Case No. 78701

In the Supreme Court of Nevada

MOTOR COACH INDUSTRIES, INC.,

Appellant,

vs.

KEON KHIABANI; ARIA KHIABANI, MINORS, by and through their Guardian MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of KAYVAN KHIABANI, M.D.; the Estate of KAYVAN KHIABANI; SIAMAK BARIN, as Executor of the Estate of KATAYOUN BARIN, DDS; and the Estate of KATAYOUN BARIN, DDS,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable ADRIANA ESCOBAR, District Judge
District Court Case No. A-17-755977-C

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Plaintiffs simply did not prove causation on their failure-to-warn claim, the only claim on which they recovered. As a result, judgment should be allowed for defendant.

At the very least, even if the pivotal question of causation on that failure-to-warn claim—the only claim on which plaintiffs prevailed—were possible for plaintiffs, it was never resolved at trial. A new trial is necessary because the jury never resolved that issue under the improper verdict form. If the judgment is not simply vacated, a new trial is necessary.

A new trial is also necessary because MCI was prohibited from introducing evidence that would have explained that any warning was superfluous, in light of existing state law.

Plaintiffs' $18 million judgment is also excessive of their actual damages, both because the jury never heard evidence that undermines plaintiffs' loss-of-probable-support award, and because the court denied MCI an offset, which awarded plaintiffs a [redacted] double recovery

ARGUMENT

Causation is a critical element in this failure-to-warn claim. First, plaintiff failed to demonstrate causation to allow the claim to go to the jury. Under those circumstances, defendant was entitled to judgment.

Second, even when the claim went to the jury, the special verdict forms did not require the jury to resolve the causation issue. As that was such a crucial issue to the case, a new trial is necessary.

I.

PLAINTIFFS DID NOT PROVE THAT A FAILURE TO WARN CAUSED DR. KHIABANI'S DEATH

Plaintiffs recovered an $18 million judgment on a case they did not prove, as a matter of law. Their failure-to-warn theory came without testimony that a warning would have prevented the injury. Indeed, plaintiffs did not even propose a suggestion about what the warning should have been, even in general terms. These issues are preserved.

A. Plaintiffs Must Prove Causation in Failure-to-Warn Cases

"In Nevada, when bringing a strict product liability failure-to-warn case, the plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*,

125 Nev. 185, 190, 209 P.3d 271, 274 (2009). And in a failure to warn case, a plaintiff must prove that "but for" the failure to warn, "his or her injuries would not have occurred." *Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991),[1] *overruled on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997); *see also Nev. Transfer & Warehouse Co. v. Peterson*, 60 Nev. 87, 99 P.2d 633, 640 (1940); *see also* AMERICAN LAW OF PRODUCTS LIABILITY § 32:4 (3d ed.), Westlaw (database updated June 2020) [hereinafter "PRODUCTS LIABILITY TREATISE"] ("[T]he claimant in a warnings case must prove that he or she would not have suffered the harm in question if adequate warnings or instructions had been provided.").

Thus, contrary to plaintiffs' assertions, they bear "the burden of showing that a warning would have made a difference in the conduct of the person warned." PRODUCTS LIABILITY TREATISE § 34:36 (citing multiple authorities, including this Court's opinion in *Rivera*). "[B]efore the

[1] *Sims* was a negligence case, but this Court has applied it in products liability cases, *see Rivera*, 125 Nev. at 190, 209 P.3d at 274, and plaintiffs cite it too (ARB 24). *See also Forest v. E.I. DuPont de Nemours & Co.*, 791 F. Supp. 1460, 1463 (D. Nev. 1992).

issue of causation may be submitted to the jury, the plaintiff must introduce evidence which will support a reasonable inference, rather than a guess, that the existence of an adequate warning would have prevented the harm." *Id.* "[T]he mere possibility that a failure to adequately warn caused a plaintiff's injury is not sufficient to permit a recovery and, when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it is the duty of the court to direct a verdict for the defendant." *Id.* That a plaintiff present proof that a warning would have made a difference matters because "[t]he purpose of the warning is to apprise a party of the danger of which the party is not aware." *Id.* § 32:1.

Given these legal principles, "[t]wo circumstances that may preclude a finding of proximate cause are (1) cases in which a product involves an obvious danger and (2) cases in which the user is actually aware, *or should be aware*, of the dangerous nature of the product." *Id.* § 32:4 (emphasis added).[2] When the "very nature of the [product] gives

[2] *See also id.* § 32:28 ("The obviousness of a danger and the form of the packaging are factors to be considered in determining what warning, if any, is needed."); *id.* § 32:26 ("A supplier is absolved from liability when the dangerous condition is one that a consumer would be expected to realize. A knowledgeable consumer does not have to be warned."); *Gen.*

notice and warning of the consequences to be expected, of the injuries to be suffered" the manufacturer "has the right to expect that such persons will do everything necessary to avoid" the anticipated injuries. *Bradshaw*, 79 Nev. at 445, 386 P.2d at 398.

That is especially true when the end user of the product is a sophisticated user like Mr. Hubbard, who drove buses for more than 20 years before the accident. *See Johnson*, 179 P.3d at 910 ("sophisticated users need not be warned about dangers of which they are already aware *or should be aware*" (emphasis added)); PRODUCTS LIABILITY TREATISE § 34:5 ("[A] user may be deemed a sophisticated user, as a matter of law, where extensive experience with the product, or of the hazard, shows that the user should have known of the danger."). "Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the

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Elec. Co. v. Bush, 88 Nev. 360, 365, 498 P.2d 366, 369 (1972) ("Warning need not be given against dangers which are generally known . . . ."), *abrogated on other grounds by Montenko v. MGM Dist., Inc.*, 112 Nev. 1038, 921 P.2d 933 (1996); *Bradshaw v. Bylstone Equip. Co. of Nev.*, 79 Nev. 441, 444, 386 P.2d 396, 397 (1963) (no duty to warn of "a danger obvious to the user").

legal cause of any harm that product may cause." *Johnson*, 179 P.3d at 910-11.

B. Mr. Hubbard's Testimony that He Would Generally "Heed" Warnings Given to Him in "Training" is Insufficient to Establish Causation

1. Plaintiffs' Causation Theory Would Resurrect the Heeding Presumption that This Court Rejected in Rivera

In *Rivera*, this Court expressly rejected the presumption that a person would "heed" a warning if one had been given because doing so would "shift[ ] the burden of proving the element of causation from the plaintiff to the manufacturer." 125 Nev. at 187, 209 P.3d at 272. This Court in *Rivera* also noted that where the only evidence that a person "would have heeded a more specific warning is speculative," it is "unlikely" that the plaintiff can prove causation because the testimony would probably be inadmissible. *Id.* at 190, 209 P.3d at 274. "A mere possibility that the product caused the injury is insufficient." *Lewandowski v. Taser Int'l, Inc.*, 2009 WL 10692836, at *3 (D. Nev. Aug. 10, 2009) (citing *United Exposition Serv. Co. v. State Indus. Sys.*, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993)). And "[a] possibility is not the same

as a probability." *United Exposition Serv.*, 109 Nev. at 425, 851 P.2d at 425.

Plaintiffs' arguments would shift the burden of proof on causation to the defendant, merely because a witness answers "yes" to an abstract question about whether he pays attention to warnings given in "training." It would be odd for this Court to have rejected the "heeding presumption" in *Rivera* if a plaintiff's burden on causation could be so easily satisfied in the absence of the presumption. In short, plaintiffs' arguments run contrary to *Rivera* and should be rejected.

2. Rivera Requires Proof That a Warning Would Have Avoided the Accident

Plaintiffs contend that they do not have to prove that a warning would have avoided the accident because *Rivera* allows them to submit "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.'" (ARB at 24); *Rivera*, 125 Nev. at 191, 209 P.3d at 275 (quoting *Riley v. Am. Honda Motor Co., Inc.*, 856 P.2d 196, 198 (Mont. 1993)). While plaintiffs seek refuge in the second prong of the test

("would have prompted plaintiff to take precautions"), they do not identify any evidence that satisfies that test. They failed to demonstrate that a warning would be heeded.

On the necessity of presenting evidence of heeding a warning, plaintiffs omit this Court's citation to the Montana Supreme Court's decision in *Riley*, a case that is fatal to their position. *See Flowers v. Eli Lilly & Co.*, 2016 WL 4107681, at *3 n.2 (D. Nev. Aug. 1, 2016) (noting that this Court in *Rivera* "adopted Montana's causation approach for failure-to-warn products liability cases"). For example, the plaintiff in *Riley*, who had fallen off his motorcycle, "did not testify that he would have altered his conduct had he been warned of the motorcycle's alleged propensity to wobble; nor did he present other witnesses to testify to that effect." 856 P.2d at 199. He relied "solely on his general testimony that he respected machinery and was concerned about safety to meet the causation element." *Id.* He suggested on appeal "that he 'might have rode [sic] the motorcycle differently and might not have taken it on a long trip on the highway' had warnings been given." *Id.* The court held that this "suggestion [w]as not supported by evidence of record,

however." *Id.* The appellate court rejected the notion that he had made out a case for liability.

Here, Mr. Hubbard testified to even less than the plaintiff in *Riley*. There is no evidence, none, that Mr. Hubbard "might have" heeded any warning. Rather, the evidence shows that he *could not have* heeded any warning—at least according to the his version of the events. *See Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F. Supp. 495 (E.D. Pa. 1977).

Mr. Hubbard did not testify that he would have or could have done anything different on the day of the accident. He was not asked about his adherence to warnings he ever received about other vehicles he drove; he was not asked about manufacturer warnings *at all*. He was asked only about warnings he received in "training." (AOB 10.) He testified that he was already aware that motor coaches created air disturbances. He further testified that, on the day of the accident, once he saw Dr. Khiabani it was too late to avoid the collision. There is no evidence of any articulable information either that would have affected Mr. Hubbard's decision in that moment or that would have prevented Dr. Khiabani's death.

The only evidence from Mr. Hubbard (whose credibility plaintiffs do not question) as to whether the accident could have been avoided by a warning demonstrates that the accident was inevitable.

Nevertheless, plaintiffs contend that "warning causation can be established by proof of historical compliance alone," citing *Sims* and *Rivera*. (RAB 24.) Although that would require demonstration of a habit of true fastidiousness, not a blanket statement. *Sims*, 107 Nev. at 524, 815 P.2d at 156. In both *Sims* and *Rivera*, however, a warning would have prevented the injury. In *Sims*, the injured person could have been warned away from the area containing the dangerous condition. And in *Rivera*, the injured person could have heeded a warning by not smoking cigarettes.

This case falls into a different category, where there is no possibility of heeding the warning in a manner to prevent the injury, a class of circumstances exemplified by *Greiner*.[3] In that case, the district court

[3] MCI cited the *Greiner* district court's opinion in its opening brief. (AOB 44.) Plaintiffs cite the Third Circuit's prior opinion, *Greiner v. Volkswagen*, 540 F.2d 85 (3d Cir. 1976), remanding to the district court to determine whether the plaintiff could demonstrate proximate cause. (RAB 43.) But *Greiner* supports MCI, not plaintiffs, because the district court on remand concluded that proximate cause was absent.

held that the plaintiff could not demonstrate proximate cause because the driver of the vehicle that crashed could not have acted on a warning, no matter what the warning stated. She was driving on the wrong side of the road facing an oncoming car, swerved, started heading for a concrete bridge, swerved again, and the car overturned. 429 F. Supp. at 497. The court noted that, while there may be an "assumption that the warning could have been heeded to avoid the peril," when that assumption proves wrong—because there is no possibility of heeding the warning—proximate cause is absent as a matter of law. *Id.*

For a plaintiff to prevail on a failure to warn case, she must show that a warning would have made a difference: the user would have, and could have, acted on the warning to prevent the harm. *Id.*

That is true even in a jurisdiction that has a heeding presumption:

> A plaintiff invoking the "read-and-heed" presumption must show that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case.

PRODUCTS LIABILITY TREATISE § 34:2; *see also Kovach v. Caligor Midwest*, 913 N.E.2d 193, 199 (Ind. 2009) (citing 1 DAVID G. OWEN, MADDEN & OWEN ON PRODUCTS LIABILITY § 9:11 (3d ed. 2000)).

Even if generic "historical compliance" were enough, plaintiffs did not prove any historical compliance. They elicited only Mr. Hubbard's conclusory, hypothetical, speculative, self-serving testimony that he heeded warnings given to him in "training." The plaintiff in *Riley* at least testified that he "might have" have changed his behavior if he had received a warning. Here, Mr. Hubbard did not testify that he "might have," "would have," or "could have" changed his behavior, so the failure-to-warn claim against MCI should have been dismissed.

3. Plaintiffs' Speculation About What Mr. Hubbard Might Have Done is Not Evidence

On appeal, plaintiffs have hypothesized about what Mr. Hubbard could have done to avoid the accident. (RAB 51-53.) But like the *Riley* plaintiff's speculation, those hypotheses are not supported by any evidence of record. And they ignore these undisputed facts:

- Mr. Hubbard testified that, after passing Dr. Khiabani, he did not see Dr. Khiabani again **until he had already driven 450 feet down the road**. (AOB 4-5.)
- Mr. Hubbard testified that he was unaware of Dr. Khiabani's presence until it was too late to avoid the accident. (AOB 4-5, 46-48.)

- All of the evidence shows that **all bus drivers**, including Mr. Hubbard, are aware that buses cause air displacement and that all buses are pretty much the same. (AOB 10-12, 38, 40.)

Plaintiffs' hypotheticals are not evidence, and here they are contrary to the user's actual testimony.[4] *Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014).

"There are no proven facts in the record which would lend the dignity of an inference as opposed to a guess" that Mr. Hubbard would have, or could have, done something different if given a warning. *See Greiner*, 429 F. Supp. at 489. "Indeed, the impropriety of permitting the jury to make such a finding is intensified by the fact that [Mr. Hubbard] testified in [plaintiff's] case and was totally silent about the effect such a warning would have had." *See id.*

[4] If Mr. Hubbard's account of the physical events is disbelieved (as plaintiffs seem to prefer), there is no principled basis to rely on anything he would say about the warning.

C. Plaintiffs Were Required to Propose at Least the Substance of a Warning

Plaintiffs argue that if there is no warning, "the only question to be decided is whether there should have been a warning." (RAB 42.) But that cannot be all there is to a case; plaintiffs must show what the warning should have been. Plaintiffs must demonstrate an appropriate and necessary warning that would have avoided the accident.

It is the *content* of the warning that matters. (AOB 29-45.) A plaintiff must articulate the information that, if communicated to Mr. Hubbard, would have changed his behavior. MCI cited multiple cases in its opening brief to this effect. (AOB 42-45 nn.11-13.)

In response, plaintiffs still have not set forth even a *concept* for a warning. And the cases plaintiffs cite to excuse that failure either support MCI or are inapposite.[5]

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[5] Plaintiffs argue that cases MCI cited in its opening brief that involve inadequate warnings do not apply because here there was *no* warning. That is a distinction without a difference. An absent warning, if one is necessary, has the same effect as an inadequate one. *See* PRODUCTS LIABILITY TREATISE § 32:28 ("An inadequate warning may make a product as unreasonably dangerous as no warning at all."). The issue here is whether a particular warning would have prevented this accident, a question that cannot be determined where plaintiffs were unable to conceive of such a warning.

1. Greiner *Supports MCI*

Plaintiffs cite *Greiner*, but as explained above, that case supports MCI, not plaintiffs. After the Third Circuit remanded, the district court dismissed the plaintiff's claims because there was no evidence that any articulable information would have prevented the driver of the motor vehicle from flipping her car over.

2. Plaintiffs' Remaining Authorities are Based on the Heeding Presumption and Other Distinguishable Law and Circumstances

The other two cases cited by plaintiffs are from jurisdictions where the law is different. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 759-60 (Mo. 2011), for example, expressly relied on the "heeding presumption" that this Court rejected in *Rivera*, as pointed out by the dissent.[6]

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[6] Plaintiffs attempt to mislead the Court by block-quoting a passage from *Moore,* stating that "no other state has been identified that requires proof of the specific language of an adequate warning." There, however, the court was referring only to the "[n]umerous jurisdictions" that "follow the heeding presumption in failure to warn cases." *Moore*, 332 S.W.3d at 759-60; *see also Goyal v. Thermage, Inc.*, 2012 WL 3240381 (D. Md. Aug. 2, 2012) ("With one exception, the Court is aware of no other state *that applies the 'heeding' presumption* and requires the plaintiff to state the specific language of an adequate warning." (emphasis added) (citing *Moore* and *Ayers*)).

And the other case applied a Washington statute that doesn't exist in Nevada. *Ayers ex rel. Smith v. Johnson & Johnson Baby Products*, 797 P.2d 527, 531 (Wash. App. 1990) ("The statute speaks only generally of 'warnings . . . which the claimant alleges would have been adequate.' Nothing *in the statute* requires a plaintiff to prove explicit wording." (emphasis added)). These two cases are inapplicable.

More importantly, in both cases, the plaintiff *did explain*—through testimony—how a warning would have altered the product user's conduct. In *Moore*, the plaintiff and her husband testified at length that she always read warnings because she was tall and overweight and that she never would have bought the vehicle Ford sold her if she knew that there was a risk that her seat could collapse in a car accident. *Moore*, 332 S.W.3d at 754-55, 759 n.2.

In *Ayers*, similarly, the parents of the child who was injured testified that if they were warned of the dangers of aspirating baby oil, "they would not have had it in the house." 797 P.2d at 530.

In contrast, here, Mr. Hubbard never testified that he could or would have done anything different if he was given some nebulous

warning that the plaintiffs never articulated. There was no showing of actual causation.

3. The Dissents in Moore *and* Rivera *Undermine those Cases' Applicability and Reliability*

Moore and *Rivera* were split decisions. The full examination of the issues of the issues by those courts, even under different legal rules, undermines the application of those conclusion.

The dissent in *Moore*, for example, explained that even where the "heeding" presumption applies, it "does not establish that a warning was required or what an 'adequate warning' would have been. '[T]he most the presumption does is establish that a warning would have been read and obeyed.'" *Moore*, 332 S.W.3d at 770 (Price, C.J., dissenting). Thus, "a plaintiff must [still] offer some evidence of the content or placement of a warning that would have prevented the danger posed by the product in question." *Id.* "To require anything less invites not only a roving jury instruction, but the danger of subjecting a manufacturer to liability for failing to do the impossible." *Id.* at 771. The dissent cited

multiple authorities that require plaintiffs to provide some evidence of what a warning would have communicated to the product user.[7] *Id.*

In *Ayers*, the dissent made the same points: "A jury cannot possibly decide if the manufacturer could have provided the warnings unless it is told what those warnings ought to have been." 797 P.2d at 536 (Reed, J., dissenting). There, as here, "[h]ow can it be said that but for defendant's failure to give some unspecified warning, this unfortunate accident would not have happened?" *Id.*

The *Ayers* dissent also pointed out that "we must consider the possibility that consumers will pay less attention to all risks and all warnings because of the overload of information." *Id.* at 532. It is unfair to punish the manufacturer for having a deep pocket rather than "producing a product that presents an unreasonable risk of harm," especially because it "requires a manufacturer to warn against every conceivable danger, thus diluting the importance of any warning given." *Id.* at 535.

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[7] MCI cited many authorities to the same effect in its opening brief. (AOB 30 & n.10.) Plaintiffs attempt to distinguish those cases in footnotes, but the Court will see for itself that they all stand for the proposition that a plaintiff must provide some indication of the *substance* of a warning, if not precise wording.

4. Plaintiffs Have to Suggest the Essence of an Appropriate Warning in a Failure-to-Warn Case, Even Though They Do Not Have to Propose an Alternative Design in a Design Defect Case

Plaintiffs argue that since they were not required to prove an alternative design for their design defect claims, they are not required to provide an alternative warning. (RAB 43.) This is wrong. The two claims are different—and have different requirements.

A plaintiff may suggest that an alternative design would require expensive scientific knowledge, engineering, money, and time. That would be unduly burdensome, as this Court recognized in *Ford Motor Co. v. Trejo*, 113 Nev. 520, 521, 402 P.3d 649, 651 (2017).

But an adequate warning claim does not require the same expense and engineering. A plaintiff merely needs to say what the warning should be, in essence, if not in actual wording. A failure-to-warn claim necessitates telling the jury what the advice should have been to the product user that would have changed the outcome.

Even plaintiffs' own authority states that "design defect and failure to warn theories constitute distinct theories aimed at protecting consumers from dangers that arise in different ways." *Moore*, 332 S.W.3d at 757; *see also Pankey v. Petco Animal Supplies, Inc.*, ___ Cal.

Rptr. 3d ___, 2020 WL 3445816, at *16 n.15 (Ct. App. June 24, 2020); *Evans v. Nacco Materials Handling Grp., Inc.*, 810 S.E.2d 462, 472 (Va. 2018).

When no warning is given, the plaintiff must at least introduce evidence to explain how a warning would have changed the product user's conduct. Otherwise, the plaintiff simply has no cause of action because he cannot show causation.

5. Plaintiffs Remain Vague on What Advice or Direction the Warning Should Have Conveyed

Plaintiffs imply that the information that should have been communicated to Mr. Hubbard is that he should have maintained a three-foot distance from Dr. Khiabani. The facts section of their brief repeatedly references the three-foot distance. (RAB 8 (stating, without citing anything in the record, that the Plaintiff's expert testified that the motor coach produced 10 pounds of push force and 20 pounds of suction when passing within 3 feet of a bicycle); *id.* at 9 (stating that Dr. Briedenthal testified that the "suction force" at 3 feet was a hazard); *id.* at 12 (relying on unsupported claim that the motor coach created a suction force at 3 feet); *id.* at 14 (referring to Dr. Briedenthal's testimony,

even though he never testified that there was any suction force at any particular distance from the motor coach).

At trial, however, plaintiffs expressly disavowed that this three-foot requirement was the articulable information that should have been contained in a warning. (RAB 56 ("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.").) They want to give the Court the false impression that motor coaches, which have been around for decades, are juggernauts of danger.

Even now on appeal, they refuse to tell this Court what warning should have said or how it would have prevented Dr. Khiabani's death. They want to create an impression—that this motor coach is dangerous at a three-foot distance—but they will not actually say that. Neither would their own experts. Dr. Cunitz admitted that he had no idea how far any dangerous "air displacement" might extend from the bus. (OAB at 34.) He relied on Dr. Breidenthal, who was unable to articulate not just how far a dangerous area might extend from the bus, but also

whether there even *was* a dangerous area. (*Id.* at 34-36.) Dr. Breidenthal expressly stated that his "estimates didn't associate the force with any particular distance." (RAB 8 (citing 31 App. 7156:2-6, 7532:22-23).) He expressed no opinion on what distance would be safe, because he did not know how strong the push-pull force would be at any given distance. (RAB 8-9 (citing 31 App. 7533:23-75342:2).) And plaintiffs' counsel expressly disavowed that notion that the motor coach was dangerous at any particular distance. (RAB 56.) They continue to do so today. (*Id.*)

It is telling that the argument section of plaintiffs' brief says nothing about the three-foot distance, except to argue that the jury should *not* have been told about a Nevada statute that already prohibits a driver from being closer than three feet to a cyclist. Plaintiffs have purposefully created a void that they hope will be filled by the mind of the reader—the jury or judges—but they refuse to articulate an actual warning into their arguments (and insist on excluding the one that was given by the state of Nevada in NRS 48B.270(2)). This is because plaintiffs know any warning they did propose would seem ridiculous to the

jury (and this Court) because it would warn of a danger obvious to anyone who has ever seen a motor coach. Such a standard would result in liability based on warnings that would have no effect in the real world, but their absence would result in limitless liability for manufacturers who have no idea what warning they should give.

D. All Issues Raised in this Appeal Were Preserved

MCI's Rule 50(a) motion succinctly and squarely addressed the insufficiency of evidence on the particular issue that MCI raises in this appeal. And the district court's concern about the brevity of the Rule 50(a) argument was itself erroneous,[8] especially considering that neither plaintiffs nor the district court said they would have done anything differently had MCI belabored its point while the jury waited in the hallway to hear the closing arguments.[9]

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[8] This Court reviews the district court's decision denying a Rule 50(b) motion *de novo* (*Winchell v. Schiff*, 124 Nev. 938, 947, 193 P.3d 946, 952 (2008)), which includes the consideration of whether the arguments were covered sufficiently during the Rule 50(a) motion.

[9] The plaintiffs objected to the length of MCI's arguments, thus inviting error. (40 App. 9898); *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (""The doctrine of 'invited error; embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit'" (quoting 5 AM. JUR. 2D *Appeal and Error* § 713, at 159-60 (1962))). This

The gravamen of MCI's argument was clear. A party moving for judgment as a matter of law under Rule 50(a) must "specify the judgment sought and the law and facts that entitle the movant to the judgment," although the rule does not address how specific the grounds must be. "[I]n stating the grounds in the required pre-verdict motion, technical precision is not necessary." *Kusens v. Pascal Co.*, 448 F.3d 349, 361 (6th Cir. 2006), *citing Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 197 (8th Cir. 1995); *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610 (5th Cir. 1996). And because the requirement that a Rule 50(a) motion must precede a Rule 50(b) motion is "harsh in any circumstance," a Rule 50(a) motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of the case. *Anderson v. United Telephone Co. of Kansas*, 933 F.2d 1500, 1503-4 (10th Cir. 1991); *see Otterback v. Lamb*, 85 Nev. 456, 460, 456 P.2d 855, 858 (1969) ("Counsel, in the heat of a trial, cannot be expected to respond with all the legal niceties and nuances of a brief writer."). Accordingly,

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came after a tongue lashing about how long the process of settling jury instructions had taken.

where Rule 50(a)'s purpose—*i.e.*, providing notice to the court and opposing counsel of any deficiencies in the opposing party's case prior to sending it to the jury—has been met, courts usually take a liberal view of what constitutes a pre-verdict motion sufficient to support a post-verdict motion. *See Rankin v. Evans*, 133 F.3d 1425, 1432–33 (11th Cir. 1998) (collecting cases); *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299-300, 757 P.2d 361, 362-63 (1988) ("The purpose of the requirement that a party object to the action of the trial court at the time it is taken is to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the objection.").

Here, MCI succinctly summarized the same arguments it raises now. MCI argued that "a warning about air blasts would have done no good" (40 App. 9900-01), there was a "law that would have told [Mr. Hubbard] to do exactly what the warning apparently would have told him to do" (*id.* at 9901), and that the plaintiffs "never proposed language for a warning" (*id.*). The only issues raised on appeal that relate to the Rule 50 motion are phrased almost identically. (*See* AOB at xxiv (issues presented are "[w]hether defendant-appellant is entitled to judgment as a matter of law because plaintiffs failed to propose an adequate

warning and failed to establish that any warning would have prevented the collision").) The district court was simply wrong when it concluded that MCI had not previously raised the argument that (i) Mr. Hubbard didn't testify that a warning would have changed the outcome, (ii) plaintiffs needed to explain how a warning would have prevented Dr. Khiabani's death, (iii) Mr. Hubbard's testimony that he generally heeded warnings was insufficient to establish causation, (iv) that the danger was open and obvious, and (v) that the testimony of plaintiffs' warning expert was insufficient to establish causation.

Those are all variants of the same argument—plaintiffs' inability to articulate a concrete concept that could be communicated a warning that would have made any difference. And plaintiffs never contended that they would have done anything differently, such as moving to reopen evidence, if MCI had further elaborated on these points in the oral Rule 50(a) motion. In denying 50(b) relief, the district court also gave no indication that it felt sandbagged, that it would have granted the Rule 50(a) motion if it had been more detailed, or otherwise would have done anything differently.

II.

ALTHOUGH CAUSATION WAS A CRITICAL ISSUE, THE JURY WAS NEVER ASKED WHETHER PLAINTIFFS PROVED CAUSATION ON THEIR FAILURE-TO-WARN CLAIM

Because plaintiffs had not proved causation on their failure-to-warn claim—or even if it were simply a question of fact—that critical issue was not presented to the jury for resolution. That was reversible error.

A. The Jury Instructions Cannot Cure a Defective Special Verdict

Although he issue of causation in the failure-to-warn clam was a critical issue, as demonstrated above, the jury was not asked in the special verdicts to resolve that question in the special verdicts. That was error that requires a new trial.

Plaintiffs argue that the jury instructions cured the defect in the special verdict form. Jury Instruction 30 stated: "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." (42 App. 10272.) Jury Instruction 31 stated: "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." (*Id.* at 10273.)

Neither of those instructions required or asked the jury to make any findings whatsoever. They simply state the law. A "jury instruction alone does not constitute a finding." *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 17 Cal. Rptr. 2d 242, 249 (Ct. App. 1993). "Nor does the fact that the evidence might support such a finding constitute a finding." *Id.*

This Court cannot infer that the jury answered a question that it was not asked, simply because the jury was properly instructed on the law.[10] The district court was "obligated to present to the jury an accurate statement of the law in its instructions <u>and</u> *verdict form*." *Malone*,

[10] *See United States v. Tejada*, 784 F. App'x 493, 495 (9th Cir. 2019) ("The fact that the court provided accurate jury instructions does not cure that defect, as ultimately the incorrect verdict form was right before the jury and was, presumably, the last thing the jury read before entering its verdict."); *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 827 (7th Cir. 2010) (holding that jury instruction did not excuse error in verdict form); *Malone v. Reliastar Life Ins. Co.*, 558 F.3d 683, 693 (7th Cir. 2009) (submission of flawed special verdict form that did not require jury to answer question was legal error); *Behr v. Redmond*, 123 Cal.

558 F.3d at 693 (emphasis added). "If a fact necessary to support a cause of action is not included in such a special verdict, judgment on that cause of action cannot stand." *Behr*, 123 Cal. Rptr. 3d at 110; *Myers*, 17 Cal. Rptr. 2d at 248.

Even where substantial evidence of a fact might appear in the record, and that is disputed here, "without an actual verdict by the jury[,]" a judgment that is based on the missing fact must be reversed. *Myers Bldg. Indus.*, 17 Cal Rptr. 2d at 249. *Id.* The use of the erroneous verdict form was plain error that should be reversed. *Tejada*, 784 F. App'x at 495 ("[T]he use of the special verdict form as to Count Two was plain error.").[11]

Rptr. 3d 97, 110 (Ct. App. 2011) ("When a special verdict is used and there is no general verdict, we will not imply findings in favor of the prevailing party.").

[11] The cases plaintiffs cite to support the argument that the verdict form can be ignored because the jury instructions were correct are inapposite. In *Krause Inc. v. Little*, 117 Nev. 929, 34 P.3d 566 (2001), the jury was merely instructed to disregard certain evidence. There was no verdict form that omitted an essential element of the plaintiff's cause of action. And in *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 955 P.2d 661 (1998), the Court was addressing whether the jury instructions and the special verdict form were misleading. Here, the verdict form wasn't misleading, it simply did not ask the jury to find causation.

Plaintiffs contend that no Nevada case has held that "a defendant is entitled to a special verdict form that repeats elements of instructions that a defendant desires to highlight." (RAB 31.) This is not a matter of repeating something that MCI wanted to "highlight." It's a matter of actually *asking the jury one of the very questions it was there to answer,* whether a warning would have avoided the accident—a question that the verdict form did ask in relation to every other theory of liability. The special verdict form did not do that, and the instructions cannot cure the defect.

Plaintiffs' contentions ignore the distinction between general verdict and special verdicts. The jury here did not return a general verdict, from which it might have been assumed the jury followed the instructions in deciding the ultimate outcome. It answered only special verdicts on the certain *elements* of the claims. As plaintiff did not present a special verdict on causation, the jury cannot be assumed to have answered an issue it was never asked. A special verdict is intended to "compel a jury to more accurately focus on what it properly should" by asking the jury to answer a specific fact question. *See Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985); *cf. Lowery v. Clouse*, 348

F.2d 252, 260 (8th Cir. 1965) ("We are aware that it has been said that among the purposes of a special verdict are the emphasis of facts and the removal of elements of personalities and prejudice . . . ."). And it is intended "to avoid the mistakes that the jury may make in the application of the law to the facts." *Louisville, N.A. & C.R. Co. v. Balch*, 4 N.E. 288 (Ind. 1886). The special verdict form here failed to compel the jury to focus on the causation issue and the jury consequently answered that most critical issue in this case. The judgment should be reversed.

B. MCI Proposed a Correct Verdict Form, and Plaintiffs Caused Error by Opposing It

Plaintiffs repeatedly attempt to blame MCI for the defective verdict form. (RAB 23-35.) But MCI proposed a proper and complete verdict which called for the jury to address all the issues, including causation in the failure-to-warn claim. Plaintiffs opposed that verdict, however, tactically advancing an incomplete form.

It was plaintiffs' responsibility to make sure that the verdict form contained findings on all of the elements of their claims, and failed to

prove their claims by not having the jury address causation on the failure-to-warn claim.[12] Plaintiffs are simply wrong that MCI had to argue that particular language should be included in the special verdict form before the verdict. (RAB 35.)

In any event, MCI *did* attempt to cure the omission, but plaintiffs and the district court refused to give MCI's proposed verdict form. (41 App. 10,238); *see also Myers*, 17 Cal. Rptr. 2d at 249 (rejecting waiver argument and noting that defendant repeatedly attempted to bring the problem with the verdict form to the attention of the court and opposing counsel). At the very least, plaintiffs led the district court into error.[13]

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[12] *See Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982) ("The plaintiffs bear the burden of proving every essential fact necessary to establish their cause of action."); *Behr*, 123 Cal. Rptr. 3d at 110 (plaintiff "had responsibility for submitting a verdict form sufficient to support her causes of action" and if she "chose not to include a proposed factual finding essential to one of her claims," it was not defendant's responsibility to "make sure the omission is cured"); *Myers*, 17 Cal. Rptr. 2d at 961-62.

[13] Plaintiffs contend that MCI is asking this Court to overrule *Allstate* and impose a rule that a trial court should *sua sponte* draft the special verdict form, which would be contrary to NRCP 49's requirement of timely submission of verdict forms. (RAB 34.) But both parties *did* submit proposed special verdicts. The district court then had the obligation to get the verdict form right, regardless of what the parties proposed. *See Duran v. Town of Cicero, Ill.*, 653 F.3d 632, 642 (7th Cir. 2011) (noting that it is "'the judge's responsibility to get the verdict form right, not just pick one side's proposal or the other's'" (quoting *Thomas*

C. The Only Way to Read the Verdict Form Consistently is to Conclude that the Jury Did Not Find Causation

Plaintiffs contend that the verdict form can be explained if the jury is assumed to have found in favor of MCI on the design defect claims because MCI argued that the motor coach conformed to federal regulations. That is rank speculation. There is no appropriate reason to believe that the jury believed that the federal regulations were inapplicable to the failure-to-warn claim.

The affidavit on which plaintiffs rely lacks foundation; it is no support for their speculation about what the jury did. (RAB 39 n.14 (citing 49 App. 12166-67).) That affidavit is not from a juror, which would be bad enough. It is from plaintiffs' counsel. Even juror affidavits are generally inadmissible for "proving the jurors' mental processes"—they can only be "admitted to show what physically transpired in the jury room." *Pappas v. State ex rel. Dep't of Transp.*, 104 Nev. 572, 575, 763 P.2d 348, 349-50 (1988); *see also* NRS 50.065(2) (affidavit "concerning the juror's mental processes" is "inadmissible for any purpose"). That is especially

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v. Cook Cnty. Sheriff's Dep't, 604 F.3d 293, 315 (7th Cir. 2010) (Sykes, J., dissenting)).

true where, as here, the affidavits "speculate[] as to what effect [an] unanswered question had upon the outcome of the deliberation." *Pappas*, 104 Nev. at 575, 763 P.2d at 349-50. In *Pappas*, the unanswered question was whether the jury could pick a value of property that was between the values proposed by expert testimony. Here, the still-unanswered question was whether the plaintiffs proved causation.

Plaintiffs cite no authority allowing a lawyer's affidavit to explain a verdict. The affidavit is three paragraphs of hearsay and doesn't identify a single juror. MCI have no opportunity to cross-examine the jurors that the affidavit speaks of. *See Rugamas v. Eight Judicial Dist. Ct.*, 129 Nev. 424, 431-32, 305 P.3d 887, 893 (2013) (district court's application of the law was clearly erroneous when it allowed person to testify without being cross-examined); *Lee v. Baker*, 77 Nev. 462, 467-68, 366 P.2d 513, 515-16 (1961) (record prepared by sheriff's department was inadmissible because person who prepared the record was not available for cross-examination, so report "was so prejudicial to appellant as to be inconsistent with substantial prejudice and to necessitate a new trial"). And it is just as likely that whoever spoke with plaintiff's counsel placated them with what they thought might soften the bad news.

D. The Error Was Prejudicial

In any event, MCI is not required to establish beyond doubt that the outcome would have been different if a proper verdict form was used. It is enough that the "outcome potentially hinged on" the erroneous verdict form. *Malone*, 558 F.3d at 693. Here, plaintiffs' failure to prove causation—both the substance of the warning to be given and the likelihood that any warning would have saved Dr. Khiabani—makes the failure to *ask* the jury about causation exceptionally prejudicial. This Court should order a new trial.

III.

THE EXCLUSION OF NEVADA LAW KEPT MCI FROM DEFENDING AGAINST THE FAILURE TO WARN ALLEGATION

Plaintiff's already-weak case on failure to warn would have crumbled further had MCI been able to fully defend itself. But the district eliminated the central evidence for MCI's defense—a Nevada statute that already instructs drivers, under threat of criminal penalties, to do what any hypothetical warning from MCI could have told Mr. Hubbard to do.

A. There is No Authority for Excluding Evidence That NRS 484B.270 Already Provided a Warning to Drivers

Plaintiffs argue that MCI should not have been able to tell the jury that Nevada law already prohibits drivers of motor vehicles from driving next to a bicyclist at a distance of less than three feet. The district court's exclusion of that evidence was reversible error requiring a new trial.

Since 2011, NRS 48B.270(2) has required the driver of a motor vehicle to (1) "exercise due care" when passing a bicycle and (2) maintain at least a three-foot distance between the vehicle and the bicycle. (RAB 53-59.) Plaintiffs do not cite a single authority in support of their six pages of argument that the district court properly excluded any reference to NRS 484B.270(2).[14] (RAB 53-59.) This Court should therefore disregard those portions of the brief. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); NRAP 28(a)(10)(A), (b).

[14] Although plaintiffs contend that NRS 484B.270 is irrelevant, their own complaint alleged that the bus driver violated that statute, including "by failing to leave at least 3 feet" himself and Dr. Khiabani. (3 App. 628.)

Instead of citing authority, plaintiffs contend that MCI's argument—that the jury should have been informed of a Nevada statute that has always required drivers of motor vehicles to keep their distance from bicyclists—is "fanciful, "hogwash," and "inane" because MCI could not foresee that the Nevada Legislature would amend the statute in 2011 to expressly require a three-foot distance. (RAB 53.) But foreseeability plays no role in a "consumer expectations" state like Nevada (except for the "sophisticated user" and "open and obvious" *defenses* to a failure-to-warn case). *See Ford Motor Co. v. Trejo*, 133 Nev. 520, 529 402 P.3d 649, 656 (2017) (rejecting a test that considers "'foreseeable risks of harm' apparent to a manufacturer when adopting a design"). The knowledge of the manufacturer may be relevant to negligence or punitive damages, but it otherwise plays a very limited role. Moreover, the statute's amendment did not change much. The statute *always* required drivers to exercise due care when passing a bicyclist (AOB 66) and, when amended, expressly required a minimum 3-foot distance between a vehicle and a bicyclist.

B. The Relevant Statute is the One in Effect at the Time of the Accident

Foreseeability is also irrelevant because the relevant time period for the application of state safety regulations, especially in a failure to warn claim, is not when the product left the manufacturer, but when the accident occurred. Otherwise a manufacturer would be liable for inadequate warnings even if it provides an adequate warning after the sale, but before the accident. Plaintiffs do not even attempt to distinguish the multiple authorities MCI cited to that effect in its opening brief. (OAB at 65-66.)

C. Mr. Hubbard is Conclusively Presumed to Know the Law

Plaintiffs contend that NRS 484B.270 is irrelevant because Mr. Hubbard was unaware of it. But it is conclusively presumed that Mr. Hubbard *did know* the statute and the penalty for violating it.[15] *See Smith v. State*, 38 Nev. 477, 481, 151 P. 512, 513 (1915).[16]

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[15] A driver of a motor vehicle who collides with a bicyclist is guilty of a misdemeanor and may be imprisoned. NRS 484B.270(6), 484B.653(4).

[16] *See also Nationstar Mortgage, LLC v. BDJ Invs., LLC*, 2019 WL 6208548, at *2 (Nev. Nov. 20, 2019) (unpublished disposition) (applying *Smith* in a civil case); *US Bank, N.A. v. SFR Invs. Pool 1, LLC*, 2018 WL 1448248 (Nev. Mar. 15, 2018) (unpublished disposition) (same); *Sengel v. IGT*, 116 Nev. 565, 573, 2 P.3d 258, 262-63 (2000) (same);

D. Mr. Hubbard's Actual Knowledge is Irrelevant Because the Test is Objective

Even if Mr. Hubbard is not presumed to know the law, his actual knowledge is irrelevant. MCI's argument on the topic of NRS 484B.270 is analogous to the "sophisticated user" and "open and obvious" defenses to a failure to warn case—*i.e.* a product is not defective for omitting warnings of dangers that are, or should be, known. And those defenses are tested under an objective standard. *Johnson v. Am. Standard, Inc.*, 179 P.3d 905, 914-15 (Cal. 2008) ("The obvious danger rule is an objective test, and the courts do not inquire into the user's subjective knowledge in such a case."). "Under the 'should have known' standard there will be some users who were actually unaware of the dangers." *Id.* at 914. But "even if a user was truly unaware of a product's hazards, that fact is irrelevant if the danger was objectively obvious." *Id.*; *see also* PRODUCTS LIABILITY TREATISE § 32:55 ("The opportunity to acquire knowledge by the use of reasonable diligence is the equivalent of having knowledge.").

Goldsworthy v. Johnson, 45 Nev. 355, 204 P. 505 (1922); *Capron v. Strout*, 11 Nev. 304, 306, 204 P. 505, 507 (1876).

Plaintiffs try to make this into a factual issue, but it is an issue of domestic law, on which the district court should take judicial notice. MCI wasn't required to introduce any testimony from its employees about the statute, as plaintiffs contend. (RAB 54.) As a matter of law, Mr. Hubbard was charged with knowing about the statute. For that reason, a vehicle manufacturer is not required to include warnings against illegal conduct like "stop at stop signs" or "do not exceed the speed limit." (AOB 61-62.) Just so here. The statute provides the warning, and a sanction for not obeying it. A warning from MCI would have been superfluous, and as MCI's expert would have testified, it would have been overkill, so nobody would have paid attention.

In sum, MCI was precluded from showing that the closest thing to a concept of a warning that would have kept Mr. Hubbard farther from Dr. Khiabani was already the law—enforced by criminal penalties. This deprived MCI of a fair trial.

E. The District Court Could Have Issued a Limiting Instruction

Plaintiffs contend that MCI was "ginning up excuses"[17] to violate the district court's motion in limine precluding evidence of Mr. Hubbard's contributory negligence. (RAB 57-58.) But evidence that is not admissible for one purpose can be admitted for another purpose. NRS 47.110. The district court should have issued a limiting instruction instead of cutting off MCI's ability to introduce such an important piece of causation evidence. *Id.*

F. MCI was Entitled to Introduce Any Evidence to Prove Its Theory of the Case

Plaintiffs' strangest argument is that MCI's expert was properly excluded because he would not be rebutting any testimony from plaintiffs' experts. (RAB 56-57.) MCI is entitled to put on its own evidence to establish affirmative defenses or rebut plaintiffs' claims that MCI should have warned Mr. Hubbard, regardless of what evidence plaintiffs introduced. *See In re Assad*, 124 Nev. 391, 401, 185 P.3d 1044, 1050 (2008); *Lopez v. State*, 105 Nev. 68, 81, 769 P.2d 1276, 1285 (1989);

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[17] Plaintiffs' inflammatory rhetoric is sprinkled throughout their brief, but seems to become particularly heated in sections where plaintiffs cite no legal authority for their arguments.

Longabaugh v. Va. City & Truckee R.R. Co., 9 Nev. 271, 291 (1874) (defendant may introduce evidence to "rebut any evidence offered by plaintiff" or "to establish any fact in favor of defendant").

G. Admitting the Statute Would Not Have Been Prejudicial; Its Exclusion Was

Plaintiffs' last argument on this topic is that the district court properly excluded the testimony about NRS 484B.270(2) because its probative value was outweighed by its prejudice. But the district court's analysis was flawed because it was premised on the legally erroneous notion that Mr. Hubbard did not know the law. (RAB 58.) It is irrelevant whether Mr. Hubbard knew about NRS 484B.270 at the time of the accident because (1) the test is objective; and (2) every person is conclusively presumed to know the law.

The probative value of the statute was high. And, although introduction of the statute might have been prejudicial on the topic of contributory negligence, it was not unfairly prejudicial on the topic of causation. *See* NRS 48.035(2) (relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of *unfair*

prejudice" (emphasis added)). If the jury had been informed of the statute, it could have concluded that the statute *was the warning*,[18] and that giving Mr. Hubbard the same warning again would not have prevented Dr. Khiabani's death.

Given the weakness of plaintiffs' evidence on causation, the exclusion of this statute greatly prejudiced MCI's ability to defend itself, requiring a new trial.

IV.

THE NEWLY DISCOVERED EVIDENCE CALLS FOR A NEW TRIAL

A new trial is necessary not only for the jury to assess causation, but also to hear the whole truth about Dr. Khiabani's income prospects.

Emotion aside, the disagreement is narrow. Nowhere in the answering brief do plaintiffs dispute: (1) Dr. Khiabani's projected income undergirds the $2.7 million award for loss of probable support. (2) Plaintiffs affirmatively represented the income projection during discov-

[18] To be clear, the district court should have dismissed the claims against MCI as a matter of law because this is not a fact issue and the standard is objective.

ery and trial, based on the assumption that Dr. Khiabani would continue in his esteemed position or a comparable one. (3) The news accounts appear to be credible and sourced. (4) If verified, the information would significantly undermine the probability of their income projection. (5) The news broke after trial. (6) The news was shocking and unimaginable. (7) The information likely would have remained a secret but for [redacted]. (8) Within days of the reports, MCI moved for limited discovery that would enable it to confirm the reports and to *ascertain whether the information probably could have been obtained* if MCI had doubted the esteemed doctor's employment prospects before trial, which the district court denied.

Plaintiffs also acknowledge that the relevant inquiry of NRCP 59 is whether MCI probably could have uncovered the new information with reasonable efforts during discovery. (RAB 64.) Yet, they do not justify the district court's mere assumption that "any inquiry into these basic facts . . . 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 Defendants to investigate

the issue." Nor do they address the judge's refusal to allow limited discovery to determine whether the court's assumption was true, which ability MCI lacked without subpoena power. Instead, plaintiffs just emphasize that MCI never forwarded to Dr. Khiabani's employer the release that plaintiffs had executed, *as if* [redacted] (according to the reports). That argument only highlights the error in the district court's effective application of an exhaustion-of-remedies analysis, which does not apply. *See* NRCP 59(1)(D).

Finally, plaintiffs are infuriated that MCI would raise the possibility of "fraud . . . misrepresentation, or misconduct of by opposing counsel," under NRCP 60(b)(3), as an argument in the alternative. (RAB 63-70.) The point is simple. *If* plaintiffs or their counsel had any knowledge of, or reason to suspect, the extraordinary circumstances that put [redacted] in such *unusual* doubt, they had a duty to disclose it and refrain from proffering income projections that disregarded it.[19] On the other hand, if they maintain that even Dr.

[19] MCI's counsel was to reluctant raise the possibility of a knowing misrepresentation. (And undersigned counsel still hope that no one knew.) But when plaintiffs treated MCI with disdain for even bringing the

Khiabani's wife had no idea of t[redacted] that tends to demonstrate how tightly the secret was being held and the unlikelihood that [redacted] would have disclosed even the existence of such information, much less turn it over.

V.

PLAINTIFFS ARE NOT ENTITLED TO KEEP [redacted] MORE THAN THEIR ACTUAL DAMAGES

Plaintiffs do not deny that they seek a double recovery of over [redacted] beyond their (jury-determined) actual damages. In support of this windfall they muster a feeble argument to apply the Uniform Contribution Among Tortfeasors Act (UCATA), NRS 17.245, and contend that manufacturing co-tortfeasors cannot receive an offset because they are ineligible to pursue contribution from other tortfeasors. These arguments miss the point.

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news reports to the court's attention, responded contemptuously to MCI's request for limited discovery, and ever since shouted only *nondenials* regarding prior knowledge, it puts MCI in a bind. It's ironic that plaintiffs take such umbrage at MCI raising the mere possibility of a misrepresentation while also contending it was an "amazing failure" and "monstrous mistake" of MCI to trust plaintiffs' representation about future income before trial (RAB 68).

In fact, plaintiffs never address MCI's entitlement to an offset under the Uniform Joint Obligations Act (UJOA), NRS 101.040. They cite no case in which a plaintiff was permitted to do what they seek here—keeping a double recovery by depriving a manufacturing defendant an offset for settlement proceeds received from other tortfeasors. They also ignore the numerous persuasive authorities cited by MCI condemning such a result. (AOB 97.)

Unable to cite any authority supporting a double recovery, plaintiffs twist a few quotes from Prosser and Traynor to suggest that public policy vilifies manufactures, in a desperate attempt to analogize them to intentional tortfeasors who act with *mens rea*. This exaggerates even the thread of policy statements they point to, however, while ignoring the policy against double recovery.

A. The UCATA Does Not Withhold Contribution or Offsets from Strict Liability Defendants

The main thrust of plaintiffs' argument is that judgments against strict-liability defendants cannot be offset by settlements plaintiffs received from other defendants because, they contend, the law precludes strict-liability tortfeasors from seeking contribution. Assuming, *arguendo*, that a right to contribution were a prerequisite to obtaining an

offset, the UCATA provides that right. (AOB 89-92, 100-01.)

Plaintiffs present four reasons given by the district court for denying MCI an offset under NRS 17.245. (RAB 72-73.) Each fails.

1. The UCATA's Silence Regarding Strict-Liability Torts Implies That They are Included, Not that They're Excluded

Plaintiffs contend that "it logically follows" from the UCATA's *express* exclusion of intentional torts and *silence* concerning strict liability that "a defendant found liable in strict-products liability would also be barred from receiving contribution[.]" (RAB 73.) Yet, the opposite is true. Applying principles of statutory construction correctly, the UCATA's silence regarding strict liability implies that the general term "tortfeasor" includes strict-product-liability defendants.

First, because the UCATA applies generally wherever "two or more persons become jointly and severally liable in tort for the same injury to person or property or for the same wrongful death" (NRS 17.255(1)) but expressly excludes intentional torts (NRS 17.255) and "breaches of trust or of other fiduciary obligations"(NRS 17.305), this Court must presume *those* exceptions are the *only* exceptions. "Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression

of one thing is the exclusion of another." *State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012). That applies to enumerated exceptions to a statute, as well. 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed.) ("where a legislature explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent"); BLACK'S LAW DICTIONARY 581 (6th ed. 1990) ("Under this maxim, if [a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded")). Put simply, where the broad right is followed by a narrow express exception, that exception is the only exception. Here, every type of tortfeasor may seek contribution from other tortfeasors except in cases involving intentional torts or breaches of a fiduciary relationship. *Cf. Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 529, 706 P.2d 845, 849 (1985) (applying to vicarious liability).

Second, NRS 41.141(5)(a)'s express exclusion of strict-liability ac-

tions from cases subject to several liability denotes that UCATA, lacking such an exclusion, *includes* strict-liability tortfeasors.[20] "[I]f the legislature includes a qualification in one statute but omits the qualification in another similar statute, it should be inferred that the omission was intentional." *In re Christensen*, 122 Nev. 1309, 1323, 149 P.3d 40, 49 (2006). Here, the legislature excluded strict liability from NRS 41.141 but not from the UCATA. And this Court will presume that to be intentional.

Third, Nevada's 1973 enactment of the UCATA was three years after this Court extended the doctrine of strict liability to design and manufacturing defects in all types of products, in *Ginnis v. Mapes Hotel Corp.*,[21] and seven years after this Court adopted the doctrine relating to foodstuffs, in *Shoshone Coca-Cola Bottling Co. v. Dolinski*.[22] When construing statutes, this Court presumes that the legislature is aware of existing law and that later statutes will be interpreted harmoniously with existing precedents, unless the statute specifies otherwise. *See*

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[20] The UCATA was amended as recently as 1997, eight years after the most recent amendment of NRS 41.141 in 1989.

[21] 86 Nev. 408, 413, 470 P.2d 135, 138 (1970).

[22] 82 Nev. 439, 441-42, 420 P.2d 855, 857 (1966).

Hardy Companies, Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1156 (2010). Thus, the legislature must be presumed to know that this Court had included negligence-free manufactures among those who would be "liable in tort for the same injury or the same death" (NRS 17.245(1)(a)) and chosen not to exclude them.

Fourth, the words "tort" and "tortfeasor" must be construed to have ordinary meanings, as the statute does not expressly define them otherwise. *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 125, 159 P.3d 239, 243 (2007). A word's plain meaning is not its possible "esoteric" connotation but, rather, the definition that is most "apparent to the simple, honest understanding of an ordinary sensible man." Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 867 (1930). "Any other meaning is under suspicion." *Id*.

Here, while plaintiffs suggest that "tort" and "tortfeasor" are secretly synonymous with negligence, that is not their plain meaning.[23]

[23] Were this Court to construe term "in tort" to mean in negligence as a matter of statutory construction, the result also would bar negligent defendants from seeking contribution from any manufacturing entities whom the plaintiff elected not to name, as the UCATA is the avenue by which that would occur.

"Tort" is a broad term encompassing every "civil wrong for which a remedy may be obtained, usu. in the form of damages[.]" BLACK'S LAW DICTIONARY 1496. Its usage predates the development of negligence. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 610 n.11, 5 P.3d 1043, 1051 n.11 (2000) ("[T]he word 'tort' was, in the non-modern context, a descriptive term for intentional misconduct amounting to a 'civil wrong,' not negligent misconduct."); *Publix Cab Co. v. Colo. Nat'l Bank of Denver*, 338 P.2d 702, 709 (Colo. 1959) (citing PROSSER, LAW OF TORTS, 2d Ed. 116, 117). A "tortfeasor," moreover, is simply "one who commits a tort; a wrongdoer." BLACK'S LAW DICTIONARY 1497. In fact, the common-law doctrine barring contribution among tortfeasors originally referred only to intentional torts. *Evans*, 116 Nev. at 610 nn.11–12, 5 P.3d at 1051 nn.11–12 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50 (5th ed. 1984)).

Accurately applying the relevant cannons of construction, the UCATA must be deemed to include those who are "liable in tort" because of strict liability.

2. Other Jurisdictions Adopting the UCATA Construe it Broadly and Include Strictly Liable Defendants

Although this appeal presents a question of first impression, plaintiffs dismiss MCI's wealth of authority from other jurisdictions (AOB 91-97), preferring the sparse and conclusory language in a few Nevada opinions and a 2001 unpublished disposition, which contemplate related but different concepts. But when this Court interprets a uniform law enacted by the state legislature, it may look to the experience of other jurisdictions that have wrestled with that uniform law. *See Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 527, 706 P.2d 845, 847 (1985) (looking to Alaska and Hawaii when interpreting NRS 17.225); *Miller v. Wahyou*, 235 F.2d 612, 615 (9th Cir. 1956) ("This is a Uniform Act and construction in other states have weight.").

Other jurisdictions that have adopted the UCATA generally construe it broadly. The UCATA "does not require that tortfeasors be joint in the strict sense that their tortious acts be simultaneous, or that they act in concert, before contribution will," rather "[t]he currently accepted definition of the term 'joint tortfeasors' includes all cases where there is joint liability for a tort, whether the acts of those liable were concerted,

merely concurrent, or even successive in time."[24] The basis for a contributor's obligation rests on the liability in tort for the same injury.[25] "Accordingly, there is no requirement that the bases for liability among the contributors be the same."[26, 27] And, directly on point, other states deem the UCATA to include the right of strictly liable manufacturing defendants to pursue contribution from negligent co-defendants who cause injury to third parties.[28]

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[24] *Morgan v. Kirk Bros., Inc.*, 444 N.E.2d 504, 507-08 n. 2 (Ill. App. 1983); *see also Turcon Constr., Inc. v. Norton-Villiers, Ltd.*, 188 Cal. Rptr. 580, 582 (Cal. App. 1983) ("policy applies with equal force to all tortfeasors joined in a single action regardless of whether their acts were successive or contemporaneous").

[25] *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 267 (Ill. 1987).

[26] *Id.* (interpreting "liability in tort arising out of the same injury to person . . . or the same wrongful death" to include strictly liable defendants).

[27] A few courts have denied contribution on the notion that negligence and strict liability are literally incomparable. *See, e.g.*, *Travelers Ins. Co. v. Empiregas, Inc. of Oak Grove*, 545 So. 2d 706 (La. App. 1989). But Nevada has rejected that apples-to-oranges concept. *See Café Moda v. Palma*, 128 Nev. 78, 84, 272 P.3d 137, 141 (2012) (rejecting concept that only negligence may be compared with negligence, and "we construe [NRS 41.141(4)'s] use of 'negligence' to mean 'fault').

[28] *Sinelli v. Ford Motor Co.*, 810 F. Supp. 668 (D. Md. 1993), *aff'd*, 7 F.3d 226 (4th Cir. 1993); *Erkins v. Case Power & Equip. Co.*, 164 F.R.D. 31, 33 (D. N.J. 1995), *superseded on other grounds by statute*; *Ehredt v. DeHavilland Aircraft Co. of Canada, Ltd.*, 705 P.2d 913 (Alaska 1985); *Svetz v. Land Tool Co.*, 513 A. 2d 403 (Pa. 1986); *Schnick v. Rodenburg*,

3. The UCATA Harmonizes with NRS 41.141

Plaintiffs argue that NRS 41.141 supports withholding the right of contribution and offset from strict-liability defendants because it makes defendants "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." (RAB 73, quoting the district court's order at 50 App. 12,485). They do not elaborate any further.

While NRS 41.141(5) does preclude strict-liability defendants from enjoying the benefit of several liability—leaving them in the default common-law world of joint and several liability—it's nonsensical to infer that NRS 41.141 implies that post-verdict offsets or contribution also

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397 N.W.2d 464, 469 (S.D. 1986); *see also Johnson v. Mercedes-Benz, USA, LLC*, 182 F. Supp. 2d 58 (D.D.C. 2002) (District of Colombia law) (analysis on related issue assumed the right of manufacturing defendant to pursue a potential contribution claim against negligent tortfeasor); *Wolfe v. Ford Motor Co.*, 434 N.E. 2d 1008 (Mass. 1982) (deeming even defendants liable for breach of warranty theory to be included as those "in tort" because it was reasonable similar to strict liability, which obviously was covered); *O'Dowd v. Gen. Motors Corp.*, 358 N.W.2d 553 (Mich. 1984) (manufacturer could seek contribution from the entity who purveyed intoxicating liquor to the deceased); *Howell v. Bennett Buick, Inc.*, 382 N.Y.S.2d 338, 340 (N.Y App. Div. 1976) (permitting an automobile manufacturer liable under a warranty theory to seek contribution from a negligent dealer); *Safeway Stores, Inc. v. Nest–Kart,* 579 P.2d 441, 445–46 (Cal. 1978) (permitting a negligent supermarket to seek contribution from a strictly liable shopping-cart manufacturer).

are disallowed. By its express terms, the UCATA assumes the party seeking contribution or offset will be "*jointly* or severally liable in tort for the same injury . . .or for the same wrongful death, . . . *even though judgment as not been recovered against all* or any of them." NRS 17.225(1) (emphasis added). That's the point.

The ends of the UCATA and NRS 41.141 overlap in NRS 41.141(3), which compels offsetting judgments by proceeds for settling codefendants:

> If a defendant in such an action settles with the plaintiff before the entry of judgment . . . The judge *shall* deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

NRS 41.141(3) (emphasis added). And there is no qualifier limiting the type of defendant who settles nor restricting the type of non-settling defendant against whom the plaintiff has won a judgment. *Id*.

B. Contribution is Not a Prerequisite to an Offset

Even assuming a manufacturer were unable to pursue other tortfeasors for contribution after becoming liable for all of a plaintiff's injuries—which is not the case (see above)—it still would not follow that a

plaintiff who *elects to pursue* multiple defendants for an indivisible injury and *collects settlement proceeds* from the non-manufacturing defendants may keep a double recovery. (*See* AOB 90, 93-97.) On this crucial premise of plaintiffs' argument, plaintiffs present only one case, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000), and a footnote attempting to distinguish two of the authorities cited in MCI's opening brief. (RAB 73-75.).

1. The Reasoning in Evans *that Barred Intentional Tortfeasors from Offsets is Inapplicable in a Strict Liability Case*

Plaintiffs rely exclusively on *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000), to link entitlement to offsets with the right to pursue another tortfeasor for contribution following payment of a judgment. (RAB 73.) They cite no other authority whatsoever to substantiate that point.

Evans v. Dean Witter Reynolds misapplied the UCATA, but even under the reasoning of that case, MCI is entitled to an offset. *Evans* held that because intentional tortfeasors do not have a right to contribution, they also cannot get an offset. That appears to go too far, since the UCATA does not condition offset rights on contribution rights and

in fact goes to pains to distinguish between the two. (*See* AOB 92-100.) Regardless, MCI is not an intentional tortfeasor.

a. MCI IS NOT AN INTENTIONAL TORTFEASOR

Intentional tortfeasors are barred from benefiting from offsets by a common-law doctrine based on public policy and moral culpability. *See Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 609, 5 P.3d 1043, 1050 (2000) (citing *Income Investors v. Shelton*, 3 Wash.2d 599, 101 P.2d 973, 974 (Wa. 1940)). This Court noted in *Evans* that an intentional tortfeasor should not be entitled to an equitable setoff because an intentional tortfeasor has "unclean hands" and by definition seeks such relief from a position of ineligibility for it. *Id.* at 1051. The distinction of intentional tort is not a technical one, moreover, as only intentional torts involving a showing of *mens rea* would warrant withholding an offset, with the attendant double recovery to the plaintiff. *Evans*, 116 Nev. at 611 n.13, 5 P.3d at 1051 n.13 (exempting acts of conversion that "do not involve wrongful intent").

A manufacturer in a strict liability case does not have the same moral culpability as an intentional tortfeasor. Indeed, under a strict liability theory one may be liable even though he exercised the utmost

care to prevent harm. *Valentine v. Pioneer Chlor Alkali Co. Inc.*, 109 Nev. 1107, 1110, 864 P.2d 295, 297 (1993). Recently, this Court, in renewing its commitment to the consumer expectation test, refocused the line between the product and the actions of the manufacture. *Ford Motor Co. v. Trejo*, 133 Nev. 520, 529, 402 P.3d 649, 656 (2017). This Court rejected the risk-utility analysis and noted that the focus should not be on the conduct of the manufacturer in designing and developing but rather on than the product itself. *Id.* A jury may separately consider the manufacturer's conduct to determine punitive damages. *See id.* Thus, the unclean hands concerns articulated in *Evans* are not present in a strict liability case—especially where the jury has rejected an allegation of implied malice.

Here, plaintiffs misapply Nevada law. Plaintiffs contend that manufacturers are analogous to intentional tortfeasors partly because both are listed among the five types of cases in which a plaintiff's comparative negligence does not apply. NRS 41.141(5). The *Evans* case had nothing to do with NRS 41.141. The *Evans* Court does not even mention it. And as *Trejo* confirms, the moral culpability issues articulated by the *Evan* Court do not apply to a manufacturer. Thus, moral

culpability cannot be inferred from a finding of strict liability itself.

b. Because Product-Liability Defendants Do Retain a Right to Contribution, they are Entitled to an Offset

The analysis of NRS 17.225 in *Evans* shows why product-liability defendants are entitled to an offset. That section ensures a general right of contribution among defendants who are "*jointly* or severally liable in tort . . . for the same wrongful death." NRS 17.225(1) (emphasis added). Textually, that includes defendants who are jointly and severally liable under NRS 41.141(5). NRS 17.225(1) does leave room for exceptions *within* the UCATA, including NRS 17.255's elimination of the contribution right for intentional tortfeasors. *Evans*, 116 Nev. at 610–11, 5 P.3d at 1051. But there is no similar exception within the UCATA for product-liability defendants. Thus, they retain a right of contribution under NRS 17.225(1). *See Slocum v. Donahue*, 693 N.E.2d 179 (Mass. App. 1998) (applying Massachusetts's UCATA to give settling car manufacturer right of contribution against negligent driver). And under the analysis in *Evans*, such defendants *would* be entitled to an equitable offset, just like every other severally *or jointly* liable defendant not expressly excepted. *See id.* MCI is entitled to an offset.

2. Plaintiffs Misread NRS 17.245

MCI's opening brief cited an opinion from the Supreme Court of Ohio, *Bowling v. Heil Co.*, 551 N.E.2d 373, 381 n.6 (Ohio 1987), ruling that the nonsettling manufacturing defendant was entitled to an offset of settlement proceeds from other tortfeasors even where contribution was held unavailable. (AOB 95-96.) Plaintiffs attempt to distinguish that authority with the following explanation:

> Bowling v. Heil Co., 31 Ohio St.3d 277, 287 n. 6, 511 N.E.2d 373, 381 n. 6 (Ohio Sup. Ct. 1987), gave the strictly liable elevator manufacturer a setoff for a negligent defendants [*sic*] settlement because an Ohio statute provided that a settlement by "one of two or more persons liable in trot [*sic*] for the same injury . . . reduces the claim against the other . . . " Nevada has no such offset statute so Heil provides no guidance herein.

(RAB 75 n. 24.) Plaintiffs are simply incorrect. Nevada does have such an offset statute, with identical UCATA language:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to *one of two or more persons liable in tort for the same injury* or the same wrongful death: . . . *it reduces the claim against the others* to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . .

NRS 17.245(1)(a). And because the Ohio Supreme Court was interpreting identical language from the same uniform act, this Court should not

cast aside the authority. *See Van Cleave v. Gamboni Const. Co.*, 101 Nev. 524, 527, 706 P.2d 845, 847 (1985) ("we are convinced that our interpretation of the Uniform Act, *consistent with most courts which have construed its provisions* in vicarious liability situations, best serves the purpose of the statute").

C. It Does Not Matter that the Injured Plaintiff's Contributory Negligence is Not a Defense

Plaintiffs assume that MCI is not entitled to contribution from other tortfeasors—and assume even further that it is ineligible for an offset—based on the common-law doctrine that "contributory negligence is not a defense in a strict products liability action." (RAB 74.) For support, they quote a sentence from *Andrews v. Harley Davidson*, 106 Nev. 533, 796 P.2d 1092, 1094 (1990)) and rely improperly on an 20-year-old unpublished disposition of this Court in *Norton v. Fergstrom*, 2001 WL 1628302, *5 (Nev. Nov. 9, 2001).

1. A Manufacturer's Right to Contribution is Not Extinguished Merely Because the Plaintiff's Contributory Negligence is Not an Exculpatory Defense

It is not surprising that plaintiffs find no authority for the proposi-

tion that a plaintiff may keep a double recovery merely because contributory negligence is not a defense in a strict products liability action.

a. THE RIGHTS OF CONTRIBUTION OR OFFSET BECOME RELEVANT ONLY AFTER THE INJURED PLAINTIFF IS MADE WHOLE

The primary purpose behind the common-law preclusion of the contributory negligence defense is to afford the injured plaintiff compensation for injuries. The rights of a non-settling, judgment-debtor manufacture to pursue contribution from other tortfeasors comes into play only after that objective has been achieved. As the Supreme Court of Illinois explained:

> [T]he public policy considerations which motivated the adoption of strict liability … were that the economic loss suffered by the user should be imposed on the one who created the risk and reaped the profit. When the economic loss of the user has been imposed on a defendant in a strict liability action the policy considerations are satisfied and the ordinary equitable principles governing the concepts of indemnity or contribution are to be applied.

Skinner v. Reed-Prentice Division Package Machinery Co., 374 N.E.2d 437, 443 (Ill. 1977) (reversing dismissal of a manufacturer's third-party complaint seeking contribution from a negligent employer), subsequently codified and ratified by Illinois's adoption of the UCATA, as

stated in *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 267 (Ill. 1987), *cf. Café Moda v. Palma*, 128 Nev. 78, 82, 272 P.3d 137, 140 (2012) (discussing the legislature's attempt through NRS 41.141 to balance an injured *plaintiff's ability to recover* as much of its damages as possible against the desire to soften imposition of joint and several liability). As the Third Circuit reasoned in interpreting the UCATA:

> [T]he theory is that as between the two tortfeasors the contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.

Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 25 (3d Cir. 1986) (applying Pennsylvania law) (holding that a defendant found strictly liable and a defendant found liable for negligence may be joint tortfeasors and, thus, may be entitled to contribution).

There is even less argument that unavailability of a contributory negligence defense would sever the manufacturer's right to an offset. An offset does not allocate liability based on a percentage of fault. It simply reduces the judgment by the settlement amount to prevent double recoveries.

b. THE FAULT OF A THIRD-PARTY USER IS NOT IRRELEVANT

Although it is unnecessary to go beyond the above analysis, it is noteworthy that the statement in *Andrews v. Harley Davidson* that "contributory negligence is not a defense in a strict products liability action" is an oversimplification even as far as it goes. That doctrine—which is a remnant of the harsh common-law regime that would deprive injured plaintiffs of recovery if they were even one percent at fault—applies to *particular types* of contributory negligence:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.

RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965), *relied upon in Young's Mach. Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984); *Gen. Elec. Co. v. Bush*, 88 Nev. 360, 366, 498 P.2d 366, 370 (1972) (barring a contributory negligence defense "consist[ing] of a failure to discover the defect [] or to guard against the possibility of its existence"). Certain other negligent behaviors do remain defenses even vis-a-vis the injured plaintiff: risk assumption and unforeseeable misuse. *Young's Mach. Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984). In that vein, courts have also deemed a plaintiff's "gross negligence" and

"highly reckless conduct" to be appropriate defenses.[29] And nothing in Nevada cases suggests that imposing strict liability on the manufacturer alleviates the responsibility of other tortfeasors for the harm they cause by using a product dangerously, *regardless of the alleged defect* in the product.[30]

Here, again, the Court need not wrestle with the exact parameters of that common-law doctrine now because MCI seeks only its entitlement to an offset upon plaintiffs being made whole. But this Court should be especially wary of taking the logical leaps that plaintiffs encourage from such a thin platform.

2. Plaintiffs Rely Improperly on the Unpublished Norton *Disposition, Which Was Simply Incorrect*

Plaintiffs rely heavily on *Norton Co. v. Fergestrom* to support their

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[29] *Busch v Busch Constr., Inc.*, 262 NW2d 377 (Minn. 1977) ("Under comparative negligence, failure to inspect product or guard against defects would not offset manufacturer's strict liability but all other types of negligence, misuse, or assumption of risk would be compared on percentage basis."); *Oltz v Toyota Motor Sales, Inc.*, 531 P2d 1341 (Mont. 1975); *Reott v. Asia Trend, Inc.*, 55 A.3d 1088 (Pa. 2012).

[30] Here, the settling defendants included other another manufacturer (of the decedent's helmet), the retailer, and the bus company whose driver allegedly passed the decedent without maintaining a three-foot distance between them—which is negligence per se. NRS 48B.270(2).

contention that the bar of contributory negligence as a defense bars MCI from obtaining an offset. No. 35719, 2001 WL 1628302, at *5 (Nev. Nov. 9, 2001). The citation is improper, as this Court forbids citation to any of its unpublished dispositions issued before January 1, 2016. NRAP 36(a). Here, they not only cite it, they erroneously contend it is dispositive.[31]

Assuming it were citable, the per curiam *Norton* order is also weak precedent on the merits. The proposition for which plaintiffs cite it is *dicta*, a superfluous ground for rejecting the last (of four) issues the appellant had raised; the appellants had failed to even preserve the issue. *Id*. at *5. The gravamen of the putative contribution claim is never mentioned. Most importantly, the *Norton* order articulates no authority or rationale for denying a manufacturer the *post-judgment* right of contribution from *other tortfeasors* based on its inability to raise a contributory negligence defense vis-a-vis the injured plaintiff in the underlying action.

[31] RAB 73 ("This is dispositive here.". . . "Because Norton eliminates any argument that Nevada law requires an offset . . .")

Finally, the *Norton* order is inapplicable. It does not concern offsets—*i.e.*, the appropriate allocation of settlement money that the plaintiff has already received from other tortfeasors after the plaintiff elected to sue them in addition to the non-settling manufacturer. As demonstrated in MCI's opening brief and above, that is different.

D. No Policy Supports Withholding Offsets from Manufacturers, Much Less Justifies Plaintiffs Pocketing Double Recoveries in any Product Case

Unable to cite any case where a plaintiff was ever permitted to keep a double recovery by denying a post-trial offset to a non-settling manufacturer, plaintiff leans into a distorted origin story of strict-products-liability to craft an impression of manufacturers are analogous to intentional tortfeasors. They hyperbolize a minor thread of the policy statements underlying strict-liability law while ignoring the extensive policy against double recovery.

No public policy supports letting plaintiffs in product cases keep the double recovery they receive by settling with other tortfeasors whom they sued for the same harm.

1. Strict Liability Does Not Exist to Terrify Society's Inventors and Makers

Plaintiffs suggest "the primary rationale" underlying strict liability (RAB 70) is akin to punitive damages—*i.e.*, to threaten unmitigated liability. With Orwellian euphemism, they warn that "[a]bsent the full economic incentive, the 'maximum possible protection' against dangerous products is not achieved" and that "giving a manufacturer an offset for payments by negligent [co-defendant] users, the result can only be lesser protection to the community[.]" (RAB 72 (emphasis added).)

The primary purpose behind imposition of strict liability is not to punish manufacturers but to provide easier access to compensation for damages. *See Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d (1966) (citing William L. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 799 (1966)). We impose the burden of liability even absent negligence because manufacturers "are best able to afford it" (*id.*), even if "consumers shall be compelled to accept substantial price increases on everything they buy in order to compensate others for their misfortunes." William L. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1021 (1966). And we deem this a reasonably fair re-

sult considering the position of manufacturers to fix problematic products, that they decide how their products are marketed, and they have collected profits from sale of their products over time. *See Shoshone Coca-Cola Bottling Co.*, 82 Nev. at 441-42, 420 P.2d 856-57. Certainly, the specter of liability incentivizes manufacturers to be as safe as possible; but that is not the reason for imposing liability in the *absence of negligence* where the manufacturer has exercised due care.

Put simply, strict liability does not exist because the law villainizes manufactures and endeavors to scare them into caring about their customers and the public. Where manufacturers are worthy of punishment, the law allows imposition of punitive damages.

2. The Social Policy Aims Behind Strict Liability are Not that Different from Liability for Negligence

Plaintiffs exaggerate the policy differences behind strict liability and negligence. Negligence liability serves both restorative justice and deterrence. Gary T. Schwartz, Mixed *Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1820 (1997). Even in negligence, large compensatory damages can effectively punish. *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 511,

746 P.2d 132, 138 (1987), *abrogated on other grounds by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006). Such awards may also serve an exemplary purpose to deter would-be tortfeasors. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017) (allowing "statements asking the jury to send a message" consistent with the evidence). And we hold negligent tortfeasors accountable for the damages they cause by excluding any evidence of collateral source payments.[32]

The preference for providing deep pockets to injured plaintiffs also is not unique to strict liability. As this Court explained in *Buck v. Greyhound*, Nevada prioritizes making a non-negligent plaintiff whole:

> We realize that the result of the entry of joint and several judgments against all defendants may cause substantial inequities. Such a contingency has always been a possible if not probable result of the application of the common law rule. It is apparent, however, that the rule favored the proposition that it is better to fully compensate an innocent victim of the combined negligence of multiple defendants than to assure that each

[32] *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1 , 911 P.2d 853, 854 n.1 (1996); *see also Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 8 (Wis. 2007) (holding that a tortfeasor "is not relieved of his obligation to the victim simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source"); *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 212 (Kan. 2010) (similar).

> defendant is held responsible only for his proportionate share of the plaintiff's damages.

105 Nev. 756, 764, 783 P.2d 437, 442 (1989). But once the priority to compensate the plaintiff in such cases has been satisfied via imposition of joint and several liability, the policy priority shifts to spreading the cost by way of contribution and offsets. *E.g.*, NRS 17.225; NRS 101.040. Just as it does in strict liability cases. *See Skinner*, 374 N.E.2d at 443.

What plaintiffs suggest are big differences, differences that supposedly villainize manufacturers in strict liability and contrast them to negligent tortfeasors, are not really differences at all. There is no justification for treating negligent tortfeasors any differently from strict liability defendants under the UCATA, the UJOA, the offset provision of NRS 41.141(3), or the common-law entitlement to an offset.

E. Plaintiffs' Feeble Justification of a [redacted] Windfall

Plaintiffs' remaining argument is that the approximately [redacted] settlement represents the fruit of their strategic and industrious choices in litigation. They provide no legal authority for this concept, however. And it does not make sense.

It is true that plaintiffs are the masters of their complaint with the right to choose whom to sue and for what. *Reid v. Royal Ins. Co.*, 80

Nev. 137, 141, 390 P.2d 45, 47 (1964); *Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. 788, 793, 312 P.3d 484, 488 (2013). It's also true that they could have chosen to sue only MCI, which is jointly and severally liable for the full amount of their damages (in hindsight of the jury verdict). But this is a distinction without a difference: the same could be said of any defendant. If plaintiff had sued only Michelangelo, that defendant also would have been jointly and severally liable for all of their damages. *See Humphries*, 129 Nev. at 793, 312 P.3d at 488. Conversely, if plaintiffs had sued only MCI and collected the entire verdict from MCI, plaintiffs could not sue the other tortfeasors for more.

Plaintiffs elected to pursue multiple tortfeasors in this case, and wisely so. First, under plaintiffs' theory of the events, evidence indicated that the driver *was* negligent per se, passing Dr. Khiabani at an illegally short distance of separation that would be perilous regardless of the vehicle being driven. That defendant did not pay [redacted] out of generosity. Second, the case against MCI was thin and risky, as demonstrated by the jury's rejection of every alleged design-defect theory and plaintiffs' continued inability to articulate a warning not already known

to commercial drivers that would have made a difference. Third, plaintiffs' theory was novel, alleging that aerodynamic aspects of a vehicle render it unreasonably dangerous merely because of the turbulence everyone feels when large objects move by them quickly.

Because plaintiffs elected to sue multiple tortfeasors and then collected settlements from most, operation of law reduces the damages to be collected from the non-settling defendant. That operation flows from a carefully interwoven system of statutes, common-law doctrines, and abutting policy considerations.

Finally, if the law were otherwise, allowing a plaintiff to sue multiple tortfeasors in order buildup double recoveries, it would have the effect of encouraging—not reducing—litigation. *See Schnick v. Rodenburg*, 397 N.W.2d 464, 469 (S.D. 1986) (denying the non-settling manufacturer offset from settlement between the injured plaintiff and the negligent user of the product would encourage pursuit of double recoveries). That would be wrong.

F. Judicial Estoppel: Plaintiffs Cannot Defend the District Court's *Post Hoc* Rationalization

Plaintiffs contend that their successful, pretrial argument that MCI *would* be entitled to an offset does not estop them from advancing

the opposite position after trial. (RAB 76-77.) They point to (1) the district court's post-trial statements when denying the offset that it never considered the certification of a good-faith settlement relevant to the remaining defendant, and (2) the judge's post-trial impression that "considering the jury verdict, it appears that the settling defendants might have paid even more than their fair share of liability." (RAB 77.) Those *post hac* rationalizations are problematic. First, it is difficult to imagine why the district court would refrain from warning the parties that she disagreed with their expressed understanding about the ramifications of certifying the good faith settlement. Second, the court was in no position to *weigh the merits* of the claims against the settling defendants relative to the plaintiffs' theories against MCI. The court heard no evidence on the subject when granting the motions for good faith settlement, the settlements all occurred before substantive pre-trial briefing, and the presentation at trial and jury's verdict is not helpful, as all evidence of the driver's negligence was excluded from the trial. The justifications do not hold up.

VI.

THE AWARD OF COSTS WAS UNJUSTIFIED AND UNJUSTIFIABLE

Plaintiffs propose exceptions that would swallow the rules, uncapping the *taxable* expense of litigation that the legislature has sought to contain.

A. Expert Fees

Besides stating that the factors enumerated in *Frazier v. Drake*, 357 P.3d 365 (Nev. App. 2015) were considered (50 App. 12,409), the district court did not share any analysis justifying $237,000 in expert fees—every dollar requested. It's true "the same judge presided over the entirety of the case" (RAB 79), but that is true in most cases. Plaintiffs set out the experts' relevance and expertise (RAB 80-81), but if the test of admissibility were the bar, every expert would bust the $1,500 cap. They seek credit for modesty because they claimed the cost of only five of the 14 experts and because MCI incurred costs as well (RAB at 79-80), but NRS 18.005(5) limits the experts to five. And the fact plaintiffs forced MCI to spend a small fortune defending an ambitious case, in which they asked the jury for hundreds of millions, based on entirely

novel theories (that the jury largely rejected), cannot justify requiring MCI to fund their exorbitant experiment, as well.

B. "Trial Support Fees"

The answering brief concedes "[t]rial support costs are outsourced as a more efficient method by which to present evidence." (RAB at 84.) That is precisely MCI's point. That business decision cannot transform into taxable costs the types of fees and overhead expenses that the legislature declined to make transferrable.

CONCLUSION

For these reasons, this Court should reverse the judgment.

Dated this 7th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 15,730 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

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