Case No. 78701

In the Supreme Court of Nevada

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

KEON KHIABANI *et al.*,

Respondents.

REPLY ON MOTION TO EXCEED PAGE LIMIT

and

OPPOSITION TO COUNTERMOTION TO DISMISS

As stated in one of the cases plaintiffs–respondents cite, "[s]ome cases are more complex than others, and in those cases, flexibility is required." *State v. Johnson*, 477 P.3d 783, 828 (Ariz. 2019). This is one of those cases.

Plaintiffs' countermotion to have this appeal dismissed on the most technical of grounds reeks of desperation. The Court should grant the motion to exceed the word limit and deny the countermotion to dismiss.[1]

[1] Contrary to plaintiffs' contention, MCI properly sought leave under Rule 32(a)(7)(D) to exceed the 14,000 word limit (making the alternative page limit inapplicable) and simultaneously filed the proposed brief.

REPLY ON MOTION TO EXCEED PAGE LIMIT

A. This Case Involves Many Important Legal Issues

In fairness to plaintiffs, MCI was reluctant to preview the merits of the case in a motion to exceed the word limit, but plaintiffs have forced MCI's hand by falsely asserting that this appeal only involves a "very straightforward failure to warn verdict." (Resp. at 2.) To the contrary, this is a complex case, with eight meaty issues briefed over a 12,489-page record, resulting in a judgment for nearly $20,000,000.

This is a wrongful death products liability case brought by relatives of Dr. Kayvan Khiabani, who died after his bicycle collided with a motor coach manufactured by MCI. After expedited, and extensive, discovery, the district court held a jury trial over 23 days. The jury rejected each of plaintiffs' design-defect theories but agreed with plaintiffs that MCI did not "provide an adequate warning that would have been acted upon."

The eight issues on appeal are significant:

Causation: As a matter of law, plaintiffs did not show how MCI's alleged failure to warn caused the collision. The driver of the motor coach did not testify that he would or could have avoided the collision if

he had been warned because he immediately steered away from Dr. Khiabani the instant he saw him. And plaintiffs were unable to even formulate a warning that would have avoided the accident.

Verdict Form: Even if MCI does not prevail as a matter of law, it is entitled to a new trial. Unlike the verdict form on plaintiffs' three design-defect claims, which required a finding of causation and which the jury rejected, the verdict form on the failure-to-warn claim improperly let the jury assess damages without determining that the absence of a proper warning—even assuming it would be heeded—was a legal cause of injury. The only way to reconcile the jury's verdict is to recognize that they would have concluded that the failure to warn did not cause Dr. Khiabani's death, had they been asked.

Statutory Warning: The district court improperly excluded expert testimony about the impact of Nevada statutes—which already warn drivers to keep a safe distance from cyclists, and which the professional driver was charged with knowing—on the need for a duplicative warning from MCI.

Income Taxes: The district court improperly allowed plaintiffs' witness to testify about Dr. Khiabani's gross salary but prohibited MCI

from presenting evidence that Dr. Khiabani's yearly take-home pay was about $330,000 less than his gross salary because of taxes. This error inflated the jury's verdict on probable support.

Dr. Khiabani's Employment: The district court erred in denying a new trial—or even discovery—based on explosive post-trial reporting that Dr. Khiabani was about to be fired (or already had been) due to allegedly improper billing practices. That evidence was relevant to liability and to plaintiffs' claims for lost support, which were premised on Dr. Khiabani's continued employment.

Offset: The district court, relying on plaintiffs' citation to the uncitable order in *Norton Co. v. Fergestrom*, 2001 WL 1628302 (Nev. Nov. 9, 2001), held that plaintiffs are entitled to a double recovery because a defendant in a strict products-liability action is categorically disentitled to an offset for settlement proceeds paid by other defendants.

"Trial Support" Costs: The district court improperly awarded more than $100,000 in "trial support costs" for services attorneys typically provide and for office supplies.

Expert Fees: The district court awarded expert witness fees that exceeded the statutory cap by $229,576.61, yet did not explain the basis

for that excess award, as *Frazier v. Drake*, 131 Nev. 632, 650, 357 P.3d 365, 377 (Nev. Ct. App. 2015) requires.

Although MCI's counsel agrees that the issues on appeal should be narrowed as much as possible, further reductions would cut into bone—forcing MCI to acquiesce to fundamental errors and invite their repetition.

B. MCI Used the Extensions of the Filing Deadline to Edit the Brief

Plaintiffs suggest that MCI was not diligent because it requested extensions. But MCI spent that time tightening the issues; without it, the brief would have been longer. The filed brief distills the multiple issues to a cogent minimum.

C. MCI Had to Brief an Uncitable Case

MCI's brief would be far shorter had plaintiffs not pushed the trial court to adopt the uncitable *Norton* order to eliminate MIC's offset. *Norton* misapplied the distinct concepts of contribution and comparative negligence, and then the district court extended that misapplication to the distinct concept of offset. This forced MCI in Part Three to go back to basics to explain the court's fundamental error.

OPPOSITION TO COUNTERMOTION TO DISMISS

A. MCI's Brief Was Timely; the Uncitable *Rusk* Order Does Not Support Dismissal

Plaintiffs' penchant for violating Rule 36(c)(3) resurfaces in its meritless countermotion to dismiss the appeal, where it relies exclusively on the uncitable order in *Rusk v. Nev. State Bd. of Architecture, Interior Design & Residential Design*, 2013 WL 3969678 (Nev. July 30, 2013).

Regardless, *Rusk* does not support dismissal. Plaintiffs try to minimize the "timeliness issues" in that case (making it only "slightly dissimilar"), but timeliness was this Court's primary consideration: There, the appellant missed his initial deadline to file an opening brief and only belatedly sought a retroactive extension, which this Court granted. *Id.* at *1. The appellant then filed three more motions for an extension of time, all late—after the proposed extended deadlines had expired. When the appellant finally submitted his oversized brief, it was late, too, arriving three days after the proposed deadline in the fourth motion for extension. It was only after the fourth missed deadline—this time without even a *request* for a retroactive extension—that this Court refused to file the oversize brief and dismissed the appeal.

Id. at *2.

The appellant in *Rusk* also misled the respondent into not opposing two of the belated extension motions and then, after the final request for an extension expired, did not submit the brief with the motion for leave to exceed the page limit.[2] Though the *Rusk* order does not mention it, the appellant's counsel had recently had a separate appeal dismissed for similar abuses. *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 200, 322 P.3d 429, 432 (2014) (dismissal on June 25, 2013).

Here, *Rusk* does not apply. MCI filed its opening brief by the deadline set by the Court. MCI never misled plaintiffs into believing that MCI would not seek to file an oversize brief to secure plaintiffs' nonopposition; plaintiffs unsuccessfully opposed the last request for an extension. And MCI's brief was accompanied by a timely, justified motion to exceed the word limit: the record here is 10 times the size of the record in *Rusk*, and MCI's brief would be significantly shorter were MCI not required to explain why plaintiffs' uncitable *Norton* order is wrong. There is no basis to dismiss MCI's appeal when it timely filed its brief

[2] Although there is some inconsistency in the order—one of the reasons this Court prohibits its citation—it appears that the proposed oversized brief was not submitted on the same day as the motion. *Id.* at *2.

and motion.

B. If MCI's Motion Is Denied, the Remedy Is to Require MCI to File a Shorter Brief, Not Dismiss the Appeal

The cases plaintiffs cite in opposition to the motion to exceed the word limit also highlight the reasonableness of MCI's actions and request here. In *State v. Johnson*, the original opening brief was 105,651 words "covering more than 400 pages." 447 P.3d 783, 828 (Ariz. Ct. App. 2019). Despite that extreme excess, the court granted leave to file an opening brief with 42,000 words and a reply with 21,000 words. *Id.* MCI's brief is a fraction of the size of those briefs.

And in *Idaho Asphalt Supply v. State of Montana, Department of Transportation*, 974 P.2d 1117, 1118 (Mont. 1998), the court noted that it "tend[s] toward liberally granting motions to exceed the word limits of briefs where good cause is shown and where the complexity or importance of the case necessarily demands extended briefing." It denied the request to file a brief in excess of the word limit only because it found that there was "nothing unusual or complex about the legal issues."[3] *Id.* Here, in contrast, the legal issues are numerous and com-

[3] The court did not explain what issues were presented in the case.

plex.

At most, the Court should enter an order requiring MCI to file a shorter brief. That will be a difficult task and the Court's decision-making will suffer for it. But if the Court decides that a shorter brief is warranted, it should grant MCI 30 days to file it. *See Idaho Asphalt*, 974 P.2d at 1118 (granting 30 days to revise brief). The countermotion to dismiss the appeal should be denied.

Dated this 18th day of December, 2019.

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CERTIFICATE OF SERVICE

I certify that on December 18, 2019, I submitted the foregoing Reply on Motion to Exceed Page Limit *and* Opposition to Countermotion to Dismiss for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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