IN THE SUPREME COURT OF THE STATE OF NEVADA

MOTOR COACH INDUSTRIES, INC., Appellant, vs. ARIA KHIABANI, *et al.* Respondents,	Case No.: 78701

RESPONDENTS' OPPOSITION TO MOTION TO STRIKE REPLY AND COUNTERMOTION TO SUBMIT FIVE-PAGE REPLY

MCI's hypocrisy knows no bounds. It cavalierly claims it can file a 108-page proposed opening brief but that a reply that is barely one page over the five-page limit should be immediately stricken. To void MCI's objection, Respondents hereby tender the same basic reply redrafted on five pages (Exhibit 1). The fundamental point advanced by MCI that overlong pleadings should be stricken is not in dispute and should be applied equally by this Court. The 108-page proposed opening brief should be stricken and the appeal summarily dismissed.

Dated this 27th day of December, 2019.

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EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

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REPLY IN SUPPORT OF COUNTERMOTION TO DISMISS APPEAL

A. MCI's multiple rule violations warrant dismissing this appeal.

MCI argues that *Rusk* should be ignored, yet it cites several "uncitable" cases in its proposed brief. *Rusk* is particularly and aptly illustrative, but it is only one decision in a long line that support the dismissal of appeals for litigants' failure to follow meaningful rules. In *Huckaby Props v. NC Auto Parts*, 130 Nev. 196, 198 (2014), this Court dismissed the appeal because the appellant filed its opening brief and appendix a single day after the extended deadline:

> [I]n *Kushner v. Winterthur Swiss Insurance Co.*, the Third Circuit Court of Appeals dismissed an appeal for appellant's failure to file an appendix that complied with court rules. 620 F.2d 404, 407 (3d Cir. 1980). In so doing, the court made it clear to the appellate bar the importance and necessity of complying with court rules concerning **the content and filing** of briefs and appendices. *Id.* The court explained the practical reasons and jurisprudential justification for its decision to dismiss the appeal, noting that **the rules of appellate procedure and local court rules were enacted to enable the court to effectively process its increasing caseload**, and that the number of appeals filed per judge had swelled dramatically since the rules were enacted. *Id.* at 406–07. **The court thus reasoned that it would not expend valuable judicial time in performing the work of errant**

> **counsel who failed to properly comply with briefing rules, and who, by failing to abide by appellate rules, hindered the court's efforts to provide speedy and just dispositions of appeals for every litigant.** *Id.* at 407. *Huckaby Props*, 130 Nev. at 205 (bold added).

Although the *Huckaby Props* Court dismissed the subject appeal for rule violations that included a timing rule, its opinion extended to rule violations governing the **content** of briefs as well.[1]

Here, MCI did not follow the rules governing type-volume limitations and motions to exceed word limit. It submitted an oversized, 108-page brief that contained nearly 5,000 words more than the generous 14,000 words allowed under the Rules. While it submitted a perfunctory motion to exceed word limit, MCI failed to attach any supporting declaration or a copy of the proposed brief, and it made no attempt to demonstrate diligence or good cause for such an absurdly large proposed brief.

The likely reason that it made no attempt to show diligence or good cause is that MCI has no good arguments in support of enlarging its brief beyond 14,000 words. For example, MCI's opening brief contains at least 50 pages of arguments

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[1] *Id.*, citing *Abner v. Scott Mem'l Hosp.*, 634 F.3d 962, 965 (7th Cir.2011) (affirming district court summary judgment and striking oversized brief that was not accompanied by a timely and supported motion for leave to exceed the type-volume limitation); *Snipes v. Ill. Dep't of Corr.*, 291 F.3d 460, 464 (7th Cir. 2002) (an appellate court may dismiss an appeal or summarily affirm the judgment when appellant fails to comply with briefing rules); *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145 (9th Cir.1997) (dismissing appeal based on briefing violations).

that were not raised in MCI's original NRCP 50(a) motion. The district court succinctly rejected MCI's post-verdict attempt to add new arguments that were not raised in the Rule 50 motion:

> Defendant cannot raise issues in the "Renewed" Rule 50 motion that were not first raised in the Rule 50 motion filed at the close of evidence. *Nelson v. Heer*, 123 Nev. 217, 163 P.2d 420, 424 n. 9 (Nev. 2007)
>
> . . . .
>
> [A]bsent in the Rule 50(a) motion was (1) the new argument that "Hubbard did not testify about any particular warning or that a warning would have changed what he did" [] (2) the new argument that Plaintiffs should have explained "how it [a warning] would have prevented Dr. Khiabani's death" [], (3) the new argument that Hubbard's heeding testimony "is insufficient to demonstrate causation" and that Hubbard "never testified that he would have done anything differently" [], (4) the new "open and obvious" argument [] (5) the new attack on Plaintiffs warning expert (Cunitz) []. Because the last 5 arguments were not made in the Rule 50(a) motion, they have not been preserved and are denied as procedurally improper. 2/1/19 Combined Order, attached as **Exhibit 1**.

MCI's blatant attempt to resurrect these exact same forbidden arguments on appeal violates Rule 50, and there is no good cause to allow MCI pages upon pages for arguments that will only result in further violations of Nevada law.

Amazingly, it is not until **page 50** of the proposed 108-page brief that MCI presents an argument that was arguably preserved. The primary arguments in MCI's proposed brief, i.e., pages 29 to 50, regurgitate the arguments concocted after the verdict that the district court expressly held were not preserved in the Rule 50 motion. For example, Section B of the proposed brief on p. 41 is entitled "B.

Plaintiffs Did Not Show that a Warning Would Have Prevented Dr. Khiabani's Death." The district court properly rejected this "new argument" that Plaintiffs should have explained "how it [a warning] would have prevented Dr. Khiabani's death...." Ex. 1, 2:14-15.

MCI's rule violations warrant dismissal because they have already hindered the Court's ability to provide a speedy and just disposition of this appeal for Respondents. The jury rendered its verdict in Respondents' favor in March 2018. Given the original opening brief deadline of September 3, 2019, MCI had ample time to prepare an opening brief that complied with the rules. Nearly 18 months was not enough time to prepare an opening brief with 14,000 words or less in a straightforward failure-to-warn case, as MCI sought and received three month-long extensions. In granting MCI's third extension (over the opposition of Respondents), this Court admonished that MCI would receive no more extensions absent extraordinary circumstances.

21 months was not enough time to prepare an opening brief with 14,000 words or less either. Instead of timely filing an appropriately-sized brief, MCI filed a grossly oversized brief that regurgitates 50 pages of arguments that the district court found were not made in the Rule 50 motion. MCI did so with a perfunctory motion merely concluding that more words were somehow appropriate. The effect of MCI's improper brief and motion to exceed word limit

was to delay this appeal even further than the nearly two years that have passed since the verdict and hinder this Court's ability to provide a just and **speedy** disposition for Respondents.

B. Allowing MCI the opportunity to refile a shorter brief would not remedy the prejudice to Respondents.

In its opposition, MCI argues that, instead of dismissal, it should be allowed to file a shorter brief. Presumably, MCI will chop off the first 50 pages of the brief now that its Rule 50 violations have been red-flagged. But this would allow MCI's multiple rule violations to delay the disposition of this appeal even further. This should not be allowed. MCI had nearly two years to file an appropriate-sized brief. It had ample opportunity to narrow its appeal to arguments that were actually preserved—not the brand-new arguments concocted post-verdict that were not preserved in MCI's pithy Rule 50 motion. It chose not to do so. It chose to unreasonably delay the disposition of this appeal to the detriment of Respondents by filing a 108-page proposed brief that regurgitated all the arguments that the district court properly found had not been asserted in the original Rule 50 motion. The remedy is not to reward MCI; the remedy is to dismiss the appeal

Dated this 27th day of December, 2019.

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