Case No. 78701

IN THE SUPREME COURT OF NEVADA

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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. (decedent); THE ESTATE OF KAYVAN KHIABANI, M.D. (decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN, DDS (decedent); and the ESTATE OF KATAYOUN BARIN, DDS (decedent),

Respondents.

RESPONDENTS' ANSWERING BRIEF

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STATEMENT OF THE CASE[1]

"When you blame and criticize others, you are avoiding some truth about yourself." Deepak Chopra[2] Some report that Socrates said: "[w]hen the debate is lost, slander becomes the tool of the loser."[3] Even Adam reportedly blamed the first sin on Eve. Genesis, 3

MCI has made wild and slanderous accusations of incompetence and misconduct by its adversary when the actuality is that MCI bungled basic discovery, mishandled its liability defense and failed to preserve nearly all the arguments set forth in its massive brief[4] by omitting them from MCI's pithy oral

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[1] Appellant Motor Coach Industries, Inc. shall be referred to as "MCI." Respondents are Keon and Aria Khiabani (minor heirs) and the Estates of their deceased parents, Dr. Kayvan Khiabani and Dr. Katayoun ("Katy") Barin. All 4 Respondents shall be referred to collectively as the "Khiabanis" or the "the Khiabani family" unless reference need be made to one individual Respondent. MCI's Opening Brief shall be cited as ("OB").

[2] Deepak Chopra, Some Truth About You, Deepak Quotes, www.deepakchopra.com (May 30, 2012), https://www.deepakchopra.com/blog/article/3549.

[3] BK Mag, 62 Socrates Quotes, September 24, 2019. But see, checkyourfact.com, fact-check-socrates-debate-lost-slander-tool-loser

[4] To assist the Court in matching the arguments herein with MCI' hopelessly jumbled and repetitive opening brief, the Khiabanis provide the following guidance. MCI did not address the Rule 50 flub in its opening brief. The Khiabanis discuss this at 19-23. Because MCI did not appeal the district court determination that the 5 pertinent arguments were not preserved, MCI should be precluded from belatedly making this argument. MCI's first principal argument is that an alternative warning must be proposed and that there is insufficient evidence that any warning would have prevented the injury. (OB 28-49) The

Rule 50 motion. Starting with discovery, MCI failed to perform any basic employment discovery and was also stunningly irresponsible in failing to send an executed release form for employment information. MCI avoids this truth by condemning the Khiabanis for supposedly concealing facts from MCI. MCI deposed Dr. Khiabani's widow ("Katy") weeks before her death from terminal cancer and failed to ask even one single question about her husband's employment but now carps that Katy's interrogatory answer was "misleading." (OB 77)

As for liability, in a case that centered on the incredibly dangerous aerodynamic flaw of the subject bus, MCI failed to hire an aerodynamic engineering expert. This blunder rendered MCI unable to refute the damning revelation by Dr. Briedenthal that MCI's bus generated a 20 pound suction that jerked bystanders into its wheel area while safer competing buses produce absolutely no pull force because of their superior aerodynamic design.

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law that there is no requirement for an alternative warning is on 40-50. The response to the insufficient evidence claim is on 50-55. MCI next raises the supposed infirmity in the verdict form. (OB 50-57) The response is on 23-35. MCI's inconsistent verdict argument (OB 57-60) is dealt with on 35-40. MCI's next argument is that it should have been allowed to highlight driver negligence by discussing NRS 484B.270. (OB 61-66) The response is on 53-59. MCI next suggests that tax evidence is admissible. (OB 67-70) The response is on 59-62. MCI's "newly discovery evidence" claim (OB 71-82) is disproved on 63-70. MCI's offset argument (OB 83-102) is rebutted on 70-77. MCI's cost arguments (OB 103-107) are refuted on 77-85.

MCI asserts multiple times that the jury was somehow precluded from considering causation by the failure to warn jury instruction and verdict form. MCI drafted JI 31, which required the Khiabanis to prove that "the individual who might have acted on any warning **would have acted in accordance with the warning, and that doing so would have prevented the injury in this case**." (Bold added). MCI's underlying (but unstated) causation thesis is that the jury did not follow J1 31 – a rancid conjecture precluded by applicable caselaw.

MCI's most startling miscue was its failure to preserve the two primary arguments that MCI now asserts on appeal: (1) the assertion that the verdict form was flawed; and (2) the contention that the evidence was inadequate to prove that a warning would have been acted upon. On the first point, MCI did not tender a verdict form with the warning causation language that MCI now declares was essential (a warning that "would have prevented the injury in this case"). (OB 56, 57) MCI dismisses this glaring failure by asserting that the district court had a unilateral obligation to prepare a special verdict form with language not offered by MCI. (OB 51; "the district court needed to get it right.") Nevada caselaw requires MCI to tender the specific verdict form that MCI claims should have been used as opposed to second guessing the district court after verdict.

On the second point concerning adequacy of evidence, the district court explicitly pointed out that, in its Rule 50(a) motion, MCI did not raise the

argument that the evidence was inadequate to prove warning causation. This precludes MCI from asserting it after verdict. The district court also found that there was adequate evidence for the jury to determine that a warning would have prevented the accident: " . . . the jury could have, and evidently did, find that the lack of an adequate warning caused the accident." 50 App. 12379:4-6

Because MCI cannot claim that the jury was not properly instructed on warning causation (since MCI drafted JI 31), MCI muses that there was an inconsistent verdict because the jury could not have found in MCI's favor on unreasonably dangerous causation while at the same time imposing liability for lack of an adequate warning. First, there no evidence that causation was the basis for the unreasonably dangerous verdict. Additionally, MCI is perverting its own misconduct in presenting a disfavored defense which was unique to the unreasonably dangerous claim (i.e., supposed federal compliance) into a claimed causation "inconsistency" in the jury verdict. The jury determinations on the different liability theories are easily reconciled by acknowledging that MCI somehow succeeded on the federal compliance defense but that defense is inapplicable to failure to warn liability.

It is understandable that MCI was disappointed to lose a high profile case. It is regrettable that MCI does not admit the basic truth that its bus has a dangerous aerodynamic flaw compared to its much safer competitors and just fix it (or at least

warn about it). Instead, MCI blasts the victims for MCI's inept discovery, its flawed liability defense, MCI's failure to submit the special verdict form that MCI belatedly argues was needed and the Rule 50 faux pas. Regardless of how MCI ultimately decides to conduct its future business activity, this Court should affirm the jury award.

ISSUES PRESENTED

1. Whether the district court correctly found that 5 of MCI's post-trial and appellate arguments are procedurally barred because they were not made in the pre-verdict Rule 50(a) motion (which 5 non-preserved arguments comprise the bulk of the opening brief).

2. Whether a jury instruction and verdict form that contained the warning causation language drafted by MCI ("acted in accordance" "and that doing so would have prevented the injury in this case") were fatally defective because a special interrogatory on causation duplicating the jury instruction was required on the verdict form.

3. If MCI had preserved such argument, whether the district court abused its discretion in determining that the bus driver could have "acted in accordance" with a warning and avoided the accident.

4. Whether Nevada law requires the injured party to draft an alternative warning where no warning was given.

5. Whether the district court abused its discretion in precluding MCI's expert from testifying regarding irrelevant Nevada traffic law where the alleged contributory negligence of the bus operator was not a viable legal defense.

6. Whether the district court abused its discretion in precluding MCI from asserting that theoretical future income taxes would reduce future lost probable support.

7. Whether the district court abused its discretion in determining that MCI did not prove that it "could **not** have obtained employment records during pretrial discovery" when MCI neglected to do any employment discovery and failed to forward an executed employment release for 7 months.

8. Whether a product manufacturer found strictly liable is entitled to an offset for monies paid by a negligent party that was not part of the chain of distribution.

9. Whether the district court abused its discretion in awarding trial expert fees in excess of the statutory cap and trial support costs.

STANDARD OF REVIEW

Issues 1 and 8 above are decided under a de novo review standard.

Issues 2, 3, 4, 5, 6, 7, and 9 are decided under an abuse of discretion review standard.

STATEMENT OF FACTS

A. The J4500 Bus Had a Treacherous Aerodynamic Hazard That Required a Warning

This tragic accident was captured on video by a Red Rock Hotel and Casino surveillance camera which was shown to the jury and the key frames of which were replicated in 4 serial photos:

EXHIBT 221 EXHIBT 222 EXHIBT 223 EXHIBT 224

These four photos were admitted as trial exhibits (but the yellow circles around Dr. Khiabani are illustrative aids.) 23 App. 5730

The Khiabani's bus safety expert (Brian Sherlock) examined the Red Rock pictures and explained the aerodynamic issue presented in this case:

> Q. And what does that [the still pictures of Dr. Khiabani alongside of the right front of the bus from the Red Rock surveillance video] indicate as concerning whether the doctor was traveling horizontal or parallel [to the bus]?
> A. Roughly parallel.
> Q. And why is that important?
> A. **The question boils down to did the doctor steer into the bus or was he pulled in by aerodynamic forces? And the fact that they're both going roughly parallel argues strongly that the**

fundamental cause of this was bad aerodynamic design. 26 App. 6465-66 (Bold added)

The MCI experts had no explanation whatsoever for the bike being hauled into the bus.[5]

In stark contrast to MCI's utter failure to explain why the bike was tugged to its left into the bus, the Khiabani's aerodynamic expert testified that the J4500 produced 10 pounds of push force and **20 pounds of suction** when passing within 3 feet of a bicycle. A driver that saw the accident from behind testified that the bus was two to three feet away when it passed the bike. 25 App. 6029:3-7 "Q. And how far away was it? A. 2 or 3 feet.") MCI concedes that the deadly 20 pound suction force greatly increased the closer someone gets to the bus. (OB 40; noting "the force would go up if the bike was closer than three feet away from the bus.")

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[5] MCI conceded in pre-trial motions that MCI had no evidence supporting any theory as to why the bike was dragged into the bus. 7 App. 1578:20-23; "To this day, no one-not Plaintiffs, nor their counsel, and not their experts-can explain with any probability why Dr. Khiabani [sic] bicycle moved into the coach's travel lane." MCI's accident reconstruction expert (Rucoba) admitted that MCI had no physical evidence that the doctor steered into the bus: Q. Okay, Mr. Rucoba. And I want to focus you specifically on the wobble. Okay? Specifically on the wobble. Isn't it true you have no evidence whatsoever of human error with regards to being a cause for the wobble? A. True. Q. No evidence? True. 33 App. 8086-87 Rucoba also admitted that MCI had no explanation whatsoever as to why the doctor's bike was forcibly pulled into the bus. 33 App. 8085 (3/13 TT 60:16-19; "Q. You do not have an opinion, as we sit here today, as to what caused the wobble; correct? A. Correct. I do not.")

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

> Q. So if -- if a Mercedes was -- well, strike that. If a CJ3 [another MCI bus] or J4500 [the subject bus] was passing a bike, you said the side [push] force would be what?
> A. 10 pounds.
> Q. Okay. And if a Mercedes Setra was passing a bus, the [side] push force would be what?
> A. 3.
> Q. **Now, if a CJ3 or a J4500 [both made by MCI] is passing a bike, the pull force is what?**
> A. **About double 10, or about 20.**
> Q. **And if a Setra Mercedes bus is passing a bike, the pull force is what?**
> A. **Zero.** There's no reattachment, so there's no reattachment force.
> Q. So we go – **good aerodynamic design can take us from 20 pounds of pull into the bus to 0 pounds of pull into the bus. Is that what you're saying.**
> A. **I am**. 30 App. 7486:12 to 7487:5 (Bold added)

Dr. Briedenthal also explained that the 20 pound suction force generated by a J4500 at 3 feet was "the more sinister" hazard "because it's pulling the cyclist towards the bus":

> Q. So, the J4500 could have been designed aerodynamically safer?
> A. Oh, yes.
> Q. Okay. And if they had done that, what happens?
> A. A lot of good things happen. The things that happen pertinent to this case are the push force drops -- I estimate by about a factor of 3 -- and **pull force essentially vanishes**. **And the pull force I regard as the more sinister of the two because it's pulling the cyclist towards the bus**. 30 App. 7449:15-25 (Bold added)

This extremely damning testimony that a J4500 bus moving 25 mph produces a risky 20 pound suction force on objects within 3 feet while the competing Mercedes bus produces **no suction force whatsoever** was not rebutted because MCI did not hire an aerodynamic engineer. Instead of calling their own opposing aerodynamics expert, MCI's defense was to ridicule Dr. Briedenthal's expertise despite his 40 years in aerodynamics and his specific experience with bus aerodynamic design. MCI even denigrated him as an "airplane" expert because Briedenthal works at the William E. Boeing Department of Aeronautics & Astronautics. 41 App. 10118:2; MCI attorney Barger saying "he's an airplane guy")

The Briedenthal testimony about the "sinister" 20 pound suction generated by a J4500 bus was reinforced by testimony from bus safety expert Sherlock:

> A. And as it does that, it [the air flow] has momentum. And when it tries to go around the corners, that momentum carries it wide. So the air on the side doesn't go around like in a well-designed vehicle; it shoots out to the sides. And that creates a pressure wave where that jet of air is coming off, and that would push a bicyclist away. This is well studied. There's a Kato paper that you'll probably see that goes into this in detail. **So it pushes the rider away, and then it sucks them in, because right behind that pressure wave is an area that's a partial vacuum**. And that's what led to these problems I was talking about with air quality, all these other things. 27 App. 6619:1-14 (Bold added)

The Breidenthal and Sherlock testimony was scientifically supported by a landmark 1981 scientific paper. Kato, "Aerodynamic Effects to a Bicycle Caused

by a Passing Vehicle, SAE (1981) 30 App. 7453 (admitting T Ex. 139) Dr. Kato's key finding was that a passing bus first causes an outward air blast from bus to bicycle followed by a strong sucking tug when the bus is even with the vehicle that "tends to pull the bicycle toward the vehicle":

> The first peak of force Fy occurs just as the front of the vehicle is even with the rear wheel of the bicycle and the negative value indicates that the force is in a direction away from the vehicle. The second peak occurs when the vehicle is approximately even with front of the bicycle, and **the positive value tends to pull the bicycle toward the vehicle**. 1 RApp. 104

Relevant to this case, Dr. Kato's three primary conclusions were as follows:

> 1. The force acting on stationary body (bicycle) in a direction away from the moving body (vehicle) occurs for the first time as the passing begins.
>
> 2. **The force which pulls the stationary body (bicycle) toward the moving body (vehicle) is at a maximum when the two bodies come closest.**
>
> 3. **The maximum pulling force increases markedly** with the decreasing of the distance between the two bodies (bicycle and vehicle). 1 RApp. 109

(Bold added) Dr. Kato documented that when a bus with poor aerodynamic design first passes a bike an air blast causes the bike to "wobble by a passing vehicle" and then when the bus and bike are even there is a "force which pulls the stationary body (bicycle) toward the moving body (vehicle) . . . ." Id.

The watershed Kato paper was peer reviewed and published in the Society of Automotive Engineers Journal. It was referenced hundreds of times during the

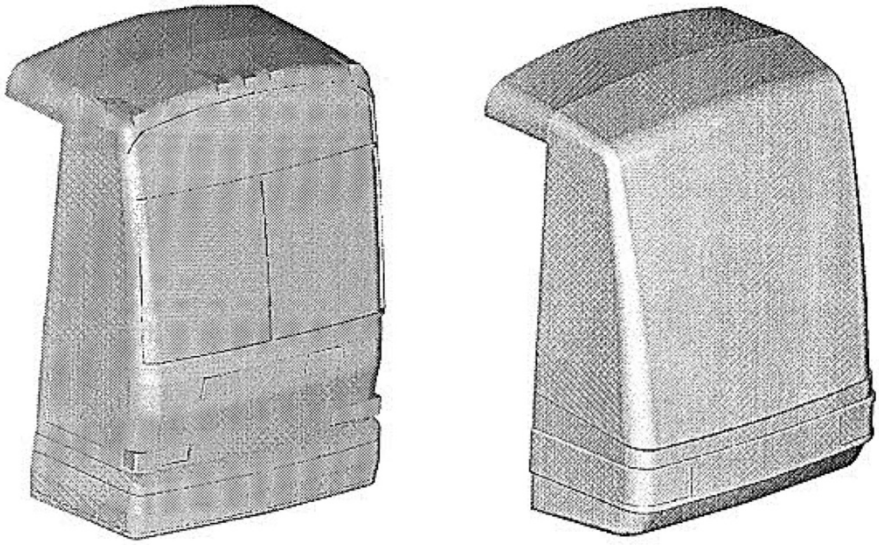
trial by both parties. Even MCI's experts acknowledged that the Kato paper was a ground breaking study. 34 App. 8471:15-18

The 20 pounds of suction force that is generated by a J4500 moving 25 mph and extends to objects within 3 feet explains why Dr. Khiabani and his bike were yanked into the tires of the passing bus. Again, the key accident witness documented that **the bus was only 2 to 3 feet away from the bike when it passed**. 25 App. 6029:3-7 The still pictures of the accident demonstrate that Dr. Khiabani and the bike were at the exact front corner location predicted by Dr. Kato to encounter the suction force. The general danger predicted 39 years ago by Dr. Kato was magnified by the huge suction force (20 pounds) which Dr. Briedenthal testified is generated by a J4500 moving 25 mph.

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

Seven full years before the J4500 design process started, MCI conducted extensive wind tunnel testing on multiple bus shapes. 22 App. 5683 (admitting

T Ex. 126) This effort resulted in a comprehensive report dated August 1993 entitled "A Wind Investigation of the Aerodynamic Characteristics of Buses." [hereinafter "1993 Wind Tunnel Test"] 1 RApp. 1-98 (T Ex. 126) This exhaustive testing gave MCI specific insight on the aerodynamic menace of a "boxy" bus (i.e., the J4500) and the vast benefits of an aerodynamically sleek bus. The explosive 1993 wind tunnel test report documented that MCI could cut the air blast in half[6] by using a safer alternative bus front which simply rounded the corner of the front of the bus and by mildly sloping the roof front:



Standard MCI CJ3 MCI Proposal 2

[6] The August 1993 Wind Tunnel Test concluded that "[t]he wind tunnel measurements demonstrated that the **best combination**, consisting of the new rear plus the Proposal 1 front, produced a reduction in wind-averaged drag coefficient of 41.5% compared to the standard CJ3 [bus] configuration." 1 RApp. 6 (at MCI-039858) (Bold added)

1 RApp. 32 For this reason, MCI has been forced to admit that, since 1993, it had "a more aerodynamically streamlined design that supposedly would have minimized these forces [suction]." (OB 6) MCI characterized these alternative streamlined shapes the "best combination" of bus design. Id.

Rather than utilize the "best combination" of aerodynamic design when building the J4500, MCI decided to copy the old boxy design from MCI's E series bus designed in 1992. 28 App. 6830:4-5 Cost factored into this design choice because square bus corners are much cheaper to build than round corners and a tapered roof. Valuing safety and not just profits, Mercedes chose the safer, more sleek design for its Setra. Dr. Briedenthal's testimony detailed the devastating results of MCI's bad design decision (i.e., a 20 pound suction when passing people at 25 mph).

MCI hid the 1993 Wind Tunnel Test from the J4500 design team. A key MCI J4500 designer (Lamothe) confessed that the design team failed to give any consideration whatsoever to the safety implications of aerodynamic forces. 28 App. 6780-81; "Q. So as far as you know, when the J4500 was designed, no one looked at the aerodynamics as a safety factor? As far as you know? A. Not to my knowledge.") Despite this clear cut defective design case, the jury found for MCI on the aerodynamic design claim based on MCI's improper argument that the bus complied with federal regulations. See n. 14, infra.

B. MCI's Complete Failure to Provide Any Warnings

1. MCI Warned Only That the Air Conditioning Refrigerant in the Bus AC Would Damage the Ozone Layer – a Warning Required By California Law

This was a relatively rare case where the product manufacturer provided absolutely no warnings of the known aerodynamic hazard of the bus. As the MCI salesperson confessed, the only warning provided in the "warnings" section of the sale papers concerned damage to the ozone layer:

> Q. And the warning says, "This vehicle may contain HCFC R-134A refrigerant, a substance which harms public health and the environment by destroying ozone in the upper atmosphere." Did I read that right?
> A. Yes.
> Q. And that is the only warning I see in Exhibit 2. Do you see any other warning?
> A. No. 30 App. 7259:11-19

This "warning" did not discuss general air displacement much less warn bus users that the J4500 had a dangerous 20 pound suction force when passing bystanders or bikes while competing safer buses created no traction whatsoever.

2. Hubbard's Testimony That It Was His "Personal Habit" to Follow Safety Directives and That He Would "Heed" An Air Blast Warning Was Sufficient Evidence to Prove Warning Causation

In Sims v. General Telephone & Electronics, 107 Nev.2d 151, 815 P.2d 151, 156 (Nev. 1991) [hereinafter Sims], this Court held that merely showing that the actor had a history of following warnings was adequate evidence to prove a failure to warn claim without further confirming testimony to that end:

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

Id. (Bold added) See also Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) [hereinafter Rivera] (approving Sims and commenting that: Sims "stated that the evidence [of historic compliance] could demonstrate that he would have adhered to an adequate warning."); cf. Thomas v. Hardwick, 126 Nev. 142, 231 P.3d 1111, 1117 (2010) (holding that "NRS 48.059(1) deems evidence of habit or routine relevant and admissible to prove an act in conformity with the habit or routine, provided an adequate foundation is laid."; affirming admission of medical practitioner's routine practice as evidence relevant to what the practitioner did on a particular occasion).

Going far beyond the mere historic evidence required by Sims, in this case, bus driver Hubbard explicitly testified himself that it was his "personal habit" to "heed" safety directives:

> Q. All right. I remember questions being posed to you, Mr. Hubbard, in your deposition about your knowledge of aerodynamics and air blast. And my recollection is you didn't have any particularized knowledge?
>
> A. No, sir.
>
> . . . .
>
> Q. Had you ever been trained as to possible hazard of an air blast?

A. No.
Q. **And in terms of your personal habits, if you're trained about something relative to safety, do you heed those training warnings?**
A. **Absolutely.**
Q. And you've never been told that a bus could create air displacement?
A. No, sir. 26 App. 6348:5-10 and 15-24 (Bold added)

The response "absolutely" fully provides all of the causation evidence needed to prove a warnings claim under Sims.

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

Q. Let me ask you a question. Is it your understanding that, if a bus is moving at 30 or 35 miles an hour, that that will cause air blast or air displacement at the front of the bus? Have you ever heard that?
A. No, sir.

26 App. 6387:14-19 Despite Hubbard's pointed testimony, MCI repeats the false claim made at trial that bus drivers already knew that the J4500 caused some generic air displacement. (OB 40) In response, Hubbard's testimony is clear. Moreover, MCI disingenuously attempts to confuse air displacement in general with the actual hazard posed by a J4500 bus moving 25 mph (a 20 pound suction that its streamlined competitor does not generate). This effort to muddle the true danger is repeated multiple times in MCI's brief. (OB 10-12, 40-41)

There was also compelling evidence disproving MCI's averment that even minor air displacement knowledge was ubiquitous. David Dorr was MCI's lead

west coast salesman and a 20 year bus driver that formerly owned a tour company.

Dorr testified that he did not know that the J4500 created an air blast:

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

29 App. 7246-47 MCI did not call one single bus driver as a witness. Hence, there was no testimony that any bus driver (including driver Hubbard) realized that the J4500 generates a 20 pound suction when closely passing a bicyclist.[7]

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[7]

Less is more. The Japanese calligraphy known as shodo is an art form using minimal brush strokes. Khiabani family counsel presented their warnings expert (Cunitz) after aerodynamics expert Dr. Briedenthal had given an exposition on the 20 pound suction hazard and after the bus driver had explicitly testified that he would heed a warning -- which combined testimony established the basic warning case without more. A strategic decision was made to minimize the Cunitz expert testimony to preclude MCI from trying to use it as an excuse to violate motion in limine # 1 that prohibited MCI from arguing contributory negligence by the bus driver as a defense. As highlighted by MCI's shenanigans in attempting to introduce an opinion from MCI expert Krause that the driver violated a criminal statute, the primary MCI trial strategy was to attempt to circumvent the order precluding a contributory negligence defense because MCI correctly determined that it had no defense for its defective product (except the illicit federal compliance defense) and no defense whatsoever for its complete failure to provide any warnings. Against this background, MCI's criticism that Khiabani counsel "threw together" (OB 7) the warning liability case and that it was

ARGUMENT

A. Five of the Arguments Raised in MCI's So-Called Renewed Rule 50(b) Motion Were Not Raised in MCI's Pre-Verdict Rule 50(a) Motion and Fail on Procedural Grounds

MCI cannot raise issues in a "Renewed" Rule 50(b) motion on appeal that were not first raised in the Rule 50(a) motion lodged at the close of evidence. Nelson v. Heer, 123 Nev. 217, 163 P.2d 420, 424 n. 9 (Nev. 2007) This Court recently emphasized that a "district court should have denied the NRCP 50(b) motion for its procedural defect instead of addressing it on the merits" where arguments were not preserved in a 50(a) motion:

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

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

"poorly developed" (OB 28) demonstrates that MCI to this day fails to appreciate that sometimes less is more. MCI now owes the Khiabanis over $22 Million with accrued interest. Imagine the peril MCI would face if counsel for the family were marginally competent as opposed to the complete fools described by MCI. **The symbol above means wind** and is believed to originate from Ono no Michikaze (894-966). Sato, Shodo (2014)

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

> A Rule 50(b) motion for judgment as matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party must renew its motion under Rule 50(b). **Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion.** Thus, a party cannot properly "raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion."

Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003)

In the present case, MCI made its pre-verdict Rule 50(a) motion orally the morning of March 22, 2018. The entire argument comprises 12 terse pages of transcript. 40 App. 9892-9903 The district court explicitly ruled that MCI failed to preserve 5 arguments first set forth in MCI's 50(b) motion because they were not raised in the Rule 50(a) motion. The court detailed the arguments that MCI actually made:

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

> S-1 Gard [a tire protective barrier] argument (3/22/18 22:21 to 23:10); and (5) strict liability does not extend to bystanders (3/22/18 23).

50 App. 12376:4-11 (Bold added)

The District Court outlined the new arguments that MCI concocted post-verdict and denied them as procedurally improper:

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

50 App. 12376:12-21 This procedural ruling was required under Nevada law.

MCI never once alerts this Court that it is attempting to appeal numerous arguments that were not preserved below. (OB 21; reciting 3 of the district court rulings on the Rule 50(b) motion but making no mention whatsoever of the dispositive ruling that 5 arguments had not been preserved). This cannot be an honest oversight given the clear directive by the district court that such arguments were not preserved. Moreover, the same issues MCI failed to preserve are argued nearly verbatim in its Opening Brief. For example, the district court

expressly found that MCI did not preserve "the new argument that Plaintiffs should have explained 'how it [a warning] would have prevented Dr. Khiabani's death . . ." 50 App. 12376:14-15 MCI shamelessly repeats this exact same forbidden dispute as Part B of its "Causation" section. (OB, v. "B. Plaintiffs Did Not Show that a Warning Would Have Prevented Dr. Khiabani's Death.") Likewise, the district court expressly found that MCI did not preserve "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 . . . ." 50 App. 12376:16-18 MCI repeats this exact same procedurally banned plea at subsection 3 of Section B: "There Was No Evidence that the Driver, Heeding Any Different Warning, Would Have Done Anything Differently." (OB, vi. 3.) Because the district court properly eliminated these arguments on procedural grounds, MCI cannot advance them on appeal. For this reason, this Court should simply strike Section B and Section C under Part One Causation; i.e., OB 41-50. In no event should the substance thereof be considered because the district court correctly found that they were not preserved in a timely Rule 50(a) motion.[8]

[8] Section C includes MCI's "open and obvious" argument. (OB 47, 48) In addition to not being preserved, this argument fails because Hubbard was not aware of air displacement in general (supra, p. 19) and no one but MCI knew that the J4500 created a 20 pound suction when passing whereas competing buses were safe.

The Khiabanis fear that MCI's complete failure to address this dispositive procedural ruling in the opening brief is some sort of attempt to sandbag them with an extensive discussion of the issue in the reply brief. Not only would this be procedurally forbidden but it should be a beacon of impropriety to this Court. If this occurs, this Court is requested to intently focus on the truncated pre-verdict oral Rule 50 motion (40 App. 9892-9902) and the clear ruling by the district court cited above. Sleight of hand cannot resurrect a Rule 50 argument that was not made in the first instance.

B. The Jury Instruction and Verdict Form Both Incorporated Causation

MCI's three warning causation points are (1) the jury did not decide causation in determining failure to warn liability (despite the explicit instruction to do so in J1 31); (2) the jury's findings on unreasonably dangerous and failure to warn were inconsistent; and (3) the evidence was insufficient to find as to MCI's failure to warn.

1. The Warning Causation Required By J1 31 Was Much More Stringent Than That Required Under Nevada Law

The Khiabanis agreed to a warning causation instruction stronger than that required under Nevada law in the misguided hope that this would eliminate this issue on appeal. Rivera v. Philip Morris, Inc., 125 Nev. 185, 209 P.2d 271, 275 (Nev. 2009) held that "the burden of proving causation can be satisfied in failure to warn cases by demonstrating that a different warning would have altered the way

the plaintiff used the product **or** would have prompted plaintiff to take precautions to avoid the injury." (Bold added) JI 31 was much more stringent than what Rivera requires to prove causation because it required further proof that a warning "would have prevented the injury in this case."

Sims and Rivera held that warning causation can be established by proof of historical compliance alone. Here, despite the absence of supporting Nevada law, MCI demanded a more draconian warning causation test requiring proof of two things:" "[f]irst, the plaintiff must prove that the user of the product would have read and heeded the warning" and "second, plaintiffs must convince the fact-finder that, heeding the warning, the user would have avoided the injury to plaintiff decedent." (OB 41) In its motion to the district court, MCI cited Indiana law in support of this "two-step inquiry." 51 App. 12676:13 to 12677:2 In response, Nevada law applies -- not Indiana law.

Despite MCI's misguided assertions, Rivera does not require a two-step inquiry but instead set forth the alternative described above and below. Either plaintiff can prove that a "different warning would have altered the way the plaintiff used the product" **or**, alternatively, plaintiff can prove that a "different warning would have prompted plaintiff to take precautions to avoid the injury." JI 31 is more onerous than Rivera because JI 31 required plaintiff to prove both that the product user "acted in accordance with the warning, **and** that doing so

would have prevented the injury in this case." Despite getting a warning causation instruction more arduous than the law requires, MCI still complains.

2. MCI Prepared the Jury Instruction and Verdict Form Regarding Failure to Warn Causation

MCI criticizes the language "would have acted in accordance with the warning, and that doing so would have prevented the injury in this case" in J1 31 and "would have been acted upon" in the verdict form as purportedly not incorporating whether the user would have heeded the warning and "change[d] his conduct." (OB 46, 47; "he would have had to heed the warning and change his conduct. But there is no proof that would have happened here.") However, MCI crafted both JI 30 and JI 31; the 2 warnings instructions.

JI 30 was given regarding the requirement for a warning:

> A product, though faultlessly made, is defective for its failure to be accompanied by suitable and adequate warnings concerning its safe and proper use if the absence of such warnings renders the product unreasonably dangerous.

40 App. 9928:8-12 (Bold added) The Khiabanis proposed another instruction that MCI objected to and was not given. 39 App. 9687:23 to 9688:4

J1 31 is the warnings heeding and causation instruction -- heeded changed to "acted in accordance." J1 31 explicitly required the Khiabanis to prove that heeding the warning "**would have prevented the injury in this case**"). (Bold added) MCI first proposed the following instruction on March 13, 2018:

> If you find that warnings provided with the motor coach were inadequate, the defendant cannot be held liable unless Plaintiffs prove by a preponderance of evidence that the individual who might have acted on any alternative warning would have understood and heeded the alternative wording, **and that doing so would have prevented the injury in this case**.

49 App. 12172:1-7 (Bold added) The Khiabanis proposed a standard warning instruction on the heeding element and a simple warnings jury question.

At the first jury instruction conference on Sunday, March 18, 2018, MCI demanded that the term "heeded" that MCI itself authored be removed and replaced with the language "acted in accordance:"

> MR. KEMP: So Mr. Polsenberg [MCI counsel] on Sunday said he didn't like the word heeded. He wanted to change to acted in accordance or whatever.
> MR. HENRIOD: So esoteric.
> MR. KEMP: Yeah, it's a little esoteric, so --
> **THE COURT: Although Mr. Hubbard said he would have heeded it.**
> **MR. KEMP: Yeah.**
> **THE COURT: On the -- on the stand; right?**
> **MR. KEMP: Maybe that's why Mr. Polsenberg** -- anyway, so they say, Did MCI fail to provide an adequate warning that would have been acted upon? I'm fine with that. You know, I think heeded would be better, but I'm fine with that.
> MR. HENRIOD: I think we still need a separate question, but I think that this gets us much closer. 40 App. 9823:25 to 9824:17 (Bold added)

As the Khiabanis remarked and the Court noted, MCI's new found aversion to the term "heeding" that MCI first embraced was apparently motived by MCI's concern that the bus driver had already explicitly testified that he would have "heeded" a

warning. MCI had to dump the term "understood and heeded" to bolster the defense by providing the jury with different causation language than heeding.

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

> If you find that warnings provided with the ~~motor~~ coach were inadequate, the defendant cannot be held liable unless Plaintiffs prove by a preponderance of the evidence that the individual who might have acted on any ~~alternative~~ warning have would have ~~understood and heeded the alternative~~ acted in accordance with the warning, and that doing so would have prevented the injury in this case. [9]

49 App. 12211:1-8 The warning causation instruction that MCI revised on March 20th was given **verbatim** as follows:

> If you find that warnings provided with the motor coach were inadequate, the defendant cannot be held liable unless Plaintiffs prove by a preponderance of the evidence that the individual who might have acted on any warning **would have acted in accordance with the warning, and that doing so would have prevented the injury in this case.**

40 App. 9928:13-19 (Bold added) The Khiabanis submit that **it is dispositive that MCI admits in its brief that the jury was properly instructed on**

[9] MCI took out the language "alternative warning" twice when MCI revised J1 31. Having done so, there is no possible credible argument that MCI can make that the jury should have been instructed that the Khiabanis had to offer an alternative warning. MCI's deletion of reference to an "alternative" warning reinforces the district court determination that MCI did not offer a jury instruction requiring an alternative warning. 50 App. 12378:26-28 (holding that . . . "Defendant did not propose a jury instruction requiring that Plaintiff provide proof of a specific warning and instead only tendered J1 30 and J1 31.")

causation for the failure to warn claim. To quote MCI, "the jury was instructed that causation was a necessary element for [warning] liability . . ." (OB, 56) Despite this concession that the jury instruction was sound, MCI asserts error because, in MCI's words, "the jury was not asked, as a general verdict would have, to find MCI **liable** for failure to warn." (OB 56) (Bold by MCI) But this finding is exactly what J1 31 demanded.

Instead of the simple verdict form proposed by the Khiabanis where the jury would check yes or no on whether MCI failed to warn, MCI demanded that the jury question on warnings be crafted to exclude reference to heeding and instead use MCI's newly minted terminology of "acted upon." 40 App. 9823:10 to 9824:18 Again, the term "heeded" suddenly became tabu to MCI after the bus driver testified that he would have "heeded" a warning. MCI added a specific causation component: "that **would have been** acted upon" to the verdict form. (Bold added) The complete warnings question on the verdict form read as follows:

> 5) Did MCI fail to provide an adequate warning **that would have been acted upon**?
>
> Yes _____ No _____

41 App. 10238:25-28 (Bold added) The jury checked yes.

Because MCI generated the language for both the applicable warnings instructions (JI 30 and JI 31) and the "would have been acted upon" language for

the verdict form, MCI cannot argue error on these points. This is especially true where the language "that plaintiffs must "prove by a preponderance of evidence" that Hubbard "would have acted in accordance with the warning [heeded] and that **doing so would have prevented the injury in this case**" in JI 31 and "would have been acted upon" in the verdict form (both drafted by MCI) explicitly incorporated the causation requirement for failure to warn liability that MCI now wrongfully argues was missing. (OB 42; "plaintiffs must convince the fact-finder that, heeding the warning, **the user would have avoided the injury to plaintiff – decedent**.")

3. This Court Should Presume That the Jury Followed J1 31

The unstated premise that is the linchpin of this appeal is that the jury did not follow J1 31 that states that "the defendant cannot be held liable unless Plaintiffs prove . . . the bus driver would have acted in accordance with the warning, and that doing so would have prevented the injury." In this vein, MCI proclaims "[f]or all we know from this incomplete verdict form, the jury would have returned a general defense verdict claim because they found no causation on this claim." (OB 56) **MCI's speculation is based entirely on the assumption that the jury did not follow J1 31**. Numerous decisions of this Court require a presumption that the jury followed the law as instructed – not theorizing that the jury did not do so. See, e.g., Kause, Inc. v. Little, 117 Nev. 929, 937, 34 P.3d

566, 571 (2001) ("This court presumes that a jury follows the district court's instructions") This Court has explicitly held that the jury instructions and a special verdict form must be "read together" to defeat claims of error. See Yamaha Motor Co. v. Arnott, 114 Nev. 233, 246, 955 P.2d 661, 669 (1998) ("We conclude that, when read together, the jury instructions and the special verdict form were not prejudicially misleading on this point.") MCI offers no justification for overruling this precedent and instead engaging in rank conjecture that the jury disregarded J1 31.

4. There Is No Requirement to Repeat the Warning Causation Test In JI 31 in the Verdict Form

Boiled away, MCI's real argument is that, although JI 31 did in fact properly instruct the jury on the requirement of warning causation and did so **in words selected by MCI**, MCI believes that warning causation should have been repeated as a special interrogatory using the term "legal cause" in the warnings portion of the special verdict form. (OB 51-57) MCI fails to cite Allstate Ins. Co. v. Miller, 125 Nev. 300, 306, 322, 212 P.3d 318, 323, 333 (Nev. 2009) [hereinafter Allstate], the most pertinent decision of this Court on special verdict forms.

Allstate holds that separate liability theories should be differentiated in verdict forms if "they are timely and properly submitted:"

> . . . we are holding that district courts should follow Skender by submitting timely and properly proposed special verdicts or

> interrogatories when a plaintiff presents claims of tort and contractual liability or multiple theories of liability under a single claim.

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

The verdict form in this case fully complied with Allstate because it required the jury to differentiate between the unreasonably dangerous determinations and the failure to warn determination. It clearly allows the parties and this Court to determine which of the multiple theories of liability was resolved in favor of plaintiff. MCI does not contend that there is confusion (as in Allstate) concerning the prevailing liability theory.

Neither Allstate nor any Nevada court has held that, in addition to differentiating liability theories, a defendant is entitled to a special verdict form that repeats elements of instructions that a defendant desires to highlight. Where MCI concedes that JI 31 accurately stated Nevada law regarding warnings causation (OB 56) and J1 31 **was drafted by MCI**, there is no valid argument that not adding "legal cause" to the warnings portion of the verdict form constitutes legal error. The Khiabanis emphasize that the warnings question in the verdict form did incorporate MCI's preferred "would have been acted upon" language which was the last minute MCI surrogate for "understood and heeded." 41 App.

10238:25-28 (Bold added) ("Did MCI fail to provide an adequate warning **that would have been acted upon**.")

5. Putting the Substantial Factor Instruction ("Legal Cause") in a Special Verdict Form For Failure to Warn Liability Is Inappropriate

Plunging into a whirlpool of revisionism, MCI claimed below that it tendered a special verdict form asking "the next question: 'If an adequate warning were heeded, would Dr. Khiabani's death been avoided.'" 51 App. 12678:4-6 Not only did MCI fail to propose a verdict form with this "next question", the verdict form actually proposed by MCI added the substantial factor instruction, i.e., "legal cause": whether "the defect was a **legal cause** of Dr. Khiabani's Death?" (OB 14) (Bold added) This is a completely different inquiry than what MCI now argues should have been included. MCI's failure to offer a verdict form with "the next question: "If an adequate warning were heeded, would Dr. Khiabani's death been avoided," precludes MCI from now arguing to the Court that a new trial should be ordered because this question was not included in the verdict form.[10]

[10] MCI also makes a silly argument that the word "liable" should have been included in the warning question on the verdict form because, according to MCI, the jury did not understand that it was rendering a verdict when it completed the verdict form. (OB 56; ". . . the problem is that the jury was not asked, as a general verdict would have, to find MCI liable for a failure to warn.") In response, not only did MCI not tender a special verdict form with "liable" in the warnings question, MCI refused to use the term liable twice. First, MCI rejected the simple warnings question first offered by the Khiabanis: Is MCI **liable** for failure to warn? 1 RApp. 110-113 (Bold added) Second, the Khiabanis again suggested the night before closing that the word "liable" be used. "[s]o we can

Turning to the "legal cause" or "substantial factor" instruction that MCI did propose adding to the failure to warn portion of the verdict form (using the term "legal cause"), MCI's hypocrisy is unbridled. MCI argued for nearly an hour at the Sunday, March 18, 2018 charging conference that the "substantial factor" test did not apply. 39 App. 9694-95, 9680 Over MCI's vehement objections, the Court allowed JI 24, which provided as follows:

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

MCI's objections to JI 24 was noted on the record on the evening of March 21, 2017. Id. MCI cannot argue that the verdict form was flawed because the substantial factor test that MCI strenuously objected to was not included as a separate warning determination in the verdict form. This is especially true where the "legal cause" definition differs from the "would have prevented the injury case" language that MCI now asserts was essential.

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

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change the wording on that [the verdict form] to say, Is MCI liable for failure to warn? And then a parenthetical saying (Did MCI fail to provide an adequate warning that would have been acted upon?" 40 App. 9823:11-13 MCI declined. The duplicity of MCI twice refusing to use "liable" on the warnings question then arguing on appeal that "liable" was a critical omission is stunning.

> If you find that warnings provided with the motor coach were inadequate, **the defendant cannot be held liable unless Plaintiffs prove by a preponderance of the evidence that the individual who might have acted on any warning would have acted in accordance with the warning, and that doing so would have prevented the injury in this case**. (Bold added)

The phrase "and that doing so would have prevented the injury in this case" (not "legal cause") is the "next question" that MCI argued below and now claims to have been missing from the verdict form. Again, MCI **never** proposed that this phrase be added to the verdict form. MCI instead proposed "legal cause" be in the verdict form.

6. MCI's Obligation to Tender a Verdict Form With Warning Causation Language Cannot Be Foisted Upon the District Court

To overcome MCI's complete failure to offer the special verdict form that it now spends pages insisting was essential, MCI audaciously asks this Court hold to that the district court should have *sua sponte* drafted the special verdict form that MCI did not tender:

> Having chosen to give a special verdict form without a general verdict form for plaintiffs, the district court needed to get it right.

(OB 51) Instead of being frank with this Court that it seeks to reverse Allstate, MCI's silent request is that the following holding of Allstate be eviscerated and NRCP 49 be ignored: "[t]he district court is not required to submit special verdicts or interrogatories to the jury **if the party does not timely and properly submit**

proposed special verdicts or special interrogatories to the court. NRCP 49." Allstate, 212 P.3d at 332 (Bold added)

On top of MCI's failure to request language such as "would have prevented the injury" be added to the verdict form, MCI fails to show that the district court abused its discretion in approving the verdict from used. See Allstate Ins. Co. v. Miller, 125 Nev. 300, 212 P.3d 318, 331 (Nev. 2009). Given that MCI's fixation on warning causation language in the verdict form (as opposed to the "legal cause" addition that MCI actually suggested) arose **after** verdict, an abuse of discretion can never be shown.[11]

C. There Is No "Inconsistency" in the Unreasonably Dangerous Verdict (the Aerodynamic Defective Design Determination) and the Failure to Warn Verdict

MCI's unsupported hypothesis that the jury rejected the unreasonably dangerous product claims (including the aerodynamic design claim) on causation grounds is both factually wrong and legally infirm. MCI phrased its argument to the district court as follows:

> On that defective design claim, the jury found no liability: "Is MCI liable for defective design (Did the aerodynamic design of the coach make it unreasonably dangerous and a legal cause of Dr. Khiabani's death? Yes ___ No ____ (Special Verdict #4). **In**

[11] MCI cites a California case to shift its burden of offering a special verdict from itself to the district court. (OB 51) But Bell v. Bayerische Motoren Werke Aktiengesellschaft, 105 Cal. Rptr.3d 485, 498 (Ct. App. 2010) did not even consider this issue. Moreover, MCI cites to "498" of that case; which page is simply a list of the special interrogatories – not a legal holding.

> **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.**"

48 App. 11976:9-15 (Bold added) On appeal, MCI soft peddles this unqualified proclamation that "the jury **concluded** that it [defective design] was not [the legal cause of damage]" to the more tentative claim that it "is **doubtful**" that the jury did not decide legal cause. (OB 59) MCI's speculation that the jury answered no to **both** questions (unreasonably dangerous **and** legal cause) instead of merely the first question has no merit and defies common sense. Because the word "and" required two findings for an affirmative answer, the jury could have decided either issue against the Khiabani family and checked no. If the jury decided for MCI on the first point (unreasonably dangerous), there was no need to continue to decide causation.

Unless MCI is conceding that the jury answered yes on the first inquiry as to whether the bus was unreasonably dangerous on all four theories, MCI cannot credibly argue that the jury continued to consider causation. MCI counsel will likely never formally state on the record that the jury found the aerodynamic design was unreasonably dangerous (which would require the jury to next consider the second question; cause) because this would mean MCI counsel is conceding that the hundreds of other J4500 buses still on the road have aerodynamic design defects. In this regard, the Court should focus on how MCI's brief dexterously

leap frogs over this key point by arguing that the jury found no causation on aerodynamic design defect but remaining deathly silent on the aerodynamic unreasonably dangerous finding. (OB 57-60)

The most sensible explanation is that the jury did not find MCI liable for an unreasonably dangerous aerodynamic design because the jury accepted MCI's improper argument that the bus complied with federal regulations[12] MCI faithfully recites some of the caselaw that the Court must strain to read the verdict consistently whenever rationally possible. (OB 58) Indeed, such reconciliation is mandated by the Seventh Amendment. Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1111-12, 197 P.3d 1032, 1038 (2008) However, MCI puts blinders on when viewing the myriad of possibilities to reconcile the jury verdicts.

[12] Most courts preclude evidence and argument of federal compliance in strict liability cases. See Bailey v. V & O Press, 770 F.2d 601, 607-609 (6th Cir. 1985) (holding compliance with government standards irrelevant "where the product's condition and consumer expectations are the central inquiries and liability may be imposed regardless of the degree of care exercised by the manufacturer) (Ohio law); Harsh v. Petroll & Hac., 840 A.2d 404, 425 (Pa. 2003) (same under Pennsylvania law); Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 803, 174 Cal. Rptr. 348-04, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) (same under California law); cf. Wyeth v. Rowatt, 126 Nev. 446, 244 P.3d 765, 799-80 (2010) (" . . . we reject Wyeth's contention that compliance with FDA standards negates its liability for punitive damages . . ."); Volvo Cars of North America, Inc. v. Ricci, 122 Nev. 746, 136 P.3d 161 (2006) (trial court admission of federal vehicle standards disapproved)

MCI rolled out the federal compliance defense to the unreasonable dangerous claims at the end of trial but it did not apply to the warning claim. Over the Khiabani's vehement objections (37 App. 9034:9 to 9067) MCI presented an expert "opinion" from lay witness Virgil Hoogestraat on the last day of testimony that the MCI bus complied with federal regulations.[13]

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

> **And I want to talk to you about something I think is very important. Remember the discussion about federal government standards and regulations?** Federal Motor Carrier Safety Administration. NHTSA, National Highway Trade – National Highway Traffic Safety Administration. **And remember the testimony from Mr. Hoogestraat**. **There are no -- there were not in 2007, and there are not today, any requirements by the federal government, who study these things and make rules that manufacturers have to comply with, no requirement** of a proximity sensor device. Absolutely none. The federal government has said we are not going to make you put one on. **Number two, there are no factors for aerodynamics drag factor**. There are factors for length of a bus, width of a bus, and all kinds of what they call FMBSS standards. 40 App. 10132:14 to 10133:8 (Bold added)

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[13] Apart from federal compliance not being a proper defense (see n. 12, supra), the expert "opinion" testimony should have been precluded for 3 other reasons: (1) Hoogestraat was a lay witness – not an expert; (2) the Khiabanis could not present an expert to rebut the Hoogestraat opinion because Hoogestraat did not file an expert report; and (3) no federal regulation opinion was appropriate because there is no federal regulation regarding the specific defects identified by the Khiabanis. The district court granted the Khiabanis a continuing objection to the Hoogestraat testimony but allowed Hoogestraat to opine that the J4500 was not unreasonably dangerous because it met federal regulations. 37 App. 981: 10-11; 38 App. 9303:8-11

The ultimate result of the inappropriate federal compliance "opinion" from MCI lay witness Hoogestraat and the powerful federal compliance closing argument was that the jury found against the Khiabanis on the aerodynamic defect question (and also the right side blind spot, the proximity sensor and the S-1 Gard questions).[14]

MCI did not present any evidence that the **warning** was subject to federal regulations. For this reason, the warning liability could not be torpedoed by the same improper federal compliance defense that fatally infected the unreasonably dangerous determination. Federal compliance was a factor that MCI strenuously argued the jury should consider in determining whether the bus was unreasonably dangerous. However, MCI never asserted that federal regulation applies to the warning determination. This key distinction by itself demonstrates that the jury determinations were not "inconsistent." Because of this glaringly obvious explanation for the jury verdict, the Seventh Amendment and Nevada law dictate

[14] 49 App. 12166-67 (Christiansen Aff. ¶ 2; "After the jury rendered its verdict and was discharged, several of the jurors were discussing the verdict with Plaintiffs, Plaintiffs' friends or family members, and Plaintiffs' counsel, including me. During these discussions, **multiple jurors advised that the jury decided against Plaintiffs on all four defect claims because the bus complied with the federal regulations**.") (Bold added) "The general rule is, that affidavits of jurors are admissible to explain and uphold their verdict, but not to impeach and overthrow it." Verven v. City of Pittsburgh, 227 Kan. 259, 261, 607 P.2d 36, 38 (Kan. Sup. Ct. 1980)

that the unreasonably dangerous and failure to warn verdicts be reconciled as consistent.

The district court rejected MCI's argument that there was an inconsistent verdict:

> Plaintiffs need not prove precisely how the facts would have been different had there been an adequate warning, as this would amount to speculation; Plaintiffs need only to provide the facts sufficient to allow the jury to draw the conclusion that the presence of an adequate warning would have avoided the accident. As noted above, Plaintiffs did so here. In line with the above, the Court disagrees that the jury's verdict was "consistent with" judgment as a matter of law on causation, as the jury could have, and evidently did, find that the lack of an adequate warning caused the accident. The Court disagrees with Defendant's suggestion that the jury finding no liability on the defective design claim means "when the jury was actually asked whether the allegedly defective design was the legal cause of damage, the jury concluded that it was not." In reality, the jury found no liability after being instructed that liability for defective design required **both** a design defect and causation, so a simple "no" answer to the defective design question does not necessarily mean the jury found causation to be lacking. 50 App. 12378:28 to 12379:12 (Bold added)

The federal compliance distinction noted above fully supports this reasoning.

D. An Injured Victim is Not Required to Draft a Warning

MCI's assertion that the Khiabanis must propose a specific warning fails for 3 reasons: (1) Nevada law does not require that the victim propose a specific warning, especially in cases like the present where there was no warning whatsoever and no basis for MCI to demand a more "adequate alternative warning" be tendered; (2) MCI did not propose a jury instruction requiring an

alternative warning as an element of proof and instead MCI actually **removed** the reference to an "alternative" warning in MCI's re-draft of J1 31; and (3) MCI presented evidence and argued this precise issue to the jury (i.e., that the Khiabanis did not draft a warning) but lost the failure to warning claim.

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

This Court has never held that injured persons must propose a specific warning -- especially where there is no warning whatsoever of the pertinent hazard. Instead, the seminal Nevada warnings case provides as follows:

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

Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 65 P.3d 245, 250 (2003) The Sea Ray Court did not hold or suggest in any way that the injured party had to provide an alternative warning as an element of proof. In fact, if there is a "specific" product risk and there is no warning whatsoever, a manufacture automatically flunks the Sea Ray test because, by definition, **if there is a complete absence of warnings** -- the warning cannot be designed to reasonably catch attention, the warning cannot have comprehensible language and the warning cannot be of

sufficient intensity. Where there is no warning, the only question to be decided is whether there should have been a warning -- not the exact terminology that a warning should have used and/or how conspicuous it was required to be given the hazard involved.

In Rivera, the Court focused on a "different warning" because there was already a warning on cigarette packs -- but the smoker argued that it was not adequate. Rivera, 209 P.2d at 275 (stating plaintiff could prove that "a different warning would have altered the way the plaintiff used the product.") Where there is no warning in the first place, the prime inquiry is whether to warn or not -- as opposed to whether the language or placement of an existing warning is adequate.

Numerous jurisdictions have held that an injured party is not required to prepare an alternative warning in a failure to warn case. The Missouri Supreme Court rejected the same tactic that MCI apes to add another element to warning liability that requires accident victims to draft an adequate warning:

> Ford does not cite any Missouri Law placing the burden on the plaintiff to propose the wording of an adequate warning to make a submissible case. While both Ford and the dissenting opinion note that Indiana apparently does place this burden on plaintiff, Indiana appears to be unique in this regard. Numerous jurisdictions follow the heeding presumption in failure to warn cases, not just Missouri and Indiana, and **no other state has been identified that requires proof of the specific language of an adequate warning as an element of plaintiff's claim**. Indeed Washington specifically provides that the plaintiff in a failure to warn case need not "prove the exact wording of an adequate warning." Ayers v. Johnson & Johnson Baby Products Co., 59 Wash.App. 287, 797, P.2d 527, 531 (1990).

. . . .

> Missouri does not require a plaintiff to create an alternative design to prove a design defect claim; it is enough that plaintiff show that the design used was defective and unreasonably dangerous. Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 794 (Mo. App. 2008) (plaintiff need not show what alternative design should be although defendant can show difficulties with alternative designs in defense). **This court rejects the suggestion that this concededly new element must be added to those required already under Missouri law to prove failure to warn.**

Moore v. Ford Motor Co., 332 S.W. 3D 749, 759-760 (Mo. Sup. Ct. 2011) (Bold added); see also Greiner v. Volkswagen, 540 F.2d 85, 93 n. 10 (3rd Cir. 1976) ("The appellees cite us no Pennsylvania precedent holding that the appellant had the burden of showing the particulars of proper warning.")

In Nevada, plaintiffs are **not** required to provide proof of an alternative safe design in a design defect case. See Trejo v. Ford, 133 Nev. 520, 402 P.2d 649, 654 (Nev. 2017) [hereinafter "Trejo"] ("a plaintiff **may** choose to support their case" with evidence of an alternative design) (Bold added) The same rationale applies to the failure to warn claim and dictates that there is no requirement under Nevada law to propose an alternative warning. As the district court cogently observed, rejecting an alternative warning as an element of proof harmonizes with Trejo. 50 App. 12378:22026

As explained in Ayers v. Johnson & Johnson Baby Products Co., 59 Wash.App. 287, 292-94, 787 P.2d 527 (Wash. App. Ct. 1990), aff'd, 117 Wash. 2d

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

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

The Washington Supreme Court also explained in detail why requiring alternative warnings is folly:

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

Ayers, 818 P.2d at 1342. Placing the burden on injured victims to craft warnings and demanding that juries wrangle over alternative warnings is not sound policy. Trejo, 402 P.2d at 657 (holding that it was "contrary to the public policy supporting the adoption of strict liability in Nevada" to require proof of alternative design because it "poses an unfair burden to many prospective plaintiffs.")

MCI provides no rationale for forcing injured victims to design warnings for manufactures and there is none. Instead, MCI feebly attempts to confront the

persuasive Supreme Court holdings in Ayers, Moore, and Trejo set forth above with cites to inapposite appellate cases.[15]

There is no merit to MCI's underlying thesis that a product that is defective because it lacks a warning mysteriously becomes not defective because plaintiffs did not propose an alternative warning. See Fyssakis v. Knight Equipment Corp., 108 Nev. 212, 214, 826 P.2d 570, 572 (Nev. 1992) ("Under Nevada law, a product must include a warning that adequately communicates the dangers that may result from its use or foreseeable misuse; otherwise, the product is defective."). MCI

[15] Koken v. Black Veatch Constr., Inc., 203 F.3d 39, 45 (1st Cir. 2005) applied the law of Maine. The Maine Supreme Court held 6 years after Koken that, not only was an alternative warning not required, but that an injured victim must merely prove that "the inadequate warning or absence of a warning proximately caused the plaintiff's injury." Burns v. Architectural Doors and Windows, 19 A.3d 823 (Me. Sup. Ct. 2011) Furthermore, the portion of Koken relied upon by MCI holds only that it is "plaintiff's burden to establish a duty to warn and to prove proximate causation of loss resulting from the failure to warn" and does not hold that plaintiff must propose an alternative warning as an element of the case. Koken, supra at 45. The Koken victim "suggested four different warnings" so any discussion about the absence of an alternative warning is dicta. Koken, supra at 45. In Campbell v. Boston Scientific Corp., 882 F.3d 70 (4th Cir. 2018), the issue of whether an alternative warning was a required element of proof was not an issue on appeal where the Court held that expert testimony is not required to prove a failure to warn claim. The quotation MCI cites is from the district court opinion in Campbell v. Boston Scientific Corp., 2016 WL 5796906 (S.D. W. Va. Oct. 3, 2016), where proximate causation was established by a doctor testifying that he would not have prescribed a drug if he had been provided with a Material Safety Data Sheet ("MSDS") regarding one of the chemicals in the drug. There was no alternative warning proposed or discussed in the case. Hence, Campbell actually held exactly the opposite of what MCI claims in that it found that a hazard set forth in a MSDS constituted proximate cause in a warnings case despite there being no alternative warning proposed.

confuses the determination that a product is dangerous without warning to the mechanism (an adequate warning) to temper the danger. This Court should not hold that strict liability mandates that injured victims design and present alternative warnings. [16]

[16] MCI also cites 7 other non-appellate cases from foreign jurisdictions which MCI mistakenly claims require an alternative warning. (OB 30, n. 30) In Weilbrenner v. Teva Pharmaceuticals USA. Inc., 696 F.Supp.2d 1329, 1340 (M.D. Ga. 2010), the district court actually held that expert testimony "that the minocycline label should have contained specific information" alone "created an issue of fact as to whether the warnings Teva provided were sufficient under Georgia law." The expert identified "four ways in which Teva's [existing] minocycline label was allegedly inadequate and defective" -- he did not present an alternative label. Id., at 1339. Cuntan v. Hitachi KOKI USA, Ltd., 2009 WL 333464 at x 17 (E.D.N.Y. Oct. 15, 2009) was authored by a New York federal magistrate applying New York law -- not by an Article III judge. Unlike the present case, the manufacturer gave "warnings that specifically dealt with the danger of the injury that occurred" and ". . . plaintiff here [Cutan] was aware of the warnings and the manual and chose to ignore them . . . ." Cuntan * 17 It was in this limited context -- an existing warning of the specific danger that was read and ignored by the user -- that the Cuntan magistrate found "he has to at least propose an alternative warning that would have caused him to take notice and prevented the accident." Broussard v. Procter & Gamble Co., 463 F.Supp.2d 596, 609-610 (W.D. La. 2006) did not hold that plaintiff must provide an alternative warning to prove a failure to warn case. MCI next miscites Thompson v. Nissan N. Am., Inc., 429 F.Supp.2d 759, 781 (E.D. La. 2006), involving an automobile manual with an express warning on the hazard involved which both of Plaintiffs' experts stated they were either not addressing. It was in this context that the Thompson Court said: "Plaintiffs have presented no evidence, from either of its experts Wallingford or Breen, of an inadequate warning, nor do they present any language of a proposed adequate warning." It is regrettable that MCI pretends that Broussard and Thompson reached the issue of whether an alternative warning is a required element of proof when they did not even discuss this question. MCI then runs from Louisiana to New York; citing Derienzo v. Trek Bicycle Corp., 376 F.Supp.2d 537, 566 (S.D.N.Y. 2005), which MCI claims holds that "plaintiff must prove that 'a proposed alternative warning would have prevented Plaintiff's accident.'" (OB 30, n. 10) The language cited by MCI is

2. MCI Did Not Request a Jury Instruction That Plaintiffs Had to Propose An Alternative Warning

MCI crafted both of the warning instructions given to the jury, i.e., JI 30 and JI 31. MCI did **not** offer an instruction that Plaintiffs were required to propose an alternative warning. Having failed to do so, MCI cannot now argue that an alternative warning designed by the Khiabanis was required. As the district court found, MCI "did not propose a jury instruction requiring that Plaintiff provide proof of a specific warning and instead only tendered JI 30 and JI 31." 50 App. 12378:27-28 In fact, as discussed in detail in n. 9, supra, MCI actually removed reference to an "alternative warning" in J1 31. MCI's failure to tender a specific jury instruction requiring an alternative warning precludes it from arguing on appeal that this was legally required. See Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 412, 470 P.2d 135, 137 (1970) ("We will not consider on appeal an instruction not offered to the trial court.")

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actually the court's summary of **Defendants' assertions** that Plaintiff's expert was not qualified. Id. It is not a holding that an alternative warning is an element of a failure to warn. In fact, the Derienzo Court held the exact opposite under New York law -- stating that a plaintiff was not required to show that an adequate warning would have prevented his injury because defendant was required to rebut the inference that a warning would be effective. Id. The language MCI cites in Demaree v. Toyota Motor Corp., 37 F.Supp.2d 959, 967 (W.D. Ky. 1999) (OB 30, n. 10) is dicta -- as evidenced by the Court's extensive discussion of whether a "general warning," a "specific warning", a "generic warning" or a "horn-specific warning" would have been effective. White v. Caterpillar, Inc., 867 P.2d 100, 107 (Colo. Ct. App. 1993), focused on an "open and obvious" jury instruction -- not on whether an alternate warning was a required element of proof.

3. This Is Not a Case Involving a Warning That Was Alleged to Be Inadequate

There were no warnings given whatsoever by MCI except the ozone depletion warning California law requires for all air conditioners. Hence, this is not a case where the Khiabanis could propose an "alternative" warning because there was no warning whatsoever. Presumably, this is why MCI counsel removed the term "alternative" from J1 31 when he redrafted it. See n. 9, supra. Both Sea Ray and Rivera were "inadequate" warning cases because the boat manufacturer did in fact provide a warning (but the victims argued it was inadequate) and the cigarette company provided a warning (and the smokers argued it was inadequate). Even in cases where there was some warning, this Court has not required the preparation of an alternative warning. There is certainly no reason to do so when there was no warning whatsoever.

The district court emphasized that MCI provided no warning whatsoever and that MCI's contention that the victim must craft an adequate warning was particularly inapt in such a situation:

> Next, Defendant suggests that Plaintiffs' duty to prove causation required Plaintiffs to craft an adequate warning. Failure-to-warn claims can be classified as one of two types: allegations that the warning given by the defendant was crafted in such a way to be ineffective in preventing the injury; or allegations that the product is dangerous enough that a warning should have been provided but the defendant did not prove any warning. In cases of the first variety, the jury must consider whether the warning was adequate under the factors provided in Lewis v. Sea Ray Boats, Inc. However, in the

> second category, the absence of any warning, the lack of any warning, could not possibly be considered adequate under the Sea Ray factors, and thus the only required findings are that the product was unreasonably dangerous and that an adequate warning would have avoided the injury. This case falls into the second category, where Defendant undisputedly did not provide any warnings about any of the alleged defects which Plaintiffs alleged. In such a case, the Court finds no support for Defendant's assertion that no reasonable jury could find that the product was unreasonably dangerous and that an adequate warning would have avoided the injury without a specific warning being proposed by the plaintiffs. While it is true that providing a model warning to show what the defendant could have done to make the product reasonably safe may be a helpful illustration for the plaintiff's case, it is not required for the jury to find in Plaintiffs' favor. cf. Ford Motor Co. v. Trejo (in a design defect claim, "a plaintiff may choose to support their case with evidence that a safer alternative design was feasible at the time of the manufacture.")

50 App. 12378:8-16 The district court holding is supported by Moore, Trejo, and Ayers.

4. The Jury Rejected MCI's Argument That No Warning Was Required Because of "Information Overload"

MCI had its warning's expert (Krauss) comment on the fact that Cunitz did not offer an alternative warning. 36 App. 8926:2-8 Krauss then opined that MCI's decision to provide no warning whatsoever was justified to avoid "over warning" or "providing information overload" to drivers. 36 App. 8928:8-24 As the "information overload" claim spotlights, where there are no warnings whatsoever provided by a manufacturer (a relatively scarce event), the focus is on the need to warn -- not on the specifics of an alternative warning.

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

> MR BARGER: "So Mr. Hubbard is who they say should give a warning to that there could be air displacement or an air blast as you're driving down the road. I assure you bus drivers who had 30 years' experience know that." 41 App. 10119:9-13

MCI clearly tendered the alternative warning issue to the jury and lost. As the Nevada Supreme Court said in Zhang v. Barnes, 382 P.2d 878, (Nev 2016) (unpublished), "[a]party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it."

E. The District Court Properly Determined That the Bus Driver Could Have "Acted in Accordance" With a Warning and Avoided the Accident.

MCI did not preserve this argument for appeal because it was not set forth in the pre-verdict Rule 50(a) motion. The district court ruling on this point is found at 50 App. 12375-76. Again, MCI has failed to appeal this procedural determination (or even discuss it). This Court should reject this argument on procedural grounds.

In the event that this Court desires to dig into the weeds of this case and review the evidence regarding how the accident occurred, the district court succinctly explained the error in MCI's contention (OB 46,47) that a warning could not possibly have been heeded because the bike "suddenly appeared" when "it was too late to avoid the collision;" stating:

> Defendant's first argument in the motion is the Plaintiffs failed to prove causation on the failure to warn theory because the facts

> showed that Dr. Khiabani suddenly appeared in Mr. Hubbard's peripheral vision, and the accident happened too quickly for a reasonable jury to find that Mr. Hubbard could have avoided the accident. This argument ignores the full facts as presented in the Plaintiffs' case-in-chief, specifically the testimony of Mr. Hubbard that he observed the bicycle turn onto Pavilion Center before Mr. Hubbard turned the coach until Pavilion Center. Thus, although Mr. Hubbard testified that he did not see Dr. Khiabani's bicycle for 450 feet before the accident, the "split-second" that the accident occurred was not the first time Mr. Hubbard was made aware of the bicycle's presence. **Taking all inferences in Plaintiffs' favor, Plaintiffs elicited sufficient evidence for a reasonable jury to find that, had Mr. Hubbard been adequately warned about the dangerous nature of the coach, he would have driven differently as early as when he turned onto Pavilion Center – for example by driving in the left lane instead of the right lane, or by driving slower so as not to pass the bicycle – and that his different action would have avoided the accident**. Thus, the accident did not happen too quickly for a reasonable jury to find that a warning would have made a difference.

50 App. 12376:22 to 12377:10 (Bold added) In addition to the accident eliminating scenario described by the district court, an adequate warning could have prevented the accident in several other ways.

1. Hubbard Could Have "Acted in Accordance With the Warning" By Immediately Taking the East Thru Lane Instead of the West Thru Lane When First Turning on to Pavilion Center

Elaborating on the potential avoidance action discussed by the district court, Hubbard saw and slowly followed Dr. Khiabani down Charleston without passing him. Hubbard then turned into the right travel lane on Pavilion Center after Dr. Khiabani turned onto Pavilion Center. 26 App. 6333:16-21 If adequately warned of the dangerous suction of the subject bus, Hubbard could have taken the

left thru lane on Pavilion Center instead of the adjoining right thru lane. Indeed, prudent drivers aware that their vehicles created a dangerous 20 pound suction would give a full lane of clearance. If Hubbard had taken the left turn lane when entering Pavilion Center and thereby "acted upon" the warning, the accident would not have occurred. MCI focuses solely on the last second bus and bike locations and ignores the likelihood that a well-informed driver would have taken the safer of two travel lanes at the outset.

2. Hubbard Could Have "Acted in Accordance With the Warning" By Continuing to Follow Dr. Khiabani Down Pavilion Center Without Passing (Just As Hubbard Did on Charleston)

If Hubbard was warned of the serious aerodynamic flaw of the J4500 compared to safer buses with streamlined features, the jury could reasonably have concluded that Hubbard would have continued to slowly follow the doctor down Pavilion Center without passing. Hubbard did in fact follow Dr. Khiabani slowly down Charleston; suggesting that Hubbard would have continued to do so on Pavilion Center if warned of the J4500's extreme 20 pound suction danger. If Hubbard did not pass Dr. Khiabani on Pavilion Center, no accident occurs.

3. Hubbard Could Have "Acted in Accordance With the Warning" By Giving the Bicycle Lane Wider Berth on Pavilion Center

If warned of the aerodynamic problems of the J4500 compared to safer buses, Hubbard could have moved to the extreme east of the right thru lane on Pavilion Center (if he still took the right thru lane instead of the left thru lane) to

create more distance between the bus and the bike lane. The Red Rock video shows the J4500 in the middle of the right thru lane -- not hugging the east side of the right thru lane. The jury could reasonably conclude that Hubbard could have "acted in accordance with the warning" by moving to the far east side of the right thru lane. Again, this would have avoided the accident. For the foregoing reasons, there were multiple actions that Hubbard could have taken that would have resulted in no accident if Hubbard had been apprised of the acute aerodynamic danger.

F. The District Court Did Not Abuse Its Discretion in Precluding Expert Testimony About the 3 Foot Law

1. MCI Could Not Foresee in 200**7** That NRS 484B.270 Would Be Enacted in 20**11** and This Was Not Why MCI Did Not Provide a Warning

MCI made the fanciful claim below that MCI did not provide a warning of the aerodynamic hazard because MCI gave "appropriate consideration of **existing law** when selecting issues about which to warn." 51 App. 12679:4-5 (Bold added) MCI posited that "[i]n determining whether to issue a warning, it is appropriate for a manufacturer to consider what conduct is **already illegal**" and that "it is reasonable for a manufacturer to consider what conduct is **already against the law**." 51 App. 12680:4-5 and 14-15 (Bold added) Finally, MCI told the district court that Dr. Krauss' proposed opinion regarding NRS 484B.270

was based entirely upon the theory that MCI did not provide a warning because of existing Nevada law:

> Dr. Krauss' opinion was not based on or about whether Dr. [sic] Hubbard was negligent. Rather, his opinion was about what a **manufacturer thinks** when deciding to issue a warning. 51 App. 12679:22-24 (Bold added)

The assertion that MCI did not provide a warning because of the "existing law" in Nevada regarding the 3 foot rule cannot withstand the slightest scrutiny. This is why MCI does not disclose in the brief the inane argument for admissibility that MCI made to the district court.

MCI sold the bus on September 4, 200**7**. NRS 484B.270 was passed by the legislature in May 20**11** -- almost 4 years **after** the bus was sold. Unless Nostradamus was an MCI employee in 2007, there is no possible way that MCI could have foreseen that the Nevada legislature was going to enact a new law creating a 3 foot rule when passing bikes in 2011 that would obviate the need for MCI to issue a warning.

No MCI employee testified that a potential Nevada statute was the reason that MCI did not provide a warning of the aerodynamic hazard. For these reasons, MCI's foundational tender to the district court that MCI decided not to issue a warning in 2007 because MCI somehow predicted that Nevada would enact NRS 484B.270 in 2011 was utter hogwash. Because this was the basis offered to the district court for the Krauss "opinion" that a warning was not needed because

of "existing" Nevada law, the district court did not abuse its discretion when it properly excluded portions of the Krauss testimony.

2. The Bus Driver Did Not Know About NRS 484B.270 Until After the Accident

Assuming arguendo that the Nevada law had been enacted in 2007 and the bus sold in 2011 (the opposite of the actual facts) and that, in addition, that MCI did prove that MCI did not give a warning because MCI knew of NRS 484B.270, the Krauss "opinion" was still inadmissible. Hubbard not knowing about the 3 foot law until long after the accident gutted any foundation upon which Krauss could base his proposed opinion. 11 App. 2565:11-13 Because of the driver's lack of knowledge of the law that MCI wanted to substitute for a warning, an advisory about the extreme hazard of the bus was essential (i.e., the 20 pound sucking force when passing). This is a second reason to exclude any Krauss testimony that a warning was not needed because of the law.

3. MCI Asserted That the Nevada Statute Did Not Apply Because There Was An Adjacent Bike Lane

While MCI's brief contends that NRS 484B.270 applies and was violated (OB 62), MCI trial counsel admitted to the district court that "there is an interpretation of the statute" that NRS 484B.270 does **not even** apply:

> MR. ROBERTS: We're not talking about the portion of Nevada law that would require him to change lanes, which he [Hubbard] apparently violated, **although there is an interpretation of the statute that he didn't have to change lanes because the bicycle was**

> **not occupying his lane but a bicycle lane**, and, therefore, he was already in the next lane. 33 App. 8179:24 to 8180:5 (Bold added)

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

4. The Argument That Krauss Could Opine Regarding the 3 Foot Rule in Order to Rebut Khiabanis' Expert Fails at the Outset Because the Khiabanis' Experts Did Not Render Any Such Opinion

MCI also tried to sneak in the Krauss testimony that Hubbard violated the Nevada law requiring 3 foot separation by arguing that it was needed to rebut the testimony by the Khiabani's warning expert that MCI should have warned that the air blast extended 3 feet. 33 App. 8176-77 But Khiabani's warning expert (Cunitz) did not propose that MCI warn that the bus be driven 3 feet from bikes -- as MCI falsely asserted. Hence, there was no warning "opinion" for MCI warning expert Krauss to counter with the proposed testimony about the Nevada 3 foot law:

> MR. KEMP: First of all, as Mr. Roberts accurately said, our expert did not give an opinion that the warning should be that they should stay 3 feet away. That was not the testimony by our expert . Our expert merely said that they should give some kind of warning of the air blast, not that it should be 1 feet away, not that it should be 3 feet away, not that it should be 5 feet away, just a warning of the air blast. Mr. Roberts has constructed this 3-foot thing solely out of thin air so he can try to violate the Court's motion in limine.
>
> He wants to get this expert to testify that the bus driver was negligent because either he didn't know or didn't comply with Nevada law that he [Roberts] says has criminal penalties requiring 3 feet clearance.

> So, clearly, what they're trying to do is violate motion in limine No. 1 on contributory negligence. And this expert's [Krauss] report is replete with those kind of statements. 33 App. 8177:19 to 8178:12

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

After the Khiabanis pointed out that Krauss could not be rebutting the non-existent Cunitz opinion regarding a 3 foot warning, MCI changed gears and said that **MCI Expert Krauss** (not Khiabani's warning expert Cunitz) had determined that a "maintain 3 feet" warning was "the most appropriate warning" and that this warning was not required because NRS 484B.270 already existed:

> MR. ROBERTS: We're saying that **the most appropriate warning here** -- which I didn't make up; **this was my expert's opinion** -- that, based on his review of their experts, **the most appropriate warning to give would be maintain 3 feet, and there's already a law**. 33 App. 8184:19-24 (Bold added)

The admission that MCI's proposed Krauss testimony on the 3 foot law was needed to rebut Krauss's own contrived opinion on "the most appropriate warning" -- not the Khiabani's expert opinion -- demonstrates in full that MCI was simply ginning up excuses to use Krauss to violate the district court ruling on Motion In Limine No. 1 (which prohibited MCI from arguing driver negligence as a defense).

5. The District Court Properly Determined That the Prejudice of Admitting the 3 Foot Law Substantially Outweighed Any Probative Value

MCI's proposal to have Krauss testify that MCI did not provide a warning in 2007 because of the 3 foot requirement in NRS 484B.2702 would have allowed MCI to establish that the bus driver was negligent per se for violating such law. But such third party negligence is not a defense in a product liability; as the district court ruled in granting Motion in Limine No. 1. In other words, MCI was attempting to introduce a Nevada law and violation thereof at the end of the trial that had been explicitly precluded.

The district court properly determined that the prejudice of admitting such testimony was outweighed by any potential probative value:

> With respect for NRS 484B.270 and 211 -- wait 484B.270. Okay. So here's my analysis: This is a strict liability case. And, as stated in the motion in limine, driver negligence is foreseeable and therefore is irrelevant in a strict liability case. Here, mention of law that the driver, Mr. Hubbard, was required to follow it necessarily raises, in this Court's view, the question in the jury's mind as to whether he was negligent.
>
> Thus, number one, **mentioning the law at all is highly prejudicial**.
>
> **Two, with respect to probative value, when Mr. Hubbard has said is -- he is not aware of the law**, then **the expert's conclusion would be wrong because it is based upon the assumption that the driver knows the law** and that he is not -- the case -- that is not the case here.
>
> Three, these issues -- concerning all the above issues, **the probative value is substantially outweighed by the risk of unfair prejudice**. Dr. Krauss cannot mention the existence of the statute or any

> conclusion based upon the statute; however, Dr. Krauss can give opinion or discuss 3 feet is a safe distance based upon his review of plaintiffs' experts.

33 App. 8222:18 to 8223:20 This makes it crystal clear that the district court properly applied a balancing test that weighed the probative value against the prejudice. For the reasons set forth above, the district court did not abuse its discretion in so ruling.[17]

G. Theoretical Future Income Taxes Are Not Admissible to Reduce Future Wage Loss

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

The majority rule is that future tax income should not be considered when calculating future earnings in a wrongful death case.[18] New York's High Court

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[17] The district court allowed Dr. Krauss to give the ultimate opinion that MCI sought, i.e., that he did not think a warning would be either necessary or effective (but only precluded Dr. Krauss from discussing NRS 484B.270). 36 App 8925:13-15 (Krause opined that "it's unclear that an instruction to stay more than 3 feet away would change what drivers are already trying to do.")

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

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

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

Klawonn v. Mitchell, 105 Ill.2d 450, 475 N.E.2d 857 (Ill. Sup. Ct. 1985) (following majority rule and expressly rejecting MCI's argument that the minority rule adopted by the U.S. Supreme Court in FELA cases required such instruction in a state court negligence case; "[a]lthough Liepelt has established that in FELA actions juries, upon request, must be instructed that any damages awarded are not subject to taxation, this case involves purely State law, and Liepelt is not directly controlling."); Hinzman v. Palmanteer, 81 Wash.2d 327, 501 P.2d 1228, 1232 (Wash. Sup. Ct. 1972) (en banc) ("The majority of the courts considering items to be deducted from the decedent's gross income and fixing damages for destruction of his earning capacity have held that income tax on those probably future earnings should not be taken into consideration."); Cox v. Superior Court, 120 Cal.Rptr.2d 45, 47, 98 Cal.App.4th 670 (Ct.App.2nd 2002) (following "the settled law in California that the trier of fact is not to consider evidence of tax considerations in determining damage awards.")

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

Nevada follows the majority rule except in very special circumstances "when the likelihood that the jury will consider tax consequences is magnified by discussion of tax-related issues during the trial." Otis Elevator Co. v. Reid, 101 Nev. 515, 706 P.2d 1378, 1382 (Nev. 1985) The Reid Court explicitly discussed the minority rule in Norfolk x W. Ry. Co. v. Liepelt, 444 U.S. 490 (1980) [hereinafter "Liepelt"] involving an FELA case and rejected this rule for Nevada. Liepelt is the principal case relied upon by MCI. (OB 69)

The jury award for loss of support in this case was very small, i.e., $1 Million for Aria, $1.2 Million for Keon and $500,000 for the then deceased widow.[19] Pre-verdict, MCI predicted that the loss of support award could balloon

[19] MCI's conflicting claims in the brief that there was a "firing" of Dr. Khiabani (OB 71), that there was no a firing but he "had been told that he was going to lose his job" (OB 79) and that his employment "was about to end--if it had not already ended" (OB 71) are based upon the rankest of hearsay, i.e., a statement in a news telecast that neither quotes anyone nor cites documentary support. More specifically, MCI cites "51 App. 12, 513" (OB 18) which is a printout of a TV 8 newscast that states without any supporting information that: "[a] day before he died, Khiabani was told by his employer, the University of Nevada, Reno School of Medicine that he was getting let go." This unverified comment in a news report is both inadmissible evidence and suspect -- given that there is no authority cited whatsoever in support of the claim. Worse, MCI argued a completely different fact pattern to the district court -- claiming that Dr. Khiabani was going to continue to be employed for **months** after the April 18, 2017 accident but was not going to be transferred to a new position. 51 App. 12623:23-25, 12624:1-6; ("Dr. Khiabani was not going to be employed after the UNLV transfer on July 1st, 2017.") In further response, as a tenured professor in

to $15 Million if the inappropriate Liepelt instruction requested by MCI was not given. 38 App. 9291:24 to 9292:2; "**if the jury isn't instructed on taxes and awarded 15 million**, they will have awarded 5 million more than it would have been possible for Dr. Khiabani to pay them [the children] if he had paid his taxes.") Where the jury actually awarded only $2.7 million total (far less than $15 million), the dire predictions made by MCI were proven false.[20] Regardless, the requested instruction was not appropriate under Nevada law following the majority rule.

2. The District Court Correctly Concluded That the Probative Value of Taxation Evidence Was Substantially Outweighed By the Prejudice

In addition to following the majority rule, the district court correctly determined that "the probative value is substantially outweighed by the risk of unfair prejudice and confusing the jury with respect to the taxation issue." 39

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the university system, Dr. Khiabani could not have been fired at the whim of a supervisor. He would have been entitled to a hearing to contest any termination and such hearing would also have been subject to judicial review. State ex rel. Richardson v. Board of Regents of Univ. of Nev., 70 Nev. 144, 149, 261 P.2d 515 (1953).

[20] MCI's outrageous smear that Dr. Khiabani committed "outright [Medicare] fraud" (OB 18) is belied both by the very documents that MCI references -- which actually state that Dr. Khiabani "wasn't close to being the worst offender [of numerous audited doctors]." More tellingly, the UNR medical school dean referred to the "audit findings as '**routine**' and '**typical**' adding that contrary to our [Channel 8] report, the audit made '**no findings of fraud**.'" 51 App. 12, 517 (Bold added) Even MCI admits that "UNR released a statement noting that the audit "does not make findings or conclusions related to Medicare fraud or abuse." (OB 19 n. 8) MCI's proclamations of "outright fraud" are flagrant sensationalism since UNR characterized the audit as "routine" and "typical."

App. 9630 to 9631 The Khiabanis submit that this was a wise decision given the resulting "parade of tax experts" and "Pandora's box" that various High Courts predict would result if the minority rule were adopted.

H. The District Court Did Not Abuse Its Discretion in Determining That MCI Did Not Prove That It "Could Not Have Obtained Employment Records During Pretrial Discovery" Where MCI Failed to Forward the Employment Release For 7 Full Months

Pursuant to NRCP 59(a)(1)(D), a party is only entitled to a new trial on the basis of newly discovered evidence where it could not, "with reasonable diligence," have discovered and produced the evidence at the time of trial. Because the judiciary has a public interest "… in protecting the finality of judgments,' courts generally embrace restrictive discovery rights post-trial, **requiring a prima facie demonstration of success on the merits**."' U.S. ex rel. Free v. Peters, 826 F.Supp. 1153, 1154 (N.D. Ill. 1993) (citing H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1118 (6th Cir. 1976) (Bold added) [hereinafter "Goodyear"][21]

[21] Goodyear involved a Rule 60(b) attempt by the losing party to overturn a judgment on the basis of fraud. Following entry of judgment, Goodyear learned of information that caused it to believe that the opposing party failed to disclose critical documents during discovery. 536 F.2d at 1118 Goodyear argued the concealed documents would support its request to vacate the final judgment and sought post-judgment discovery on that basis. Id. The district court denied the request for post-judgment discovery.

On appeal, the Sixth Circuit first observed that "Goodyear has not cited, and we have not found, any cases dealing with the **right** to post-judgment discovery.

Curiously absent from MCI's 52 Volume Appendix is the district court's May 23, 2018 Order denying MCI's Motion for Limited Post Trial Discovery:

> A new trial based on new evidence is only feasible if the party's "substantial rights" were materially affected due to the discovery of evidence "which the party could not, with reasonable diligence, have discovered and produced at the trial." This requirement implicitly supports the policy of finality of judgments and respect for the value of a jury's time and effort.
>
> . . . .
>
> However, under the NRCP 59 standard, the question is not whether Defendant had asked for this specific information that it now seeks, but rather whether Defendant could have uncovered these facts in the course or reasonably diligent discovery. **Thus, the issue for the Court would be whether reasonably diligent discovery could have led to disclosure of the sought after information, and whether Defendant failed to conduct this reasonably diligent discovery**.
>
> . . . .
>
> **Knowing that Dr. Khiabani's current and future economic well-being would be a vital aspect for litigation, it would be reasonably diligent to pursue discovery of every fact that would enable the**

…." Id. (Bold added) Nevertheless, the Court affirmed the district court's decision denying Goodyear's extraordinary request for post-judgment discovery for the purpose of attacking a final judgment:

> **Goodyear is plainly not entitled to discovery of documents it did not request in pretrial discovery**…. Goodyear apparently believes that it is entitled to broader discovery so that it can fish for other documents arguably within the class of documents which it could have requested in pretrial discovery. **We do not consider the granting of post-judgment discovery a proper vehicle for reviewing the integrity of pretrial discovery. Allegations of nondisclosure during pretrial discovery are not sufficient to support an action for fraud on the court.** Id., citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2870, p. 254 (1973) (Bold added).

> **parties to accurately predict what the Plaintiffs' actual loss of support would be**. This would include, at least, seeking to determine the specific terms of Dr. Khiabani's employment contract, how long the contract was going to remain in effect had Dr. Khiabani not passed away, whether the contract would have been renewed, and whether this salary or benefits would be likely to change over the remainder of his foreseeable employment. Further, any inquiry into these basic facts sought from Dr. Khiabani's employer could have, and most certainly would have, produced either the very information Defendant now seeks, or a more general response that would be sufficient to spur the Defendant to investigate the issue, such as a response that Dr. Khiabani's contract would not have been renewed.
>
> **However, Defendant here evidently did not pursue any discovery on this topic**.

1 RApp. 114-120 ("Underline by district court, bold added) Where MCI "did not pursue any" employment discovery, there can never be "fraud upon the court." See n. 21, supra.

The district court also specifically focused on MCI's inexplicable failure to transmit an executed employment authorization for 7 full months before trial:

> **While the above is sufficient for the Court to find a lack of diligence, the conclusion is supported by the fact that Plaintiffs provided to Defendant an authorization to obtain Dr. Khiabani's employment records on July 26, 2017, but evidently Defendant never followed through on actually requesting the very information that it now seeks to obtain. Moreover, Defendant evidently has no explanation for why this information was not actually sought after the authorization was given**.
>
> Finally, the Court disagrees with Defendant's insinuation that its discovery efforts were diligent in light of the expedited discovery schedule in this case. Defendant was represented by a veritable army of gifted and seasoned attorneys, including several attorneys admitted to practice on a pro hac vice basis, and Defendant was able to complete extensive discovery on every

other aspect of the case. **There is no explanation for why such a strong legal team did not try to discern an accurate picture of Dr. Khiabani's future income, which was a critical factual issue in this case**, even when the Defendant hired economists specifically to try to predict Dr. Khiabani's economic future.

Id. at 3-6 (Underline by district court, bold added).

In a second order dated February 1, 2019, the district court expressly rebutted MCI's argument that NRCP 16.1 required that the Khiabani family do MCI's discovery and denied the motion for limited new trial on similar grounds:

> The Court is also not convinced by Defendant's argument that the difficulty in discovering this evidence is exhibited by Plaintiffs' lack of knowledge, or that Defendant was entitled to rely on Plaintiffs' duty to disclose such information. NRCP 16.1 requires a party to disclose the identity of individuals likely to have discoverable information, but it does not require a party to conduct discovery for the other parties. Here, it appears Plaintiffs disclosed Dr. Khiabani's employer, which was sufficient to satisfy Plaintiffs' duty under NRCP 16.1; Plaintiffs were under no duty to actually discover any information from Dr. Khiabani's employer, just to enable Defendant to do so. 50 App. 12381

The district court again zeroed in on MCI's incredible failure to forward the executed employment authorization for 7 months:

> As stated in the Court's prior order, Defendant had access to the "new evidence" had it simply attempted to get it because **Plaintiffs executed an employment released prepared by Defendant on July 27, 2017 – nearly five months before the discovery cut-off and nearly seven months before the trial commenced on February 12, 2018**. As also stated in the Court's prior order, **Defendant "evidently has no explanation for why this information was not actually sought after authorization was given."** Moreover, even if the Court were to find that Plaintiffs' lapsed on their discovery obligations, this Court does not find that such a finding would render

> the "new evidence" undiscoverable with due diligence, so a new trial is not warranted on these grounds.

50 App. 12381-82 (Bold added) Why MCI's brief does not disclose that this issue had been rigoursly considered below or advise this Court of the true reasons for the district court rulings remains unknown.

Without attempting to gild the lilly, the Khiabanis' emphasize several points. First, the defense in personal injury cases typically conduct rigorous discovery on damages elements -- including income. Where MCI told the district court that $15 Million in probable support could be awarded, MCI's failure to do any discovery whatsoever in this area is indefensible. MCI's implicit argument that it could shirk this standard discovery task and instead rely upon its adversary to do so is non-sensical. Second, MCI hides from the glaring error cited by the district court that MCI was given an employment authorization on July 27, 2017 and failed to use it for 7 months before trial. Worst, MCI concealed from the district court (and hides to this day) the real reason why MCI did not simply send the employer the executed employment authorization. As the district court said, MCI "evidently has no explanation for why this information was not actually sought after the authorization was given." 50 App. 12381-82

The most likely answer is that someone at MCI simply screwed up and failed to send out the employment authorization for 7 full months before trial. If so, MCI is basically asking this Court to penalize its adversary for MCI's own

monstrous mistake. Of interest, MCI did not offer one single affidavit to the district court to justify its amazing failure to perform income discovery or to forward an employment authorization -- an endeavor taught in Discovery 101. While MCI does suggest that discovery was "chaotic" (OB 81), the truth is that MCI sat on the executed employment authorization for 7 full months.

But there is more. MCI accuses the Khiabanis of "fraud upon the court" [22] because of the answer to interrogatory 17 that MCI calls "materially incomplete." (OB 78, 79) MCI omits mention that this interrogatory answer was signed by Katy, the Khiabani widow, and that MCI failed to ask Katy about this answer (or

[22] Without one shred of evidence, MCI accuses both the Khiabani family and their counsel of committing a fraud upon the Court. Starting with the Khiabani family, MCI omits mention that **Dr. Khiabani himself was not told that there were any concerns regarding his work**. 51 App. 12601; June 17, 2016 email from Dean Schwenk to Dean Atkinson: "**We have been particularly careful to not do anything to let this faculty member know of the investigation**, because of our concern about potential retaliation against the relator(s)." (Bold added) As for the family members that survived his death, a preservation deposition was taken of Dr. Katy Barin, the widow, on September 22, 2017 -- 20 days before her death. Despite a reference to Dr. Khiabani's employment during direct exam (31 App. 7610:12-19), MCI failed to ask the Katy any questions about Dr. Khiabani's employment. MCI deposed Aria and Keon, the 2 minor heirs, on November 3, 2017 and January 4, 2018. Again, MCI failed to ask any questions about employment. Finally, Aria testified at trial on March 12, 2018. 30 App. 7732 No question was asked about employment. Based upon this record, it is impossible to support a claim of fraud by the widow or the minor heirs -- yet MCI loudly asserts it by stating that "Plaintiffs [i.e., the widow and minor heirs] gave a materially incomplete response to MCI's interrogatory . . . ." (OB 78) But MCI told the district court that ". . . it is entirely possible that Plaintiffs were also unaware of these developments . . ." and that Plaintiffs could not provide information they did not have." 51 App. 12508:14-17

about income in general) when MCI deposed her weeks before Katy's untimely death on October 12, 2017. It is impossible to reconcile MCI's alibi that MCI could not be expected to discover employment information "When Even the Medical School Tried to Keep the Story under Wraps" (OB 81) and that the "Press Reports Were Surprising" (OB 80) with MCI's related assertion that the dying Khiabani widow "had reason to know" about it and filed a "misleading" interrogatory answer.[23] (OB 77)

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[23] Focusing on the false accusation made against counsel for the Khiabani family, MCI asserts that MCI attorneys could not possibly discover negative employment evidence because "the medical school tried to keep the story under wraps . . . ." (OB 81) MCI goes farther and says "it is clear that MCI very likely would never have discovered this evidence, no matter how extensively it might have sought it." (OB 81) Then MCI flip-flops and asserts that counsel for the Khiabani family both knew of the supposed negative employment information and intentionally concealed it during discovery; "Counsel's Failure to Correct a **Known** Misimpression Is a Fraud on the Court." (OB 73) (Bold added) MCI cites no evidence for this outrageous libel. MCI never explains why the attorneys for MCI "would never have discovered this evidence, no matter how extensively it might have sought it" yet counsel for the Khiabani family (both retained **after** the accident) should somehow have discovered this theoretical evidence. Worse, MCI's brief asserts without a scintilla of evidence that family counsel not only discovered the negative evidence but intentionally concealed it. However, MCI told the district court the exact opposite; stating that both the surviving Khiabani family and its lawyers were unaware of the allegations: ". . . **we have revelations that I trust at this point are shocking to all parties**." (51 App. 12608) (Bold added) Directly opposite to what MCI now claims, MCI admitted below that it did not have any evidence of fraud on the court: "**And in terms of fraud on the Court, I don't want to allege that** because I don't know right now what they knew. Nobody knows, I assume, but we need to find out." (51 App. 12629) (Bold added) Apparently, the need to spice up this brief motivated MCI to claim a fraud on the court that it earlier admitted it had no evidence regarding and was not alleging.

The Khiabanis respectfully submit that the district court properly found that MCI did not prove that it could not have obtained the employment records during pretrial discovery where (1) despite fearing $15 Million probable support damages, MCI did not do any discovery on income other than request an employment records release to be signed by the Khiabani widow; (2) MCI failed to send the employment records release to Dr. Khiabani's employer for 7 full months before trial; and (3) MCI did not ask the widow (or minor heirs) any questions regarding income yet now claims that Katy committed a fraud upon the court by providing a "misleading" interrogatory answer.

I. A Product Manufacturer Found Strictly Liable Is Not Entitled to An Offset For Monies Paid By a Negligent Party Outside the Distribution Chain

1. Giving Manufacturers Offsets for Unrelated Negligence Recoveries Contravenes the Prime Tenent of Strict Liability

The primary rationale for strict liability is the public interest in discouraging the marketing of defective products by placing "the responsibility for whatever injury they may cause upon the manufacturer, who . . . is responsible for its reaching the market." Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 362, 150 P.2d 436, 441 (1944) (concurring opinion by J. Traynor) Prosser has referred to this as the "risk-spreading" argument "which maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to

do so, and through their prices to pass such losses on to the community at large." Prosser, The Assault Upon The Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1120 (1965)

The "maximum possible protection" can only be achieved by putting "full responsibility for the harm" on the manufacturer:

> The public interest in human life, health and safety demands the **maximum possible protection** that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and **it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause**, even though the supplier has not been negligent.

Id., 1122. As Justice Traynor wrote in his most famous opinion, "[t]he purpose of such liability is to ensure that costs of injuries resulting from defect products **are borne by the manufacturers** . . . ." Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 63 (Cal. Sup. Ct. 1963) (Bold added)

Instead of taking "full responsibility" and instead of bearing all liability, MCI suggests that manufacturers of defective products should only be partly responsible because some of the burden should be shifted to the persons using the products under the concept of an offset. More fully, MCI argues that it should not have to pay the full $22 Million that it now owes and that its liability as a manufacture should be reduced by the $5 Million paid by the product user (the bus company and its driver). This discounting of "full responsibility" undercuts the prime purpose of strict liability in two ways. First, "risk-spreading" is not effectuated because the manufacturer is

only partially responsible for the cost of the injury and is no longer the entity taking "full responsibility for the harm they cause." Prosser, supra at 1122. Second, the financial incentive on the manufacturer to make a safer product or provide adequate warnings is significantly lessened. Absent the full economic incentive, the "maximum possible protective" against dangerous products is not achieved. By giving a manufacturer an offset for payments by negligent users, the result can only be lesser protection to the community (not the "maximum possible protection") which hurts the public interest.

2. MCI Was Not Entitled to An Offset Under NRS 17.245(1)(a)

The district court refused MCI's request for an offset in a fairly scholarly opinion. First, the inapplicability of NRS 17.245 was addressed:

> MCI is not entitled to an offset under NRS 17.245 because defendants that are liable for strict products liability, such as MCI, have no right to contribution from any other defendants. Norton v. Fergstrom, 2001 WK 1628302 *5 (Nev. Nov. 9, 2011); see also Andrews v. Harley Davidson, 106 Nev. 533, 537-38, 796 P.2d 1092, 1094 (1990); Central Telephone Co. v. Fixtures Mfg., 103 Nev. 298, 299 738 P.2d 510, 511 (1987); NRS 17.225, NRS 41.141. While Norton is unpublished and cannot be used as precedent because it was decided prior to 2016, the Court finds its rationale persuasive and agrees with the Nevada Supreme Court's rationale. Norton was decided in 2001, after NRS 17.245 was enacted in 1973 and amended in 1997. NRS 41.141 was enacted in 1973 and amended in 1979, 1987, and 1989, and also precedes the Court's decision in Norton. Contributory negligence is not a defense in strict products liability. Andrews v. Harley Davidson, 796 P.2d 1092 (Nev. 1990). Because contributory negligence is not a defense in strict products liability, MCI is not entitled to contribution. Id.

. . . .

> NRS 17.245 applies to joint tortfeasors, but is silent concerning an offset for defendants found liable in strict products liability. But, it follows logically, that similar to NRS 17.255, which bars intentional tortfeasors from contribution, a defendant found liable in strict products liability would also be barred from receiving contribution from the other defendants. Unlike other product liability cases where defendants receive offsets, here, none of the other defendants in this case acted in concert with MCI in manufacturing the coach. 50 App. 12484-85

After shredding MCI's NRS 17.245 argument, the district court next explained why NRS 14.141 does not aid MCI:

> MCI also argues it is entitled to an offset under NRS 41.141. Pursuant NRS 14.141, defendants are responsible for 100% of plaintiff's injuries if their liability arises from a claim based on strict liability, an intentional tort, or any of the other enumerated categories. Café Moda v. Palma, 128 Nev. 78, 272 P.3d 137 (Nev. 2012). 50 App. 12485

Finally, the District Court analyzed the applicable Nevada caselaw:

> Plaintiffs analogized this matter to Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043 (Nev. 2000). In Evans, the Court enforced the principal that although offsets are typically allowed in a case that involves joint tortfeasors, there is a carve-out for intentional torts. Intentional tortfeasors "may not apply credits from settlements by their joint tortfeasors in reduction of judgments against them arising from their intentional misconduct. Id. Moreover, equitable offsets are based on a right to contribution and intentional tortfeasors have no right to contribution under NRS 17.225. Id.
>
> Just like the intentional tortfeasors in Evans, MCI has no right to contribution from the settling defendants. See Andrews, Norton Co., Café Moda, and NRS 41.141, supra. As in Evans, MCI has no right to receive contribution from the settling defendants – either directly through a contribution claim or indirectly through a post-judgment

> offset. MCI was never entitled to seek contribution or indemnity from any other tortfeasors. NRS 17.245 cannot and did not bar MCI from pursuing contribution claims that never existed in the first place; and MCI is not entitled to indirectly receive a nonexistent right to contribution under the guise of an "offset."

50 App. 12485 The well-reasoned decision of the district court stands on its own.

3. MCI Has No Right to Contribution From Michelangelo and Hubbard Because Contributory Negligence Is Not a Defense to a Strict Products Liability Claim

It is well-settled Nevada law that "**contributory negligence is not a defense in a strict products liability action**." Andrews v. Harley Davidson, 106 Nev. 533, 796 P.2d 1092, 1094 (Nev. 1990) (Bold added) For this reason, defendants that are liable for strict products liability have no right to contribution from any other defendants. Norton Co. v. Fergestrom, 2001 WL 1628302, *5 (Nev. Nov. 9, 2001). In Norton, the plaintiff (Fergestrom) was injured when a grinding wheel made by the Norton Co. exploded while he was sharpening a knife on the wheel. Id. at *1. Fergestrom sued the owners of the wheel (Matthews) for negligence and Norton for strict products liability. Id. The district court entered summary judgment on Norton's cross-claim against Ferguson. Id.

This Court affirmed entry of summary judgment:

> **We conclude that Norton was not entitled to contribution from Matthews because contributory negligence is not a defense in a products liability action.** *Id*. (bold added), citing Andrews, 796 P.2d at 1094; *IU*, 738 P.2d 510, 511 (Nev. 1987); and NRS 17.225

(Nevada's contribution statute) and NRS 41.141 (Nevada's comparative negligence statute).

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

This is dispositive here. The judgment against MCI is based on strict products liability failure to warn. The alleged liability of Michelangelo and Hubbard was based on negligence. To the extent that MCI would have otherwise been able to assert contribution claims against Michelangelo and Hubbard, those claims would have necessarily been premised on contributory negligence. But because contributory negligence is **not** a defense to a product liability claim, MCI has no right to receive contribution from Michelangelo or Hubbard.[24]

4. Denying An Offset Will Not Result in An Impermissible or Inequitable Double Recovery

MCI argues that this Court must award it an **equitable** offset or Plaintiffs will impermissibly or inequitably receive a "double recovery." (OB 83-85) If

[24] Because Norton eliminates any argument that Nevada law requires an offset, MCI asks this Court to instead apply the laws of Hawaii and Ohio. (OB 95, 96). Gump v. Wal-Mart Stores, Inc., 93 Haw. 428, 5 P.3d 407 (Haw. 2000) involved a slip-n-fall case that focused on a landlord (Wal-Mart) and tenant (McDonald's) that were **both sued for negligence** and, hence, were joint tortfeasors. Gump adds nothing to the analysis herein. Bowling v. Heil Co., 31 Ohio St.3d 277, 287 n.6, 511 N.E.2d 373, 381 x n.6 (Ohio Sup. Ct. 1987), gave the strictly liable elevator manufacturer a setoff for a negligent defendants settlement because an Ohio statute provided that a settlement by "one of two or more persons liable in trot for the same injury . . . reduces the claim against the other . . ." Nevada has no such offset statute so Heil provides no guidance herein.

it is given an offset, MCI will receive a windfall by paying less than the amount that it would otherwise have to pay. If the Khiabanis had not sued the bus company and the driver, MCI would get no credit because there would be no $5 Million settlement from the bus company and its driver and MCI has no right of contribution. MCI should not profit on the Khiabani's success against other entities (i.e., get a windfall) when MCI would get no credit if only MCI had been sued.[25]

5. The Good Faith Settlement Motion Does Not Provide a Basis for Estoppel

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

[25] MCI cites Elyousef v. O'Reilly x Ferrario, LLC, 126 Nev. 441, 444 245 P.3d 547, 549 (2010) in support of its double recovery argument. (OB 85, 100) But Elyousef involved negligence claims against both defendants – not a strict liability claim and a negligence claim.

The district court rejected MCI's estoppel argument (OB 87-89) for the following reasons:

> **Here, element three is not met.** The plaintiff did not successfully assert their prior position because the Court granted the motion for good faith settlement based on Plaintiffs' assertion that the non-settling defendants will receive an offset. When conducting the analysis of Plaintiffs' good faith settlement, the Court instead considered the relative liability of the defendants and determined that the settlement amount was proper. **The Court did not adopt the plaintiffs' argument that the non-settling defendant would be entitled to an offset**. **Further, the jury verdict was based on failure to warn, which has absolutely no bearing on the plaintiffs' claim against the other defendants – the settling defendants**. Now, considering the jury verdict, it appears that the settling defendants might have paid even more than their fair share of the liability.
>
> Collectively, the defendants settled for $5,110,000.00 which constitutes almost 40% of the total award in this matter. When looking at the potential liability of all defendants, the Court finds that MCI was responsible for a large majority of the damages. Thus, judicial estoppel does not apply here.

50 App. 12486-87 (Bold added) The Khiabanis agree and emphasize only that an absolute requirement for estoppel is that "the tribunal adopted the position" at issue and the district court expressly stated that it did not do so. MCI can never prove an estoppel under these facts.

J. Trial Expert Fees and Trial Support Costs Were Properly Awarded

The Khiabanis sought $619,888.71 in taxable costs and the district court reduced that by $77,061.87 for a total award of $542,826.84. MCI challenges the award with respect to expert witness fees above the statutory cap and trial support

expenses. Because the district court's decision was based on a thorough review of documentation demonstrating the costs awarded were reasonable and necessarily incurred, the award should not be disturbed on appeal. "A district court's decision regarding an award of costs will not be overturned absent a finding that the district court abused its discretion." Village Builders 96 v. U.S. Labs., Inc., 121 Nev. 261, 276 112 P.3d 1082, 1092 (2005)

The 10 page cost order provided a detailed analysis of the costs to be retaxed versus those awarded. It also broke down the amounts sought in each particular category and subtracted from the total award. 50 App. 12401-411

1. The District Court Expressly Assessed the Reasonableness and Necessity of the Expert Witness Fees Awarded

Pursuant to NRS 18.005(5), a prevailing party may recover "reasonable fees of not more than five expert witnesses in an amount of not more than $1500 for each witness, unless the court allows a larger fee after determining the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." An award of expert witness fees in excess of $1500 must be supported by an "express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether the circumstances surrounding the expert's testimony were of such necessity to require the larger fee." Frazier v. Drake, 131 Nev. 632, 650, 357 P.3d 365 (2015).

In analyzing the Khiabanis' request for costs, the district court had before it more than 1300 pages of supporting documentation in addition to declarations of counsel and the parties' respective briefing. 42 App. 010375 – 47 App. 011742. The same district court judge presided over the entirety of the underlying case, including numerous motions in limine regarding the admissibility of experts. This judge was intimately familiar with the necessity, nature and quality of experts presented on both sides. The order awarding costs expressly incorporated the court's evaluation of the Frazier factors and found that such analysis justified expert fees above $1500. 50 App. 124-36

The Khiabanis disclosed 14 expert witnesses and incurred expert witness fees totaling more than $550,000.00, but sought to recover less than half this amount; $237,000 in fees for 5 of those experts. 49 App. 12044. The Khiabanis called 6 experts at trial (no fee request was made for bus safety expert Sherlock.)[26] MCI also called 6 expert witnesses at trial.

Complex product liability cases cannot be presented without expert testimony and the types of experts used by both sides were typical with the exception of this accident's unique aerodynamic feature and a focus on buses as the vehicle involved instead of cars or trucks. MCI's grumbling about the

[26] MCI twice calls Mary Weatherell "plaintiffs' bus-safety expert" (OB 11, 40) but Weatherell was a fact witness that was not paid by either party.

reasonableness of $237,000 in fees is disingenuous given that MCI spent $226,000 itself on four invoices relating to just **two** of its experts. 49 App. 12044; 49 App. 12063-82. The Khiabanis provided substantial justification for each of the 5 experts for which fees were sought and awarded.

An accident reconstruction expert was the first expert witness called by the Khiabanis (and then by MCI when the defense case began.)[27] This is the standard witness to open a vehicular accident case. The next expert for the Khiabanis was a 3D visualization and photogrammetry specialist.[28]

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[27] MCI baldly asserts that Robert Caldwell's testimony was "duplicative" and "unnecessary" (OB 107) but does not specify which expert he duplicated nor explain why his opinions were not needed. To the contrary, Caldwell was the Khiabanis' **only** accident reconstruction expert and he testified for nearly a full day at trial. 23 App. 5598 to 24 App. 5804 The district court had ample opportunity to observe firsthand that Caldwell's knowledge and expertise assisted the jury in understanding the collision. The district court received Caldwell's detailed invoices which document that he spent a significant amount of time on this case. 43 App. 10564-65, 10581-91 Caldwell's work included a thorough investigation of the accident scene and he drafted a complex report detailing his reconstruction of the accident. Caldwell's fees awarded ($81,297 for discovery and trial work) were undeniably reasonable and customary particularly when compared to MCI's accident reconstructionist; Robert Rucoba, who charged significantly more **for just two months' work** before trial (i.e., $92,000) 49 App. 12079-82

[28] Joshua Cohen is a premier 3d visualization and photogrammetry expert and has extensive experience creating 3d modeling and computer-generated animations for demonstrative and illustrative use in litigation. 27 App. 6630-45 In objecting to Cohen's fees, MCI ignores that **both** parties used Cohen's 3d models and video exhibits to highlight different evidence, measurements and to scrutinize various eyewitnesses' version of events. 27 App. 6696-98; (MCI attorney Terry asking Cohen to display multiple line of sights for various witnesses to the jury). Cohen

Because Dr. Khiabani's head was crushed by the bus tires, the skull fractures that he suffered were hotly debated regarding pain and suffering. The Khiabanis called Dr. Stalnaker[29] and MCI responded with Dr. Michael Baden (infamous from the O.J. Simpson criminal trial) and Dr. Michael Carhart.

MCI's brief (OB 34) discusses the role of Dr. Robert Cunitz as a human factors and warnings expert.[30] Dr. Kraus was the counter-part to Cunitz.

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also enhanced the Red Rock surveillance video to create various exhibits. Cohen offered substantive opinions about the speed of the bus and the location and measurement of other physical evidence. Like Caldwell, Cohen testified for nearly a full day at trial. 27 App. 6630 to 28 App. 6764 The district court had significant opportunity to observe his expertise and the extent to which he assisted the trier of fact and both parties in explaining their respective positions.

[29] Dr. Stalnaker is one of the country's foremost biomechanical experts and was the Khiabanis' only expert in the field. MCI's own biomechanical expert cited and relied upon Dr. Stalnaker's groundbreaking primate skull and fracture work in the 1970s. 39 App. 9584-85 Dr. Stalnaker testified regarding a number of biomechanical issues, including the manner in which the fatal injuries were inflicted and the impact forces during the collision. 28 App. 6989-96 In order to reach his opinions, Dr. Stalnaker performed thorough inspections of the physical evidence, including Dr. Khiabani's bicycle, and the remnants of the helmet that he was wearing at the time of the collision and the medical evidence such as skull MRIs. Dr. Stalnaker then made complex calculations of the crushing forces to prepare his opinions. As his invoices prove, Dr. Stalnaker spent significant time preparing for his deposition and trial testimony. 43 App. 10600-01 Dr. Stalnaker's fees were reasonable and customary within his field of expertise and were substantially less than MCI's biomechanical expert. 49 App. 012064-77 MCI's less experienced opposing expert (Dr. Carhart) charged $495 per hour while Dr. Stalnaker's hourly rate is just $250 per hour. 43 App. 10567

[30] Dr. Cunitz is a Certified Human Factors Professional and was the expert regarding warnings. He is a psychologist with **5 decades** of experience and specialized knowledge regarding the need to warn against inherent risks. 29

Both sides called economist witnesses to discuss wage loss.[31]

2. The Trial Support Fees Were Properly Awarded[32]

MCI is mistaken that trial support services are not recoverable as costs. The district court specifically considered MCI's objections and found that "the complex nature of the claims and gravity of damages at issue required plaintiffs to expend costs that may be considered luxuries in different cases, such as oversize

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App. 7138-40 Dr. Cunitz has worked for both private companies and federal governmental agencies, including NASA, the U.S. Army and served as the first head of the Human Factors Section of the Center for Consumer Product Technology of the National Bureau of Standards where he designed the black and yellow labels on household appliances that are now universal. 29 App. 7140-42 The impact of Dr. Cunitz's testimony is evident from the success of the Khiabanis failure to warn claim. 41 App. 10238 Although his trial testimony was intentionally constricted for tactical reasons (see n. 7, supra), Dr. Cunitz opinions were helpful. 29 App. 7143-44 Given his extensive experience in the human factors field, his rates compare favorably to less knowledgeable experts like MCI's Kraus.

[31] Dr. Larry Stokes is highly experienced and prepared multiple reports, which required him to review complex financial documents. He not only provided valuable trial testimony but also assisted during discovery and in preparation for the cross-examination of MCI's economic expert. Dr. Stoke's detailed invoices substantiate the number of hours he dedicated and demonstrate that his fees are reasonably and customary within his field. 43 App. 10592-93

[32] MCI also challenges $20,485.62 allegedly awarded for "common office supplies." (OB 106) However, it does not offer any citation to the record or breakdown this amount. That amount does appear within any category outlined in the district court's order or the Verified Memorandum of Costs. There is not sufficient information to respond to MCI's half-hearted argument -- except to note that the district court reviewed MCI's objections and found all costs awarded to be reasonably and necessarily incurred.

color printing and trial support services." 50 App. 12409-10 The action of MCI in hiring its own trial support consultant convincingly proves that MCI believes that such services are necessary in a complex trial. 21 App. 5056:15-19 MCI's (Roberts: "He [Brian Clark] handles all the audiovisual presentations . . .")

MCI contends trial support fees "more closely" resemble billable services typically performed by attorneys or paralegals. (OB 105-106) MCI misplaces reliance[33] on In re Matter of DISH Network Derivative Litig., 133 Nev. 438, 451 n. 6, 401 P.3d 1081, 1092 n. 6 (2017) which analyzed whether it was an abuse of discretion to allow recovery of costs incurred for outsourcing electronic discovery. 133 Nev. at 451 It was argued that such costs were closely related to attorney's fees and should not be taxable under Bergmann v. Boyce, 109 Nev. 670, 680, 856 P.2d 560 (1993) (superseded by statute). However, this Court approved the electronic discovery expenses, stating "[u]nlike the computer research expenses at issue in Bergmann that were incurred by the attorneys 'as a function of their research of the law,' the district court determined the costs awarded … were for electronic discovery conducted by electronic discovery vendors…" In Re Matter of Dish Derivative Litig., 133 Nev. at 451 (internal citations omitted). As a

[33] MCI also cites Robert Dillon Framing, Inc., v. Canyon Villas Apartment Corp., 2013 WL 3984885 (Nev. Apr. 17, 2013) (unpublished disposition). This case does not support the blanket proposition that trial support services are not recoverable as costs. 129 Nev. at *5. The court's decision was limited to finding that paralegal fees were recoverable as part of an attorney's fee award. Id.

result, electronic discovery costs were deemed not "legal fees" and were recoverable. Id.

The differentiation between electronic discovery expenses and legal fees applies with equal force to trial support fees which can never be properly called a legal service given that neither the consultant hired by the Khiabanis nor that by MCI is a lawyer. Although MCI frames part of the consultants' tasks as "research," the trial support consultants did not conduct legal research but rather used their expertise to address technical issues. While some attorney or paralegal somewhere may theoretically be able to perform these complex video functions, these tasks do not involve legal analysis or demand specialized legal training. Trial support costs are outsourced as a more efficient method by which to present evidence. They are not legal fees but taxable costs.

MCI's criticism of costs incurred for vendors to summarize juror questionnaires is also without merit.[34] The vendors did not conduct legal analysis, nor draw any conclusions regarding any particular juror. 47 App. 11735 The district court in this case agreed that such costs were reasonably and necessarily incurred and Nevada law does not foreclose that exercise of discretion.

[34] While the Bergmann court did not allow recovery of costs for "jury analysis," it did so because the party seeking such fees did not attempt to justify them as reasonable and necessary. 109 Nev. at 682. Nevertheless, the outsourced vendors here did not conduct "jury analysis" but rather synthesized data.

CONCLUSION

When Icarus plunged into the sea, he did not blame the sun for his fatal mistake. But MCI's 3 core arguments arise squarely from its own errors. Before addressing them, MCI's major cliché is that the jury did not find causation on the failure to warn claim. This presupposes that the jury did not follow JI 31 -- drafted by MCI. JI 31 contains the "would have prevented the injury" language that MCI tardily suggests was critical to the verdict form (but did not propose).

The true issue is whether MCI has proven that the jury failed to follow J1 31. There is absolutely no evidence to support this imagined premise. The unassailable consequence of a proper instruction on warning causation explains MCI's extreme gyrations to find fault in the special verdict form -- MCI has nowhere left to turn but to pervert the record to create supposed verdict form errors.

MCI first asserts that the warnings portion of the verdict form was flawed because an additional causation component ("would have prevented the injury") was not included. (OB 56, 57) MCI never proposed that this language be used. Instead, MCI argued that "legal cause" be added. MCI essentially asks this Court to reverse Allstate -- which requires MCI to offer **before** verdict the specific language deemed essential – not concoct it **after** verdict.

MCI's second core argument that there was an "inconsistent" verdict is resolved by focusing on the "federal compliance" defense that MCI asserted against

the unreasonably dangerous claims but did not raise to the failure to warn claim. This improper defense is an obvious explanation for the verdict where one of MCI's last witnesses expounded on federal regulation and MCI counsel asked the jury to reject the unreasonably dangerous claims for this precise reason. The Seventh Amendment mandates that this Court find that the federal compliance defense was a conceivable basis for the outcome to reject MCI's inconsistent verdict theory.

The third core argument that MCI puts forth is that the evidence was inadequate to prove that a warning would have prevented the injury. The first fatal blow to this assertion is that it was not made in MCI's pre-verdict Rule 50(a) motion and the district court expressly held that it was not preserved. Because MCI did not appeal this decision, this Court should not consider the merits of the inadequate evidence claim. If the Court is inclined to delve into the facts to explore whether a warning would have been effective, the Khiabanis endorse the express finding of the district court that there were multiple ways in which the actor could have prevented the accident by heeding the warning. The verdict should be affirmed.

DATED: April 23, 2020

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 24,477 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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CERTIFICATE OF SERVICE

Under NRAP 25(c)(1)(A), I certify that I am an employee of Kemp Jones, LLP and that on this date I caused to be served, via the Nevada Supreme Court's electronic filing system, a true copy of the Answering Brief to all parties on the service list.

AND

Via U.S. Mail to:

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DATED: April 23, 2020

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An employee of Kemp Jones, LLP