because, as we point out in two of our briefs, twice in different briefs of theirs they said that we would get an offset and that we were entitled to an offset under 17.245.

Now they're arguing, first of all, that we don't get

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an offset and, secondly, surprise, surprise, they're apportioning it in an entirely improper way. So under judicial estoppel, I don't think we should even have to address the issue of whether we get an offset, but they do raise it, and they raise it in a couple of different ways.

They raise it, first of all, in a contribution context and, secondly, in a comparative fault context, which they -- which the breach largely call contributory negligence. But we are entitled to an offset. We're entitled to an offset under 41.141(3), which is the comparative fault statute. We're entitled to it under 17.245(1)(a), which is part of the uniform contribution act. We're entitled to it under 101.040, which is the uniform joint obligations act. We're entitled to it under the common law, the long existing common law in Nevada that you cannot have a double recovery.

Now, they have different arguments and they tend to conflate the principles, but they have different arguments here. First of all, under the comparative negligence statute, they're saying, well, this is a products liability case. And comparative negligence, contributory negligence of the plaintiff is not a defense under that statute in -- for strict liability for products liability.

Well, those are two entirely different concepts. Down at the bottom of 41.141(4) or (5) it sets out the exceptions to comparative negligence. But -- but in an entirely different

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section it makes very clear that the non-settling defendant is entitled to an offset for the amount of the settlements of the settling defendants. The same thing is clear under 17.245.

And they come in here and say, well, we're not entitled to contribution. But their argument for our not being entitled to contribution is that we're not entitled to a cert comparative negligence of the plaintiff under 41.141. We are in a products liability case, even as a strictly liable defendant entitled to contribution.

They cite no case that says that in a tort case that's not based on fault you can't get contribution. What they cite is Evans versus Dean Witter Reynolds, which is a case that said where you have intentional act of wrongdoing that you are not entitled to contribution, but that's different. There's not the same moral culpability here when we're dealing about strict liability.

In fact, while some scholars have written that failure to warn in strict liability is very close to negligence, in fact, in strict liability, you can be liable without any fault. So they can't take the principle from Evans that says somebody who intentionally does wrong is not entitled to contribution, and change it into somebody who is liable without any wrongdoing, without even negligence is not entitled to contribution.

And we can see that under Trejo, T-R-E-J-O, versus

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Ford Motor Company where the Nevada Supreme Court has recently reaffirmed, rearticulated the idea that strict liability, although many other states have moved to a cost benefit analysis to figure out whether a design is defective, Nevada sticks with the old 402A rule from the restatement, that you're liable, a product manufacturer can be liable for a defect without considering, the jury is not even to consider the defendant's conduct.

So they can't take a conduct-based rule where intentional wrongdoers are not entitled to contribution and turn it into a strictly liable defendant is not entitled to contribution. And we've cited cases from across the country that make clear that you can get contribution, and that's not even the issue here.

It's not like we're trying to get contribution from some tortfeasors they haven't sued. They did sue these other people. They got a settlement with them, and all we're trying to seek is on offset. We're not trying to get contribution. And an offset under 17.245(1)(a) is not based on anything other than the fact that there was a contribution.

Now, Federal Judge Jennifer A. Dorsey recently, in the TRW case, ruled that, yes, even a strict liability case, the strictly liable products manufacturer is entitled to an offset. So they're trying to take these notions of contributory negligence, more accurately comparative negligence and

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contribution, and twist them into an idea that we're not entitled to an offset. And the law has been clear under these circumstances in Nevada, they're not entitled to a double recovery, and we've cited all those cases about that.

So when we were here last time they made the argument, well, it might be premature, we haven't had these settlements funded yet, and we should -- we should put this off. We briefed the fact that I didn't think it mattered whether we did it earlier or whether we do it now. I think the -- the -- both statutes are clear that we're entitled to an offset for their agreed upon settlement, but they wanted to wait and make sure it was funded.

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Now we see really why they wanted to wait. Because what they did is they came in here and they allocated the 5.1 million in an entirely inappropriate way, and they did it ex parte. And I know from -- from dealing with you in this case that you did not intentionally get involved in this ex parte proceeding for the -- for the purpose of prejudicing us. But that's what they've effectively done here. They've allocated the 5.1 million in a way that just tries to defeat an offset for us.

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First of all, they allocate $2.5 million to Dr. Khibani's estate. Well, that's ridiculous. And they did that because all the estate recovered from this jury was $46,000. So what they're saying is, and they say it on page 2 of their

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Exhibit 2, which I don't understand how you can have an exhibit which is an argument to a document, but I've got bigger fish to fry. So what they're saying is we only get a $46,000 offset for 2.5 million, just about half of the prior settlement because they've allocated that to the estate.

Well, procedurally and substantively that's inappropriate. The estate could not have recovered from those other defendants anything more than they're entitled to recover under the wrongful death statute, 41.085. When the estate is entitled to recover their medical and -- which they recovered here with this jury, their medical and funeral expenses. But now they've tried to allocate half of the prior settlements into a category and not give us an offset.

And just as inappropriately, they've only allocated $10,000 to Dr. Barin's estate. And the reason for that is because we've argued under Ramadanis versus Stupak that Nevada law is clear, you take prior settlements and you offset them against past damages first. And the past damages here in this entire case are less than the $5.1 million settlement.

So this should offset all the past damages. But they've only allocated $10,000 to Dr. Barin's estate. Dr. Barin received -- directly her estate received a million and a half dollars in past damages, and then also a share, $333,000 of the prior pain and suffering for Dr. Khibani.

So all of that would be past damages, and they've only

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allocated $10,000 to that -- to allocate more money to the heirs so that they'll be able to get interest on the argument that the offset is not as much as their past damages. This is inappropriate. We've cited the cases saying, look, you can't do this apportionment after the verdict. You can't do this apportionment intentionally, inappropriately to create -- to defeat the offset.

So I think the offset that we are entitled to is the entire 5 point million should be allocated among the past damages of all the parties, and then after that proportionately to the future damages. Thank you, Your Honor.

THE COURT: Thank you.

MR. PEPPERMAN: Thank you, Your Honor. First, this -- this estoppel argument that we've said in two different -- in two different briefs that they're entitled to an offset, that's just meritless. At the time that we submitted the motion for good faith settlement determination and whatever the pleading was, there were negligent claims against negligent co-defendants. They would have been entitled to the offset. There was no judgment against MCI.

Conceivably, the jury could have found negligence, we could have conformed the evidence to the claim of negligence. That's not how it worked out. They were found liable under a strict liability theory failure to warn, and this is the consequence of that. Because they're a strict liability

defendant, they have no right to contribution from the negligence co-defendants. And because they have no right to contribution, they have no right to an offset.

So the first reason that they're -- the first way that they bring their claim, and what they're essentially asking for is an offset based on NRS 17.245, which the reason NRS 17.245 provides for an equitable, and I emphasize the word equitable, offset in certain circumstances, it doesn't apply in every case, is because a good faith settlement determination cuts off a non-settling joint tortfeasor's right to seek contribution from the settling tortfeasor.

The equitable offset, the offset, and this is true in any case, is that -- is consideration for not being able to pursue contribution. So if the non-settling tortfeasor has no right to contribution in the first place, then it's not giving anything up and there's no consideration supporting a right to an offset.

This is exactly the rule from Evans v. Dean Witter Reynolds. Dean Witter Reynolds involved an intentional tortfeasor seeking an offset against settlement proceeds paid by a negligent tortfeasor. The Nevada Supreme Court held that because the intentional tortfeasor wasn't entitled to contribution from a negligent tortfeasor, it's request for an offset was nothing more than an attempt to enforce contribution rights that didn't already exist.

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Now, in one respect, I agree with that Evans Dean Witter is distinguishable in the sense that this case doesn't involve an intentional tortfeasor. The reason that MCI is not entitled to contribution is because -- it's not because it's an intentional tortfeasor like was the case in Dean Witter, it's because they're a strict liability defendant. But in both cases, the tortfeasor seeking an offset is not entitled to contribution.

And so the second holding of Dean Witter, which is essentially if you don't have a right to contribution, you can't manufacture that right through the guise of an offset. That applies equally here. That is all they're trying to do. They're trying to say, hey, we have no right to contribution, but we're going to create that right by asking -- by calling it an offset instead of contribution.

That is not allowed in Nevada. It's clear in Nevada law in Dean Witter that that's not proper. So even though Dean Witter was decided under slightly different circumstances, the circumstances that matter are exactly the same as those before Your Honor.

Think of it this way. What if there was no good faith settlement determination? The settling defendants paid settlement proceeds. MCI can go to trial to get a judgment against MCI. MCI will be responsible for 100 percent of that judgment. As a strictly liable defendant, they're responsible

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for 100 percent of that judgment.

Now, they're not entitled to the credit because there's no good faith settlement. So what is MCI's recourse? The recourse is to go after the settling defendants for contribution, but they can't do that. They can't -- they couldn't do that. They would -- that would go nowhere because MCI is not entitled to contribution.

So if this scenario sounds familiar, it's because it's exactly the Norton case, the Norton v. Fergustrom (phonetic) case that we cite in our brief repeatedly. Now, in that case you had a strictly liable defendant, a negligent co-defendant. The negligent co-defendant settles for $2 million. The case goes to trial against the manufacturer, the strictly liable defendant, jury awards damages against the strictly liable defendant, and they want to seek contribution from the negligent defendant.

But the Supreme -- the district court said, no, you don't get contribution from a negligent defendant, entered summary judgment against the strictly liable defendant, went up on appeal, and the Nevada Supreme Court said, no, you don't get contribution, comparative fault is not a defense, strictly liable defendants are -- are -- and there's negligent defendants are severally liable, you don't get to seek contribution from the negligent defendant; therefore, we affirm the trial court's ruling.

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That is exactly the case here. Look at Norton. In that case the -- the plaintiffs got the settlement proceeds, they received the judgment, there was no good faith settlement determination, no offset, no right to contribution. That's exactly what the result we're asking for here is exactly the same as was in the Norton case.

Now, they hate the Norton case. They don't like it. And I know they don't like it because they don't talk about it in their reply until the very last two pages, and then they give you lip service, and then they say, well, it's an unpublished decision. Well, that's true, Your Honor, it is an unpublished decision.

I do find it interesting that if you look in their opposition, in the Nevada Federal District Court case that they just argued, those are unpublished decisions, too. I even took the time to go back into their renewed motion for judgment of matter of law, found citations to eight different unpublished opinions. So to borrow a phrase from Mr. Roberts, it's the goose/gander argument, Your Honor. You know, when it's good for them, they want to do it, but when it's good for us, no, you can't -- you can't do it.

But in any event, I think that the Norton case is an important case for this Court because we know no natter what your ruling is here today, this is going up on appeal. This -- this case will probably create the law on this issue. The

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Supreme Court is going to decide this issue. It's just the fact of the matter. And that's okay. We're comfortable with that -- with that happening.

So as you sit here, what can you do to make -- to make the best decision possible on how the Supreme Court is going to come down on this. And with that in mind, I would submit that the Norton case is something properly to consider because it is the exact situation here, and that case is exactly in line with Dean Witter, which basically is if you don't have a right to contribution, you don't have a right to an offset. They're synonymous in this for these purposes. No contribution, no offset. It's that simple.

And, you know, the -- the -- starting with the TRW case that they cite, I looked at that opinion from Judge Dorsey, and, again, not published, but the reason that there's a concern with relying on published opinions is what value do they have? I would submit that the Norton case has extensive value because this comes up from -- is going to the Supreme Court and this is a Supreme Court decision on an identical matter.

Judge Dorsey's federal court decision I would say should have little bearing on your decision because in that case the other -- the plaintiffs conceded an offset. They didn't raise this issue. That -- that was their mistake. But because the plaintiffs don't understand the different -- that a strict liability defendant is not entitled to an offset because they're

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not entitled to contribution, that shouldn't reflect on what the law is and what your decision is in this case. That would be, in my opinion, a mistake.

The other cases that they cite to for this notion that strict liability defendants are entitled to seek contribution if they call it an offset, they don't cite a single Nevada case. Every single case that they cite is some foreign jurisdiction case. And I've looked at those case and what you have is a distinction between states on this issue of law.

In Nevada, strict liability defendants are 100 percent liable, and negligent defendants are severally liable. So if you have a strict liability defendant and a negligent defendant, the negligent defendant is severally liable and the strict liability defendant is jointly and severally liable. That's the Café Moda case.

Now, they say we're confusing these principles of law. Your Honor, we're not confusing anything. This is an important distinction to make in this context because in those cases that they cite where the strictly liable defendant was entitled to an offset, the reason they were entitled to an offset is because they were entitled to contribution.

In many states, I have a products case in California right now where the -- you have a joint -- a strictly liable defendant and a negligent defendant. The jury apportions fault. They apportion fault in those cases and, therefore, there's a

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right to contribution. It's not -- it's -- the strictly liable defendant isn't jointly and severally liable versus severally liable. It's several liability.

So that's the distinction. It's an important distinction. And it distinguishes those states where they cite to try to make it seem that, oh, this is done all the time. It's not, Your Honor. Not in states where there's a strictly liable defendant who is not entitled to contribution seeking an offset. It's -- it's -- you know, it's a Trojan horse. They're trying to get something they're not entitled to.

And they make a big stink about double recovery and it's unfair. Well, Your Honor, they're the ones that are seeking the windfall in this case. They want to get a credit for settlement proceeds that they are not entitled to. They are 100 percent liable for this judgment. They have no right to seek contribution.

We didn't demand a good faith settlement. The plaintiffs didn't demand this. This was something that the defendants, the settling defendants asked for as a condition to settlement because in -- they wanted to protect themselves from contribution claims, and so we gave that to them and they're protected from contribution claims.

Now they want to capitalize on that, even though they wouldn't be allowed to seek contribution and say, well, now we get to get an offset because -- even though we wouldn't

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otherwise be entitled to seek contribution from you. That is not the law. That's not how the law should be, and that's not how you should rule on this case.

In the unlikely event that you think an offset is appropriate, we do think that the offset should be based on the individual judgment amounts based on the individual settlement allocations. Now, we allocated the settlement proceeds in a way that we thought made sense. That is not binding on this Court. We're not trying to trick the Court into anything. We're not saying, oh, you approved this, this is how you have to do it. That's not what we're saying at all, and that's not the reality.

The reality is is any allocation -- the money could be allocated any way for the purpose of any hypothetical offset. We think this is an appropriate way because all we essentially did was run the attorney fees and costs through one of the -- one of the plaintiffs. So these -- this -- these proceeds aren't proceeds that the family received anyway.

So if they're not entitled to an offset to begin with, they're certainly not entitled to an offset of proceeds that the plaintiffs didn't even receive. So we think that the -- very clearly the law is that there is no offset allowed whatsoever. If the Court is going to grant an offset, we think it should be based on individual settlement allocations against the individual judgment amounts.

And however the Court wants to determine that, if you

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want to go with the allocation as we allocated it, if you wanted to allocate it four ways evenly, that would be the Court's discretion. We would accept the Court's ruling. As I said, we think no matter what, this is going to be decided by the Supreme Court anyway. Thank you.

MR. POLSENBERG: Let me take that last part first. I don't think the Court has discretion to allocate. That's the Ramadanis case where the Court -- the district court allocated across the board, and the Supreme Court said, no, you have to do the allocation of prior settlements to pass damages first.

So -- but the plaintiff started their argument with the discussion of judicial estoppel. Let me tell you what bothered me so much on this motion. First of all, they repeatedly made representations that, yes, of course we're entitled to an offset under 17.245, everybody knows that. And the fact is, everybody does know that. That's been the law for a long time.

Counsel says we're going to go up on appeal and make law, this is the case to make the law. No, we already have the law. But after they made these representations that we would get an offset, in the time that went on since our last hearing -- or, actually, since after the judgment when we made the motion for the offset, then they come up with a new theory after they've admitted we get an offset, they come up with a new theory that says, oh, wait, maybe they don't get an offset. And

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it's law that never existed before.

And what it is, it's taking two different parts of a statute, and they're actually -- they're confusing 17.245(1)(a) and 17.245 (1)(b). Now, they used to be (1) and (2) under the old statute, and they added a new section, too, that talks about the cutting off contribution for only implied indemnity claims as opposed to contractual indemnity claims. Actually, I just said that part backwards.

And that section of the statute was my fault because of a case called Medallion versus Converse. But the statute used to be absolutely clear, and it still is absolutely clear, there are two different sections. One has to do with the offset, and the other one has to do with cutting off contribution claims. They are not the same thing.

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And even if they were somehow under that statute the same thing, we've got other statutes that allow us that offset. 41.141(3) says the same thing as 17.245(1)(a). And here's -- here's why we have this. Because when Nevada -- Nevada kept amending their contribution act and their comparative negligence act, and under the model uniform contribution tortfeasor act and what most states did was you had the jury allocate percentages. Nevada calls it equitable shares.

And so the jury would come back and say, okay, the defendant in front of us is 20 percent at fault. The two defendants who already said, oh, they're each 40 percent at

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fault. So under every other state's procedure, you would only recover against the non-settling defendant, that equitable share, 20 percent. Nevada changed that when they amended 41.141 and said the jury doesn't consider the percentages of the non-settling defendant.

And so under that statute the jury doesn't give an allocation to the non-settling defendant. The only way we settle it is by an offset for the amount paid. Now, they're coming in here and -- and just totally confusing all these statutes. That's the way we do it in Nevada. The jury doesn't attribute fault, a percentage of fault to the settling defendants, and we get an offset for the amount that they settled for.

And they're now coming in here and saying that they offset is conditional on the right to contribution. There is nothing that says that. All they rely on is evidence. But evidence was a -- they say a slightly different circumstance. It's a hugely different circumstance. That is an intentional wrongdoer who meant to cause this harm.

Now, you cannot say just because it's an intentional wrongdoer that all of the sudden it falls to anybody else who may be jointly and severally liable. That's a completely different situation. They raise hypothetical situations like what if and they talk about Café Moda. Here's what Café Moda is.

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Café Moda was a case where they sued an intentional wrongdoer and a negligent wrongdoer. It was a security case. Somebody stabbed another patron at a restaurant, and they sued the restaurant and the wrongdoer.

THE COURT: I read it, but go on.

MR. POLSENBERG: I've read it, too.

THE COURT: Okay.

MR. POLSENBERG: And the jury said 80 percent for one, 20 percent for the other. And what the Supreme Court said is, no, the negligent tortfeasor is only liable for its equitable share, 20 percent. But let's take that out and see how it plays. What if Café Moda paid the 20 percent and they executed, tried to execute against Richards, the intentional actor. Under those circumstances, he would still be entitled to -- maybe under Evans he would not be entitled to contribution.

THE COURT: I'm sorry. Back up. The last thought, please.

MR. POLSENBERG: Sorry?

THE COURT: Just your last thought.

MR. POLSENBERG: Let me take a hypothetical --

THE COURT: Okay.

MR. POLSENBERG: -- based on Café Moda --

THE COURT: All right.

MR. POLSENBERG: -- where you have the same situation like ours where you have strict liability 20 percent, and a

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negligent actor 20 percent. Here's -- here's where -- here's the only way it comes into play whether we're strictly liable. If that was -- remember, they -- they sued Café Moda because the guy, Richards, who did the stabbing, was an empty pocket. He couldn't pay this, all right.

Let's say, though, that you -- they sue us and they get 20 percent and go against the negligent tortfeasor. That tortfeasor would still be entitled to the equitable offset. The only reason Evans is different is because saying that offset is equitable in nature, if you act intentionally, you have unclean hands and so you're not entitled to the offset. We're not in that situation where we have unclean hands. We -- we didn't act intentionally. We didn't even -- we weren't even found at fault.

Norton, yes, Norton bothers me, as well. That case is from November 9, 2001. The rules are clear that you cannot cite a case, a Nevada case, to the Nevada courts before 2016. And the reason for that is because of what Justice Hardesty calls the law of unintended consequences. Courts are not -- the Nevada Supreme Court and the circuit courts are not as careful when they do unpublished decisions, and so they may wind up writing something that isn't entirely clear.

Now, the Supreme Court said you can cite unpublished Nevada opinions after January 1, 2016, because now they know to be more careful in their unpublished decisions. So saying -- if

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you were to rely on Norton, I think that would be a real point on appeal that you're relying on a case that they're proposing that you're not allowed to rely on. And the critical point about Norton is that it's not about an offset. It's not about an offset for a settlement amount at all.

You know, when I was listening to counsel argue, I was thinking the whole time, I already covered this, I already covered this. And yet I got up and I argued this far. I think I've already covered all these points. The judicial estoppel point that bothered me is because they said something, then they thought of something later and came in and made a new argument.

I think that's the same thing with the allocation. I think they thought of this all after the fact about how to apportion it. I think we're entitled to an offset. There's nothing in Nevada that says you have to have a contribution right in order to have an offset, and there's nothing in Nevada that says that a product manufacturer does not have a contribution right.

So, first of all, their conclusion is wrong based on their premise, but their premise is also wrong. So under all these circumstances, I think we're entitled to an offset, I think it's for the 5.1 million, I think that should be apportioned to all the past damages first, and then proportionately to the future damages. Thank you, Your Honor.

MR. PEPPERMAN: Your Honor, may I briefly respond?

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MR. POLSENBERG: I will, then, too.

THE COURT: Of course.

MR. PEPPERMAN: Let me read to you from Footnote -- page 4, Footnote No. 2 from their motion. Ordinarily, a joint tortfeasor who pays a judgment in excess of his equitable share of liability is entitled to seek contribution or indemnity from any other tortfeasors. Any joint tortfeasor in a multi-defendant tort action may, however, obtain protection from claims of contribution in an implied indemnity under NRS 17.245 by settling with the tort claimant in good faith. This is fair only because the non-settling defendants are then able to offset the settlement moneys against the judgment.

That is what we're talking about here. An offset is only fair because your other -- you're giving up the right to contribution. You're otherwise entitled to seek contribution. You're giving up that right so, therefore, you get the offset. If you don't have the right to contribution, which they concede they don't have, then you don't get the offset. It's that plain. It's that simple.

On the allocation, Nevada law is very clear. If there is an offset, it's damages against the same damages. You can't offset damages for someone or something else against damages for someone or something different. Under that rule, you have to apply the settlement apportionment to the individual damages award to each plaintiff.

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Now, how you allocate that and do it, whether it's a split four ways and you apply it against the individual judgments, we think it's fair the way that we've allocated it, but that is Your Honor's discretion. But in any way that you do it, if there's an offset, the allocation has to be each plaintiff's damages against each plaintiff's settlement allocation. That's just the way it's done. That's the clear law in Nevada. Thank you.

MR. POLSENBERG: Wow. How can anybody say I conceded we don't have a right to contribution? I've said it twice. I said it in my opening argument, I said it in my rebuttal argument, here I am in my super secret reverse surrebuttal argument. We would have a right to contribution, but that doesn't matter. They're two different sections of 17.245. It is a whole other statute, 41.141. I've already cited 101.040 and the Western Technologies case. We would have a right to offset under this circumstance.

What they're reading here is the justification for the cutting off the contribution action. He said it -- he said it in his main argument, now he said it now in his surrebuttal argument about we wanted protection from contribution. Nobody is going to bring a contribution action against us. We're the non-settling defendant. We don't need protection from contribution.

Now, they settled with the other defendants. They may

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need protection from contribution. That is why they said that they wanted the good faith settlement. We weren't the one who said we wanted a good faith settlement. But, yes, that does explain what I talked about earlier in my argument is the way Nevada does it. We don't have the jury apportion percentages and then make the non-settling defendant only responsible for that amount.

What we do in Nevada is we take -- we have the jury just figure out the amount of damages, and we have to pay after the offset. The offset is different from contribution. It's not based on contribution. Even if it were based on contribution, we would have a contribution right because we are not an intentional tortfeasor and the apportionment is entirely inappropriate in this case. It's procedurally inappropriate.

They went to the Court ex parte with these numbers. It's substantively inappropriate. You cannot come up with these numbers, and we cite a case that says that, after the verdict to try to shift all the numbers to a party that isn't entitled to recover anything more than $46,000.

This was a scam, and that's what bothered me about the judicial offset. Just like they said we could have an offset and then they changed their mind and come up with a new theory. Then they say let's hold off on this argument, and then they come to the Court ex parte with these phony numbers. I don't think the Supreme Court would hesitate a moment saying that this

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is inappropriate under Ramadanis. Thank you, Your Honor.

THE COURT: Okay.

MR. PEPPERMAN: And I would just take offense that this is a scam. If anyone is trying to get over on someone, it's MCI against these two kids who lost their parents.

MR. POLSENBERG: Oh, please.

MR. PEPPERMAN: They want the credit that they're not otherwise entitled to get, and that's what this is about. So to accuse us of scamming them is, I think, a little beyond the pale.

MR. POLSENBERG: This is entirely inappropriate the way they came to the Court with these numbers and the numbers are inappropriate. Thank you, Your Honor.

THE COURT: Okay. You know very well I'm going to give you a decision in writing.

MR. CHRISTIANSEN: Yes, Your Honor.

MR. POLSENBERG: Oh, I knew that.

THE COURT: Okay.

MR. POLSENBERG: But you're a great writer, Your Honor.

THE COURT: Thank you.

MR. CHRISTIANSEN: Have a good day, Judge.

THE COURT: Have a great day.

MR. CHRISTIANSEN: Thank you.

(Proceedings concluded at 11:15 a.m.)

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

Julie Potter
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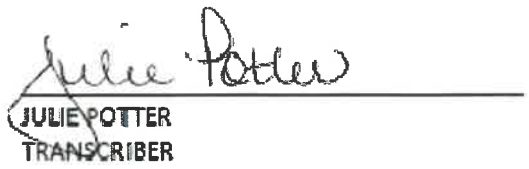

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, vs. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al. Defendants.	Case No. A-17-755977-C Dept. No. XIV **NOTICE OF ENTRY OF STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT SEVENPLUS BICYCLES, INC. ONLY**

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the above-referenced Order was entered in this matter. The Order was filed on October 17, 2018.

A copy of said Order is attached hereto.

DATED this 17th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2018, the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT SEVENPLUS BICYCLES, INC. ONLY** 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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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

STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT SEVENPLUS BICYCLES, INC. ONLY

Case Number: A-17-755977-C

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I

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Plaintiffs, by and through their counsel of record, Kemp, Jones & Coulthard, LLP and Christiansen Law Offices, and Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery. by and through its counsel of record, Murchison & Cumming, LLP, that Plaintiffs' claims against Defendant SevenPlus Bicycles, Inc. be dismissed with prejudice and that Defendant SevenPlus Bicycles, Inc. be dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This stipulation applies to Defendant SevenPlus Bicycles, Inc. **only**, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 1 day of October, 2018.

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Dated this 1 day of October, 2018.

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II

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the forgoing stipulation, Plaintiffs' claims against Defendant SevenPlus Bicycles, Inc. d/b/a Pro Cyclery are dismissed with prejudice and Defendant SevenPlus Bicycles, Inc. is dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This order applies to Defendant SevenPlus Bicycles, Inc. only, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 15 of October, 2018.

DISTRICT COURT JUDGE

Submitted by:

KEMP, JONES & COULTHARD, LLP

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, vs. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al. Defendants.	Case No. A-17-755977-C Dept. No. XIV **NOTICE OF ENTRY OF STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT BELL SPORTS, INC. ONLY**

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the above-referenced Order was entered in this matter. The Order was filed on October 17, 2018.

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A copy of said Order is attached hereto.

DATED this 17th day of October, 2018.

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of October, 2018, the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT BELL SPORTS, INC. ONLY** 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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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

STIPULATION AND ORDER DISMISSING PLAINTIFFS' CLAIMS AGAINST DEFENDANT BELL SPORTS, INC. ONLY

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I

STIPULATION

IT IS HEREBY STIPULATED AND AGREED between Plaintiffs, by and through their counsel of record, Kemp, Jones & Coulthard, LLP and Christiansen Law Offices, and Defendant Bell Sports, Inc. by and through its counsel of record, Olson, Cannon, Gormley, Angulo & Stoberski, that Plaintiffs' claims against Defendant Bell Sports, Inc. be dismissed with prejudice and that Defendant Bell Sports, Inc. be dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This stipulation applies to Defendant Bell Sports, Inc. **only**, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 1 day of October, 2018.

KEMP, JONES & COULTHARD, LLP

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Dated this 1 day of October, 2018.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

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II

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to the forgoing stipulation, Plaintiffs' claims against Defendant Bell Sports, Inc. are dismissed with prejudice and Defendant Bell Sports, Inc. is dismissed with prejudice from the above-entitled action, with each party to bear its own attorneys' fees and costs. This order applies to Defendant Bell Sports, Inc. only, and it does not dismiss Plaintiffs' claims against any other Defendant.

Dated this 15 of October; 2018.

DISTRICT COURT JUDGE

Submitted by:

KEMP, JONES & COULTHARD, LLP

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Attorneys for Motor Coach Industries, Inc,

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 CYCLES, 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. 14

ORDER GRANTING MOTION TO DISMISS WRONGFUL DEATH CLAIM

Hearing Date: January 23, 2018
Hearing Time: 9:30 a.m.

Defendant Motor Coach Industries, Inc.'s ("MCI") "Motion to Dismiss Wrongful Death Claim for Death of Katayoun Barin, DDS" (the "motion to dismiss") came on for hearing on January 23, 2018 at 9:30 a.m. Having reviewed the parties' briefing, argument of counsel, being duly advised on the premises, and good cause appearing therefor:

It is hereby ORDERED that MCI's motion to dismiss is GRANTED.

Dated this 22nd day of January, 2019.

DISTRICT JUDGE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE, LLP

By: _____

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Attorneys for Defendant Motor Coach Industries. Inc.

Approved as to form and content by:

KEMP, JONES & COULTHARD, LLP

By: _____

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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 COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL**

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the above-referenced Order was entered in this matter. The Order was filed on February 1, 2019.

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A copy of said Order is attached hereto.

DATED this 1st day of February, 2019.

KEMP, JONES & COULTHARD, LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2019, the foregoing **NOTICE OF ENTRY OF COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL** 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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FFCL

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

COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL

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This matter came before the Court on July 6, 2018, pursuant to Defendant's motion for judgment as a matter of law and Defendant's motion for limited new trial. Having considered the briefs and other pleadings and papers on file, the parties having waived oral argument on both motions, and with good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's motion for judgment as a matter of law is denied for the following reasons:

Defendant cannot raise issues in the "Renewed" Rule 50 motion that were not first raised in the Rule 50 motion filed at the close of evidence. *Nelson v. Heer*, 123 Nev. 217, 163 P.2d

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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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 subdivision (a) and must have been preceded by a motion filed at the appropriate time under subdivision (a) (2))." In the present case, Defendant presented its Rule 50(a) argument orally the morning of March 22, 2018. The entire argument comprises 12 pages of transcript. (TT 3/22/18 12-24) Defendant made the following arguments in this order: (1) strict liability is not available in wrongful death actions (3/22/18 12:24 to 20:4); (2) the evidence was insufficient to establish a product defect, including warnings, because "it was too late at that point for Mr. Hubbard to make an evasive maneuver" (3/22/18 20:5 to 22:9); (3) Plaintiffs did not propose language for a warning (3/22/18 22:10 to 22:20); (4) an S-1 Gard argument (3/22/18 22:21 to 23:10); and (5) strict liability does not extend to bystanders. (3/22/18 23).

However, absent in the Rule 50(a) motion was (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 Plaintiff's warning expert (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 are denied as procedurally improper.

Defendant's first argument in the motion is that Plaintiffs failed to prove causation on the failure to warn theory because the facts showed that Dr. Khiabani suddenly appeared in Mr. Hubbard's peripheral vision, and the accident happened too quickly for a reasonable jury to find that Mr. Hubbard could have avoided the accident. This argument ignores the full facts as presented in the Plaintiffs' case-in-chief, specifically the testimony of Mr. Hubbard that he observed the bicycle while both Dr. Khiabani and the coach were on Charleston, and saw the bicycle turn onto Pavilion Center before Mr. Hubbard turned the coach onto Pavilion Center.

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Thus, although Mr. Hubbard testified that he did not see Dr. Khiabani's bicycle for 450 feet before the accident, the "split-second" that the accident occurred was not the first time Mr. Hubbard was made aware of the bicycle's presence. Taking all inferences in Plaintiffs' favor, Plaintiffs elicited sufficient evidence for a reasonable jury to find that, had Mr. Hubbard been adequately warned about the dangerous nature of the coach, he would have driven differently as early as when he turned onto Pavilion Center—for example by driving in the left lane instead of the right lane, or by driving slower so as to not pass the bicycle—and that this different action would have avoided the accident. Thus, the accident did not happen too quickly for a reasonable jury to find that a warning would have made a difference.

The parties next dispute to what extent a plaintiff in a failure to warn claim must prove causation. Defendant argues that insufficient evidence of causation was presented by Hubbard's testimony that he "absolutely" heeds warnings he is given when he is trained about something relative to safety, because Plaintiffs needed to additionally prove that the accident would have been avoided by the user heeding the warning. Defendant cites to numerous other jurisdictions for this notion, and argues that it is further supported by the Nevada Supreme Court's *Rivera v. Philip Morris, Inc.* decision. This Court disagrees. It is undisputed that, under *Rivera*, the Plaintiffs bear the burden of producing evidence demonstrating that, among other things, the defect caused the injury. *Rivera* also 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."

Taking all inferences in Plaintiffs' favor, the Court finds that Hubbard's testimony that he would have complied with a warning, combined with the facts listed above regarding Hubbard's perception of the events leading up to the accident, was sufficient to satisfy Plaintiffs' burden of proving causation under Nevada law.

Similarly, the Court disagrees with Defendant's suggestion that "the open and obvious nature of the danger reinforces the conclusion that a warning would have been superfluous." Mot. 50(b) at 10. Taking all inferences in Plaintiffs' favor, the presence of testimony by

Hubbard, Mary Witherell, and some of Defendant's own employees that they were not aware of the significance of the air displacement created by the coach's design refutes Defendant's classification of the danger as "open and obvious." Further, even if the evidence enabled this Court to find as a matter of law that Hubbard should have known generally of the "risk of driving next to a bicyclist," which this Court has not done, no Nevada law holds that this would prevent a reasonable jury from finding that an adequate warning would have avoided the accident.

Next, Defendant suggests that Plaintiffs' duty to prove causation required Plaintiffs to craft an adequate warning. Failure-to-warn claims can be classified as one of two types: allegations that the warning given by the defendant was crafted in such a way to be ineffective in preventing the injury; or allegations that the product is dangerous enough that a warning should have been provided but the defendant did not provide any warning. In cases of the first variety, the jury must consider whether the warning was adequate under the factors provided in *Lewis v. Sea Ray Boats, Inc.* However, in the second category, the absence of any warning, the lack of any warning, could not possibly be considered adequate under the *Sea Ray* factors, and thus the only required findings are that the product was unreasonably dangerous and that an adequate warning would have avoided the injury. This case falls into the second category, where Defendant undisputedly did not provide any warnings about any of the alleged defects which Plaintiffs alleged. In such a case, the Court finds no support for Defendant's assertion that no reasonable jury could find that the product was unreasonably dangerous and that an adequate warning would have avoided the injury without a specific warning being proposed by the plaintiff. While it is true that providing a model warning to show what the defendant could have done to make the product reasonably safe may be a helpful illustration for the plaintiff's case, it is not required for the jury to find in Plaintiffs' favor. *Cf. Ford Motor Co. v. Trejo* (in a design defect claim, "a plaintiff may choose to support their case with evidence that a safer alternative design was feasible at the time of manufacture."). Furthermore, Defendant did not propose a jury instruction requiring that Plaintiff provide proof of a specific warning and instead only tendered JI 30 and JI 31. Plaintiffs need not prove precisely how the

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

facts would have been different had there been an adequate warning, as this would amount to speculation; Plaintiffs need only provide the facts sufficient to allow the jury to draw the conclusion that the presence of an adequate warning would have avoided the accident. As noted above, Plaintiffs did so here. In line with the above, the Court disagrees that the jury's verdict was "consistent with" judgment as a matter of law on causation, as the jury could have, and evidently did, find that the lack of an adequate warning caused the accident. The Court disagrees with Defendant's suggestion that the jury finding no liability on the defective design claim means "when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not." In reality, the jury found no liability after being instructed that liability for defective design required both a design defect and causation, so a simple "no" answer to the defective design question does not necessarily mean the jury found causation to be lacking.

Defendant next argues that, "MCI was not required to make a coach that does not create air disturbance," and therefore MCI was not required to provide a warning at all. While the Court notes that this argument was not raised in MCI's NRCP 50(a) motion during trial, the argument misstates the question actually posed to the jury. The failure-to-warn claim does not ask whether the coach created an air disturbance, but rather whether the coach was unreasonably dangerous due to the air disturbance it created. Thus, regardless of whether MCI had a duty to minimize or remove any air disturbance from its product, there was sufficient evidence for the jury to find that any air disturbance created by the coach was unreasonably dangerous and that the injury could have been avoided by an adequate warning.

Finally, Defendant argues that Nevada's wrongful-death statute requires proof of fault, while the nature of a strict liability claim does not require proving fault, and therefore that the elements of a wrongful death claim could not be satisfied by allegations founded in strict liability. The Court finds no support in Nevada case law for this notion, and indeed finds myriad wrongful death actions founded in strict liability, and thus the Court will not apply the law differently for this case. Moreover, Defendant's interpretation of the "wrongful act or neglect" language in NRS 41.085(2) would lead to an absurd result: a defendant who, by no

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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intentional act or malice, creates an unreasonably dangerous product would still be held strictly liable if a user were merely injured, but would no longer be held accountable if the injuries were grave enough to end the user's life.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants motion for limited new trial is denied as none of the arguments presented by Defendant exhibit an issue which "materially affect[ed] the substantial rights of an aggrieved party." NRCP 59(a).

First, Defendant argues that the jury was excused from considering causation of the failure to warn claim because the verdict form did not mention this step of the analysis, and instead allowed the jury to return a verdict in Plaintiffs' favor solely by finding that Defendant failed to provide an adequate warning that would have been heeded. First, as noted above, the Court disagrees with Defendant's position that Plaintiff must prove with specificity that an adequate warning would have actually avoided the injury, or that the accident happened too quickly for a jury to find that an adequate warning could have avoided the accident. However, the Court also notes that the jury instructions sufficiently informed the jury on all findings required for the jury to return a verdict in Plaintiffs' favor—including causation—and that this remedied any potential errors with the verdict form.

Defendant prepared and submitted the jury instruction on causation, i.e., JI 31 providing that: "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." The jury warnings question on the verdict form reads as follows: "5) did MCI fail to provide an adequate warning that would have been acted upon?" Taking into consideration the totality of the jury instructions and the verdict form, the Court does not find that the alleged absence of causation on the fifth question was prejudicial to Defendant. Finally, the Court finds no support for the notion that the special verdict form was required to include a finding for every element of every claim where JI 31 prepared and submitted by Defendant did so.

Second, the Court does not agree that precluding evidence of NRS 484B.270, the statute

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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requiring a motorist to maintain a three-foot distance from a bicyclist, constituted an error of law that warrants a new trial. The safety statute in its current form did not exist at the time the coach was sold, and the version of the statute that did exist at the time the coach was sold contained only a mandate that a motorist passing a bicyclist do so safely, which does not offer any support for Dr. Krauss's opinion that a warning was not needed because the law already required vehicles to maintain a certain distance from bicycles. Thus, the existence of the statute has no probative value as to why Defendant chose not to provide a warning with the coach. Further, the Court maintains that JI 32, on "nondelegation," was rightfully included due to evidence being presented at trial that at least one of Defendant's employees believed another entity should warn drivers about the danger of the coach. If JI 32 caused any prejudice to Defendant's case, the Court does not agree that it materially affected Defendant's substantial rights.

Third, as noted in this Court's order denying Defendant's motion for post-trial discovery, the Court does not agree that any newly discovered evidence warrants a new trial. For the same reasons iterated in that order, the Court has not been convinced that the new evidence could not have been found with reasonable diligence, so NRCP 59(a)(4) is not met here. The Court is also not convinced by Defendant's argument that the difficulty in discovering this evidence is exhibited by Plaintiffs' lack of knowledge, or that Defendant was entitled to rely on Plaintiffs' duty to disclose such information. NRCP 16.1 requires a party to disclose the identity of individuals likely to have discoverable information, but it does not require a party to conduct discovery for the other parties. Here, it appears Plaintiffs disclosed Dr. Khiabani's employer, which was sufficient to satisfy Plaintiffs' duty under NRCP 16.1; Plaintiffs were under no duty to actually discover any information from Dr. Khiabani's employer, just to enable Defendant to do so. As stated in the Court's prior order, Defendant had access to the "new evidence" had it simply attempted to get it because Plaintiffs executed an employment release prepared by Defendant on July 27, 2017—nearly five months before the discovery cutoff and nearly seven months before the trial commenced on February 12, 2018. As also stated in the Court's prior order, Defendant "evidently has no explanation for

why this information was not actually sought after the authorization was given." Moreover, even if the Court were to find that Plaintiffs lapsed on their discovery obligations, this Court does not find that such a finding would render the "new evidence" undiscoverable with due diligence, so a new trial is not warranted on these grounds.

Fourth, the Court does not agree that it erred by precluding evidence of the impact of income taxes. While the Court recognizes the difference between damages for lost wages and damages for loss of probable support, Nevada law is clear that evidence of tax implications are not admissible in a wrongful death case. *See, e.g. Otis Elevator Co. v. Reid*, 101 Nev. 515 (1985). Defendant is correct that certain special circumstances allow jury instructions on tax consequences, but only when tax issues are discussed at trial. *Id.* Here, tax issues were not discussed at trial under the general rule that tax implications are not admissible, and thus there was no indication that the jury would consider tax implications. Therefore, *Otis Elevator Co. v. Reid*'s "special circumstances" exception does not apply, and Defendant's substantial rights were not materially affected.

Dated this 31st day of January, 2019.

Hon. Adriana Escobar

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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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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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

NOTICE OF ENTRY OF FINGINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD

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PLEASE TAKE NOTICE that on the 1st day of February, 2019, a Findings Of Fact, Conclusions of Law and Order on Motion For Determination Of Good Faith Settlement was entered in the above-captioned matter, a copy of which is attached hereto as Exhibit "A."

DATED this 1st day of February, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of February 2019, I served a true and correct copy of the foregoing document (and any attachments) entitled: **NOTICE OF ENTRY OF FINGINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT** in the following manner:

■ (VIA ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List:

AND / OR (when necessary):

□ (VIA U.S. MAIL) by placing a copy in a sealed envelope first-class postage fully prepaid thereon, and by depositing the envelope in the U.S. Mail at Las Vegas, Nevada, addresses as follows:

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EXHIBIT "A"

Electronically Filed
2/1/2019 1:59 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR

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BELL SPORTS, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, Minors by and through their Guardian, MARIE-CLAUDE RIGAUD; SIMAK 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,

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

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

This matter having come on for hearing on the 23rd day of January, 2018, Plaintiffs appearing through their counsel of record, the law firm KEMP, JONES & COULTHARD, LLP, and CHRISTIANSEN LAW OFFICES; and Defendant MOTOR COACH INDUSTRIES, INC.

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appeared through the law firm WEINBERG WHEELER, HUDGINS, GUNN & DIAL, LLC.; Defendant BELL SPORTS, INC. appeared through the law firm, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI; and Defendants EDWARD HUBBARD and MICHELANGELO LEASING, INC. appeared through the law firm SELMAN BREITMAN. All other appearances noted in the record. Having reviewed the papers and pleadings on file herein, and having heard oral argument, the Court makes the following Findings of Fact, and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On April 18, 2017, a tour bus owned and operated by Defendant MICHELANGEO LEASING, INC., (d/b/a Ryan's Express) collided with the bicycle operated by 51-year-old Dr. Kayvan Khiabani thereby resulting in fatal injuries.

2. The tour bus manufactured in 2008 by Defendant MOTOR COACH INDUSTRIES, INC. was driven by Defendant Edward Hubbard. At the time of the incident, Dr. Khiabani was wearing a helmet manufactured by Defendant BELL SPORTS, INC.

3. Plaintiffs filed their Amended Complaint on June 6, 2017, citing strict liability, breach of implied warranty and wrongful death against BELLSPORTS, INC.

4. A copy of BELL SPORTS, INC.'S insurance policy was provided to Plaintiff for consideration during settlement discussions whereby Plaintiffs confirmed sufficient limits for the nature of the claims. Therefore, the amount of the insurance policy limits of the settlement party (BELL SPORTS, INC.) is not relevant to the pending settlement. The agreed amount to be paid in settlement was based upon substantial negotiations between the parties and therefore not a nuisance value settlement. The settlement amount has been sealed by the Court.

///

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5. There are four Plaintiffs in this case. The entire settlement amount that BELLSPORTS, INC. has agreed to pay Plaintiffs in this matter shall be allocated entirely to Plaintiffs and Plaintiffs' Counsel. Plaintiffs and their counsel shall allocate specific settlements amongst the four Plaintiffs.

6. The settlement discussions were conducted at arms-length, without collusion or fraud and without intention to injure the interests of the non-settling parties, MOTOR COACH INDUSTRIES, INC., d/b/a RYAN'S EXPRESS and EDWARD HUBBARD. Plaintiffs determined that a settlement at this time is necessary and appropriate based upon careful consideration and consultation with its and their counsel.

7. In accordance with *Blain Equipment Company, Inc., v. The State of Nevada,* 138 P.3d 820 (2006), the necessary parties are before this Court and no other parties are necessary to be joined on the issues that exist in this case in order to achieve final resolution, as it pertains to BELL SPORTS, INC.

CONCLUSIONS OF LAW

8. On April 18, 2017, a tour bus owned and operated by Defendant MICHELANGELO LEASING, INC. (d/b/a Ryan's Express) collided with the bicycle operated by 51-year-old Dr. Kayvan Khiabani thereby resulting in fatal injuries.

9. The tour bus manufactured in 2008 by Defendant MOTOR COACH INDUSTRIES, INC. was driven by Defendant EDWARD HUBBARD. At the time of the incident, Dr. Khiabani was wearing a helmet manufactured by Defendant BELL SPORTS, INC.

10. Plaintiffs filed their Amended Complaint on June 6, 2017, citing strict liability breach of implied warranty and wrongful death against BELL SPORTS, INC.

11. The settlement reached by Plaintiffs and Defendant BELL SPORTS, INC. was made

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in good faith pursuant to the factors in *Doctors Co. v. Vincent*, 120 Nev. 644,652, 98 P. 2d 681, 687 (2004).

12. A copy of the BELL SPORTS, INC.'s insurance policy was provided to Plaintiff for consideration during settlement discussions whereby Plaintiffs confirmed sufficient limits for the nature of the claims. Therefore, the amount of the insurance policy limits of the settlement party (BELL SPORTS, INC.) is not relevant to the pending settlement. The agreed amount to be paid settlement ($100,000.00) was based upon substantial negotiations between the parties and therefore not a nuisance value settlement.

13. There are four Plaintiffs in this case. The entire settlement amount that BELL SPORTS, INC. has agreed to pay Plaintiffs in this matter shall be allocated entirely to Plaintiffs and Plaintiffs' Counsel. Plaintiffs and their counsel shall allocate specific settlement amongst the four Plaintiffs.

14. The agreement to settle was based upon a careful analysis of the issues, the evidence, and the costs of further litigation between the settling Parties.

15. The settlement discussions were conducted at arm-length, without collusion or fraud and without intention to injure the interests of the non-settling parties, MOTOR COACH INDUSTRIES, INC., MICHELANGEL LEASING, INC., d/b/a RYAN'S EXPRESS, EDWARD HUBBARD. Plaintiffs determined that a settlement at this time is necessary and appropriate based upon careful consideration and consultation with its and their counsel.

16. In accordance with *Blain Equipment Company, Inc. 's. The State of Nevada,* 138 P. 3d 820 (2006), the necessary parties are before this Court and no other parties are necessary to be joined on the issues that exist in this case in order to achieve final resolution as it pertains to BELL SPORTS, INC.

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Accordingly, and base upon the aforementioned Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that DEFENDANT BELL SPORTS, INC.'s Motion for Determination of Good Faith Settlement filed January 17, 2018, is granted with prejudice and certified pursuant to NRCP 54(b).

DATED this 31 day of January 2019.

DISTRICT COURT JUDGE

Respectfully Submitted By:

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ANGULO & STOBERSKI

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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

NOTICE OF ENTRY OF "FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO RETAX"

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Please take notice that on the 23rd day of April, 2019, a "Findings of Fact and Conclusions of Law on Defendant's Motion to Retax"' was entered in this case. A copy of the order is attached.

Dated this 24th day of April, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, a true and correct copy of the foregoing notice of entry was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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/s/ Adam Crawford
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EXHIBIT A

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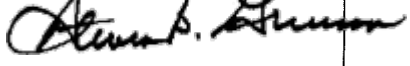
EXHIBIT A



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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 CYCLES, 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. 14

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO RETAX

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

Defendant Motor Coach Industries, Inc.'s ("MCI") "Motion to Retax Costs" came on for hearing on July 6, 2018 at 10:30 a.m. Upon stipulation of the parties, the motion was submitted on the briefs without oral argument. Having reviewed the briefing, being duly advised on the premises, and good cause appearing therefor, this Court now issues these findings of fact and conclusions of law:

I.

PROCEDURAL HISTORY

1. On March 23, 2018, following a 23-day trial, the jury rendered a special verdict awarding plaintiffs a combined total of $18,746,003.62 in compensatory damages.

2. On April 17, 2018, this Court entered judgment in favor of plaintiffs.

3. On April 24, 2018, plaintiffs' filed their "Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110," "Declaration of Peter S. Christiansen, Esq." in support of the memorandum, and supporting appendix volumes. Mr. Christiansen amended his declaration on April 25, 2018. Plaintiffs filed a supplemental memorandum on May 9, 2018.

4. MCI filed its "Motion to Retax Costs" on April 30, 2018. Plaintiffs filed their opposition on May 14, 2018, and MCI filed its reply on June 29, 2018.

5. After considering the briefing, this Court issued a detailed minute order on August 24, 2018 granting MCI's motion in part, and directing MCI's counsel to prepare this formal order.

II.

FINDINGS OF FACT

6. Plaintiffs provided a detailed and verified memorandum of costs, over 1,300 pages of documentation, including itemized lists and invoices, and a declaration of counsel in support of the memorandum of costs, which discusses

(1) the expert fees being sought; (2) reporter's fees for depositions and deposition transcripts; (3) online legal research; (4) trial support services; and (5) other "necessary and unavoidable costs," including "photocopies, travel expenses for necessary fact and expert witness depositions, postage, witness fees, juror fees, process server fees, official court reporter fees, and run services for delivery of time sensitive documents and filing." (*See generally*, Pls.' Memo and Opp.)

7. Plaintiffs requested costs incurred by their two law firms, Kemp, Jones & Coulthard, LLP ("KJP") and Christiansen Law Offices ("CLO"), totaling $619,888.71. (Pls.' Supp. Memo, at 2–3.)

8. Any of the foregoing findings of fact which constitute conclusions of law shall be deemed as conclusions of law.

CONCLUSIONS OF LAW

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9. The Court is unable to award costs under NRS 18.005 unless the prevailing party provides justifying documentation to "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998) and *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015). The Nevada Supreme Court will reverse an award of costs as an abuse of discretion if the party does not provide evidence, such as a declaration of counsel, that "explains how the [costs] were necessary and incurred rather than simply telling the district court that the costs were reasonable and necessary." *In re Dish Network Deriv. Litig.*, 133 Nev. Adv. Op. 16, 401 P.3d 1081 (2017).

10. Although the Court finds that plaintiffs' opposition to MCI's motion to retax provides some argument for why many costs were reasonable or necessary, and further that many of plaintiffs' claimed costs appear reasonable and necessary based on the Court's own experience and knowledge of this case, binding case law precludes this Court from awarding costs for which plaintiffs

have not provided sufficient documentation.

Retaxed Costs

11. $70.00 cost for a paralegal to file a subpoena. Paralegal time is not a "cost" of litigation under NRS 18.005, and is more appropriately categorized as legal fees. *See, e.g. Las Vegas Metropolitan Police Dept. v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013) (concluding that "reasonable attorney's fees" includes charges for persons such as paralegals and law clerks).

12. $22,553.75 for videography services and related fees to expedite. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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13. $5,075.00 for synchronized DVD costs. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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14. $1,736.00 for rough drafts of depositions. NRS 18.005(2) provides for one copy of each deposition, but does not provide for rough drafts, and plaintiffs have not shown in counsel's declaration how this service was necessary.

15. $3,450.00 for "Live Note" and "Zoom" connection fees. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining

how the costs were necessary.

16. $4,550.00 for videoconference costs. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

17. $100.00 for "After 5 PM charges." These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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18. $185.00 for flash drives, apparently for depositions of expert witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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19. $300.00 for video files for expert witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

20. $1,385.40 for conference rooms for depositions of various witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation

showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

21. $100.00 for "read and sign" fees. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

22. $315.00 for equipment rental. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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23. $100.00 for "non-writing wait time" for two witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

24. $79.00 for parking for depositions. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

25. $356.40 for food provided at depositions. These costs are not

specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

26. $1,050.00 for "professional fees" for Dr. Gavin. This cost is not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that this cost was incurred, but this cost is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

27. $140.00 for duplicate service on Portia Hubbard. In examining the documents provided by plaintiffs, it appears Ms. Hubbard was served with a subpoena on both on August 26, 2017 and on October 1, 2017, with no explanation for why the second subpoena was necessary. NRS 18.005(7) does not allow costs for service which the Court finds to be unnecessary. Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

28. $35.00 for wait time of process server(s). This cost is not enumerated in NRS 18.005(7), and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that this cost was incurred, but this costs is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

29. $61.60 for faxes. While "reasonable costs for telecopies" are allowed under NRS 18.005(11), under *Bobby Berosini*, 114 Nev. at 1352 and *Cadle Co.*, 345 P.3d at 1049, the documentation submitted is insufficient for the Court to find that the costs were reasonable or necessary, because plaintiffs have

provided no information stating what documents were faxed, and in most cases provide no information of who the fax was sent to. Further, plaintiffs have offered no explanation for why certain faxes have a higher per-page cost than others. Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary or reasonable.

30. $4,141.77 for scanning (internal and outside vendor). NRS 18.005 does not provide for costs of scanning, and plaintiffs have not provided any information about how costs were incurred at all due to internal scanning, or how each scan was necessary. While the Court agrees that the *DISH Network* court found the party in that case "provided the district court with sufficient justifying documentation to support the award of costs for photocopying and scanning under NRS 18.005(12)," plaintiffs here have provided no such documentation explaining the reasonableness or necessity of these costs.

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31. $39.00 for an unsubstantiated Las Vegas Metropolitan Police Department cost. MCI observes that this cost appears to be either for a police report or for a subpoena, and plaintiffs do not offer any opposition to this cost being retaxed. Moreover, while plaintiffs provide documentation showing that this cost was incurred, this cost is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

32. $1,219.98 for hotels for trial witnesses. NRS 18.005(15) only includes travel and lodging incurred while conducting discovery. While plaintiffs provide documentation showing that these costs were incurred, the declaration of counsel only discusses the necessity of costs incurred in travel expenses for depositions. Plaintiffs thus provide no documentation explaining how the costs were necessary.

33. $30,018.77 in legal research. As stated in *DISH Network*, the "reasonable and necessary expenses for computerized services for legal research" allowed in NRS 18.005(17) pertain to costs incurred in the process of electronic discovery. 133 Nev., Adv. Op. at ___, 401 P.3d at 1093. The declaration of plaintiffs' counsel states that these costs were incurred "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..." The argument contained in plaintiffs' opposition to the motion to retax reinforces that these costs were incurred not as a part of discovery, but rather to assist plaintiffs' counsel in making legal arguments in motion practice and at trial. Further, the "itemized" list of research provided in plaintiffs' appendix of documents provides only the date and cost of each transaction. Thus, under *DISH Network*'s holding that this expense does not fall under NRS 18.005(17), these costs are not taxable.

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Taxed Costs

34. As to the remaining specific costs MCI seeks to retax, the Court finds that each cost falls under NRS 18.005(17) as an expense that is reasonable, necessary, and actually incurred, based on the documentation and declaration of counsel. This conclusion contemplates that the parties conducted discovery on an extremely expedited schedule due to the preferential trial setting.

35. Further, the complex nature of the claims and gravity of damages at issue required plaintiffs to expend costs that may be considered luxuries in different cases, such as oversize color printing and trial support services.

36. Finally, the Court examined in detail the requested expert fees under *Frazier v. Drake*, 357 P.3d 365 (Nev. App. 2015) and found that the fees in excess of $1,500 for each witness was warranted in light of the factors enumerated in *Frazier*.

37. Because NRS 18.005(5) allows a court to award "a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee," the Court has determined that an award exceeding the cap for each of plaintiffs' five experts is reasonable given plaintiffs' declaration of counsel, supporting documentation, and the *Frazier* factors, and therefore taxes the entire amount claimed for each of them.

38. In total, the Court reduces plaintiffs' taxable costs by $77,061.87 for a total award of **$542,826.84**. Those costs are summarized below:

NRS	Definition of Cost	Claimed Amount	Awarded Amount
18.005(1)	Filing/Clerk Fees	$1,956.00	$1,886.00
18.005(2)	Reporter's Fees for Depositions/Deposition Transcript	$87,861.77	$46,526.22
18.005(3)	Jurors' Fees	$15,828.82	$15,828.82
18.005(4)	Witness Fees	$1,291.18	$1,291.18
18.005(5)	Expert Witness Fees	$237,076.61	$237,076.61
	Robert Caldwell	$81,296.19	$81,296.19
	Joshua Cohen	$35,084.67	$35,084.67
	Robert Cunitz	$62,599.18	$62,599.18
	Richard Stalnaker	$33,069.88	$33,069.88
	Larry Stokes	$25,026.69	$25,026.69
18.005(6)	Interpreter Fees	$620.76	$620.76
18.005(7)	Process Server Fees	$3,094.50	$2,919.50
18.005(8)	Official Reporter Fees	$49,625.42	$49,625.42
18.005(9)	Cost of Bond		
18.005(10)	Bailiff Overtime	$406.88	$406.88
18.005(11)	Telecopies (Faxes)	$61.80	$0
18.005(12)	Photocopies/Printing/Scans	$44,301.61	$40,120.84
18.005(13)	Long Distance Telephone	$909.16	$909.16
18.005(14)	Postage/Fed Ex	$1,812.48	$1,812.48
18.005(15)	Travel Expense (Air, Hotel, Car, Meals)	$14,036.65	$12,816.67
18.005(16)	Fees Charged Pursuant to NRS 19.0335		
Other	Legal Research	$30,018.77	$0
Other	Run Service	$1,887.00	$1,887.00
Other	Trial Support	$129,099.30	$129,099.30
	TOTAL	$619,888.71	**$542,826.84**

39. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

IT IS SO ORDERED.

Dated this 2 day of January, 2018

DISTRICT JUDGE

Submitted by:
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[1] Although MCI submits this order, the order expresses the Court's reasoning and conclusions. MCI does not agree with much of the reasoning articulated in this order.

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the ESTATE OF KATAYOUN BARIN, DDS (Decedent);

Plaintiffs,

v.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/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

NOTICE OF APPEAL

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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);

3. "Findings of Fact and Conclusions of Law on Defendant's Motion to Retax," filed on January 3, 2019, notice of entry of which was served electronically on April 24, 2019 (Exhibit B);

4. "Combined Order (1) Denying Motion for Judgment as a Matter of Law and (2) Denying Motion for Limited New Trial," filed on February 1, 2019, notice of entry of which was served electronically on February 1, 2019 (Exhibit C);

5. "Order," filed on March 26, 2019 (Exhibit D); and

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

DATED this 24th day of April, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, 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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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.

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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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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,

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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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EXHIBIT B

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EXHIBIT B

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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,

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

NOTICE OF ENTRY OF "FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO RETAX"

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Please take notice that on the 23rd day of April, 2019, a "Findings of Fact and Conclusions of Law on Defendant's Motion to Retax"' was entered in this case. A copy of the order is attached.

Dated this 24th day of April, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Joel D. Henriod*

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, a true and correct copy of the foregoing notice of entry was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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Edward Hubbard

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

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EXHIBIT A

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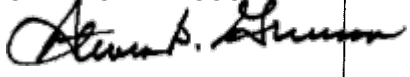
EXHIBIT A



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Attorneys for Motor Coach Industries, Inc,

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 CYCLES, 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. 14

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO RETAX

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

Defendant Motor Coach Industries, Inc.'s ("MCI") "Motion to Retax Costs" came on for hearing on July 6, 2018 at 10:30 a.m. Upon stipulation of the parties, the motion was submitted on the briefs without oral argument. Having reviewed the briefing, being duly advised on the premises, and good cause appearing therefor, this Court now issues these findings of fact and conclusions of law:

I.

PROCEDURAL HISTORY

1. On March 23, 2018, following a 23-day trial, the jury rendered a special verdict awarding plaintiffs a combined total of $18,746,003.62 in compensatory damages.

2. On April 17, 2018, this Court entered judgment in favor of plaintiffs.

3. On April 24, 2018, plaintiffs' filed their "Verified Memorandum of Costs and Disbursements Pursuant to NRS 18.005, 18.020, and 18.110," "Declaration of Peter S. Christiansen, Esq." in support of the memorandum, and supporting appendix volumes. Mr. Christiansen amended his declaration on April 25, 2018. Plaintiffs filed a supplemental memorandum on May 9, 2018.

4. MCI filed its "Motion to Retax Costs" on April 30, 2018. Plaintiffs filed their opposition on May 14, 2018, and MCI filed its reply on June 29, 2018.

5. After considering the briefing, this Court issued a detailed minute order on August 24, 2018 granting MCI's motion in part, and directing MCI's counsel to prepare this formal order.

II.

FINDINGS OF FACT

6. Plaintiffs provided a detailed and verified memorandum of costs, over 1,300 pages of documentation, including itemized lists and invoices, and a declaration of counsel in support of the memorandum of costs, which discusses

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(1) the expert fees being sought; (2) reporter's fees for depositions and deposition transcripts; (3) online legal research; (4) trial support services; and (5) other "necessary and unavoidable costs," including "photocopies, travel expenses for necessary fact and expert witness depositions, postage, witness fees, juror fees, process server fees, official court reporter fees, and run services for delivery of time sensitive documents and filing." (*See generally*, Pls.' Memo and Opp.)

7. Plaintiffs requested costs incurred by their two law firms, Kemp, Jones & Coulthard, LLP ("KJP") and Christiansen Law Offices ("CLO"), totaling $619,888.71. (Pls.' Supp. Memo, at 2–3.)

8. Any of the foregoing findings of fact which constitute conclusions of law shall be deemed as conclusions of law.

CONCLUSIONS OF LAW

9. The Court is unable to award costs under NRS 18.005 unless the prevailing party provides justifying documentation to "demonstrate how such [claimed costs] were necessary to and incurred in the present action." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998) and *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049 (2015). The Nevada Supreme Court will reverse an award of costs as an abuse of discretion if the party does not provide evidence, such as a declaration of counsel, that "explains how the [costs] were necessary and incurred rather than simply telling the district court that the costs were reasonable and necessary." *In re Dish Network Deriv. Litig.*, 133 Nev. Adv. Op. 16, 401 P.3d 1081 (2017).

10. Although the Court finds that plaintiffs' opposition to MCI's motion to retax provides some argument for why many costs were reasonable or necessary, and further that many of plaintiffs' claimed costs appear reasonable and necessary based on the Court's own experience and knowledge of this case, binding case law precludes this Court from awarding costs for which plaintiffs

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have not provided sufficient documentation.

Retaxed Costs

11. $70.00 cost for a paralegal to file a subpoena. Paralegal time is not a "cost" of litigation under NRS 18.005, and is more appropriately categorized as legal fees. *See, e.g. Las Vegas Metropolitan Police Dept. v. Yeghiazarian*, 129 Nev. 760, 770, 312 P.3d 503, 510 (2013) (concluding that "reasonable attorney's fees" includes charges for persons such as paralegals and law clerks).

12. $22,553.75 for videography services and related fees to expedite. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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13. $5,075.00 for synchronized DVD costs. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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14. $1,736.00 for rough drafts of depositions. NRS 18.005(2) provides for one copy of each deposition, but does not provide for rough drafts, and plaintiffs have not shown in counsel's declaration how this service was necessary.

15. $3,450.00 for "Live Note" and "Zoom" connection fees. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining

how the costs were necessary.

16. $4,550.00 for videoconference costs. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

17. $100.00 for "After 5 PM charges." These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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18. $185.00 for flash drives, apparently for depositions of expert witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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19. $300.00 for video files for expert witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

20. $1,385.40 for conference rooms for depositions of various witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation

showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

21. $100.00 for "read and sign" fees. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

22. $315.00 for equipment rental. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

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23. $100.00 for "non-writing wait time" for two witnesses. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

24. $79.00 for parking for depositions. These costs are not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

25. $356.40 for food provided at depositions. These costs are not

specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

26. $1,050.00 for "professional fees" for Dr. Gavin. This cost is not specifically allowed under NRS 18.005, and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that this cost was incurred, but this cost is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

27. $140.00 for duplicate service on Portia Hubbard. In examining the documents provided by plaintiffs, it appears Ms. Hubbard was served with a subpoena on both on August 26, 2017 and on October 1, 2017, with no explanation for why the second subpoena was necessary. NRS 18.005(7) does not allow costs for service which the Court finds to be unnecessary. Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary.

28. $35.00 for wait time of process server(s). This cost is not enumerated in NRS 18.005(7), and thus would only be recoverable under NRS 18.005(17). Plaintiffs provided documentation showing that this cost was incurred, but this costs is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

29. $61.60 for faxes. While "reasonable costs for telecopies" are allowed under NRS 18.005(11), under *Bobby Berosini*, 114 Nev. at 1352 and *Cadle Co.*, 345 P.3d at 1049, the documentation submitted is insufficient for the Court to find that the costs were reasonable or necessary, because plaintiffs have

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provided no information stating what documents were faxed, and in most cases provide no information of who the fax was sent to. Further, plaintiffs have offered no explanation for why certain faxes have a higher per-page cost than others. Plaintiffs provided documentation showing that these costs were incurred, but these costs are not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the costs were necessary or reasonable.

30. $4,141.77 for scanning (internal and outside vendor). NRS 18.005 does not provide for costs of scanning, and plaintiffs have not provided any information about how costs were incurred at all due to internal scanning, or how each scan was necessary. While the Court agrees that the *DISH Network* court found the party in that case "provided the district court with sufficient justifying documentation to support the award of costs for photocopying and scanning under NRS 18.005(12)," plaintiffs here have provided no such documentation explaining the reasonableness or necessity of these costs.

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31. $39.00 for an unsubstantiated Las Vegas Metropolitan Police Department cost. MCI observes that this cost appears to be either for a police report or for a subpoena, and plaintiffs do not offer any opposition to this cost being retaxed. Moreover, while plaintiffs provide documentation showing that this cost was incurred, this cost is not discussed in the declaration of counsel. Plaintiffs thus provided no documentation explaining how the cost was necessary.

32. $1,219.98 for hotels for trial witnesses. NRS 18.005(15) only includes travel and lodging incurred while conducting discovery. While plaintiffs provide documentation showing that these costs were incurred, the declaration of counsel only discusses the necessity of costs incurred in travel expenses for depositions. Plaintiffs thus provide no documentation explaining how the costs were necessary.

33. $30,018.77 in legal research. As stated in *DISH Network*, the "reasonable and necessary expenses for computerized services for legal research" allowed in NRS 18.005(17) pertain to costs incurred in the process of electronic discovery. 133 Nev., Adv. Op. at ___, 401 P.3d at 1093. The declaration of plaintiffs' counsel states that these costs were incurred "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..." The argument contained in plaintiffs' opposition to the motion to retax reinforces that these costs were incurred not as a part of discovery, but rather to assist plaintiffs' counsel in making legal arguments in motion practice and at trial. Further, the "itemized" list of research provided in plaintiffs' appendix of documents provides only the date and cost of each transaction. Thus, under *DISH Network*'s holding that this expense does not fall under NRS 18.005(17), these costs are not taxable.

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Taxed Costs

34. As to the remaining specific costs MCI seeks to retax, the Court finds that each cost falls under NRS 18.005(17) as an expense that is reasonable, necessary, and actually incurred, based on the documentation and declaration of counsel. This conclusion contemplates that the parties conducted discovery on an extremely expedited schedule due to the preferential trial setting.

35. Further, the complex nature of the claims and gravity of damages at issue required plaintiffs to expend costs that may be considered luxuries in different cases, such as oversize color printing and trial support services.

36. Finally, the Court examined in detail the requested expert fees under *Frazier v. Drake*, 357 P.3d 365 (Nev. App. 2015) and found that the fees in excess of $1,500 for each witness was warranted in light of the factors enumerated in *Frazier*.

37. Because NRS 18.005(5) allows a court to award "a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee," the Court has determined that an award exceeding the cap for each of plaintiffs' five experts is reasonable given plaintiffs' declaration of counsel, supporting documentation, and the *Frazier* factors, and therefore taxes the entire amount claimed for each of them.

38. In total, the Court reduces plaintiffs' taxable costs by $77,061.87 for a total award of **$542,826.84**. Those costs are summarized below:

NRS	Definition of Cost	Claimed Amount	Awarded Amount
18.005(1)	Filing/Clerk Fees	$1,956.00	$1,886.00
18.005(2)	Reporter's Fees for Depositions/Deposition Transcript	$87,861.77	$46,526.22
18.005(3)	Jurors' Fees	$15,828.82	$15,828.82
18.005(4)	Witness Fees	$1,291.18	$1,291.18
18.005(5)	Expert Witness Fees	$237,076.61	$237,076.61
	Robert Caldwell	$81,296.19	$81,296.19
	Joshua Cohen	$35,084.67	$35,084.67
	Robert Cunitz	$62,599.18	$62,599.18
	Richard Stalnaker	$33,069.88	$33,069.88
	Larry Stokes	$25,026.69	$25,026.69
18.005(6)	Interpreter Fees	$620.76	$620.76
18.005(7)	Process Server Fees	$3,094.50	$2,919.50
18.005(8)	Official Reporter Fees	$49,625.42	$49,625.42
18.005(9)	Cost of Bond		
18.005(10)	Bailiff Overtime	$406.88	$406.88
18.005(11)	Telecopies (Faxes)	$61.80	$0
18.005(12)	Photocopies/Printing/Scans	$44,301.61	$40,120.84
18.005(13)	Long Distance Telephone	$909.16	$909.16
18.005(14)	Postage/Fed Ex	$1,812.48	$1,812.48
18.005(15)	Travel Expense (Air, Hotel, Car, Meals)	$14,036.65	$12,816.67
18.005(16)	Fees Charged Pursuant to NRS 19.0335		
Other	Legal Research	$30,018.77	$0
Other	Run Service	$1,887.00	$1,887.00
Other	Trial Support	$129,099.30	$129,099.30
	TOTAL	$619,888.71	**$542,826.84**

39. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

IT IS SO ORDERED.

Dated this 2 day of January, 2018

DISTRICT JUDGE

Submitted by:
LEWIS ROCA ROTHGERBER CHRISTIE, LLP[1]

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Attorneys for Defendant Motor Coach Industries, Inc.

Approved as to form and content by:

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By:_____
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Attorneys for Plaintiffs

[1] Although MCI submits this order, the order expresses the Court's reasoning and conclusions. MCI does not agree with much of the reasoning articulated in this order.

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EXHIBIT C

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EXHIBIT C

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, vs. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al. Defendants.	Case No. A-17-755977-C Dept. No. XIV **NOTICE OF ENTRY OF COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL**

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the above-referenced Order was entered in this matter. The Order was filed on February 1, 2019.

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A copy of said Order is attached hereto.

DATED this 1st day of February, 2019.

KEMP, JONES & COULTHARD, LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2019, the foregoing **NOTICE OF ENTRY OF COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL** 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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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

COMBINED ORDER (1) DENYING MOTION FOR JUDGMENT AS A MATTER OF LAW AND (2) DENYING MOTION FOR LIMITED NEW TRIAL

This matter came before the Court on July 6, 2018, pursuant to Defendant's motion for judgment as a matter of law and Defendant's motion for limited new trial. Having considered the briefs and other pleadings and papers on file, the parties having waived oral argument on both motions, and with good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's motion for judgment as a matter of law is denied for the following reasons:

Defendant cannot raise issues in the "Renewed" Rule 50 motion that were not first raised in the Rule 50 motion filed at the close of evidence. *Nelson v. Heer*, 123 Nev. 217, 163 P.2d

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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 subdivision (a) and must have been preceded by a motion filed at the appropriate time under subdivision (a) (2))." In the present case, Defendant presented its Rule 50(a) argument orally the morning of March 22, 2018. The entire argument comprises 12 pages of transcript. (TT 3/22/18 12-24) Defendant made the following arguments in this order: (1) strict liability is not available in wrongful death actions (3/22/18 12:24 to 20:4); (2) the evidence was insufficient to establish a product defect, including warnings, because "it was too late at that point for Mr. Hubbard to make an evasive maneuver" (3/22/18 20:5 to 22:9); (3) Plaintiffs did not propose language for a warning (3/22/18 22:10 to 22:20); (4) an S-1 Gard argument (3/22/18 22:21 to 23:10); and (5) strict liability does not extend to bystanders. (3/22/18 23).

However, absent in the Rule 50(a) motion was (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 Plaintiff's warning expert (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 are denied as procedurally improper.

Defendant's first argument in the motion is that Plaintiffs failed to prove causation on the failure to warn theory because the facts showed that Dr. Khiabani suddenly appeared in Mr. Hubbard's peripheral vision, and the accident happened too quickly for a reasonable jury to find that Mr. Hubbard could have avoided the accident. This argument ignores the full facts as presented in the Plaintiffs' case-in-chief, specifically the testimony of Mr. Hubbard that he observed the bicycle while both Dr. Khiabani and the coach were on Charleston, and saw the bicycle turn onto Pavilion Center before Mr. Hubbard turned the coach onto Pavilion Center.

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Thus, although Mr. Hubbard testified that he did not see Dr. Khiabani's bicycle for 450 feet before the accident, the "split-second" that the accident occurred was not the first time Mr. Hubbard was made aware of the bicycle's presence. Taking all inferences in Plaintiffs' favor, Plaintiffs elicited sufficient evidence for a reasonable jury to find that, had Mr. Hubbard been adequately warned about the dangerous nature of the coach, he would have driven differently as early as when he turned onto Pavilion Center—for example by driving in the left lane instead of the right lane, or by driving slower so as to not pass the bicycle—and that this different action would have avoided the accident. Thus, the accident did not happen too quickly for a reasonable jury to find that a warning would have made a difference.

The parties next dispute to what extent a plaintiff in a failure to warn claim must prove causation. Defendant argues that insufficient evidence of causation was presented by Hubbard's testimony that he "absolutely" heeds warnings he is given when he is trained about something relative to safety, because Plaintiffs needed to additionally prove that the accident would have been avoided by the user heeding the warning. Defendant cites to numerous other jurisdictions for this notion, and argues that it is further supported by the Nevada Supreme Court's *Rivera v. Philip Morris, Inc.* decision. This Court disagrees. It is undisputed that, under *Rivera*, the Plaintiffs bear the burden of producing evidence demonstrating that, among other things, the defect caused the injury. *Rivera* also 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."

Taking all inferences in Plaintiffs' favor, the Court finds that Hubbard's testimony that he would have complied with a warning, combined with the facts listed above regarding Hubbard's perception of the events leading up to the accident, was sufficient to satisfy Plaintiffs' burden of proving causation under Nevada law.

Similarly, the Court disagrees with Defendant's suggestion that "the open and obvious nature of the danger reinforces the conclusion that a warning would have been superfluous." Mot. 50(b) at 10. Taking all inferences in Plaintiffs' favor, the presence of testimony by

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Hubbard, Mary Witherell, and some of Defendant's own employees that they were not aware of the significance of the air displacement created by the coach's design refutes Defendant's classification of the danger as "open and obvious." Further, even if the evidence enabled this Court to find as a matter of law that Hubbard should have known generally of the "risk of driving next to a bicyclist," which this Court has not done, no Nevada law holds that this would prevent a reasonable jury from finding that an adequate warning would have avoided the accident.

Next, Defendant suggests that Plaintiffs' duty to prove causation required Plaintiffs to craft an adequate warning. Failure-to-warn claims can be classified as one of two types: allegations that the warning given by the defendant was crafted in such a way to be ineffective in preventing the injury; or allegations that the product is dangerous enough that a warning should have been provided but the defendant did not provide any warning. In cases of the first variety, the jury must consider whether the warning was adequate under the factors provided in *Lewis v. Sea Ray Boats, Inc.* However, in the second category, the absence of any warning, the lack of any warning, could not possibly be considered adequate under the *Sea Ray* factors, and thus the only required findings are that the product was unreasonably dangerous and that an adequate warning would have avoided the injury. This case falls into the second category, where Defendant undisputedly did not provide any warnings about any of the alleged defects which Plaintiffs alleged. In such a case, the Court finds no support for Defendant's assertion that no reasonable jury could find that the product was unreasonably dangerous and that an adequate warning would have avoided the injury without a specific warning being proposed by the plaintiff. While it is true that providing a model warning to show what the defendant could have done to make the product reasonably safe may be a helpful illustration for the plaintiff's case, it is not required for the jury to find in Plaintiffs' favor. *Cf. Ford Motor Co. v. Trejo* (in a design defect claim, "a plaintiff may choose to support their case with evidence that a safer alternative design was feasible at the time of manufacture."). Furthermore, Defendant did not propose a jury instruction requiring that Plaintiff provide proof of a specific warning and instead only tendered JI 30 and JI 31. Plaintiffs need not prove precisely how the

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facts would have been different had there been an adequate warning, as this would amount to speculation; Plaintiffs need only provide the facts sufficient to allow the jury to draw the conclusion that the presence of an adequate warning would have avoided the accident. As noted above, Plaintiffs did so here. In line with the above, the Court disagrees that the jury's verdict was "consistent with" judgment as a matter of law on causation, as the jury could have, and evidently did, find that the lack of an adequate warning caused the accident. The Court disagrees with Defendant's suggestion that the jury finding no liability on the defective design claim means "when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not." In reality, the jury found no liability after being instructed that liability for defective design required both a design defect and causation, so a simple "no" answer to the defective design question does not necessarily mean the jury found causation to be lacking.

Defendant next argues that, "MCI was not required to make a coach that does not create air disturbance," and therefore MCI was not required to provide a warning at all. While the Court notes that this argument was not raised in MCI's NRCP 50(a) motion during trial, the argument misstates the question actually posed to the jury. The failure-to-warn claim does not ask whether the coach created an air disturbance, but rather whether the coach was unreasonably dangerous due to the air disturbance it created. Thus, regardless of whether MCI had a duty to minimize or remove any air disturbance from its product, there was sufficient evidence for the jury to find that any air disturbance created by the coach was unreasonably dangerous and that the injury could have been avoided by an adequate warning.

Finally, Defendant argues that Nevada's wrongful-death statute requires proof of fault, while the nature of a strict liability claim does not require proving fault, and therefore that the elements of a wrongful death claim could not be satisfied by allegations founded in strict liability. The Court finds no support in Nevada case law for this notion, and indeed finds myriad wrongful death actions founded in strict liability, and thus the Court will not apply the law differently for this case. Moreover, Defendant's interpretation of the "wrongful act or neglect" language in NRS 41.085(2) would lead to an absurd result: a defendant who, by no

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intentional act or malice, creates an unreasonably dangerous product would still be held strictly liable if a user were merely injured, but would no longer be held accountable if the injuries were grave enough to end the user's life.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants motion for limited new trial is denied as none of the arguments presented by Defendant exhibit an issue which "materially affect[ed] the substantial rights of an aggrieved party." NRCP 59(a).

First, Defendant argues that the jury was excused from considering causation of the failure to warn claim because the verdict form did not mention this step of the analysis, and instead allowed the jury to return a verdict in Plaintiffs' favor solely by finding that Defendant failed to provide an adequate warning that would have been heeded. First, as noted above, the Court disagrees with Defendant's position that Plaintiff must prove with specificity that an adequate warning would have actually avoided the injury, or that the accident happened too quickly for a jury to find that an adequate warning could have avoided the accident. However, the Court also notes that the jury instructions sufficiently informed the jury on all findings required for the jury to return a verdict in Plaintiffs' favor—including causation—and that this remedied any potential errors with the verdict form.

Defendant prepared and submitted the jury instruction on causation, i.e., JI 31 providing that: "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." The jury warnings question on the verdict form reads as follows: "5) did MCI fail to provide an adequate warning that would have been acted upon?" Taking into consideration the totality of the jury instructions and the verdict form, the Court does not find that the alleged absence of causation on the fifth question was prejudicial to Defendant. Finally, the Court finds no support for the notion that the special verdict form was required to include a finding for every element of every claim where JI 31 prepared and submitted by Defendant did so.

Second, the Court does not agree that precluding evidence of NRS 484B.270, the statute

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requiring a motorist to maintain a three-foot distance from a bicyclist, constituted an error of law that warrants a new trial. The safety statute in its current form did not exist at the time the coach was sold, and the version of the statute that did exist at the time the coach was sold contained only a mandate that a motorist passing a bicyclist do so safely, which does not offer any support for Dr. Krauss's opinion that a warning was not needed because the law already required vehicles to maintain a certain distance from bicycles. Thus, the existence of the statute has no probative value as to why Defendant chose not to provide a warning with the coach. Further, the Court maintains that JI 32, on "nondelegation," was rightfully included due to evidence being presented at trial that at least one of Defendant's employees believed another entity should warn drivers about the danger of the coach. If JI 32 caused any prejudice to Defendant's case, the Court does not agree that it materially affected Defendant's substantial rights.

Third, as noted in this Court's order denying Defendant's motion for post-trial discovery, the Court does not agree that any newly discovered evidence warrants a new trial. For the same reasons iterated in that order, the Court has not been convinced that the new evidence could not have been found with reasonable diligence, so NRCP 59(a)(4) is not met here. The Court is also not convinced by Defendant's argument that the difficulty in discovering this evidence is exhibited by Plaintiffs' lack of knowledge, or that Defendant was entitled to rely on Plaintiffs' duty to disclose such information. NRCP 16.1 requires a party to disclose the identity of individuals likely to have discoverable information, but it does not require a party to conduct discovery for the other parties. Here, it appears Plaintiffs disclosed Dr. Khiabani's employer, which was sufficient to satisfy Plaintiffs' duty under NRCP 16.1; Plaintiffs were under no duty to actually discover any information from Dr. Khiabani's employer, just to enable Defendant to do so. As stated in the Court's prior order, Defendant had access to the "new evidence" had it simply attempted to get it because Plaintiffs executed an employment release prepared by Defendant on July 27, 2017—nearly five months before the discovery cutoff and nearly seven months before the trial commenced on February 12, 2018. As also stated in the Court's prior order, Defendant "evidently has no explanation for

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why this information was not actually sought after the authorization was given." Moreover, even if the Court were to find that Plaintiffs lapsed on their discovery obligations, this Court does not find that such a finding would render the "new evidence" undiscoverable with due diligence, so a new trial is not warranted on these grounds.

Fourth, the Court does not agree that it erred by precluding evidence of the impact of income taxes. While the Court recognizes the difference between damages for lost wages and damages for loss of probable support, Nevada law is clear that evidence of tax implications are not admissible in a wrongful death case. *See, e.g. Otis Elevator Co. v. Reid*, 101 Nev. 515 (1985). Defendant is correct that certain special circumstances allow jury instructions on tax consequences, but only when tax issues are discussed at trial. *Id.* Here, tax issues were not discussed at trial under the general rule that tax implications are not admissible, and thus there was no indication that the jury would consider tax implications. Therefore, *Otis Elevator Co. v. Reid*'s "special circumstances" exception does not apply, and Defendant's substantial rights were not materially affected.

Dated this 31st day of January, 2019.

Hon. Adriana Escobar

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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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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ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
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EXHIBIT D

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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., 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

ORDER

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Defendant's Motion to Alter or Amend Judgment to Offset Settlement Proceeds paid by other defendants came on for a hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on September 25, 2018.

After considering the moving papers and argument of counsel, the Court **DENIES** Defendants' motion.

In this matter, the Plaintiffs settled with Defendants Michelangelo Leasing Inc., Edward Hubbard, Bell Sports Inc., and SevenPlus Bicycles Inc. for a total settlement of $5,110,000.00. Plaintiffs and the remaining defendant, Motor Coach Industries ("MCI"), proceeded to trial. The jury awarded $18,746,003.62 in favor of the Plaintiffs.

Defendant MCI moved to offset the jury award by the settlement proceeds pursuant to NRS 17.245(1)(a). Specifically, it asked the court to reduce the jury award ($18,746,003.62) by

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the total settlement proceeds ($5,110,000.00) for a total reduced judgment resulting in $13,636,003.62.

Under NRS 17.245(1)(a), "when a release ... is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death...it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant..."

MCI is not entitled to an offset under NRS 17.245 because defendants that are liable for strict products liability, such as MCI, have no right to contribution from any other defendants. *Norton v. Fergstrom, 2001 WK 1628302 *5 (Nev. Nov. 9, 2001); see also Andrews v. Harley Davidson, 106 Nev. 533, 537-38, 796 P.2d 1092, 1094 (1990); Central Telephone Co. v. Fixtures Mfg., 103 Nev. 298, 299, 738 P.2d 510, 511 (1987); NRS 17.225, NRS 41.141.* While *Norton* is unpublished and cannot be used as precedent because it was decided prior to 2016, the Court finds its rationale persuasive and agrees with the Nevada Supreme Court's rationale. *Norton* was decided in 2001, after NRS 17.245 was enacted in 1973 and amended in 1997. NRS 41.141 was enacted in 1973, and amended in 1979, 1987, and 1989, and also precedes the Court's decision in *Norton*. Contributory negligence is not a defense in strict products liability. *Andrews v. Harley Davidson, 796 P.2d 1092 (Nev. 1990).* Because contributory negligence is not a defense in strict products liability, MCI is not entitled to contribution. *Id.*

MCI has no right to contribution from the settling Defendants because plaintiff's judgment against MCI is based on strict products liability failure to warn and strict products liability has no right to contribution. To the extent that MCI would have otherwise been able to assert contribution claims against the settling defendants, those claims would have necessarily been premised on contributory negligence. Because contributory negligence is not a defense to a strict products liability claim, MCI has no right to receive contribution from the settling defendants.

NRS 17.245 applies to joint tortfeasors, but is silent concerning an offset for defendants found liable in strict products liability. But, it follows logically, that similar to NRS 17.255, which bars intentional tortfeasors from contribution, a defendant found liable in strict products liability would also be barred from receiving contribution from the other defendants. Unlike

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other products liability cases where defendants receive offsets, here, none of the other defendants in this case acted in concert with MCI in manufacturing the coach.

MCI also argues it is entitled to an offset under NRS 41.141. Pursuant to NRS 41.141, defendants are responsible for 100% of plaintiff's injuries if their liability arises from a claim based on strict liability, an intentional tort, or any of the other enumerated categories. *Café Moda v. Palma, 272 P.3d 137 (Nev. 2012).*

Because the jury found against MCI based on strict liability failure to warn, MCI is not entitled to an offset under NRS 41.141. Any alleged fault of the settling defendants had nothing to do with this failure to warn. Thus, MCI is not entitled to apportion any percentage of its responsibility to the settling defendants.

Plaintiffs analogized this matter to *Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043 (Nev. 2000).* In *Evans*, the Court enforced the principle that although offsets are typically allowed in a case that involves joint tortfeasors, there is a carve-out for intentional torts. Intentional tortfeasors "may not apply credits from settlements by their joint tortfeasors in reduction of judgments against them arising from their intentional misconduct. *Id.* Moreover, equitable offsets are based on a right to contribution and intentional tortfeasors have no right to contribution under NRS 17.255. *Id.*

Just like the intentional tortfeasors 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 tortfeasors. NRS 17.245 cannot and did not bar MCI from pursuing contribution claims that never existed in the first place; and MCI is not entitled to indirectly receive a nonexistent right to contribution under the guise of an "offset."

MCI also asserts that Plaintiffs will receive a double recovery if no offset is granted. For the foregoing reasons, an offset is not permissible, thus no double recovery will occur.

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Finally, MCI argues that Plaintiffs are judicially estopped from asserting that the defendant has no right to offset. Plaintiff's motion for good faith settlement stated:

> Indeed, the proposed settlement is favorable to any remaining defendants. Plaintiffs' remaining claims will be reduced by the settlement amounts contributed by Michelangelo and Hubbard. NRS 17.245(1)(a). As set forth above, the remaining defendants will receive a contribution toward any future judgment entered against them.

When considering a claim of judicial estoppel, Nevada's courts look for the following five elements: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996, 133 Nev. 8, 390 P.3d 646, 652 (2017)*. All five elements are necessary to sustain a finding of judicial estoppel. *Id.*

Here, element three is not met. The plaintiff did not successfully assert their prior position because the Court granted the motion for good faith settlement based on Plaintiff's assertion that the non-settling defendants will receive an offset. When conducting the analysis of Plaintiff's good faith settlement, the Court considered the relative liability of the defendants and determined that the settlement amount was proper. The Court did not adopt the plaintiff's argument that the non-settling defendant would be entitled to an offset. Further, the jury verdict was based on failure to warn, which has absolutely no bearing on the plaintiffs' claim against the other defendants - the settling defendants. Now, considering the jury verdict, it appears that the settling defendants might have paid even more than their fair share of the liability.

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ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Collectively, the defendants settled for $5,110,000.00 which constitutes almost 30% of the total award in this matter. When looking at the potential liability of all defendants, the Court finds that MCI was responsible for a large majority of the damages. Thus, judicial estoppel does not apply here.

IT IS SO ORDERED.

Dated this 26th day of March, 2019.

ADRIANA ESCOBAR
DISTRICT COURT JUDGE

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ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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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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Diana D. Powell, Judicial Assistant

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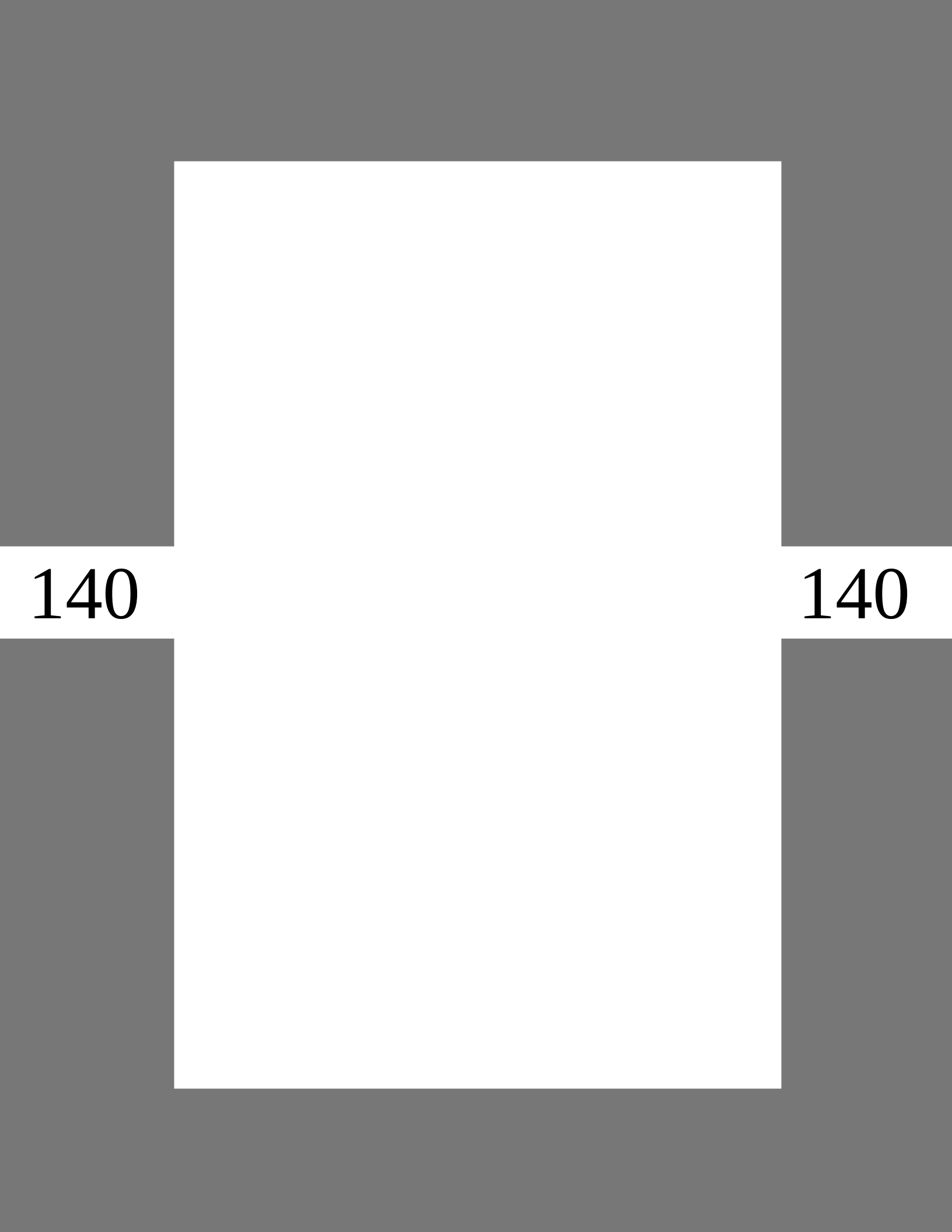
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Additional Counsel Listed on
Signature Block

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/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

CASE APPEAL STATEMENT

012462

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:

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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 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):

Darrell L. Barger, John C. Dacus, Brian Rawson, and Michael G. Terry are not licensed to practice law in Nevada. The orders granting them permission to appear are attached as Exhibit 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, the order granting costs to the prevailing party, and the orders denying post-trial relief.

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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.

Motor Coach Industries, Inc. v. A.K., et al. – Case No. 75953

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:

The parties already participated in the Nevada Supreme Court's settlement program. The effort was not fruitful.

DATED this 24th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2019, a true and correct copy of the foregoing "Case Appeal Statement" was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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EXHIBIT A

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EXHIBIT A

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012469

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; and KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, v. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/v/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20, Defendants.	Case No.: A-17-755977-C Dept. No.: XIV **NOTICE OF ENTRY OF ORDER ADMITTING TO PRACTICE**

012469

YOU WILL PLEASE TAKE NOTICE that an Order Admitting to Practice was filed on August 24, 2017 in the above-captioned matter. A copy of the Order is attached hereto.

DATED this 25th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER ADMITTING TO PRACTICE** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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012473

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; and KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, v. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/v/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20, Defendants.	Case No.: A-17-755977-C Dept. No.: XIV **ORDER ADMITTING TO PRACTICE**

Case Number: A-17-755977-C

012473

Michael G. Terry having filed a Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of Counsel, "Certificate of Good Standing"; and the State Bar of Nevada Statement; said application having been noticed, the Court having considered this matter, and the Court being fully apprised in the premises, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said application is granted and Michael G. Terry is hereby admitted to practice in the above-entitled Court for the purposes for the above-entitled matter only.

DATED this 23 day of August, 2017.

DISTRICT COURT JUDGE

Submitted by:

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Attorneys for Defendant
Motor Coach Industries, Inc.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

NOTICE OF ENTRY OF ORDER ADMITTING TO PRACTICE

YOU WILL PLEASE TAKE NOTICE that an Order Admitting to Practice was filed on July 11, 2017 in the above-captioned matter. A copy of the Order is attached hereto.

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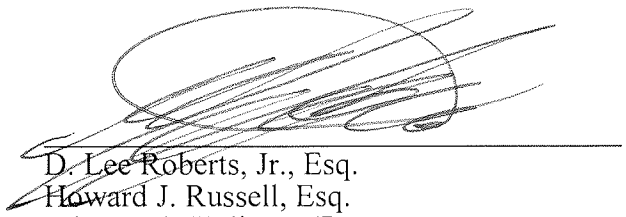
DATED this 11th day of July, 2017.



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2017, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER ADMITTING TO PRACTICE** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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Attorneys for Defendant
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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; and KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent), Plaintiffs, v. MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/v/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20, Defendants.	Case No.: A-17-755977-C Dept. No.: XIV **ORDER ADMITTING TO PRACTICE**

Darrell L. Barger, John C. Dacus and Brian Rawson having filed a Motion to Associate Counsel under Nevada Supreme Court Rule 42, together with a Verified Application for Association of Counsel, "Certificate of Good Standing"; and the State Bar of Nevada Statement;

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Case Number: A-17-755977-C

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said application having been noticed, the Court having considered this matter, and the Court being fully apprised in the premises, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said applications are granted and Darrell L. Barger, John C. Dacus and Brian Rawson are hereby admitted to practice in the above-entitled Court for the purposes for the above-entitled matter only.

DATED this 7 day of July, 2017.

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; et al.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

NOTICE OF ENTRY OF COURT'S ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID BY OTHER DEFENDANTS FILED UNDER SEAL ON MARCH 26, 2019

TO: All parties herein; and

TO: Their respective counsel;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that, on March 26, 2019, the Court entered its Order Denying Defendant's Motion to Alter or Amend Judgment to Offset Settlement Proceeds Paid by Other Defendants, and filed the same under seal on the same date.

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///

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A redacted copy of said Order is attached hereto.

DATED this 3rd day of May, 2019.

KEMP, JONES & COULTHARD, LLP

/s/ Eric Pepperman

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2019, the foregoing **NOTICE OF ENTRY OF COURT'S ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT TO OFFSET SETTLEMENT PROCEEDS PAID BY OTHER DEFENDANTS FILED UNDER SEAL ON MARCH 26, 2019** 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/ Patty Pierson
An Employee of Kemp, Jones & Coulthard.

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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., 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

ORDER

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Defendant's Motion to Alter or Amend Judgment to Offset Settlement Proceeds paid by other defendants came on for a hearing before Department XIV of the Eighth Judicial District Court, the Honorable Adriana Escobar presiding, on September 25, 2018.

After considering the moving papers and argument of counsel, the Court **DENIES** Defendants' motion.

In this matter, the Plaintiffs settled with Defendants Michelangelo Leasing Inc,, Edward Hubbard, Bell Sports Inc., and SevenPlus Bicycles Inc. for a total settlement of [redacted]. Plaintiffs and the remaining defendant, Motor Coach Industries ("MCI"), proceeded to trial. The jury awarded [redacted] in favor of the Plaintiffs.

Defendant MCI moved to offset the jury award by the settlement proceeds pursuant to NRS 17.245(1)(a). Specifically, it asked the court to reduce the jury award [redacted] by

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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the total settlement proceeds [redacted] for a total reduced judgment resulting in [redacted].

Under NRS 17.245(1)(a), "when a release ... is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death...it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant..."

MCI is not entitled to an offset under NRS 17.245 because defendants that are liable for strict products liability, such as MCI, have no right to contribution from any other defendants. *Norton v. Fergstrom, 2001 WK 1628302 *5 (Nev. Nov. 9, 2001); see also Andrews v. Harley Davidson, 106 Nev. 533, 537-38, 796 P.2d 1092, 1094 (1990); Central Telephone Co. v. Fixtures Mfg., 103 Nev. 298, 299, 738 P.2d 510, 511 (1987); NRS 17.225, NRS 41.141.* While *Norton* is unpublished and cannot be used as precedent because it was decided prior to 2016, the Court finds its rationale persuasive and agrees with the Nevada Supreme Court's rationale. *Norton* was decided in 2001, after NRS 17.245 was enacted in 1973 and amended in 1997. NRS 41.141 was enacted in 1973, and amended in 1979, 1987, and 1989, and also precedes the Court's decision in *Norton*. Contributory negligence is not a defense in strict products liability. *Andrews v. Harley Davidson, 796 P.2d 1092 (Nev. 1990).* Because contributory negligence is not a defense in strict products liability, MCI is not entitled to contribution. *Id.*

MCI has no right to contribution from the settling Defendants because plaintiff's judgment against MCI is based on strict products liability failure to warn and strict products liability has no right to contribution. To the extent that MCI would have otherwise been able to assert contribution claims against the settling defendants, those claims would have necessarily been premised on contributory negligence. Because contributory negligence is not a defense to a strict products liability claim, MCI has no right to receive contribution from the settling defendants.

NRS 17.245 applies to joint tortfeasors, but is silent concerning an offset for defendants found liable in strict products liability. But, it follows logically, that similar to NRS 17.255, which bars intentional tortfeasors from contribution, a defendant found liable in strict products liability would also be barred from receiving contribution from the other defendants. Unlike

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
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other products liability cases where defendants receive offsets, here, none of the other defendants in this case acted in concert with MCI in manufacturing the coach.

MCI also argues it is entitled to an offset under NRS 41.141. Pursuant to NRS 41.141, defendants are responsible for 100% of plaintiff's injuries if their liability arises from a claim based on strict liability, an intentional tort, or any of the other enumerated categories. *Café Moda v. Palma, 272 P.3d 137 (Nev. 2012).*

Because the jury found against MCI based on strict liability failure to warn, MCI is not entitled to an offset under NRS 41.141. Any alleged fault of the settling defendants had nothing to do with this failure to warn. Thus, MCI is not entitled to apportion any percentage of its responsibility to the settling defendants.

Plaintiffs analogized this matter to *Evans v. Dean Witter Reynolds, Inc., 5 P.3d 1043 (Nev. 2000).* In *Evans*, the Court enforced the principle that although offsets are typically allowed in a case that involves joint tortfeasors, there is a carve-out for intentional torts. Intentional tortfeasors "may not apply credits from settlements by their joint tortfeasors in reduction of judgments against them arising from their intentional misconduct. *Id.* Moreover, equitable offsets are based on a right to contribution and intentional tortfeasors have no right to contribution under NRS 17.255. *Id.*

Just like the intentional tortfeasors 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 tortfeasors. NRS 17.245 cannot and did not bar MCI from pursuing contribution claims that never existed in the first place; and MCI is not entitled to indirectly receive a nonexistent right to contribution under the guise of an "offset."

MCI also asserts that Plaintiffs will receive a double recovery if no offset is granted. For the foregoing reasons, an offset is not permissible, thus no double recovery will occur.

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Finally, MCI argues that Plaintiffs are judicially estopped from asserting that the defendant has no right to offset. Plaintiff's motion for good faith settlement stated:

> Indeed, the proposed settlement is favorable to any remaining defendants. Plaintiffs' remaining claims will be reduced by the settlement amounts contributed by Michelangelo and Hubbard. NRS 17.245(1)(a). As set forth above, the remaining defendants will receive a contribution toward any future judgment entered against them.

When considering a claim of judicial estoppel, Nevada's courts look for the following five elements: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996, 133 Nev. 8, 390 P.3d 646, 652 (2017).* All five elements are necessary to sustain a finding of judicial estoppel. *Id.*

Here, element three is not met. The plaintiff did not successfully assert their prior position because the Court granted the motion for good faith settlement based on Plaintiff's assertion that the non-settling defendants will receive an offset. When conducting the analysis of Plaintiff's good faith settlement, the Court considered the relative liability of the defendants and determined that the settlement amount was proper. The Court did not adopt the plaintiff's argument that the non-settling defendant would be entitled to an offset. Further, the jury verdict was based on failure to warn, which has absolutely no bearing on the plaintiffs' claim against the other defendants - the settling defendants. Now, considering the jury verdict, it appears that the settling defendants might have paid even more than their fair share of the liability.

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ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Collectively, the defendants settled for [redacted] which constitutes almost [redacted] of the total award in this matter. When looking at the potential liability of all defendants, the Court finds that MCI was responsible for a large majority of the damages. Thus, judicial estoppel does not apply here.

IT IS SO ORDERED.

Dated this 26th day of March, 2019.

ADRIANA ESCOBAR
DISTRICT COURT JUDGE

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ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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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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