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

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Motor Coach Industries, Inc. is a corporation. Its parent companies are Motor Coach Industries International, Inc. and MCIL Holdings, Ltd. Motor Coach Industries International, Inc. is wholly owned by MCII Holdings Inc., which is wholly owned by New MCI Holdings, Inc., which is wholly owned by New Flyer Holdings, Inc., which is wholly owned by NFI Group Inc. NFI Group Inc. is publicly traded in Canada.

MCI has been represented in this litigation by D. Lee Roberts and Howard J. Russel of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Darrell L. Barger, Michael G. Terry, John C. Dacus, and Brian Rawson of Hartline Dacus Barger Dreyer LLP; and Daniel F. Polsenberg, Joel D. Henriod, Justin J. Henderson, and Abraham G. Smith of Lewis Roca Rothgerber Christie LLP.

DATED this 4th day of December 2019.

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JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The district court entered its judgment on April 18, 2018. On May 7, 2018, defendant Motor Coach Industries, Inc. filed post-judgment motions under Rules 50(b), 59(a), and 59(e). *See* NRAP 4(a)(4).[1]

The district court denied the last post-judgment motion on April 10, 2019. (52 App. 12,931.) Defendant timely appealed on April 24, 2019. (50 App. 12,412.)

ROUTING STATEMENT

The Supreme Court should retain this appeal to resolve important issues of first impression, including (1) whether a plaintiff in a failure-to-warn case need prove only that a warning would have been heeded, without regard to whether the absence of an adequate warning *caused* the injury; and (2) whether a defendant in a strict products-liability action is categorically disentitled to an offset for settlement proceeds paid by other defendants. NRAP 17(a)(11), (12).[2]

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[1] On May 18, 2018, defendant filed a premature notice of appeal, which this Court dismissed. *See* NRAP 4(a)(6).

[2] The nearly $19 million verdict exceeds the threshold for presumptive assignment to the Court of Appeals. *See* NRAP 17(b)(5).

ISSUES PRESENTED

1. Whether defendant-appellant is entitled to judgment as a matter of law because plaintiffs failed to propose an adequate warning and failed to establish that any warning would have prevented the collision.

2. Whether the verdict form improperly allowed the jury to assess damages without determining that the absence of a proper warning—even assuming it would be heeded—was a legal cause of injuries.

3. Whether the district court erred in preventing defendant's human factors expert from testifying about the impact of Nevada statutes on the need for a warning.

4. Whether the district court erred by excluding evidence that income taxes would have greatly reduced the amount of probable support plaintiffs could have received.

5. Whether the district court abused its discretion in denying a new trial in light of newly-discovered evidence regarding Dr. Khiabani's [redacted] that directly impacts the determination of damages and liability.

6. Whether a defendant in a strict products-liability action is categorically disentitled to an offset for settlement proceeds paid by other defendants.

7. Whether the district court abused its discretion by awarding "costs" for services attorneys typically provide and for office supplies.

8. Whether the district court abused its discretion by awarding expert witness fees that exceeded the statutory cap by $229,576.61.

STATEMENT OF THE CASE

Motor Coach Industries, Inc. (MCI) appeals from a final judgment entered after a jury trial in the Eighth Judicial District Court, the Honorable Adrianna Escobar, District Judge, presiding.

Dr. Kayvan Khiabani, a renowned hand surgeon, went for a bike ride and collided with the wheels of a passing motor coach that was going about 25 mph, killing him.

Dr. Khiabani's heirs and estate sued the driver and his employer, the manufacturer of Dr. Khiabani's bike, the manufacturer of his helmet, and MCI, the manufacturer of the motor coach. Plaintiffs settled for [redacted] with the other defendants and went to trial against MCI on several product-defect theories: the allegedly boxy design of the bus, which supposedly created a dangerous air disturbance to cyclists; the absence of side proximity sensors; the allegedly poor visibility through the coach's windows and mirrors; and the absence of an "S-1 Gard," a cattle-catcher-type device that supposedly would have pushed Dr. Khiabani out of the way. The jury, asked whether any of these alleged defects was a legal cause of Dr. Khiabani's death, rejected all of them. Plaintiffs also asserted a failure-to-warn claim and, over the objections

of MCI, the verdict form did not require the jury to find causation for that claim. The jury agreed with the failure-to-warn theory (regardless of causation) and awarded $18,746,003.62, including $2.7 million for Dr. Khiabani's loss of earning capacity.

Shortly after trial, MCI learned for the first time from just-published news reports that, [redacted]. That evidence was relevant to damages because the plaintiffs' entire damages theory was based on Dr. Khiabani's continued employment at the University of Nevada Reno with an annual salary of nearly $1 million. MCI moved for post-trial discovery into the explosive new reports and for a new trial, in part based on this newly discovered evidence about Dr. Khiabani's [redacted]. The district court refused both requests.

MCI also moved for an offset for the $[redacted] paid by the settling co-defendants. The district court denied that motion, too.

STATEMENT OF FACTS

A. MCI Designs the J4500 Motor Coach

In 2000, a team of Motor Coach Industries (MCI) engineers designed a new model of motor coach, the J4500. (3 App. 693.) The design process was exacting. MCI ran multiple tests, including to ensure adequate visibility through the windows and mirrors. (*Id.* at 718-24.) The team considered whether to include side proximity sensors, which are supposed to alert the driver to objects near the motor coach, but those available at the time had too many false positives to be useful on a motor coach. (3 App. 739:14–740:16.)

B. Nevada Law Warns Drivers to Maintain at Least a 3-Foot Distance Between Cyclists

At the time the J4500 went into service in 2001 (and when the subject motor coach was manufactured in 2008), Nevada law prohibited "[o]vertak[ing] and pass[ing] a person riding a bicycle unless he can do so safely without endangering the person riding the bicycle." NRS 484.324(b) (1999). A driver must "exercise due care to avoid a collision with a person riding a bicycle" and "give an audible warning with the horn of the vehicle if appropriate and when necessary to avoid such a collision." 1999 Nev. Stat., ch. 367 §2.

In 2011, the Legislature made that warning even more explicit: "when overtaking or passing a bicycle" the driver shall either move to the adjacent left lane or "pass to the left of the bicycle or electric bicycle at a safe distance, which must be not less than 3 feet between any portion of the vehicle and the bicycle." NRS 484B.270(2)(b).

C. Dr. Khiabani Dies in a Collision with a J4500 Motor Coach

On April 18, 2017, Dr. Khiabani went for a bike ride in Summerlin. At a cutout for the city bus stop on South Pavilion Center Drive, a J4500 being driven by Edward Hubbard for Michelangelo Leasing, Inc passed Dr. Khiabani.[3] (26 App. 6334–35.) After that, Hubbard did not see Dr. Khiabani again for another 450 feet, even though he was constantly checking his mirrors. (*Id.* at 26 App. 6344, 6350, 6376–78.)

At the next intersection, in his peripheral vision, Hubbard suddenly saw Dr. Khiabani drift into his lane. (*Id.* at 26 App. 6345, 6360, 6374.) In that moment, Hubbard veered left to avoid a collision. (*Id.* at

[3] MCI accepts Hubbard's recollections for purposes of the causation analysis relevant to MCI's requests for judgment as a matter of law and for a new trial, as that was the subjective perception of the person who allegedly would have acted on any warning.

26 App. 6349, 6385.) In his words, he immediately took "evasive action." (*Id.* at 26 App. 6349.) Dr. Khiabani collided with the passenger side of the bus and fell under the rear tire, killing him.[4] According to Hubbard, it all happened "very fast." (*Id.* at 26 App. 6383.)

D. Plaintiffs Settle with Michelangelo and Bell Helmet for $[redacted]

Plaintiffs sued MCI, Michelangelo, Hubbard, and the seller and manufacturers of Dr. Khiabani's bike and helmet, SevenPlus Bicycles, Inc., and Bell Sports, Inc.

Before trial, plaintiffs settled with all of MCI's co-defendants for $[redacted].

E. The Trial

1. Plaintiffs Allege Four Design-Defect Theories

Plaintiffs alleged four design defects in MCI's motor coach: (1) the coach's corners were not round enough, creating an air disturbance (or

[4] MCI's witness testified that Dr. Khiabani did not fall under the bus and that, instead, Dr. Khiabani collided with the passenger side of the bus near the front passenger entry door and fell to the pavement with the top back edge of his bicycle helmet barely under the outboard edge of the outboard drive axle tire, resulting in head and neck injuries that led to his death. (38 App. 9391-92, 9418-20, 9437-38, 9471, 9480-81, 9494-98; 39 App. 9510-16.)

an "air blast" as plaintiffs referred to it) which blew the bike away from the coach and then sucked it back into the bus;[5] (2) the coach lacked proximity sensors to alert the driver to the presence of a bicyclist; (3) the coach should have included a cattle-catcher type device in front of the rear tires; and (4) the coach had an unusually large blind spot on the right front side.

For each of these alleged design defects, plaintiffs proffered an alternative design that they claimed MCI should have used. They emphasized, for example, that MCI had a more aerodynamically streamlined design that supposedly would have minimized these forces. (30 App. 7487, 31 App. 7504.) Plaintiffs even sought punitive damages on the

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[5] Plaintiffs' expert calculated forces allegedly caused by the turbulence based on theoretical extrapolation. No testing was done. And the expert's conclusions as to forces were dependent on variables such as relative speeds and distances between objects. For example, in support of their air-disturbance theory, plaintiffs' expert opined that the motor coach would push a cyclist three feet away with 10 pounds of pressure *assuming a 40 mph speed* (although he later backed off even that conclusion and admitted that he could not associate those numbers "with any particular separation between the bike and the bus"). (31 App. 7516:2–6; *accord id.* at 7532:22–23 ("Again, my estimates didn't associate the force with any particular distance.")).) After pushing the cyclist away, the coach under these assumptions would draw the cyclist back in with 20 pounds of pressure, again assuming a speed differential of at least 40 miles per hour and a distance of three feet or less. (30 App. 7459:1416.)

basis that the edges of the motor coach were not as round as they could have been.

2. Plaintiffs Spend Little Effort on their Failure-to-Warn Claim

Plaintiffs also threw together a failure-to-warn claim, though the basis for this was far less comprehensible. To the extent plaintiffs faulted MCI for not giving any particular warning, this claim completely overlapped with the alleged air-disturbance design defect. Plaintiffs also mounted a rhetorical attack, criticizing MCI generally for its lack of warnings overall.

a. PLAINTIFFS' WARNING EXPERT DOES NOT SAY WHAT WARNING SHOULD HAVE BEEN GIVEN

Over the course of the 23-day trial, plaintiffs called just one expert on one day for their warning claim: Robert Cunitz's direct examination occupies just seven pages of the transcript, and he stops answering questions 14 pages later. (29 App. 7138–44, 7144–58.) He sits through another four pages of plaintiffs' offer of proof. (*Id.* at 7158–62.)

Dr. Cunitz directed his testimony entirely to the air-disturbance theory, as outlined by plaintiffs' aerodynamics expert, Dr. Robert Breidenthal. But at no point did Dr. Cunitz propose what the warning

should be. (29 App. 7148:1–3 (plaintiffs' warnings expert Cunitz "did not draft a warning that [he] thought we should have given").) Dr. Cunitz could not articulate an actual warning that would address the alleged air disturbance, much less tell a driver what to do about it. (*Id.*)

b. PLAINTIFFS' EXPERTS COULD NOT SAY HOW FAR A DRIVER NEEDS TO STAY AWAY FROM CYCLISTS

This is because plaintiffs' experts had no idea how far any allegedly dangerous "air displacement" might extend from the bus. (*Id.* at 29 App. 7156:21–7157:1). Indeed, Dr. Breidenthal could not associate his assumed forces of the air disturbance with any particular distance that should be maintained between the bike and the motor coach. (*Id.* at 31 App. 7156:2–6; *accord id.* at 7532:22–23 ("Again, my estimates didn't associate the force with any particular distance.").) He did not know how strong the push-pull force would be at any given distance, so he could not say what distance would be safe:

> Q. Are you—are you prepared to express an opinion as to what lateral separation between the bus and the bike would put out significant force on the bike to upset a bike rider who weighs about 186 pounds [i.e., the weight of Dr. Khiabani]?
>
> A. No.

(*Id.* at 31 App. 7533:23–7534:2). Thus, Dr. Breidenthal could provide no specific information regarding threshold distances or speeds that would even be fodder for a warning.

c. THE DISTRICT COURT EXCLUDES EXPERT TESTIMONY ON NEVADA'S BIKE SAFETY STATUTE

To rebut plaintiffs' failure-to-warn claim, MCI's human factors expert, Dr. David Krauss, opined that unnecessary warnings mislead and dilute and that a warning is unnecessary if a law prohibits the conduct. But the district court prohibited Dr. Krauss from mentioning the very rule of the road, NRS 484B.270(2)(b), that already warned Hubbard to keep at least "3 feet between any portion of the vehicle and the bicycle." This statute was vital to Dr. Krauss's testimony, as he would have testified that warning people against actions that are already illegal causes them to ignore the warning, which reduces the overall effectiveness of warnings. In other words, *the law* is the best warning, especially because it carries penalties if it isn't followed. The jury never heard that this law had any bearing on the failure-to-warn claim.

d. HUBBARD DOES NOT TESTIFY WHETHER HE WOULD HAVE CHANGED ANYTHING BASED ON A WARNING

The effect of any possible warning was not explored at trial. A failure-to-warn claim depends on the users being warned about a previously unknown risk, but apart from unfamiliarity with the term "air blast," which plaintiffs coined in this litigation, Hubbard never indicated what he allegedly did not know. Speaking in the abstract, Hubbard said only that he would heed any safety warnings:

> Q. Had you even been trained as to a possible hazard of an air blast?
>
> A. No.
>
> Q. And in terms of your personal habits, if you're trained about something relative to safety, do you heed those training warnings?
>
> A. Absolutely.

(26 App. 6348:15–21.) And while he said that he had not been "told" that a bus displaces air, he already knew that: he knew that "a bus, if it's moving at 30 to 35 miles per hour, will cause air blast or air disturbance at the front of the bus." (26 App. 6386–89, esp. 6388:16-23.) And he already knew that he should avoid bicycles and pedestrians: when Hubbard had previously passed Khiabani, he maintained a distance from Khiabani of at least three feet (see 26 App. 6396) and as much as

five-to-seven feet (26 App. 6373–74, 6395). Hubbard was not asked if he would have (or even could have) changed his conduct on the day of the collision or taken additional precautions if he had received an air-disturbance warning.

One of plaintiffs' bus-safety experts, Mary Witherell, testified similarly. When asked whether she knew about "air blasts," she explained that she was well aware of the phenomenon although she had "just called it air displacement" (24 App. 5909), which she understood to mean that "as air disperses from the front of the bus and comes—you know, because it's a large vehicle, it comes around the side of the bus." (24 App. 5887, 5909–10.) She knew this from practical experience driving buses and coaches for over 20 years. (24 App. 5883–84.) She also experienced the air disturbance as a pedestrian frequently as buses drove by her at speeds of 45 miles per hour (see 24 App. 5933–34, 5938:21-5939:2), and perceived that it was not an issue at speeds of 25 miles per hour or less (24 App. 5938:21-5939:2).

Over those twenty years, Mary Witherell drove and was around an array of makes and models, including "hundreds of occasions" in the

MCI J4500. In that personal experience, she found the phenomenon to be no different with the subject vehicle than any others:

> Q. [by Mr. Roberts] And in your personal experience, did the J4500 have more displacement than any other vehicle that you personally drove?
>
> A. In my personal opinion, I think pretty much every bus is the same.

(24 App. 5909, 5935, 5945–46.)

3. The Jury Is Misled about Dr. Khiabani's Likely Future Income

Plaintiffs claimed that Dr. Khiabani would have continued his position as the head of hand and microsurgery at the UNR School of Medicine and chief of hand surgery at the University Medical Center, where his annual salary was nearly $1 million, resulting in a lost earning capacity of $15,316,910 and creating a loss of probable support of $909,503.[6]

These figures, however, reflect pre-tax figures, not the post-tax amounts that plaintiffs could have actually expected to receive. Plain-

[6] *But see infra* Section F.1 (discussing post-trial news reports about Dr. Khiabani's employment).

tiffs' economic expert, Dr. Larry Stokes, testified that the income number he used for 2016 was $909,503. Dr. Khiabani's W-2 indicated that federal tax withheld totaled $332,302.91. His income tax returns indicated that he paid 35 percent of gross income in taxes. So Dr. Khiabani's after-tax income was approximately $619,777.

Dr. Stokes admitted that Dr. Khiabani's heirs would never see the amount that was paid in taxes.

> Q. [Mr. Roberts]: And Mr. Christiansen said it's up to the jury to determine how much he would have provided to his children in lost support?
>
> A. [Dr. Stokes]: I believe so, yes.
>
> * * *
>
> Q. He couldn't have given his children any more than he had left in his pocket after he paid his federal taxes could he?
>
> A. Not in any current sense, no, he couldn't.

(26 App. 6317:4–13.) The district court rejected MCI's request to introduce evidence of Dr. Khiabani's income taxes.

4. The Verdict

a. THE VERDICT FORM REQUIRED A FINDING OF CAUSATION FOR THE DESIGN-DEFECT CLAIMS, BUT NOT THE FAILURE-TO-WARN CLAIM

At the end of trial, MCI proposed a verdict form that would have

asked the jury to answer whether each allegedly defective aspect of the coach (1) made the coach unreasonably dangerous, and (2) was a legal cause of Dr. Khiabani's death.

LIABILITY

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

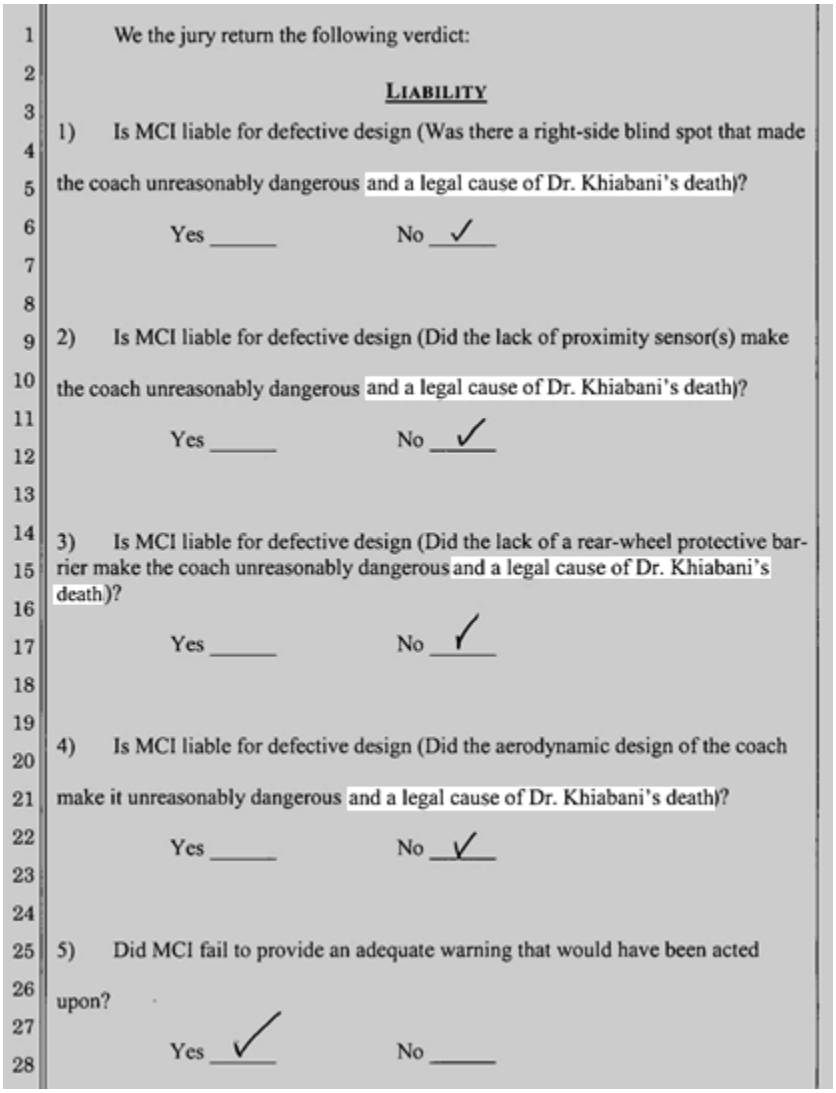
Allegedly defective aspect of the coach	***Did this make the coach unreasonably dangerous?***	***Was the defect a legal cause of Khiabani's Death?***
Right-Side Blind Spot	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Proximity Sensor	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Rear-Wheel Protective Barrier	☐ Yes ☐ No	☐ Yes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

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

(42 App. 10,299–300.)

Over objection, the district court instead issued a verdict form that combined the elements of alleged defectiveness with actual causation for each of the four design defects, but not for the alleged failure to

warn. (41 App. 10,238.) Instead, the jury had to determine only whether "MCI fail[ed] to provide an adequate warning that would have been acted upon," without regard to whether any such action would have saved Dr. Khiabani:



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 _____

(*Id.* at 41 App. 10,238.) A "Yes" to this question required the jury to assess damages. (*Id.* at 41 App. 10,239.)

b. THE JURY REJECTS THE DESIGN-DEFECT CLAIMS BUT SAYS THAT A WARNING "WOULD HAVE BEEN ACTED UPON"

The jury rejected plaintiffs' design-defect theories, including the theory that MCI's motor coach created an unreasonably dangerous air disturbance.

The jury nonetheless answered "Yes" to the question about whether "an adequate warning . . . would have been acted upon."

c. THE JURY AWARDS $18 MILLION

Accordingly, the jury awarded $18,746,003.62, including $2.7 million for loss of probable support.

d. THE DISTRICT COURT TAXES $542,826.84 IN COSTS

The court awarded plaintiffs the entire $129,099.30 requested for "trial support" fees, which consisted of charges for binders and index tabs; DVDs and flash drives; exhibit tabs; staff overtime; exemplars and exhibit boards; CDs and DVDs of scanned documents; and miscellaneous supplies (*e.g.*, an Adobe Photo Shop license, a Go Pro Hero 5, bubble wrap, storage tubes, Jack Daniels, magnifying glasses, a magnetic pointer, Courtroom Connect, LLC services, books and magazines, a helmet and a helmet fitting, bike cover, and a deflector). (50 App. 12,409–10; 47 App. 11,609–13, 47 App. 11,731.) That sum also included fees for

vendors who performed investigation services, assisted with preparing PowerPoint presentations and charts, researched literature and technical information, reviewed policies and documents, assisted with trial presentations, and summarized the jury questionnaires. *Id.*

Likewise, the district court awarded plaintiffs the entire $237,076.61 requested for five expert witnesses' fees. The court overrode the $1,500 per witness cap in NRS 18.005(5), stating only 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." (50 App. 12,410.)

F. Post-Trial Proceedings

1. KLAS-TV Channel 8 Breaks the Story of Dr. Khiabani's [redacted]

[redacted]

(48 App. 11,904:19–23), plaintiffs represented without qualification that "Dr. Khiabani's only employer for the last ten years was" the Nevada

university system. (48 App. 11,920:12–22.) Given these unqualified responses, and plaintiffs' insistence on an accelerated five-month discovery schedule, MCI focused on the liability issues and relied on plaintiffs' representation about [redacted].

Shortly after the trial, however, KLAS Channel 8, the Las Vegas CBS affiliate, broke the story—based both on documents and on interviews with anonymous sources—[redacted] (51 App. 12,513.)[7] [redacted]

[7] This was reported in two segments by KLAS-TV Channel 8's investigative reporting team. The first video segment and written article are available at George Knapp, *I-Team: Audit of UNR's School of Medicine Hidden from Public*, LASVEGASNOW.COM (last updated Apr. 16, 2018), http://www.lasvegasnow.com/news/i-team-audit-of-unrs-school-of-medicine-hidden-from-public/1120792170, 51 App. 12,513. The second video segment and written article are available at George Knapp, *I-Team: Confidential Memos Reveal Reasons UNR Audit Kept Secret*, LASVEGASNOW.COM (last updated Apr. 27, 2018), http://www.lasvegasnow.com/news/i-team-confidential-memos-reveal-reasons-unr-audit-kept-secret/1147000399, 51 App. 12,517.

[redacted]

(51 App. 12,514.)[8] [redacted] (*Id.*) [redacted] (51 App. 12,519.)

[8] In the aftermath of this reporting, [redacted] (Julie Ardito, *Statement from University of Nevada, Reno School of Medicine Dean Thomas L. Schwenk, M.D. in Response to KLAS-TV Report*, UNR SCHOOL OF MEDICINE (Apr. 14, 2018), https://med.unr.edu/news/archive/2018/statement-in-response-to-klas-tv-report, xAppx; *UNR Med Statement Regarding Coverage of Due Diligence Audit*, UNR SCHOOL OF MEDICINE (Apr. 28, 2018), https://med.unr.edu/news/archive/2018/statement-on-due-diligence-audit, xAppx.) [redacted]

[redacted]

(51 App. 12,602; *accord*, 51 App 12,518 [redacted]

[redacted] (51 App. 12,514; 51 App. 12,519), [redacted] (51 App. 12,522; 51 App. 12,602.) [redacted] (51 App. 12,522.) [redacted] (51 App. 12,513.)

2. The District Court Denies MCI's Motion for Judgment as a Matter of Law

MCI moved for a renewed judgment as a matter of law because plaintiffs failed to prove causation and defendants were not required to manufacture a crash-proof bus. MCI argued that plaintiffs failed to

prove causation because it was too late for Hubbard to avoid the collision when Dr. Khiabani suddenly appeared in Hubbard's peripheral vision. Plaintiffs also never explained what warning should have been given or how it would have prevented Dr. Khiabani's death. Further MCI was not required to manufacture a motor coach that that does not create air disturbance.

The district court denied MCI's renewed motion for judgment as a matter of law because (1) plaintiff allegedly elicited sufficient evidence for a reasonable jury to find that if Hubbard had been warned about the dangerous nature of the coach he would have driven differently and that this different action would have avoided the collision; (2) *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187, 209 P.3d 271, 273 (2009), held that the burden of proving causation can be satisfied in failure to warn cases by demonstrating that a different warning would have altered the way the plaintiff used the product or would have prompted plaintiff to take precautions to avoid the injury; and (3) under *Rivera*, plaintiffs need not prove that an adequate warning would have avoided the collision.

The district court did not consider it relevant that, beyond failing to propose the wording of a warning that MCI ought to have given, plaintiffs never identified even what *actionable information* MCI ought to have warned about—e.g., what distance should be maintained, at what speed, *etc.* According to the district court, this Court's opinion in *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245 (2003), relieved plaintiffs of any burden to specify what actionable information should have been provided by warning, and that requiring plaintiffs to propose the warning would be analogous to requiring a plaintiff in a design-defect claim to proffer an alternative design, which Nevada law does not require under *Ford Motor Co. v. Trejo*, 133 Nev. 520, 402 P.3d 649 (2017). (50 App. 12,378.)

3. The District Court Denies MCI's Motion for a New Trial

MCI also moved for a limited new trial on the failure-to-warn claim and damages. MCI argued that the jury's verdict form enabled the jury to find liability for failure to warn without causation. Further, the district court erred by excluding MCI's human factors expert's testimony on NRS 484B.270 that would have rebutted the failure-to-warn claim. MCI also argued that the district court should grant a new trial

based on the newly discovered shocking evidence related to [redacted].

The district court denied the motion for new trial because (1) the traffic safety statute in the form that existed at the time the coach was sold did not offer support for Dr. Krauss's opinion; (2) [redacted] could have been found with reasonable diligence; and (3) Nevada law prohibits evidence of tax in a wrongful death case.

The district court also denied MCI's alternative request for limited discovery on [redacted] This meant that MCI could not compel witnesses such as [redacted] to sit for a deposition or provide documents. (51 App. 12,644.)

G. In Denying an Offset, the Court Awards Plaintiffs a $[redacted] Windfall

MCI moved to offset the judgment by the $[redacted] in settlement proceeds from MCI's co-defendants, but the district court denied that motion, too. The district court concluded that product manufacturers, who can be held strictly liable—*i.e.*, without proof of any fault—have no right to an offset under NRS 17.245. The district court determined that while NRS 17.245 applies to joint tortfeasors, it does not expressly state that the offset applies in products liability.

As a result, plaintiffs stand to receive nearly $[redacted] million for a claim that the jury determined was worth just $18.7 million.

SUMMARY OF THE ARGUMENT

1. The jury did not, and could not, find causation

Plaintiffs offered no evidence that a warning would have prevented the collision. A failure-to-warn claim is premised on the effect that a warning would have on a product user. But plaintiffs opted not to offer a proposed warning, or even the substance of the information that such a warning might convey: Plaintiffs' own aerodynamics expert was unable to offer an opinion as to how far an "air blast" might extend from the motor coach. And without any idea what danger needed to be warned against, the Plaintiffs' warnings expert was unable to propose an adequate warning. So it was impossible for the jury to find causation without knowing what additional information should have been given to the driver. In addition, the driver did not see Dr. Khiabani in time to avoid the collision, and he was never asked whether, if he had been warned, he would have done anything other than what he did—steer away the instant he saw Dr. Khiabani in his peripheral vision. MCI was therefore entitled to judgment as a matter of law.

The district court also erred by submitting a special verdict form to the jury that required the jury to find causation for all four design-defect theories, but omitted causation from the failure-to-warn claim. The jury understood the omission to be deliberate and answered just the question asked, without regard to causation. When actually asked whether causation was established for the design-defect theories, the jury said no. If the jury had been asked whether causation was established for the failure to warn theory, it likely would have said no, especially since there was no evidence of causation.

Moreover, the district court should have allowed MCI's expert witness to testify about a Nevada statute that requires drivers of motor vehicles to pass bicyclists at a safe distance of no less than three feet. That evidence was important to demonstrate that the driver, who should have known from his decades of experience that it is dangerous to pass a bicyclist at a close distance, was also required by law to keep a safe distance between the motor coach and a bicyclist. A warning would have been superfluous.

2. The jury was misled about Dr. Khiabani's financial condition

The district court erred by excluding evidence of Dr. Khiabani's

payment of taxes, thus allowing "probable support" damages to be based on gross income that never would have been available to support Dr. Khiabani's heirs. A new trial is required on this issue.

The district court also should have granted MCI a new trial based on the evidence that was discovered after trial about [redacted] That evidence was relevant to show that Dr. Khiabani's future income would not be the same as his previous annual income of around $1 million, and also to show even that [redacted] MCI could not reasonably be expected to have uncovered that information through discovery because it was so shocking and plaintiffs' entire damages theory was premised on [redacted] Plaintiffs' discovery responses and disclosures indicated that [redacted]

3. MCI was entitled to an offset for amounts paid in settlement by MCI's co-defendants

The district court should have allowed MCI to offset amounts paid by settling defendants under NRS 17.245(1)(a), NRS 101.140, and the common-law prohibition against double recovery. Plaintiffs received a

windfall to the tune of over $[redacted] without any showing whatsoever that MCI intentionally caused the death of Dr. Khiabani. The district court's conclusion, based on an unpublished case, that MCI was not entitled to contribution and therefore not entitled to offset was erroneous. Offset and contribution are distinct concepts, and offset is available even if contribution is not.

4. The district court erred by awarding nontaxable and excessive costs

"Trial support" fees are not enumerated costs under NRS 18.005, so they may not be awarded. Plaintiffs' claimed fees are for services typically completed by attorneys or paralegals and routine overhead expenses. Plaintiffs cannot recover the fees under the catch-all provision of NRS 18.005 because the enumerated costs in the statute are different in kind from the claimed fees.

The district court also erred by awarding plaintiffs $237,076.61 for expert witness fees. The district court overrode the statutory cap of $1,500 per witness without providing a sufficient analysis of the basis for exceeding the cap. Further, the district court awarded the entire amount requested, without considering whether only a portion was reasonable and necessary.

ARGUMENT

PART ONE:

CAUSATION

MCI faces a judgment on a failure-to-warn claim so poorly developed that a basic element—whether the absence of any warning caused Dr. Khiabani's death—is missing. Plaintiffs did not present evidence of causation, the jury did not find causation, and MCI's expert was precluded from testifying about a statutory warning essential to MCI's causation defense.

I.

AS A MATTER OF LAW, PLAINTIFFS DID NOT PROVE CAUSATION[9]

In contrast with the design-defect claims, plaintiffs offered no warning, the lack of which rendered MCI's motor coach defective. And plaintiffs chose not to put on evidence of whether Hubbard, who already

[9] **Standard of review:** This Court reviews the denial of a motion for judgment as a matter of law *de novo*. *FGA, Inc. v. Giglio*, 128 Nev. 271, 287, 278 P.3d 490, 500 (2012).

knew that driving too close to cyclists can be dangerous, would have done anything differently and actually avoided the collision.

A. Plaintiffs Did Not Propose Any Warning at All

1. To Prove a Product Defect for the Absence of a Warning, the Plaintiff Must State What Warning is Absent

Warnings either give enough information for the user to decide whether to use the product in light of the risks or instruct a user what to do to prevent injury. In either case, to prove that a product is defective for the absence of a warning, plaintiffs must demonstrate *what* warning should have accompanied the product to prevent the injury.

When the question is the consumer's decision *whether* to use or be exposed to the product, at all, a warning must disclose the existence of a particular risk to aid in the consumer's decision. *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 571 (1992) (soap could cause blindness); *Allison v. Merck & Co.*, 110 Nev. 762, 775, 878 P.2d 948, 957 (1994) (vaccine could cause encephalitis). This case does not deal with this category of warnings: Dr. Khiabani was not the user, and plaintiffs do not contend that Hubbard would have elected not to drive the motor coach because of any allegedly undisclosed risk.

When the question is instructing the user *how* to operate a product safely, the plaintiff must propose a warning with express directions, the absence of which rendered the product unreasonably dangerous.[10]

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[10] *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 (plaintiff may prove causation by showing that a "different warning" would have altered conduct); *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); *Campbell v. Boston Scientific Corp.*, 2016 WL 5796906, at *8 (S.D. W. Va. Oct. 3, 2016) ("To establish proximate causation under a theory of failure to warn, the plaintiff must prove that a different warning would have avoided her injuries."); *Weilbrenner v. Teva Pharmaceuticals USA, Inc.*, 696 F. Supp. 2d 1329 (M.D. Ga. 2010) ("[A]s this is a failure-to-warn case, Plaintiffs must also show that a different label or warning would have avoided Katelyn's injuries."); *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"); *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"), *aff'd*, 230 Fed. App'x 443 (5th Cir. 2007); *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537 (S.D.N.Y. 2005) (plaintiff must prove that "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 that Rule 50 motion should be granted because "the plaintiff never introduced any proof of what a warning might have been," so causation

A proposed warning must provide *additional information* on which the operator could have acted on under the circumstances. *See McMurry v. Inmont Corp.*, 694 N.Y.S.2d 157, 159 (N.Y. App. Div. 1999) (summary judgment proper when "a warning would not have added anything to the appreciation of this hazard"). A warning can be phrased any number of ways, but it is impossible to show causation when the jury does not know what additional information a warning would give to a user. The jury cannot conclude that **unknown information** would have avoided the injury because it is impossible to know what effect that information would have had on the user of the product. *See 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); *McMurry v. Inmont Corp.*, 694 N.Y.S.2d 157,

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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)); 1 David G. Owen & Mary J. Davis, OWEN & DAVIS ON PRODUCTS LIABILITY § 9:30 (4th ed.), Westlaw (database updated May 2019) ("1 Owen & Davis") ("[P]laintiff 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.").

159 (N.Y. App. Div. 1999) (summary judgment is proper when "a warning would not have added anything to the appreciation of this hazard"); *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 193 (focus in failure-to-warn cases is the effect a warning would have on user of product).

Plaintiffs' burden to propose a particular warning, the absence of which renders the product defective, is the law in Nevada, too. The warning in *Robinson*, although challenged, "warned consumers to keep hands clear of the machine." *Robinson v. GGC, Inc.*, 107 Nev. 135, 138, 808 P.2d 522, 524 (1991) (plaintiffs challenged that a suitable and adequate warning would not suffice when the product could be made safer). Similarly, the challenged warnings in the owner's manual for the boat in *Lewis v. Sea Ray* did not instruct owners to take certain precautions when sleeping with the air conditioner running, precautions such as (1) posting a watch, (2) anchoring the boat from the bow, or (3) creating flow-through ventilation. *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 104, 65 P.3d 245, 247 (2003) ("experts testified in the case to the nature and quality of the warnings that were given and their supposed behavioral impact"). Likewise, the labels on the electric cart in *Outboard Marine v. Schupbach* did not have warnings that they were not sparkproof

and should not be driven in areas with combustible material, a risk about which the manufacturer knew. 93 Nev. 158, 161, 561 P2d 450, 452 (1977).

This is not, as the district court seemed to think, the same as requiring a plaintiff to proffer an alternative design. Indeed, the absence of an adequate warning cannot be said to cause injury unless an adequate warning would have *prevented* the injury. A failure-to-warn claim requires not that the plaintiff invent a new product (the way a requirement to provide an alternative design might), just that the plaintiff articulate what *actionable information* the user ought to receive to keep the product from being unreasonably dangerous—what is the risk and how does the user operate the product so as to avoid or minimize that risk? If the plaintiff cannot provide that information, then the plaintiff has not shown how the absence of a warning (as opposed to the design or manufacture of the product) has caused the product to be unreasonably dangerous. *Lewis* does not relieve the plaintiff of that burden.

2. Plaintiffs Could Not Formulate a Warning Because the Problem Was Unknowable

Here, where Dr. Khiabani was not operating the product, the warning would have been to the driver on how to operate the coach to prevent Dr. Khiabani's death. But plaintiffs don't suggest a warning on how to operate the coach under the conditions. In fact, they did not even propose what substantive information should have been conveyed to the driver.

Plaintiffs' warning expert, Dr. Cunitz, could not articulate a feasible warning because plaintiffs' experts had no idea how far any dangerous "air displacement" might extend from the bus:

> Q. You don't know what lateral separation the drivers have to maintain to avoid having air displacement affect the bike to the right front?
>
> A. We can't know that unless you know all the physical parameters. I learned that from Mr. Breidenthal. So that's unknowable at the moment.

(29 App. 7156:21–7157:1.)

Indeed, plaintiffs' aerodynamic expert, Dr. Robert Breidenthal, was unable to articulate how far from the bus a dangerous area might extend, or if there even *was* a dangerous area. Dr. Breidenthal initially

stated that the bus would create "a 10-pound push force away from itself for a length that's within 3 feet" from the bus. (30 App. 7441:10–12.) But when pressed, he admitted that he did not actually correlate his estimate of the push-pull force with any particular distance from the bus: "The 10 pounds is calculated from the assumed 40-mile-an-hour speed of the relative wind at the cyclist and the 30-degree angle of the flow. I did not explicitly associate those assumed numbers with any particular separation between the bike and the bus." (*Id.* at 31 App. 7516:2–6; *accord id.* at 7532:22–23 ("Again, my estimates didn't associate the force with any particular distance.").) In other words, the expert did not know how strong the push-pull force would be at any given distance from the side of the bus.

Dr. Breidenthal was unable to say how far away a cyclist could be and still be affected detrimentally by the aerodynamic forces:

> Q. Are you – are you prepared to express an opinion as to what lateral separation between the bus and the bike would put out significant force on the bike to upset a bike rider who weighs about 186 pounds [i.e., the weight of Dr. Khiabani]?
>
> A. No.

(*Id.* at 31 App. 7533:23–7534:2.) In fact, the expert could not even conclude that a separation of two feet would be hazardous:

> A. . . . I don't know what is significant to the bike rider, how big a force is significant.
>
> Q. Okay. So you can't reach the conclusion that it's not significant after about 2 feet . . . ?
>
> A. No, I – I don't have an opinion on how big a force it takes to affect a bicyclist. I think I said that earlier.

(*Id.* at 7591:1–8.)

He admitted that, at the initial distance between Dr. Khiabani and the bus, the aerodynamic forces exerted on Dr. Khiabani would have been insignificant: "There would be some force. Initially, it will be very, very small . . . ." (*Id.* at 7532:13–14.)

Thus, plaintiffs refused to provide not only the wording of a proposed warning, but also the substance of any warning. And Hubbard never testified as to what, if anything, he would have done differently if the coach was equipped with some kind of air disturbance warning. Hubbard was already aware that, in general, buses cause air disturbance.

3. Plaintiffs Deliberately Decided Not to Propose a Warning as Part of their Strategy

This failure to propose a specific warning was not a technical omission. This was a deliberate choice as part of plaintiffs' strategy in highlighting the overall absence of warnings on the motor coach. Plaintiffs' theory of the case, at least when it came to warnings, was that the details don't matter, but that MCI should be condemned for not giving their drivers enough warnings generally. Plaintiffs could not even explain the substance of the proposed warning precisely because it is impossible to craft a warning that could inform a driver how to have avoided this collision.

4. Plaintiffs Refused to Specify what Useful Information Ought to Be Included in a Warning that Would have Prevented this Collision

Plaintiffs' failure-to-warn theory was simple: MCI should have provided some warning to motor coach drivers that the vehicle causes turbulence, "air disturbance" or an "air blast" as it moves through space, affecting people and objects next to it. (*See* 29 App. 7143 (testimony of plaintiff's human-factors expert); 41 App. 10,013–19 (plaintiffs' closing argument).) Yet, every bus driver in this case, including Hubbard, testified that they were *already aware* of that simple fact. (26

App. 6387–89 (Hubbard); 24 App. 5886–89, 5909, 5933–45 (Witherell); 26 App. 6461 (Sherlock).) And plaintiffs' humans-factors expert, Robert Cunitz, testified on cross-examination that any warning would have to include more specific information to be useful, although he was not prepared to offer any such specificity:

> Q. Mr. Hubbard knew about it.
>
> A. Well, what do you think he knew?
>
> Q. I think he knew that there was air displacement around the right front of the bus.
>
> A. That doesn't tell us anything. He—and he doesn't say the he—no. He doesn't have the details. He doesn't have the engineering details.
>
> So it's one thing to know there may be some air around the—front of the bus; it's another thing to know—appreciate that that's hazard that has to be dealt with and the nature of that hazard and how it develops depending upon all of the factors of ambient wind and relative vehicle velocities and all of that stuff.

(29 App. 7157:7–:20 (emphasis added).) While he believed that drivers should be advised to maintain a certain distance from bicyclists when passing (*see* 29 App. 7153:18 to 7154:3), he simply referred to plaintiffs' aerodynamics expert, Robert Breidenthal:

> Q. You don't know what that lateral distance is?

> A. You have not supplied enough information in your hypothetical to answer it. And I couldn't answer it anyway, but Mr. Breidenthal, somebody with those kinds of skills, could readily answer it because he has some—he has some understanding of the forces involved and how they very as a function of—see if I remember all the things – ambient wind, the speed of the bicycle, the speed of the bus, the drag coefficients. A lot—there's a lot of complicated things. He knows about it. I don't.

(29 App. 7154:4-14.)

Breidenthal, however, also declined to state what distance must be maintained when passing. Based on his extrapolations—from a theoretical study by someone else, assumed speeds of the bus and bicycle, and estimated wind velocity—he estimated that the "J4500 produces 10 pounds push force to a bike within 3 feet" (31 App. 7515–17) but explained that the selection of three feet was arbitrary:

> Q. Okay. Why did you pick 3 feet?
>
> A. The estimate that I based the force on was for something in the proximity of the bus that's close. There's nothing sudden or magic that happens exactly at 3 feet aerodynamically. The aerodynamic forces increase as you get closer and the bike and bus get closer and closer together, but there's no sudden magic thing that happens exactly at 3 feet.

(31 App. 7515:10–17.)

Theoretically, the force would go up if the bike was closer than three feet away from the bus and would go down as the distance increased. (31 App. 7516.) But he reiterated several times that "my estimates didn't associate the force with any particular distance." (See 31 App. 7532:22, 7534:21.) In fact, plaintiffs never produced anyone to say what distance of separation should be suggested in any warning.

This is remarkable because, apart from plaintiffs' coined term "air blast," Hubbard testified that he already was aware of the general risk of turbulence caused by a motor coach's air displacement: "a bus, if it's moving at 30 to 35 miles per hour, will cause air blast or air disturbance at the front of the bus." (26 App. 6386–89, esp. 6388:16–23.) This is no surprise, as plaintiffs' bus-safety expert, with twenty years' experience driving buses, likewise knew that buses create air displacement. (24 App. 5909–10.) The J4500, in her opinion, created "pretty much . . . the same" air displacement as any other bus. (24 App. 5909, 5935, 5945–46.)

Breidenthal's refusal to suggest a safe distance to include in a warning, combined with the limited extent of Breidenthal's estimations, is significant not only to whether plaintiffs ever proved it was feasible to

post a useful warning but also to the element of causation. Put simply, Breidenthal's testimony might support a warning to maintain a three-foot separation (construing it charitably). Yet, Hubbard testified that *he had* maintained at least a three-foot separation from Khiabani when he passed him. At trial, he testified that he perceived a five-to-seven-foot when he overtook Khiabani. (26 App. 6373–74.) In his deposition, he said that it might have been three-to-four feet. (26 App. 6396.)

B. Plaintiffs Did Not Show that a Warning Would Have Prevented Dr. Khiabani's Death

1. Causation Is Not Just "Heeding"; It Is Proof that a Different Warning Would Have Avoided the Collision

"In Nevada, it is well-established law that in strict product liability failure-to-warn cases, the plaintiff bears the burden of production and must prove, among other elements, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 187, 209 P.3d 271, 273 (2009); *see also Michaels v. Pentair Water Pool & Spa*, 131 Nev. 804, 818, 357 P.3d 387, 397 (Ct. App. 2015) (plaintiff must prove causation in failure-to-warn case).

Causation requires proof of two things. First, plaintiffs must demonstrate that the user of the product would have read and heeded

the warning. *Rivera*, 125 Nev. at 193, 209 P.3d at 276 (rejecting the "heeding presumption"). And second, plaintiffs must convince the fact-finder that, heeding the warning, the user would have avoided the injury to plaintiff decedent. *Id.* at 191, 209 P.3d at 275 (requiring the plaintiff to prove that "the defect *caused* the plaintiff's injury" and that an adequate warning "would have 'prompted plaintiff to take precautions to avoid the injury'") (emphasis added) (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993))).

A failure to warn is not actionable when a proposed warning would have made no difference.[11] Thus, as part of the prima facie case, a plaintiff "must prove that he or she would not have suffered the harm

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[11] *Rivera*, 125 Nev. at 191, 209 P.3d at 275; *Kauffman v. Manchester Tank & Equip. Co.*, 203 F.3d 831 (9th Cir. 1999) (unpublished); *Gove v. Eli Lilly & Co.*, 394 Fed. App'x 817, 818-19 (2d Cir. 2010) (causation not established unless there is evidence that adequate warning would have altered conduct); *Austin v. Will-Burt Co.*, 361 F.3d 862, 869-70 (5th Cir. 2004) (same as *Gove*); *Barnhill v. Teva Pharm. USA, Inc.*, 819 F. Supp. 2d 1254, 1261-62 (S.D. Ala. 2011) (summary judgment appropriate where there was no evidence that a warning would have avoided injury); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 497 (D.S.C. 2001) (summary judgment granted because plaintiff had burden of showing that a warning would have made a difference in the conduct of person warned and plaintiff provided no evidence); *Windham v. Wyeth Labs., Inc.*, 786 F. Supp. 607, 612-13 (S.D. Miss. 1992) (same as *Gove* and *Austin*).

in question if adequate warnings or instructions had been provided." *See* AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.), Westlaw (database updated Aug. 2019). To meet that burden, the plaintiff must prove that the warning would have altered the conduct of the person using the product.[12] A futile warning cannot be the basis of a cause of action.[13]

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[12] *See Rivera*, 125 Nev. at 191, 209 P.3d at 275 (burden to prove causation may be satisfied in failure to warn cases "by demonstrating that a different warning would have altered the way the plaintiff used the product or would have 'prompted plaintiff to take precautions to avoid the injury'" (quoting *Riley*, 856 P.2d at 198)); *Gove*, 394 Fed. App'x at 818-19; *Udac v. Takata Corp.*, 214 P.3d 1133, 1153 (Haw. Ct. App. 2009) (jury should not have been instructed on failure to warn theory when there was no evidence that if person had been warned, he would have "altered his behavior"); AMERICAN LAW OF PRODUCTS LIABILITY 3D § 34:48, Westlaw (database updated Aug. 2019) (plaintiff must provide testimony "which indicates, in some way, that the plaintiff or another instrumental party would have altered conduct had an adequate warning been given"); *id.* § 32:4 & n.5 (citing voluminous cases holding that plaintiff must "show that an adequate warning would have altered the conduct that led to the injury").

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

Brown v. Shiver illustrates the problem when a plaintiff skirts this burden. 358 S.E.2d 862, 864 (Ga. Ct. App. 1987). There, the appellate court concluded that there was no proof of causation to support a failure-to-warn claim because the "plaintiff could not have seen the warning in time to avoid [a] collision." *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"); *Rosburg v. Minn. Mining & Mfg. Co.*, 226 Cal. Rptr. 299, 305 (Ct. App. 1986) ("There is no requirement that a manufacturer must give a warning which could not possibly be effective in lessening the plaintiff's risk of harm."); AMERICAN LAW OF PRODUCTS LIABILITY § 34:54 (3d ed.) ("[W]here 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."); 2 David G Owen & Mary J. Davis, OWEN & DAVIS ON PRODUCTS LIABILITY § 11:20 (4th ed.), Westlaw (database updated May 2019) ("2 Owen and Davis") ("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.").

Logically, in determining causation, the focus is on the actual circumstances of the injury, not some abstract notion of safety. *See Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 193 (Mo. 1992) ("[T]he traditional approach to proximate cause in failure to warn cases focuses on the effect of giving a warning on the actual circumstances surrounding the accident."); AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.), Westlaw (database updated Aug. 2019) ("In approaching the proximate cause issue in warnings cases, the focus is on the effect an inadequate warning had, or if no warning was provided, the effect an adequate warning would have had if given, on the actual circumstances surrounding the accident.").

2. Plaintiffs' Decision Not to Propose a Warning Undermines Plaintiffs' Case on Causation

Proposing a warning that is necessary to keep a product from being unreasonably dangerous is an independent element of a failure-to-warn claim. Without it, there is no proof of defect.

But beyond that, electing not to propose a warning also keeps the plaintiff from establishing causation, as the jury lacks a basis to determine whether the presence of such a warning would have averted the injury.

3. There Was No Evidence that the Driver, Heeding Any Different Warning, Would Have Done Anything Differently

Even if plaintiffs were excused from proposing a specific warning, they failed to prove that *any* warning would have avoided the collision because the motor coach driver did not see Dr. Khiabani in time to avoid the collision:

> Q. —from that point when you pass the bike up through the zero line, you did not see a cyclist?
>
> A. Correct. Not in the bike lane, no, sir.
>
> Q. Not only did you not see the cyclist in the bike lane, you didn't see the cyclist in this turnlane; correct?
>
> A. Correct, yes.
>
> Q. You didn't see the cyclist at all?
>
> A. Correct.

(26 App. 6343:7–15.)

In other words, the coach driver would need to both have been aware of what the warning required of him, and he would have had to

heed the warning and change his conduct. But there was no proof that would have happened here. Hubbard testified that when Dr. Khiabani suddenly appeared in his peripheral vision, it was too late for him to avoid the collision. Although he immediately turned away from Dr. Khiabani and stopped the bus, that did not prevent the collision.

And there is no evidence that a warning of some sort would have prevented the collision. Under these circumstances, any driver would not—could not—have taken action like switching lanes to gain clearance from a bicyclist that, until it was too late, he did not know was next to him.

Irrespective of what warning could have been given, Dr. Khiabani would still have died. *See Brown v. Shiver*, 358 S.E.2d 862, 864 (Ga. Ct. App. 1987).

C. A Warning Would Have Been Unnecessary Because Nevada Coach Drivers Know of the Danger of Driving Too Close to Cyclists and Pedestrians

1. It Is Unnecessary to Warn of an Obvious or Known Danger

Under Nevada's "consumer-expectation test" for products liability, one considers whether a product was more dangerous than the ordinary

user would expect because it failed "'to perform in the manner reasonably to be expected in light of [its] nature and intended function.'" *See Ford Motor Co. v. Trejo*, 133 Nev. 520, 402 P.3d 649, 653 (2017) (quoting *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970)).

Thus, it has long been the law in Nevada that a manufacturer is "not required to warn against dangers that are generally known." *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 241, 955 P.2d 661, 666 (1998); *see also* Jodie L. Miner, Note, *An Analysis of Koske v. Townsend Engineering: The Relationship Between the Open and Obvious Danger Rule and the Consumer Expectation Test*, 25 Ind. L. Rev. 235, 252-53 (1991) ("The consumer expectation test is so interrelated with the open and obvious danger rule that one doctrine cannot be discarded without affecting the other."). Where no danger exists outside of the expectations of the drivers, no warning is required. *See Morton v. Homelite, Inc.*, 183 F.R.D. 657, 659 (W.D. Mo. 1998) ("[W]here a warning would not have conveyed any additional information it is appropriate for the Court to enter judgment.").[14]

[14] *See also Dorshimer v. Zonar Sys., Inc.*, 145 F. Supp. 3d 339, 354 (M.D.

2. Hubbard, Like any Coach Driver, Already Knew to Keep Clear of Visible Cyclists

The ordinary user of a motor coach would expect a risk of collision if the coach came close to a cyclist. And Hubbard was a sophisticated user, having driven coaches and buses for over two decades. (26 App. 6324.) Even if he did not know the particulars of plaintiffs' air-disturbance theory or the made-up term of art "air blast," coined for this case, he knew that driving next to a bicyclist is dangerous. (26 App. 6373–74, 6395–96.) In fact, he testified that at the precise moment he became

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Pa. 2015) (no duty to warn bus driver when warning would have been meaningless because danger was open and obvious); *Johnson v. Honeywell Int'l Inc.*, 101 Cal. Rptr. 549, 556 (Ct. App. 2009) ("[A] manufacturer is not liable to a sophisticated user of its product for failure to warn, if the sophisticated user knew or should have known of the risk, whether the cause of action is for negligence or for strict liability for failure to warn."); *Calles v. Scripto-Tokai Corp.*, 832 N.E.2d 409, 417 (Ill. Ct. App. 2005) ("The manufacturer has no duty to add pointless warnings about dangers the consumer already recognizes."); *Bazerman v. Gardall Safe Corp.*, 609 N.Y.S.2d 610, 611 (N.Y. App. Div. 1994) ("[T]here is no liability for failure to warn where such risks and dangers are so obvious that they can ordinarily be appreciated by any consumer to the same extent that a formal warning would provide or where they can be recognized simply as a matter of common sense." (citations omitted)); AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.), Westlaw (database updated Aug. 2019) ("Two circumstances that may preclude a finding of proximate cause are (1) cases in which a product involves an obvious danger and (2) cases in which the user is actually aware, or should be aware, of the dangerous nature of the product.").

aware that Dr. Khiabani was too close to the motor coach, he took evasive action to avoid the collision, thus demonstrating that he already knew what a warning would have told him. The obviousness of the danger and Hubbard's immediate reaction to it highlights the fact that a warning would not have made any difference here.

Because plaintiffs did not establish causation, MCI is entitled to judgment as a matter of law.

II.

THE SPECIAL VERDICT FORM ELIMINATED CAUSATION FROM THE FAILURE-TO-WARN CLAIM[15]

Even if MCI is not entitled to judgment as a matter of law, a new trial is necessary because the special verdict form did not require the jury to determine whether plaintiffs proved causation. Tellingly, on plaintiffs' four other claims which did include a causation requirement, the jury returned a defense verdict. Because of this error in the verdict form, a new trial is necessary.

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[15] **Standard of review:** This Court reviews for abuse of discretion the denial of a new trial. *Gunderson v. DR Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014).

A. The Verdict Form Did Not Require the Jury to Find Causation on the Failure-to-Warn Claim

1. A Special Verdict Must Not Mislead the Jury

NRCP 49(a) provides that "[t]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact." "It is essential that all material factual issues in the case should be covered by the questions submitted to enable the trial judge to enter a judgment on the entire dispute on the basis of the jury's responses." 9B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2506.

This is not merely an issue of discretion in choosing to use special verdicts. While the court has the discretion to use special interrogatories on only some factual issues under Rule 49(b), as opposed to special verdicts under Rule 49(a), those interrogatories must be accompanied by a general verdict. NRCP 49(b).

Having chosen to give a special verdict form without a general verdict form for plaintiffs, the district court needed to get it right. *Bell v. Bayerische Motoren Werke Aktiengesellschaft*, 105 Cal. Rptr. 3d 485, 498 (Ct. App. 2010). An erroneous special verdict form "has the same potential to misguide the jury and result in a miscarriage of justice as

an erroneous or misleading jury instruction." *Id.* "The trial court must consider the special verdict form and jury instructions as a whole, and the particular circumstances of the case, and decide whether the question was erroneous or misleading and, if so, whether the defect 'materially affected the substantial rights of' the party moving for a new trial." *Id.* (quoting Cal. Code Civ. Proc. § 657).[16]

2. The Issue of Causation Was Never Submitted

In a very real sense, the issue of causation was never submitted to the jury on plaintiffs' failure-to-warn claim. The verdict form expressly required a finding of causation for four liability theories, but did not require such a finding for the failure-to-warn claim.

This is the jury verdict form MCI proposed:

[16] NRCP 59(a) uses language identical to Cal. Code Civ. Proc. § 657.

LIABILITY

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

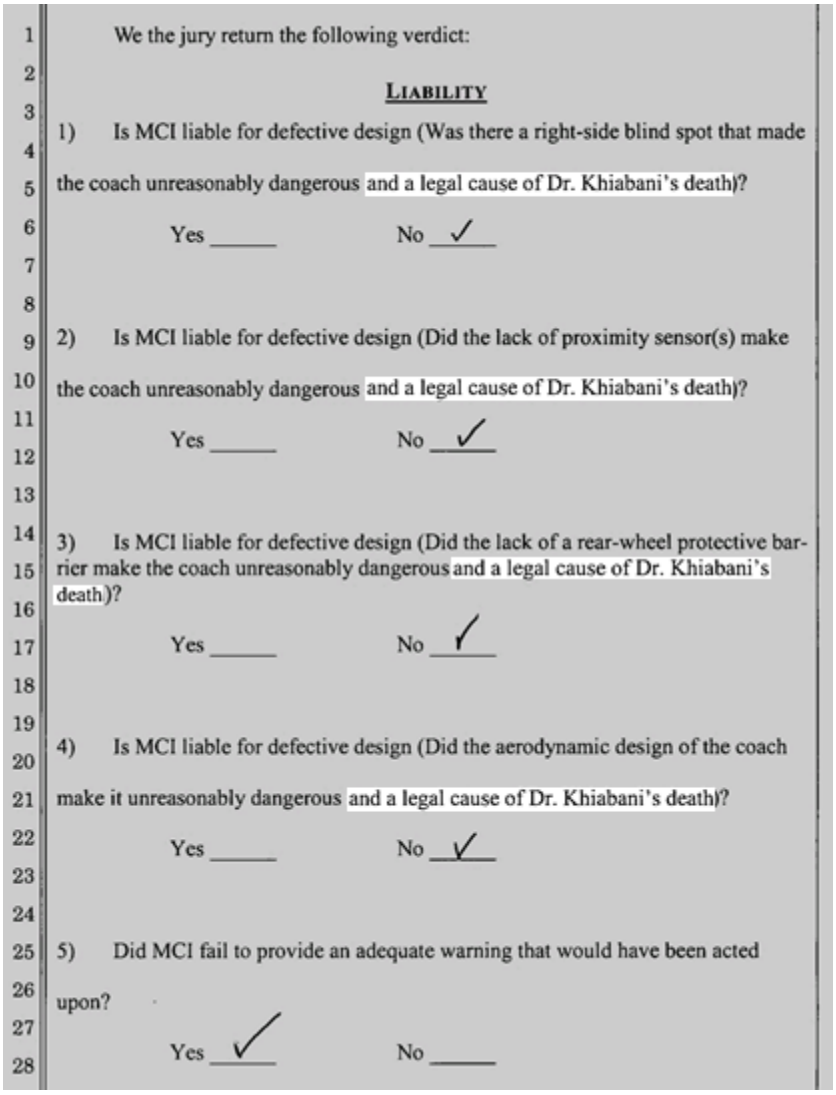
Allegedly defective aspect of the coach	***Did this make the coach unreasonably dangerous?***	***Was the defect a legal cause of Khiabani's Death?***
Right-Side Blind Spot	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Proximity Sensor	☐ Yes ☐ No	☐ Yes ☐ No
Absence of Rear-Wheel Protective Barrier	☐ Yes ☐ No	☐ Yes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

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

(42 App. 10,299–300.)

That form would have required the jury to expressly find that the coach was unreasonably dangerous due to the failure to warn, and that failure to warn was the cause of Dr. Khiabani's injury.

Here is the special verdict form that the district court submitted to the jury over MCI's objection:



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 _____

(41 App. 10,238.)

The first four questions were carefully worded. They each spoke to whether MCI was "liable" for the particular theory, and then required the jury to find that both the design was "unreasonably dangerous" and a "legal cause."

But the fifth question only asked the jury "Did MCI fail to provide an adequate warning that would have been acted upon?" There was no

mention of "liability" or "unreasonable danger," and the question gave the jury no reason to even think about causation. The question only addresses the first, "read and heed," prong of the causation analysis. After marking "Yes" to this question, the following paragraph *required* the jury to find defendant liable and determine the amount of damages, without considering whether heeding the warning would have avoided the injury. (*Id.* at 41 App. 10,239.)

The jury understood the omission to be deliberate and answered only the precise question they were asked, which excused them from finding causation for the failure-to-warn claim.

The jury's actual verdict shows that the jury did not find causation. The jury found in MCI's favor on all theories that required a finding of causation. The warning claim was tied to the allegedly defective aerodynamic design, which supposedly caused air disturbances. On that defective design claim, the jury found no liability. In other words, when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not.

For all we know from this incomplete verdict form, the jury would have returned a general defense verdict on the failure-to-warn claim because they found no causation on this claim.

3. Omitting the Causation Element Was Legal Error

Under either subsection of Rule 49, by not having a complete verdict form on all the issues in the failure-to-warn claim, the district court committed error.

The district court brushed aside the absence of causation in the verdict form because the jury was instructed that causation was a necessary element for liability:

> 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.

(50 App. 12,380:17–25.) But the problem is that the jury was not asked, as a general verdict would have, to find MCI *liable* for a failure to warn. It was asked a special interrogatory: "Did MCI fail to provide an adequate warning that would have been acted upon?" The jury properly did not speculate *why* they were being asked this question, as opposed

to a question about MCI's liability or a question specifically about causation. The error in the verdict form cannot be papered over with an assumption that the jury was equally sloppy. The jury stayed within the bounds of the question they were asked, affecting MCI's substantial rights.

If a proper verdict form had been given, the jury was likely to find causation absent, as it did for the four theories for which the jury was actually asked if causation was present.

B. The Only Plausible Way to Read the Verdict Consistently Is to Recognize that the Jury Did Not Find Causation

It is impossible to conclude that the ambiguity in the verdict form was harmless. The design-defect claim and the failure-to-warn claim were premised on the same allegedly dangerous condition. The jury simply couldn't find no liability on the *actual* allegedly dangerous condition (air blasts), but find that MCI's failure to warn of that exact same condition was both a defect and a cause of Dr. Khiabani's injuries. The only possible conclusion is that the jury did not find causation on the failure-to-warm claim, because the verdict form did not require it.

1. The Court Must Read the Verdict Consistently, If Possible

The district court, if it can, must read verdicts consistently with one another. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1111–12, 197 P.3d 1032, 1038 (2008) ("The Seventh Amendment to the United States Constitution 'requires a court to adopt that view of a case under which a jury's special verdicts may be seen as consistent.'" (quoting *Bernardini v. Rederi A/B Saturnus*, 512 F.2d 660, 662 (2d Cir.1975))). That "responsibility of a trial judge to resolve the inconsistency" exists "even when no objection is made." *Id.* (quoting *Schaafsma v. Morin Vt. Corp.*, 802 F.2d 629, 634 (2d Cir. 1986))

And if reconciling the verdict exposes a legal error, the remedy is a new trial.

2. There Are Just Two Ways to Reconcile the Defense Verdict on the Design of the Coach with the Finding on Failure to Warning

Plaintiffs had two theories on their failure-to-warn claim: one substantive, and one rhetorical. In both cases, reconciling the verdict confirms the error in the verdict form.

a. OPTION 1: THE VERDICT IS CONSISTENT BECAUSE THE JURY DID NOT FIND THAT THE AIR BLAST WAS A CAUSE OF INJURY

Plaintiffs' substantive theory overlapped with their design-defect claim to such a degree that the only way the failure-to-warn claim could succeed is if the shape of the motor coach created an "air blast" effect, that effect wouldn't be known to the ordinary consumer (such that a warning is necessary), and the turbulence was a legal cause of Dr. Khiabani's injury. But this is doubtful because of the defense verdict on the design-defect claim. Either the motor coach did not cause this turbulent effect or the turbulent effect did not cause the collision.

The jury wasn't instructed on the obscure concepts of "unavoidably unsafe" products or told that the possibility of a warning claim is no defense to a design-defect claim. *Cf. Allison v. Merck & Co., Inc.*, 110 Nev. 762, 878 P.2d 948 (1994) (exploring comment k).[17]

So if the jury thought that the allegedly boxy design of the motor coach caused Dr. Khiabani's death, it would have found MCI liable for that design defect. The jury did not, pointing to the verdict form itself

[17] To find the air blast "unavoidably unsafe"—i.e., not fixable through a redesign—would imply that the jury disbelieved the substance of plaintiffs' expert testimony on the allegedly defective condition.

as the reason for the different verdicts: the failure-to-warn claim allowed the jury to assess damages without causation.

b. OPTION 2: THE VERDICT IS CONSISTENT BECAUSE THE JURY SOUGHT TO PUNISH MOTOR COACH FOR A GENERAL LACK OF WARNINGS, AS PLAINTIFFS' COUNSEL URGED

The rhetorical basis for plaintiffs' failure-to-warn claim was a general criticism by plaintiffs' counsel that there weren't many warnings about this motor coach at all. But that attack was not tied to any particular danger or alleged defect. Thus, it is possible (even likely) that the verdict on the failure-to-warn claim reflected the jury's desire to punish MCI for not giving enough warnings in general, untethered to whether the subject of any possible warning caused the collision.

3. If the Court Reads the Verdicts Consistently, the Remedy Is a New Trial

The two verdicts are not necessarily inconsistent. But the only way to reconcile the inconsistency is to conclude that the verdict form erroneously instructed the jury that causation was not required.

III.

THE DISTRICT COURT IMPROPERLY EXCLUDED CONSIDERATION OF A LAW THAT ALREADY WARNED AGAINST THIS DANGER

A. A Statutory Duty Is Relevant to the Adequacy of a Product's Warnings

1. A Product Does Not Have to Duplicate Warnings in the Law

A manufacturer has no duty to warn about that which an operator already knows, "and that which the law already charged him with knowing." *Ward v. Arm & Hammer*, 341 F. Supp. 2d 499, 501 (D.N.J. 2004); *Riordan v. Int'l Armament Corp.*, 477 N.E.2d 1293 (Ill. Ct. App. 1985) (a manufacturer would have no reason to expect a reasonable user not to realize the dangers of illegal handgun misuse). Professional drivers, in particular, are presumed to know the traffic laws that apply to them. *See e.g., Mallery v. Int'l Harvester Co.*, 690 So. 2d 765, 768 (La. Ct. App. 1996); *Alfonso v. Robinson*, 514 S.E. 2d 615, 618 (Va. 1999).

2. Drivers Are Charged with Knowing the Rules of the Road and Need Not Be Warned to Follow Them

A safety statute is effectively the same as a warning that is affixed to the product at the time the statute becomes effective. "Outside products liability, drivers are obligated to avoid intoxication, maintain a

proper lookout, observe traffic signals, drive at an appropriate speed, and follow other rules of the road to protect other persons on and near the highway . . . ." 2 Owen & Davis § 18:12. So a manufacturer has no reason to warn a driver to follow the law.

B. NRS 484B.270 Cautioned Drivers to Keep at Least Three Feet from Cyclists

At the time of the collision, NRS 484B.270 provided that "when overtaking or passing a bicycle," the driver of a motor vehicle shall either move to the adjacent left lane or "pass to the left of the bicycle or electric bicycle at a safe distance, which must be not less than 3 feet between any portion of the vehicle and the bicycle." NRS 484B.270(2)(b).

Likewise, the Nevada driver's handbook states that a motorist must move into the left lane when passing a bicycle, unless an adjacent lane does not exist, in which case the motorist must pass the bicycle at a safe distance of at least three feet. Nevada Dept. of Motor Vehicles, Nevada Driver's Handbook 46 (Jan. 2018), *available at*

https://dmvnv.com/pdfforms/dlbook.pdf. Virtually every state has a similar statute requiring passage of a bicycle at a safe distance, generally no less than three feet.[18]

Thus, just as a manufacturer does not have to warn the user it cannot exceed the speed limit or drive on the wrong side of the road, it does not need to warn a user to give a bicyclist a wide berth.

C. The Court Erred By Prohibiting MCI's Expert Testimony on the Effect of the Statute

The district court erred in excluding Dr. Krauss's expert testimony regarding this rule of the road to which Hubbard was subject. Dr. Krauss would have testified that warnings may be unnecessary when there is a law that already prohibits conduct and carries penalties for non-compliance. In other words, the law *is* the warning, and it is more effective than a manufacturer's warning would be. (48 App. 11,807

[18] *See, e.g.*, Ala. Code § 32-5A-82(3); Ariz. Rev. Stat. Ann § 28-735(a); Ark. Code Ann. § 27-51-311(a); Cal. Veh. Code § 21760; Colo. Rev. Stat. § 42-4-1003(1); Conn. Gen. Stat § 14-232(a); Del. Code Ann. Tit. 21 § 4116; Fla. Stat. 316.083(1); Ga. Code Ann. § 40-6-56; Haw. Rev. Stat. § 291C-43; Idaho Code Ann. § 49-632(1); 625 Ill. Comp. Stat. § 5/11-703(d); Ind. Code § 9-21-8-5(3); Iowa Code § 321.299(1); Kan. Stat. Ann. § 8-1516(c); Ky. Rev. Stat. Ann. § 189.340(2); La. Rev. Stat. Ann. § 32:76.1(B); Me. Rev. Stat. tit. 29-A, § 2070(1-A); Md. Code Ann., Transp. § 21-1209.

("This knowledge of the law would likely increase compliance more than any warnings as there is voluminous evidence that associating an enforced penalty with failed compliance increase compliance rates.").) And additional warnings mislead and are ineffective. (48 App. 11,806.) Therefore, a manufacturer must be selective in determining whether to give a warning.

Dr. Krauss would have opined that it was not necessary to warn the user of the bus of the alleged "air blasts" because, regardless of the reason, it is already against the law to be close to a bicyclist. Dr. Krauss would have also testified that warning people against actions that are already illegal would result in the recipients dismissing it altogether, thereby reducing their effectiveness in general.

It was an abuse of discretion for the district court to exclude Dr. Krauss's testimony, especially after plaintiff's expert, Cunitz, failed to explain what warning MCI should have given.

D. The Statute's Amendment after the Coach's Manufacture Does Not Render that Evidence Irrelevant

The district court also erred in excluding Dr. Krauss's testimony based on differences in the statute at the time the motor coach was manufactured versus at the time of the collision.

1. The Relevant Law Is the One in Effect at the Time of the Collision

The district court held that NRS 484B.270 had no probative value because the law that existed at the time the motor coach was manufactured did not include the three-foot requirement. But the existence of a statute that warns (and penalizes) drivers who get too close to cyclists should be evaluated as of the time of the collision because the premise of a failure-to-warn claim is the user's lack of knowledge at the time of the collision. *See Johnson v. Am. Standard, Inc.*, 179 P.3d 905 (Cal. 2008) ("[T]he sophisticated user's knowledge of the risk is measured from the time of the plaintiff's injury, rather than from the date the product was manufactured."); *Menz v. New Holland N. Am., Inc.*, 507 F.3d 1107 (8th Cir. 2007) (no evidence of causation in failure to warn case where expert testified that "there was no information or warning the defendants could have given [plaintiff] that would have altered [his]

conduct *at the time of the accident*" (emphasis added)); *Robinson v. Delta Int'l Mach. Corp.*, 274 F.R.D. 518, 523 (E.D. Pa. 2011) (no reasonable juror could find that plaintiff was unaware of risks because "*at the time of the accident* there was no additional information that [plaintiff] needed in order to operate the table saw safely," so plaintiff could not establish proximate cause)(emphasis added). "[F]ailure to warn claims involve some consideration of the defendant's conduct and do not necessarily focus exclusively on the product's condition." *Johnson*, 179 P.3d at 916.

2. The Statute in Effect at the Time of the Motor Coach's Manufacture Was Also Probative

And even if the relevant statute is the one in effect when the motor coach was manufactured in 2008, that statute still required a motorist to safely pass a bicyclist. It required a driver of a motor vehicle to "exercise due care to avoid a collision with a person riding a bicycle" and to "give an audible warning with the horn of the vehicle if appropriate and when necessary to avoid such a collision." 1999 Nev. Stat., ch. 367 §2.

The district court abused its discretion in excluding consideration of the statute. Under the circumstances, especially combined with the improper verdict form, a new trial is necessary.

PART TWO:

NEW TRIAL ON FINANCIAL SUPPORT

IV.

EXCLUDING CONSIDERATION OF TAXES INFLATED THE FINANCIAL SUPPORT AWARDS

Nevada law allows heirs in a wrongful death action to recover "damages for loss of probable support." *Freeman v. Davidson*, 105 Nev. 13, 16, 768 P.2d 885, 887 (1989) (citing NRS 41.085). "The legislature carefully chose the words 'probable support.'" *Id.* Probable support damages are "based on the decedent's lost earning capacity." *Id.*

MCI was prejudiced by the district court's exclusion of evidence of Dr. Khiabani's payment of income taxes because the jury was left with the impression that Dr. Khiabani's take-home income was around $1 million per year, when it was really some $300,000 less than that.

A. Probable Support Damages Are Based Solely on Take-Home Earnings, Not Gross Income

Probable support damages compensate family members for their own actual loss of financial support. STEIN ON PERSONAL INJURY DAMAGES § 3:8 (3d ed.), Westlaw (database updated Apr. 2019) ("STEIN"). Earning capacity is not the only consideration when calculating the amount of damages because "gross earnings are obviously not available for the support of the family." STEIN § 3:8. "Initially, gross earnings are reduced by the amount of income taxes withheld at the source." *Id.*

> Where the plaintiff's evidence starts by showing the decedent's gross income, exclusion [from that total] of sums that the decedent could not contribute to the plaintiffs is logical and usually permitted. That would deny the survivors a recovery for benefits they would never receive, including any sums that would have been paid by the decedent in income taxes.

Dan. B. Dobbs, et al., DOBBS' LAW OF TORTS § 374 (2d ed.), Westlaw (database updated June 2019) ("Dobbs"). "In the case of one of high earning capacity, like the decedent, this is an important factor to be offset against what would otherwise be his loss from the destruction of his earning capacity." *Floyd v. Fruit Industries*, 136 A.2d 918, 925 (Conn. 1957).

Courts thus recognize that evidence relating to the impact of income taxes on probable support damages is admissible. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980) ("It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family."); *Burlington N., Inc. v. Boxberger*, 529 F.2d 284, 291 (9th Cir. 1975) ("[A]nnual gross income is such that future taxes would have a substantial effect, evidence of the decedent's past and future tax liability should be admitted if a reasonably fair and accurate estimate of his lost future income is to be assured.").

B. The District Court Erroneously Held that Nevada Law Categorically Excludes Evidence of Taxes

Instead of exercising its discretion, the district court concluded as a matter of law that "evidence of tax implications is not admissible in a wrongful death," action based on *Otis Elevator Co. v. Reid*, 101 Nev. 515, 706 P.2d 1378 (1985). But *Otis Elevator* holds only that juries should not be instructed that personal injury awards are exempt from income tax. That holding does not go to *proof* of damages, but rather to the possibility that the jury will speculate about the tax consequences of an award and adjust the award in contravention of the evidence. As

Otis Elevator noted, "some tax-conscious juries are likely to inflate damage awards in their ignorance of laws exempting these awards from income tax." *Id.* at 522, 706 P.2d at 1382.

Otis Elevator does not deal with a plaintiff's proof of future earnings potential for an award of probable support damages. And it noted that tax instructions are appropriate in special circumstances. *Id.* This is one of those circumstances.

C. The Tax Evidence Was Highly Probative

In this case, the evidence of income tax was highly probative because Dr. Khiabani was in the very highest tax bracket—35%. Because the impact of income taxes was excluded, the jury awarded more money in lost probable support than Dr. Khiabani would have actually had available—a difference of $300,000 per year. Excluding the evidence was an error. The error inflated the jury's assessment of damages, prejudicing MCI.

V.

NEWLY DISCOVERED EVIDENCE THAT [redacted] REQUIRES A NEW TRIAL ON FINANCIAL SUPPORT

A. The Jury Should Have Been Told About [redacted]

A new trial is necessary based on newly discovered evidence that undermines the integrity of this judgment. NRCP 59(a)(4). Plaintiffs' evidence of Dr. Khiabani's lost earning capacity was based on a projection of Dr. Khiabani's recent salary into the future. Plaintiffs estimated the lost earning capacity at $15,316,910. (26 App. 6282.)

But the evidence that MCI learned about for the first time in news reports after trial indicates that [redacted]

A new trial is necessary even if any of the plaintiffs or their counsel were unaware of these facts[19] because the information could not have been discovered with reasonable diligence. NRCP 59(a)(4). In fact, it almost certainly would have remained secret if someone hadn't [redacted].

B. The Newly Discovered Evidence Undermines the Jury's Verdict

The Channel 8 reports undermine the integrity of the jury verdict for two reasons. First, plaintiffs never informed MCI that [redacted], even though this information is obviously relevant to damage calculations. Given that much of the damage award was based on Dr. Khiabani's future earning potential, the fact that [redacted] should have been presented to the jury.

[19] If plaintiffs or their counsel knew or should have known that [redacted], a topic MCI was precluded from exploring, there has been a fraud on the court, which compels a new trial or other relief. *Estate of Adams ex rel. Adams v. Fallini*, 132 Nev. 814, 822, 386 P.3d 621, 626 (2016) (interpreting NRCP 60(b)(3) and holding that "when he knew or should have known that [an admission] was false . . . counsel committed a fraud upon the court when he failed to fulfill his duties as an officer of the court with candor").

Second, this information raises questions about liability. If the jury had been informed that Dr. Khiabani was facing (1) his wife's terminal cancer, (2) [redacted], (3) [redacted], (4) [redacted], the jury could have concluded ([redacted]) that something other than an "air blast" caused him to veer into the motor coach.

C. If Plaintiffs or Plaintiffs' Counsel Were Aware of [redacted], then the Judgment Must Be Set Aside for Fraud on the Court

1. Counsel's Failure to Correct a Known Misimpression Is a Fraud on the Court

"Counsel violates his duty of candor to the court [and thereby commits fraud on the court] when counsel: (1) proffers a material fact the he knew or should have known to be false . . . and (2) relies upon the false fact to achieve a favorable ruling." *Estate of Adams v. Fallini*, 132 Nev. 814, 819-20, 386 P.3d 621, 625-26 (2016); *see also Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119, 125-26, 808 P.2d 512, 516 (1991) (counsel committed fraud upon the court "in violation of SCR 172(1)(a) and (d)" when he proffered evidence and omitted pertinent portions of a

document to "buttress" his client's argument, and that he "knew or should have known" that the omitted portion was harmful to his client's position); *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1078-79 (2d Cir. 1972) (counsel pursuing case with known complete defense commits fraud on the court, where the defense was unknown to the court, and apparently unknown to the defending parties).

In *Estate of Adams*, it was enough that an attorney asked for an admission to a fact that the attorney knew or should have known was false, even though the opposing party failed to deny it or otherwise respond. The duty of candor prohibited reliance on the default admission. 132 Nev. Adv., Op. 81, 386 P.3d at 626.

Moreover, an attorney commits fraud on the court if he knowingly presents testimony based on a false premise or knowingly elicits false testimony. *See Wooderts v. Warden, Fed. Corr. Inst. Seagoville*, 516 F. App'x 370, 371 (5th Cir. 2013); *Blakeney v. Lee*, 2007 WL 1341456, at *28 (W.D.N.C. May 3, 2007) (recognizing that it is fraud on the court to present testimony "that [the attorney] knows to be false or to be based upon a false premise"), *aff'd sub nom. Blakeney v. Branker*, 314 F. App'x 572 (4th Cir. 2009); *Fla. Bar v. St. Louis*, 967 So. 2d 108, 122 (Fla.

2007), *clarified* (Oct. 11, 2007); *Matter of McCarthy*, 623 N.E.2d 473, 477 (Mass. 1993); *cf. Davis v. Singletary*, 119 F.3d 1471, 1475 (11th Cir. 1997) ("Because of his ethical duty not to present a defense based upon what he personally knew to be a lie, [the defense attorney] could not have used at trial [the defense expert's opinion], founded as it is on a falsehood.").

2. If Plaintiffs Had Reason to Know about [redacted], Not Disclosing it Was a Fraud on the Court

Plaintiffs offered expert testimony regarding Dr. Khiabani's future earning potential. This testimony was based on the premise that Dr. Khiabani would remain employed with the UNR/UNLV medical system. [redacted]. If plaintiffs or their counsel were aware of this, a fraud on the court has been committed that demands a new trial.

The district court, however, denied MCI's requests for discovery on the issue and did not require plaintiffs or their counsel to say whether they were aware of [redacted]. At a minimum, this Court should remand to allow discovery on this serious question.

D. A New Trial Is Necessary Even in the Unlikely Event Plaintiffs Were Unaware of [redacted]

A party is entitled to a new trial if it discovers new evidence "that the party could not, with reasonable diligence, have discovered and produced at the trial." NRCP 59(a)(1)(D). "Due diligence does not require omniscience. 'Due diligence means doing everything reasonable, not everything possible.'" *Kubeck v. Foremost Foods Co.*, 461 A.2d 1380, 1383 (Conn. 1983) (quoting *People v. Sullivan*, 296 N.W.2d 81 (Mich. App. 1980)); *see also* 66 C.J.S. *New Trial* § 170, Westlaw (database updated June 2019) ("[A] party is not required to do all that is possible to discover evidence, but rather, it is sufficient that a party do all that is reasonable to lead to the discovery of evidence."). It "does not require impeccable, flawless investigation in all situations." *Foerstel v. St. Louis Pub. Serv. Co.*, 241 S.W.2d 792, 795 (Mo. App. 1951).

> Where the movant has no information as to the existence of certain matters or as to the making of certain statements, it will not be presumed that he or she should have made inquiry in the community with respect to such matters or statements or that the movant would have discovered such evidence by ordinary diligence.

66 C.J.S. *New Trial* § 171, Westlaw (database updated June 2019).

Here, the newly discovered evidence could not have been discovered with reasonable diligence for five reasons.

1. Plaintiffs Had a Duty to Disclose the Information

First, plaintiffs had an affirmative duty to disclose this information, which directly undercuts the veracity of their representation to the Court, MCI's counsel, and the jury that [redacted]. NRCP 16.1(a)(1); NRCP 26(e)(1) ("A party is under a duty to supplement . . . if the party learns that the information disclosed is incomplete or incorrect"). Plaintiffs never disclosed any individuals knowledgeable about Dr. Khiabani's employment. Their obligation was not limited to identifying only those people they were aware of, but rather the identity of anyone "reasonably available" to them. NRCP 16.1(a)(1).

2. MCI Was Entitled to Rely on Plaintiffs' Interrogatory Answers, Which Were Misleading

Second, MCI was entitled to rely on plaintiffs' response to interrogatories that implied that [redacted]

When a party's discovery responses imply that certain facts don't exist, the diligence requirement is "reduced to the minimum." *Foerstel v. St. Louis Pub. Serv. Co.*, 241 S.W.2d 792, 795 (Mo. App. 1951); *see also Higgins v. Star Elec., Inc.*, 908 S.W.2d 897, 904 (Mo. Ct. App. 1995). MCI "was thrown off the trail by an answer which, if given truthfully, would have led defendant straight to the files of [the medical school.]" *Foerstel*, 241 S.W.2d at 795. When counsel does not have relevant information and has no reason to be "on guard," "it will not be presumed that they should have made inquiry" into the unknown information, and "it cannot be said that they could have discovered same by ordinary diligence." *Ill. Cent. R. Co. v. Frick*, 76 S.W.2d 13 (Ky. 1934).

[redacted]

[redacted]

(48 App. 11,920:12–22.)

[redacted] (*Id.*) [redacted]

In light of plaintiffs' duty to give accurate responses to interrogatories and "seasonably to amend a prior response to an interrogatory," NRCP 26(e), MCI reasonably relied on plaintiffs' unqualified representation that there [redacted]

3. The Press Reports Were Surprising

Third, MCI could not reasonably have imagined such a surprising and unusual turn of events. The information revealed in the Channel 8 reports is so scandalous and unusual that no reasonable party would have expected it or requested information about it.

No party can or should be expected to brainstorm every hypothetical scenario, no matter how far-fetched, and then seek discovery on each feeble possibility. As reflected in the recent amendment to Nevada Rule of Civil Procedure 26(b)(1) – which now expressly directs discovery to be "proportional to the needs of the case, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit (NRCP 26(b)(1)(2019)) – to require a party to search for every possible occurrence in discovery would burst open the floodgates. Discovery, which is already quite burdensome, would become unmanageable and never-ending if MCI was truly required to turn over literally every stone. The hectic pace of discovery barely allowed MCI to complete the discovery it *did* seek.

4. MCI Cannot Be Expected to Have Discovered the Evidence When [redacted]

Fourth, it is clear that MCI *very likely would never have discovered* this evidence, no matter how extensively it might have sought it, [redacted] (51 App. 12,731 [redacted].) [redacted] (51 App. 12,723 ([redacted]

5. Discovery Was Chaotic Enough

Finally, discovery was so truncated here that the parties did not have the luxury of time to turn over every conceivable stone. The parties had only a little over five months to conduct discovery in this com-

plex, product-liability, wrongful death action because the case was initially on an expedited trial track. During those five months MCI had to engage in a substantial amount of discovery over a wide range of issues. The parties took over thirty-five depositions, including at least twelve expert depositions. Between July 23 and October 18, 2017, MCI answered three sets of written discovery. MCI identified and provided for inspection of five boxes of engineering documents and drawings. MCI produced six expert reports, requiring its experts to expedite testing and analysis on complicated technical issues. MCI subpoenaed high school records for the minor plaintiffs.

It was prudent to use the limited time to address plaintiffs' wide-ranging liability theories in light of the plaintiffs' response to the interrogatory about [redacted]. To say the least, [redacted] It is a minor miracle that the parties were able to complete even this discovery. To expect MCI to also seek discovery on every imaginable (and unimaginable) scenario, no matter how likely, is simply not reasonable.

PART THREE:

OFFSET

VI.

THE DISTRICT COURT ERRED BY NOT OFFSETTING AMOUNTS PLAINTIFFS RECEIVED FROM SETTLING CO-DEFENDANTS

MCI was entitled to a credit of $[redacted] toward the judgment to reflect the amounts settling defendants paid to plaintiffs.

A. MCI was Entitled to An Offset

1. The Uniform Contribution Among Tortfeasors Act and the Uniform Joint Obligations Act Enact Nevada's Policy against Double Recovery

The axiom that "a plaintiff is entitled to only one recovery" runs throughout the law, both as a freestanding equitable principle, and as codified in the Uniform Contribution Among Tortfeasors Act (UCATA) and the Uniform Joint Obligations Act (UJOA).

Under UCATA,

> When a release or a covenant not to sue or not to enforce judgment 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, or in the amount of the consideration paid for it, whichever is the greater.

NRS 17.245(1)(a). There is no exception in the statute for strict products liability.

Likewise, the UJOA contains no exception for strict products liability:

> The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint, or of joint and several obligors, in whole or in partial satisfaction of their obligations, shall be credited to the extent of the amount received on the obligations of all coobligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

NRS 101.040.[20]

Both the UJOA and UCATA prevent double recovery. *Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 67 (2004) (NRS 17.245(1)(a) "prevent[s] double recovery to the plaintiff"); *Whittlesea v. Farmer*, 86 Nev. 347, 350, 469 P.2d 57, 59 (1970) ("Since the

[20] The UJOA survived the enactment of the UCATA. *W. Techs., Inc. v. All-American Golf Center, Inc.*, 122 Nev. 869, 873 139 P.3d 858, 861 (2006) (NRS 101.040 "applies to contract actions as well as actions in tort, and . . . permits offsets between co-obligors").

plaintiff may have but one satisfaction for his injuries from joint tortfeasors, the amount paid for a covenant by one of them reduces by that amount the liability of the others.").

The common law has the same rule. This Court prohibits double recovery, regardless of whether a particular statutory scheme applies, because it is inequitable. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (formally adopting the prohibition against double recovery in a tort case that involved claims for negligence (against both defendants), breach of fiduciary duty (against non-settling defendant), and breach of good faith (against non-settling defendant)). Unless an express exception applies, the notion that "a plaintiff can recover only once for a single injury" is a polestar of Nevada law. *Id.*

2. Without an Exception for Product Manufacturers, the District Court Erred in Denying an Offset

Here, the district court erred by prohibiting MCI from applying a credit to the judgment for amounts paid by the settling defendants, which impermissibly allowed plaintiff a windfall double recovery to the tune of over $5 million.

B. Plaintiffs Were Estopped from Arguing that MCI Was Not Entitled to An Offset

Plaintiffs are also estopped, based on their previous assurance that MCI would be entitled to an offset, from opposing one now.

1. Judicial Estoppel Applies to Positions Taken in a Successful Motion to Approve a Settlement

Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position *or accepted it as true*)." *In re Frei Irrevocable Tr. Dated Oct. 29*, 1996, 133 Nev. 50, 390 P.3d 646, 652 (2017) (emphasis added). The court does not have to formally "adopt" the party's argument before judicial estoppel applies. *See id.*[21]

That element is satisfied where a court approves a settlement. *Id.* at 56, 390 P.3d at 652 (noting the third element was satisfied because party asserted position in his petition and the district court approved his petition); *Kale v. Obuchowski*, 985 F.2d 360, 361 (7th Cir. 1993) (holding that where court approved settlement, judicial estoppel applied because no case "makes application of judicial estoppel depend on the

[21] The other four elements of a claim of judicial estoppel are not at issue in this appeal.

existence of a judicial opinion adopting the litigant's position; it is enough that the litigant win," and "[p]ersons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment."); *see also Reynolds v. C.I.R.*, 861 F.2d 469, 473 (6th Cir. 1988) (holding that because bankruptcy agreements must be approved as fair and equitable, bankruptcy agreements satisfy judicial acceptance prong of judicial estoppel inquiry).

2. The District Court Erred in Letting Plaintiffs Withdraw their Successful Position that MCI Would Be Entitled to an Offset

MCI's expectation of an offset is not novel. Even plaintiffs previously recognized that MCI was entitled to an offset in two separate motions that they filed for a determination that their settlements were made in good faith. Those motions were filed so that the settling defendants could eliminate any contribution claim from non-settling defendants. Under NRS 17.245(1)(b), 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," the release "discharges the tortfeasor to

whom it is given from all liability for contribution and for equitable indemnity to any other tortfeasor."

Plaintiffs stated in the motions that MCI would get an offset of the settlement proceeds, because that is exactly what NRS 17.245(1)(a) says. They told the court that:

> 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.

(11 App. 2745:15–18.)[22]

The district court erroneously determined that plaintiffs were not judicially estopped. According to the district court, plaintiffs had not been unsuccessful in asserting their earlier position because, in granting the motion to approve the settlements, the court did not expressly adopt the plaintiffs' argument that the non-settling defendant would be entitled to an offset.

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[22] Plaintiffs also argued in "Plaintiffs' Reply in Support of Motion for Remand" that unless the court made a good faith settlement determination, the parties would still be subject to liability. Plaintiffs emphasized that the parties would still be subject to contribution to any other tortfeasor including MCI. (Plaintiffs' Reply in Support of Motion for Remand filed October 26, 2017 (in Case 2:17-cv-02674-RFB-CWH), at 9:12.)

But that is no excuse. The district court's findings of fact and conclusions of law state that the settlement discussions were conducted without collusion or fraud and without intent to injure the interest of non-settling party MCI. (50 App. 12,393.) The entire purpose of the proceeding was to cut off co-defendants' rights to contribution, and plaintiffs acknowledged that MCI was entitled to an offset as a result. Indeed, had MCI known that it would not get the $[redacted] offset, it could have approached settlement discussions with plaintiffs differently. Only after trial did the district court later hold that there was never a right to contribution. Judicial estoppel is intended to prohibit just this kind of change in position.

C. There Was No Showing that MCI Intentionally Caused Dr. Khiabani's Death

The district court concluded that a defendant found liable in strict products liability—without proof of fault—is effectively the same as a defendant who has committed an intentional tort because, the district court held, neither of those kinds of defendants are entitled to contribution. (52 App. 12,932.) Thus, according to the district court, MCI was not entitled to offset. (*Id.*) That was legal error because there was no evidence that MCI intentionally caused Dr. Khiabani's death.

1. NRS 17.255 Does Not Relate to Offset

First of all, NRS 17.255 provides that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." The statute says nothing about offset, so it is inapplicable on its face.

2. NRS 17.255 Bars Contribution Only for Intentional Tortfeasors, Not Those Held Strictly Liable Without Proof of Culpability

But even if NRS 17.255 does apply, there was no showing whatsoever that MCI "intentionally caused" Dr. Khiabani's death. Strict liability is not an intentional tort in Nevada. "Evidence supporting only passive negligence, breach of implied warranty or strict liability is insufficient to establish active wrongdoing." *Medallion Dev., Inc. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997), *overruled on other grounds as stated in Doctors Co. v. Vincent*, 120 Nev. 644, 98 P.3d 681 (2004). Indeed, that is the whole point: Under a strict liability theory, one may be liable even though he exercised the utmost care to prevent harm. *Valentine v. Pioneer Chlor Alkali Co. Inc.*, 109 Nev. 1107, 1110, 864 P.2d 295, 297 (1993); *see also Allison v. Merck & Co., Inc.*, 110

Nev. 762, 771, 878 P.2d 948, 954 (1994) (drug manufacturer may be liable in strict liability even if drug is prepared and marketed "*non-negligently*"); *Bowling v. Heil Co.*, 511 N.E.2d 373, 379 (Ohio 1987) ("[I]n strict liability in tort we hold the manufacturer or seller of a defective product responsible, not because it is 'blameworthy,' but because it is more able than the consumers to spread that loss among those who use and thereby benefit from the product.").

In a products liability case, the Alaska Supreme Court interpreted a statute with language identical to NRS 17.255 and held that it "applies only to tortfeasors who act with the specific intent to cause the resultant harm." *Borg-Warner Corp. v. Avco Corp. (Lycoming Div.)*, 850 P.2d 628, 633 (Alaska 1993). The court gave two reasons. "First, the legislature deleted the 'willfully or wantonly' language contained in the uniform act from which [the Alaska statute] was drawn." *Id.* And second, "an expansive interpretation of 'intentional' is incompatible with the comparative negligence principles introduced into the law of contribution by the enactment of the Tort Reform Act in 1986." *Id.* Compara-

tive negligence principles allocate "fault" for negligence, grossly negligent, and willful and wanton conduct, so there cannot be a bar on contribution for conduct that falls short of intentional. *Id.*

That holding is in accord with Nevada law. *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 66 (2004) (even though defendant "acted improperly," it was still entitled to offset because "its acts were not intended or designed to cause harm" to plaintiff); *Medallion Dev.*, 113 Nev. at 33, 930 P.2d at 119; *Cafe Moda v. Palma*, 128 Nev. 78, 272 P.3d 137 (2012) (distinguishing between intentional torts and negligence under comparative fault statutes).

Thus, in strict liability cases, contribution is only barred if there is evidence of specific intent to cause harm. AMERICAN LAW OF PRODUCTS LIABILITY § 52:49 (3d ed.), Westlaw (database updated Aug. 2019).

3. The Jury Rejected the Argument that MCI Acted Intentionally

Here, there was no such evidence. The jury rejected plaintiffs' claim for punitive damages for alleged intentional wrongdoing. So MCI was not barred from asserting a claim for contribution or offset. The district court erred by analogizing strict liability to an intentional tort

in the absence of any evidence that MCI intentionally caused Dr. Khiabani's death.

D. The District Court Erred by Applying Contribution Concepts When the Real Issue Was Double Recovery

The district court also erred in its resort to NRS 41.141, Nevada's comparative-negligence statute. The district court's logic appears to go like this: (1) contribution is only available if contributory negligence applies; (2) contributory negligence does not apply in strict liability cases; (3) because contributory negligence does not apply in strict liability cases, contribution does not apply either; (4) thus, MCI is not entitled to offset. That logic improperly conflated the three distinct concepts of (1) contribution, (2) contributory negligence, and (3) prohibition of double recovery through offset.

1. Offset Is Distinct from Contribution

Contribution and offset are not the same thing. *See, e.g.*, *Gump v. Wal-Mart Stores, Inc.*, 5 P.3d 407, 413 (Haw. 2000) ("The right of contribution is separate and distinct from the right to set off."). The legal concept of "contribution" speaks to whether co-defendants can recover *from each other*. *United States v. Atl. Research Corp.*, 551 U.S. 128, 138 (2007) (contribution is "defined as the 'tortfeasor's right to collect from

others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault'" (quoting Black's Law Dictionary 353 (8th ed. 2004)); *Doctors Co. v. Vincent*, 120 Nev. 644, 651 (2004). "[T]he principle of contribution affects only the relationship of the co-obligors among themselves." 18 AM. JUR. 2D *Contribution* § 1 (2d ed.), Westlaw (database updated Aug. 2019).

The distinction between offset and contribution is demonstrated by the fact that they are governed by different statutes. *Compare* NRS 17.225 (contribution), *with* NRS 17.245 (offset resulting from settlement). In fact, even the underlying tort action giving rise to joint and several liability is distinct from a contribution claim. *Slaughter v. Penn. X-Ray Corp.*, 638 F.2d 639, 645 (3d Cir. 1981) ("[T]he right to contribution is of a different nature and separate from the tort action out of which it arose."). A contribution claim may be brought in a separate action, regardless of whether a judgment has been entered against any joint tortfeasor. NRS 17.285(1); *see also* Richard L. Durbin, et al., *Texas Tort Law in Transition*, 57 Tex. L.R. 381, 448 n.414 (1979) ("[T]he comparative negligence statute recognizes the separate nature of such an

action by its authorization for a named defendant to proceed in a subsequent suit for contribution against a cotortfeasor who was not a party to the former suit and who has not settled with the claimant."). The contribution statute even has its own statute of limitations. NRS 17.285(3)-(4). And any judgment in a contribution action is binding only on the joint torfeasors, not the plaintiff. NRS 17.285(5).

Here, MCI is not seeking recovery from its co-defendants. It is only seeking a *credit* for the payment toward the *same wrongful death* for which the other defendants settled. The district court erred by applying contribution concepts to bar MCI's right to offset.

2. Offset Is Available Even When Contribution Is Not

Gump v. Wal-Mart Stores, Inc., 5 P.3d 407 (Haw. 2000), is directly on point and concisely explains why the district court was wrong. *Gump* interpreted a statute that was virtually identical to NRS 17.245. It provided that a release of joint tortfeasors "reduces the claim against the other tortfeasors in the amount of the consideration paid for the releases or release." *Id.* at 413 n.2. The court distinguished Hawaii's statute that governs the effect of contribution from the statute that governs the effect on the injured person's claim. *Id.*

The court emphasized that setoff was mandatory because "*there should be only one recovery for compensatory damages* except where statutes otherwise provide." *Id.* The limitation on double recovery "is independent of" a claim for contribution. *Id.* at 414; *see also* 18 C.J.S. *Contribution* § 1, Westlaw (database updated June 2019) ("The right of contribution is separate and distinct from the right to set off." (citing *Gump*)).

Likewise, the Ohio Supreme Court, which, like Nevada, bars a comparative-negligence defense in products liability cases and makes the defendants jointly and severally liable, rejected the logic the district court applied. *Bowling v. Heil Co.*, 511 N.E.2d 373, 381 & n.6 (Ohio 1987). Although the nonsettling defendant was not entitled to a reduction based on the percentage of fault attributable to the settling defendant, it was "entitled to a reduction of its liability equal to the amount of such settlement (plus all other settlements, as well)" under Ohio's UCATA. *Id.*

Many other courts, including courts applying Nevada law, have concluded that a defendant in a products liability case is entitled to a setoff for settlement payments made by other defendants.[23]

3. Contributory Negligence Is Distinct from Contribution

Contributory negligence is also distinct from contribution.

Nevada is a modified comparative-negligence state. *See* NRS 41.141. Under NRS 41.141, if the plaintiff's comparative negligence is not greater than the defendants', the jury is to apportion the percentage of fault among the defendants. *See Café Moda v. Palma*, 128 Nev. 78, 272 P.3d 137 (2012). The concept of comparative negligence does not address the defendants' right to recover from one another. Thus, contribution is very different from contributory negligence. *See United States*

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[23] *Thompson v. TRW Auto., Inc.*, 2015 WL 5474448, at *17 (D. Nev. Sept. 17, 2015) (allowing an offset for a prior settlement pursuant to NRS 17.245 in a product defect action), *aff'd sub nom. Thompson v. TRW Auto. U.S. LLC*, 694 F. App'x 566 (9th Cir. 2017); *Velazquez v. Nat'l Presto Indus.*, 884 F.2d 492, 497 (9th Cir. 1989); *Parker v. O'Rion Indus., Inc.*, 769 F.2d 647, 649 (10th Cir. 1985); *Mitchell v. Big Lots Stores, Inc.*, 2010 WL 1814962, at *2 (W.D.N.C. May 3, 2010); *Farrall v. A.C. & S. Co.*, 586 A.2d 662, 667 (Del. Super. Ct. 1990); *Degen v. Bayman*, 241 N.W.2d 703, 707-08 (S.D. 1976); *Baker v. ACandS*, 755 A.2d 664, 668 (Pa. 2000).

v. Gov't Dev. Bank, 132 F.R.D. 129, 133 n.10 (D.P.R. 1990) ("Here . . . we are not referring to the doctrine of comparative negligence (which refers to the possibility of apportioning damages between several codefendants), but to the right of contribution among joint and severally liable debtors, an entirely separate and distinct legal concept."); *Rowe v. Sisters of Pallottine Missionary Soc'y*, 560 S.E.2d 491, 499 n.5 (W. Va. Ct. App. 2001) ("The concept of joint and several liability is a doctrine separate from the comparative negligence doctrine."); *Fuchsgruber v. Custom Accessories, Inc.*, 628 N.W.2d 833, 839-40 (Wis. 2001) (in Wisconsin, where contributory negligence is a defense in products liability case, the "initial comparison is plaintiff-against-product, not plaintiff-against defendants" and "*[a]n entirely separate question* asks the jury to apportion liability for contribution among the various defendants" (emphasis added)). The difference between contributory or comparative negligence and contribution is highlighted by the fact that "the degree of comparative negligence does not *per se* yield the same percentage of contribution." *Ogg v. Coast Catamaran Corp.*, 490 N.E.2d 111, 113 (Ill. Ct. App. 1986).

Thus, the fact that a product defendant cannot assert the plaintiff's comparative negligence as a defense has no bearing on whether offset or contribution are available to a defendant. All three of those concepts are distinct.

4. The Offset Statute Only Requires that the Defendants Be Liable "in Tort" for the Same Wrongful Death

The district court's misunderstanding of these three legal concepts is highlighted by its erroneous conclusion that MCI was not entitled to an offset because the failure-to-warn claim against MCI was substantively different from the claims against the other defendants.

The theory of liability is irrelevant. NRS 17.245(1) applies when two or more persons are "liable in tort for the same injury or the same wrongful death." When a statute applies to co-defendants who are "liable in tort," "there is no requirement that the basis for liability among contributors be the same." 18 C.J.S. *Contribution* § 5, Westlaw (database updated June 2019); *see also J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 267 (Ill. 1987) (under statute that governed contribution claims where two or more persons were "subject to liability in tort arising out of the same injury to person or

property," there was "no requirement that the bases for liability among the contributors be the same"). The phrase "liable in tort" refers to "a person's exposure to a civil action and not to the existence of final judgment in tort." *Nat'l Farmers Union Prop & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983); *Degen v. Bayman*, 241 N.W.2d 703, 707 ("The test in such case is: Was the defendant sued as a tort-feasor? If so, any liability of the remaining defendants to the plaintiff must be reduced by the amount paid for such release or covenant not to sue by such defendant.").

The district court's rationale would mean that if the judgment against MCI had been entered against all of the defendants, the plaintiff could recover the full amount from each of them. But even when intentional torts are involved, this court does not allow windfall double recoveries. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (explaining that, under the double recovery doctrine, a plaintiff asserting claims under different legal theories, including intentional breach of fiduciary duty, "is not entitled to a separate compensatory damage award under each legal theory"). A plaintiff

awarded compensatory damages can recover no more than the loss actually suffered. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 370, 212 P.3d 1068, 1083 (2009).

Under the plain language of NRS 17.245(1)(a) and the general principle barring double recoveries, MCI was entitled to an offset, regardless of the theories plaintiffs asserted against other defendants.

5. Norton *Is Noncitable, Inapplicable, and Wrong*

The district court improperly relied on this Court's unpublished, noncitable decision in *Norton Co. v. Fergestrom*, 2001 WL 1628302 (Nev. Nov. 9, 2001), which wrongly concluded that a defendant was not entitled to contribution "because contributory negligence is not a defense in a products liability action."[24]

Norton is flawed for the same reason the district court's order is – it conflates contribution and contributory negligence. It also does not grapple with causation issues. Contributory negligence is not a defense because the user of a product cannot be faulted for failing "to discover

[24] Nevada's refusal to apply comparative fault in strict products liability cases is a minority position. 2 Owen & Davis § 13:11 ("[T]he great majority of courts apply comparative fault to products liability claims based on strict liability in tort.").

the defect in the product, or to guard against the possibility of its existence." Restatement (Second) of Torts § 402A cmt. n. "On the other hand, if the plaintiff knew of the danger from an independent source, the manufacturer's failure to warn would not be the proximate cause of the injury." 2 Owen & Davis § 13.4 (quoting Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 Va. L. Rev. 145, 163 (1955)).

Regardless, *Norton* did not involve a claim for offset so it is inapplicable. In fact, the owner was dismissed from the trial and did not settle with the plaintiff before trial. *Id.* The district court erred by going a step further than *Norton* and holding that entitlement to contribution is a prerequisite for offset. Again, those are two separate concepts and no Nevada case, published or otherwise, holds that a defendant in a strict liability case is not entitled to offset.

PART FOUR:

COSTS

VII.

THE DISTRICT COURT IMPROPERLY AWARDED "TRIAL SUPPORT" FEES AND EXCESSIVE EXPERT WITNESS FEES

The district court erred by awarding plaintiffs $542,826.84 in taxable costs for two reasons. First, "trial support" fees are not taxable costs.[25] Second, the district court failed to set forth an adequate basis to override the statutory cap on recovery of expert witness fees.

A. "Trial Support" Fees Are Not Awardable

1. Nevada Law Does Not Allow Recovery of Everything That a Plaintiff Labels "Costs"

NRS 18.005 enumerates sixteen categories of costs recoverable by a prevailing party, and then sets forth a catch-all provision for any "reasonable and necessary expense incurred in connection with the action."

[25] MCI does not challenge the district court's award of $14,261.23 for arbitration or mediation fees. *See Las Vegas Land Partners, LLC v. Nype*, 408 P.3d 543 n.3 (Nev. 2017) (allowing mediation costs under NRS 18.005(17)).

NRS 18.005(17). Under the *ejusdem generis* doctrine, "where a general statutory provision and a specific one cover the same subject matter, the specific provision controls." *In re Resort at Summerlin Litig.*, 122 Nev. 177, 185, 127 P.3d 1076, 1081 (2006). Consistent with that principle, the catch-all provision is "narrowly" interpreted and the interpretation is guided by the sixteen specific provisions. *See Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993) (catch-all must be construed "narrowly"), *superseded in part by statute as recognized in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451 n.6, 401 P.3d 1081, 1093, n.6 (2017). Thus, costs "more closely related to attorney's fees than to the kinds of recoverable costs in NRS 18.005" and costs for routine overhead expenses are not recoverable. *Id.* at 680-81, 856 P.2d at 566-67.

2. The District Court Erred by Awarding "Trial Support" Fees

The expenses enumerated in NRS 18.005 include only two types of taxable costs: court costs (e.g., clerk's fees, reporters' fees, and juror fees) and litigation costs (e.g., reasonable costs for photocopies, long-distance phone calls, and traveling). Plaintiffs' "trial support" fees do not fall within either category.

First, plaintiffs incurred $94,352.45 of the "trial support" fees by

outsourcing services typically performed by attorneys or paralegals. Plaintiffs outsourced the bulk of the "trial support" work to a vendor that created PowerPoint presentations and charts for trial, researched literature and technical information to assist counsel, and provided an "information technologies consultant" to assist with trial presentations. (47 App. 11739–40.) Plaintiffs had two other vendors summarize jury questionnaires and investigate. (*Id.*)

Each of the outsourced tasks more closely resembles billable services typically performed by attorneys or paralegals than the costs enumerated in NRS 18.005.[26] *See Robert Dillon Framing, Inc. v. Canyon Villas Apartment Corp.*, 2013 WL 3984885, at *5 (Nev. Apr. 17, 2013) (including paralegal fees incurred in representation of a client as attorneys' fees); *Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 847–48 (D. Me. 1996) (analyzing paralegal fees, including the review of jury questionnaires, in a request for attorneys' fees). Plaintiffs cannot recover fees for work their lawyers could have done in the guise of "costs." *See Bergmann*, 109 Nev. at 680 (differentiating between costs incurred

[26] This Court has expressly held that costs are not available for jury analysis. *Bergmann*, 109 Nev. at 680-81, 856 P.2d at 566-67.

as a function of a role of an attorney from costs similar to those enumerated in NRS 18.005); *DISH Network Derivative Litig.*, 133 Nev. at 451 (same).

Second, the district court erroneously permitted the taxation of $20,485.62 in costs for common office supplies (*e.g.*, binders, flash drives, DVDs, index tabs, and computer program licenses) and staff overtime. Plaintiffs failed to show that the circumstances transformed these routine overhead expenses into necessary and extraordinary services. *Bergmann*, 109 Nev. at 680-81, 856 P.2d at 566-67.

To sum up, all of plaintiffs' claimed "trial support" fees are different in kind from the enumerated costs and they cannot be taxed under the general catch-all provision, or the enumerated expenses will become superfluous.

B. The District Court Erred by Awarding Expert Witness Fees That Exceeded the Statutory Cap

1. Expert Witness Fees Are Generally Capped at $1,500 Per Witness

NRS 18.005(5) caps an award of expert witness fees at $1,500 per expert witness, "unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such

necessity as to require the larger fee." An award exceeding the cap "must be supported by an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining" that the fees were reasonable and necessary. *Frazier v. Drake*, 131 Nev. 632, 650, 357 P.3d 365, 377 (App. 2015). A court abuses its discretion when it "fail[s] to adequately set forth the basis for its decision." *Id.* at 652.

2. The Expert Witness Fees Exceeded the $1,500 Statutory Cap Without an Adequate Basis

The district court awarded plaintiffs an amount exceeding the statutory cap by $229,576.61—supported only by a single sentence that lacked any careful analysis. The district court therefore abused its discretion as a matter of law by failing to adequately set forth a basis to override the statutory cap.

Even worse, two of the experts' testimony related to plaintiffs' failed defective-design claim, not the failure-to-warn claim. Additionally, Caldwell's testimony was duplicative of other experts' testimony and was unnecessary.

The district court should have, at a minimum, reduced the expert

witness fees to an amount that was reasonable and necessary after considering the pertinent factors of this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Dated this 4th day of December, 2019.

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1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

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Dated this 4th day of December, 2019.

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