Case No. 86417

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEON KHIABANI, an individual; ARIA KHIABANI, an individual; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Appellants

vs.

MOTOR COACH INDUSTRIES, INC.,

Respondent.

APPEAL
From the Eighth Judicial District Court, Clark County
The Honorable Adriana Escobar, District Judge
District Court Case No. A-17-755977-C

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Appellants are individuals and do not include any corporations. Appellants/Plaintiffs have been represented in this litigation by the law firms of Kemp Jones, LLP, and Christiansen Trial Lawyers.

DATED this 20th day of November, 2023

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JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1) and 3A(b)(8). The district court entered its order granting Defendant/Respondent Motor Coach Industries, Inc.'s motion for offset on March 16, 2023. [2 App. 0301]. Written notice of entry of the order was served on March 24, 2023. [2 App. 0319]. Appellants timely appealed from the district court's order on April 12, 2023. [2 App. 0340]. *See* NRAP 4(a)(1).

ROUTING STATEMENT

The Supreme Court should retain this appeal to resolve important questions of statewide public importance, including the proper application of this Court's prior published decisions, under NRAP 17(a)(11) and 17(a)(12). The amounts at stake also exceed the threshold for presumptive assignment to the Court of Appeals. *See* NRAP 17(b)(5).

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STATEMENT OF THE CASE[1]

A jury returned a verdict in favor of the Khiabani family in the amount of $18,746,003.62 for compensatory damages and judgment was entered on April 17, 2018. [1 App. 0143-45]. The Khiabanis prevailed on a failure to warn claim. [1 App. 0139]. After post-trial challenges and an appeal to this Court, the verdict was affirmed and this matter was remanded to the District Court to calculate the offset, if any. The potential offset arose as a result of the settlement before trial by the bus operator for $5 Million in response to an offer of judgment in like amount. Two other defendants also paid $110,000.00 to match other offers of judgment. The Khiabanis have conceded that MCI, the bus operator and the other defendants were sued for the "same injury."

The parties dispute the amount of the offset. MCI contends and the District Court agreed that MCI is entitled to a credit for the full $5 Million settlement paid

[1] Appellants are Keon and Aria Khiabani and the Estates of their deceased parents, Dr. Kayvan Khiabani and Dr. Katayoun ("Katy") Barin. All 4 Appellants will be referred to collectively as the "Khiabanis" or "the Khiabani family" unless reference need be made to individual Appellants. Respondent Motor Coach Industries, Inc. shall be referred to as "MCI." Ryan's Express d/b/a Michaelangelo was the bus operator that settled below and will be referred to herein as the "bus operator." The bus operator and driver are not parties to this appeal as they were dismissed with prejudice after settlement approval at a good faith hearing. The landmark J.E. Johns & Assoc. v. Lindberg, 136 Nev.Adv.Op. 55, 470 P.3d 204 (2020) case will be referred to as "Lindberg."

by the bus operator and the full $110,000.00 paid by the other 2 settling defendants. The Khiabanis contend that the $5.11 Million in settlements must be allocated to unique damages to which the bus operator and the other defendants were exposed but to which MCI was not exposed (i.e., potential attorneys' fees under NRCP 68 and/or punitive damages).

The District Court offset hearing was held on June 28, 2022. A decision was announced without oral argument. [2 App. 0293-94]. The Order Granting Defendant Motor Coash Industries, Inc's Motion For Offset was filed on March 16, 2023. [2 App. 0301]. The District Court made three different rulings regarding the offset: (1) Lindberg is constricted solely to "a clear statute that allowed for treble damages" and "any discussion about punitive damages was dictum" [2 App. 0310:14-19]; (2) punitive damages cannot be allocated unless the liability of the settling tortfeasor is adjudicated by a finder of fact [2 App. 0310:20-0311:11]; and (3) the Khiabanis were estopped from claiming that the bus operator had a punitive exposure for its conscious disregard in implementing faulty applicant screening procedures because the Khiabanis argued that the bus driver would have heeded a warning [2 App. 0311:2-19]. Despite acknowledging that the Khiabanis urged that exposure to attorneys' fees as a result of an offer of judgment was exposure to unique damages [2 App. 0309:13-0310:2], the District Court did not explain why it did no offset calculation for the statutory attorney fee exposure.

The District Court stripped the entire $5.11 Million in settlements from the $18,746,003.62 compensatory verdict. MCI paid the balance to the Khiabanis with the vast majority going to the surviving sons; Keon and Aria.

ISSUES PRESENTED

1. Whether Lindberg was "dicta" or binding precedent that should be applied to other statutory damages or punitive damages exposure unique to a settling defendant?
2. Whether potential NRCP 68 liability for attorneys fees is a unique exposure for which settlement proceeds should be allocated?
3. Whether potential punitive liability to the bus operator for its corporate misconduct is a unique exposure for which settlement proceeds should be allocated?
4. Whether the punitive damage liability exposure of a settling defendant must be adjudicated by a finder of fact to constitute an offset?
5. Whether the Khiabanis were estopped from alleging that the bus **operator** acted with conscious disregard in its driver hiring or training procedures by arguing at trial that the bus **driver** would have heeded a warning?

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STANDARD OF REVIEW

All issues are decided under a de novo review standard. Lindberg, 136 Nev.Adv.Op.55, 470 P.2d 204, 207 (2020) ([T]he district court's interpretation and construction of NRS 17.245(1)(a) presents a question of law that we review de novo.")

STATEMENT OF PROCEDURE

The Khiabanis made offers of judgment to the 3 settling defendants in the exact same amount as the ultimate settlements. [2 App. 0255-58; 0270-72; 0274-76]. No offer of judgment was made to MCI. The punitive damages claim against MCI was submitted to the jury which found in its favor on this claim:

> If you answered "Yes" on any of the above liability questions, you must also determine Plaintiffs' claim for punitive damages against MCI:
>
> **PUNITIVE DAMAGES**
>
> Is MCI liable for punitive damages?
> Yes_____ No__√__

[1 App. 0141]. MCI was not responsible for attorneys' fees. [1 App. 0145-46].

STATEMENT OF FACTS

MCI was found liable on a strict liability failure to warn theory centered on the dangerous aerodynamic properties of its "boxy" bus design. The bus operator was sued for negligence and punitive damages. The punitive damages claim against the bus operator was primarily based upon (1) the faulty procedures adopted by the

bus operator to perform background checks before hiring applicants which did not find four serious prior traffic violations by the bus driver involved in the accident; and (2) the failure of the bus operator to update driver training materials with noteworthy changes to traffic laws such as the 2011 bicycle safety law.

1. The Bus Operator Bungled The Driver Background Check

William Bartlett was produced as the bus operator 30(b)(6) witness on multiple safety topics:

> Subject #1: For the time period beginning one year prior to Defendant Edward Hubbard's employment with ML,[2] through the present, all ML policies and procedures regarding hiring, training, supervision and retention of any employee and/or independent contractor, including in particular, Defendant Edward Hubbard . . . .
>
> Subject #2: For the time period beginning one year prior to Defendant Edward Hubbard's employment with ML through the present, all ML policies and procedures regarding driver discipline, driver safety and rules under which drivers operate.

[2 App. 0227-33]. Bartlett was the Director of Safety and Risk Management of the bus operator from January 2015 to March 2017 -- when the bus driver was trained. [2 App. 0236-37].

The bus operator had an absurd corporate policy of scrutinizing traffic violations for only the three prior years before the interview date of potential drivers. Bartlett admitted that the bus operator could easily have looked back for 10 years.

[2] "ML" meant "Michaelangelo" which was the d/b/a of the bus operator.

If the bus operator had done so, it would have discovered four serious traffic violations by the bus driver applicant that would have resulted in his not being hired:

> Q. Okay. If you'd gone back ten years, you would have known about all these things I just read to you from exhibit 6; right?
> A. Right.
>
> . . . .
>
> Q. I am suggesting that, if you had known about Exhibit 6, the [traffic violations] information in Exhibit 6, you wouldn't have hired this guy?
> A. You're very possibly right.

[2 App. 0248-50]. The conscious disregard of adopting a comically limited review period for past traffic violations is bad conduct by the company -- not by the driver. These damaging facts created the unique "exposure" to punitive damages that the bus operator settled.

2. The Bus Operator Mismanaged Training Manual Updates

Bartlett conceded not knowing of the 2011 bicycle law that requires buses go to the far left lane and provide bicyclists with 3 foot clearance and admitted that the bus operator provided no driver training regarding the bicycle statute:

> Q. . . . Prior to September 1st [the week before the Bartlett deposition], you did not know there was a law in Nevada that required motor vehicles to move over to the far left lane if there's two travel lanes?
> A. I was not.
> **Q. Okay. And since you weren't aware of that, that was never part of the training session for drivers?**
> **A. No.**

> Q. And prior to September 1st, were you aware that there's also a law in Nevada that buses and motor vehicles cannot come within 3 feet of a bicycle?
> A. No, sir.
> Q. So that's -- you know that now, I assume.
> A. I've been made aware there is some sort of law.
> Q. Okay. Whose job is it to make sure that the training curriculum is up-to-date -- is up-to-date with the laws in Nevada?
> A. Well, I put the curriculum together.
> Q. Okay. So assuming, for the sake of argument, that this law comes out back in 2011, whose job would it have been at that time?
> A. Had I been aware, it would have been mine.

[2 App. 0238:4-0239:3 (Bold added)]. This testimony cemented that the Director of Safety Bartlett did not know of the 3-foot law and also that it was not included in driver training materials.

Bartlett testified that he copied the driver training manuals that the bus operator used from another bus company in 2010. [2 App. 0245:9-21]. Failing to update a purloined training handbook for 7 years between 2010 and 2017 with significant developments such as the 2011 bicycle law was a stunning act of corporate malfeasance.

The bus driver was hired on April 20, 2016. and trained on April 20-22, 2016. [2 App. 0246:11-14; 0247:17-20]. The parroted 2010 training manual still being used in 2016 did **not** reference the 3-foot bicycle law that was enacted years earlier in 2011. [2 App. 0251-53]. These facts also generated punitive "exposure" to the bus operator for corporate malfeasance.

3. The Bus Operator Settlement Materialized After The Corporate Misconduct Was Divulged And Was Not Motivated By The Driver's Deposition

The damning facts about the farcical pre-hiring investigation and the flawed and outdated training materials were documented in the Bartlett deposition taken on September 8, 2017. Three days later, Plaintiffs served an offer of judgment. [2 App. 0255-58]. The bus operator agreed to settle days later. The bus driver was not deposed until September 20, 2017 -- 9 days **after** the offer of judgment was served. The shocking corporate misconduct and resulting punitive exposure that was chronicled in the Bartlett deposition triggered the bus operator settlement -- not anything that the bus driver testified to **after** the offer of judgment was made regarding his conduct.

I. ARGUMENT

A. The Lindberg Holding That Offsets Must Be Calculated By Allocating Part Of A Settlement To Actual Damages And Part To "Unique" Statutory Or Punitive Exposure Of The Settling Tortfeasor Was Not "Dicta" To Be Disregarded By The District Court

1. Lindberg Adopted An Offset Calculation That Pro-Rates The Offset If The Settling Defendant Had Unique "Exposure" To Statutory Or Punitive Damages

J.E. Johns & Assoc. v. Lindberg, 136 Nev. 477, 470 P.3d 204 (2020) [hereinafter "Lindberg"] was decided on August 20th, 2020 -- after the briefing on the initial appeal of this case had closed but before oral argument. This Court

remanded the offset determination under Lindberg. See Motor Coach Industries, Inc. v. Khiabani, 493 P.3d 1007, 137 Nev. Adv.Op 42 (2021) The District Court wrongfully disregarded Lindberg as dicta and ordered that there should be a complete offset for the entire $5.11 Million paid by the 3 settling defendants.

Lindberg elucidates "that settlement offset calculations pursuant to NRS 17.345(a)(1) must adhere to the statute's goal of avoiding windfalls, which necessarily includes restricting the settlement credit to the amount that fully compensates the plaintiff's injury and does not otherwise provide for double recovery." Lindberg, 470 P.3d, at 211. Instead of "avoiding windfalls," the District Court gave MCI a multi-million dollar godsend by subtracting the entire $5.11 Million from its compensatory liability. Conversely, the Khiabanis were inappropriately mulcted. Lindberg, 470 P.3d at 211 ("To conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant.")

Lindberg has simplified offset calculations to a two part test. First, Lindberg asks if both defendants were sued for the "same injury." The Khiabanis have conceded that the same injury underlies both claims.

The second Lindberg inquiry is to identify unique damages sought against the settling defendant (the bus operator) and compare such exposure to the damages awarded against the non-settling defendant (MCI):

> Thus, ensuring that a plaintiff does not recover twice for the same injury does not mean that a plaintiff should otherwise be precluded from

> receiving the portion of a settlement award that resolves a settling defendant's **exposure beyond actual damages -- such as treble or punitive damages** -- if such exposure is **unique** to the settling defendant.

Lindberg, 470 P.3d at 211 (Bold added) In Lindberg, an aggrieved home buyer sued the seller and the real estate agents of both parties. "The Lindbergs specifically alleged that the sellers violated their statutory disclosure obligation under NRS 113.130, for which NRS 113.150 (4) permits the recovery of treble damages, and that the sellers' agents and the Lindbergs' agents violated their statutory duties of disclosure pursuant to NRS 645.252, which gave rise to a cause of action under NRS 645.257 to recover their actual damages." Lindberg, 470 P.3d at 205. Before trial, the buyers settled with the sellers for $50,000 and with buyer's agent for $7,500.

The Lindberg District Court awarded $75,780.79 against the seller's agents. "Then, the district court offset the $27,552.95 award [to fix a septic tank] by the entire settlement amount paid by the Lindbergs' agents ($7,500), and by one-third of the settlement amount paid by the sellers ($50,000 x 1/3 = $16,650) in recognition that the Lindbergs `would be entitled to treble damages against the sellers associated with any claim established under NRS 113.250.'" Lindberg, 470 P.3d at 210.

On appeal, the agent for the Lindberg seller made the same covetous argument that MCI now makes: they insisted on a credit for the full settlement amount as opposed to a portion of it. The Lindberg Court described the issue before it as:

"[w]hether NRS 17.245(1)(a) requires district courts to automatically deduct the entirety of a settlement award without considering the makeup of the award in relation to the judgment against the nonsettling defendants . . . ." Lindberg, 470 P.3d at 210.

Based upon the principle that equitable settlement offsets are to avoid windfalls, the Court held that offsets must be applied only after "scrutinizing the allocation of damages awarded therein" and differentiated between actual damages and treble damages. Lindberg, 470 P.2d at 210. The Court then made the critical holding that where treble or punitive damages was a "unique **exposure** to the settling defendant", "then ensuring that a plaintiff does not recover twice for the same injury does not mean that a plaintiff should otherwise be precluded from receiving the portion of a settlement award that resolves a settling defendant's exposure beyond actual damages -- such as treble or punitive damages -- if such **exposure** is unique to the settling defendant." Lindberg, 470 P.3d at 211. (Bold added) The Khiabanis emphasize that the Lindberg Court explicitly commented multiple times that the settling defendant's "exposure" to **punitive** damages must be considered.

2. The Bus Operator Had Statutory Exposure To Sizable Attorneys' Fees Because Of The Offer Of Judgment That Triggered The $5 Million Settlement

The Khiabanis served offers of judgment to all 3 settling defendants. [2 App. 0255-58 ($5 Million Dollar offer of judgment to the bus operator); 2 App. 0274-76

($100,000 offer of judgment to Bell Sports); and 2 App. 0270-72 ($10,000 offer of judgment to Sevenplus Bicycles, Inc.)]. The final settlements by all 3 settling defendants were the exact same amounts as set forth in the respective offers of judgment.

The Khiabanis did not **serve** an offer of judgment to MCI. MCI was not "exposed" to attorney fees under NRCP 68 and NRS 17.115(4)[3]. The judgment entered against MCI did not include attorneys' fees. [1 App. 0143-46]. MCI did not pay fees.

Given service of the offers of judgment, all 3 settling defendants had a substantial "exposure" to costs and fees under NRCP 68. See Capriati Construction Corp., Inc. vs. Yahavi, 137 Nev.Adv.Opin. 69 498 P.3d 226, 231 (2021) [hereinafter Capriati] ("Under NRCP 68(f)(1)(B), if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment, the offeree must pay `reasonable attorney fees, if any be allowed, **actually incurred** by the offeror **from the time of the offer.**" (Bold in original) In contingent fee cases, the amount of the contingent fee is the post-offer attorney fees under NRCP 68. Id.

Capriati held:

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[3] See Beattie v. Thomas, 99 Nev. 578, P.2d 268, 668 P.2d, 273-74 (1983) (NRS 17.115 expressly governs judgment offers, but varies from NRCP 68 in that it allows recovery of only costs and expert witness fees, and not attorney's fees). See also NRS 17.115(4).

> We now clarify that a district court may award the entire contingency fee as a post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails. See Grasch v. Grasch, 536 S.W.3d 191, 194 (Ky. 2017) (holding that "the attorney does not possess a vested right to the actual contingent fee until the case is won or settled"); see also Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 562 (Tex. 2006) (holding the same). A contingency fee is contingent on the plaintiff prevailing, which will happen only **after** an offer of judgment is rejected -- never before.

Capriati, 498 P.3d at 231. For these reasons, under Capriati, the 3 settling defendants were exposed to weighty fees in the amount of the contingency fee times the compensatory damages that could be awarded for a wrongful death.

The only difference between the unique statutory damages exposure in this case and in Lindberg is that one statute awards trebling (NRS 113.250) and the other statute awards attorneys' fees. This is a distinction without a difference as the rationale is to allocate the settlement if there is a **unique** exposure. Here, there was undeniably exposure to the settling defendants for the fees. There was no fee exposure or award against MCI.

In this case, the actual damages were determined by the jury to be $18,746,000.00. 40% of the actual damages is $7,498,840.00.[4] This is the amount of fees that all 3 settling defendants were exposed to under Rule 68. Again, offers

[4] Like the Capriati case, the contingent fee in this case was 40%. [2 App. 0216-17].

of judgment were served to **all** of the settling defendants. No offer of judgment was served to MCI and no fees were awarded against MCI. For these reasons, the attorney fee "exposure" under NRCP 68 was a "unique damage" to which the settling defendants but not MCI were exposed under Lindberg.

3. The Bus Operator Had Unique Exposure To Punitive Damages Which Were Buttressed By Overwhelming Evidence

Concerning punitive damages "exposure" in this case, the Second Amended Complaint, Para. 58, sought punitive damages against the bus operator ("Ryan's Express" d/b/a Michaelangelo"):

> 58. In carrying out its responsibility to adequately train its drivers, Defendant Ryan's Express acted with fraud, malice, express or implied, oppression, and/or conscious disregard of the safety of others. **As a direct and proximate result of the conduct of Defendant Ryan's Express, Plaintiffs are entitled to punitive damages** in excess of Fifteen Thousand Dollars ($15,000).

[1 App. 0111 (Bold added)]. Likewise, the Second Amended Complaint also sought punitive damages against the other 2 settling defendants in paragraph 77. [1 App. 0114].

There was a substantial punitive exposure based on the cogent testimony of corporate malfeasance cited above (1) that the bus operator constricted its standard background check procedure to a mere 3 years of applicant driving history; (2) that the bus operator would not have hired the bus driver if a 10 year background check had been conducted because the driver had 4 different consequential traffic

violations; and (3) that the outdated driver training materials did not include the crucial 2011 bicycle laws.

Under Lindberg, it is only necessary for the District Court to find that the bus operator resolved an exposure to punitive damages: "Here, the district court reasoned that the settlement amount took into account **the risk of treble damages**, or in other words, **the sellers resolved their exposure for treble damages**." 470 P.3d at 211. (Bold added) The bus operator herein had a substantial "risk of treble damages." The maximum possible punitive award against the bus operator would be **3 times** the compensatory damages under NRS 42.005 because the claim against the bus operator sounded in negligence and not in product liability.

Because MCI got a defense verdict on the punitive claim, punitive exposure was **unique** to the settling defendants. [1 App. 0141]. None of the portion of the bus operator settlement attributed to punitive damages exposure should be an offset to the compensatory damages awarded against MCI. As Lindberg noted, a plaintiff should not be "precluded from receiving the portion of a settlement award that resolves a settling defendant's exposure beyond actual damages -- such as treble or **punitive damages** . . ." Lindberg, 470 P.3d at 211 (Bold added). The bus operator and the other 2 defendants had significant punitive damages "exposure."

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4. The Lindberg Discussion Of Statutory And Punitive Damages Exposure Is Not Dicta

Instead of faithfully applying Lindberg, the District Court bewilderingly misinterpreted Lindberg as being inflexibly restricted only to the scant number of cases where plaintiffs are entitled to recover treble damages under NRS 113.130. This paramount mistake occurred at MCI's insistence. [1 App. 0173:20 (arguing that Lindberg is a "limited circumstance" that "is inapplicable here."); 1 App. 0172:16-17 (arguing that "Unlike J.E. Johns, this Case Does Not Involve a Statutory Entitlement to Treble Damages."); and 1 App. 0173:20-21 (arguing that "Unlike the treble damages at issue in J.E. Johns, a plaintiff in [sic] never entitled to punitive damages.")]. There are two cardinal flaws in MCI's arguments. First, where the attorneys fee exposure herein was statutory because of the offers of judgment, there is no logical reason why this statutory exposure should be treated differently than the statutory exposure to treble damages in Lindberg.

The second flaw in MCI's argument concerns the claim that punitive damages – which were limited to treble damages in this negligence based case – should be treated differently than statutory exposure to treble damages. Lindberg itself stated that its "exposure" test applied to "punitive damages" as the Court referenced both statutory treble damages and punitive damages in its holding:

> Ensuring that a plaintiff does not recover twice for the same injury does not mean that a plaintiff should otherwise be precluded from receiving the portion of a settlement award that resolves a settling

> defendant's exposure beyond actual damages – such as treble or **punitive damages** – if such exposure is unique to the settling defendant. Lindberg, 470 P.3d at 211 (Bold added)

"Exposure" is the test adopted by Lindberg. This is a simple bright-line test that can usually be resolved by examining the complaint to determine if there is "exposure [that] is unique to the settling defendant." In this case, the Khiabanis have cited both the punitive allegations in the complaint against the bus operator and have also quoted damning testimony evincing punitive exposure. The deposition testimony discussed in the Statement of Facts conclusively shows that the bus operator had "exposure" to punitive damages that had nothing to do with the conduct of the bus driver on the day of the accident. The "exposure" evidence in this case is more compelling than that in Lindberg because Lindberg based its treble damages exposure solely upon the allegations in the complaint whereas the Khiabanis have cited both the punitive allegations in the complaint and pertinent testimony documenting systemic indifference by the bus operator.

It is decisive that the bus operator resolved its exposure for both fees and also for punitive damages. As Lindberg states: "Here, the district court reasoned that the settlement amount took into account the risk of treble damages, or in other words, **the sellers resolved their exposure for treble damages**." 470 P.3d at 211. There has been a dismissal with prejudice entered that fully resolves the potential claims for attorneys' fees and punitive damages against the bus operator.

B. Offsets Do Not Require Adjudications Of Liability Of Settling Tortfeasors

The "exposure" standard in Lindberg irreconcilably conflicts with the "adjudication" mandated by the District Court. Offsets arise from persons or entities that have settled before trial because, if joint tortfeasors go to trial and are found liable, contribution and indemnity comes into play as opposed to a judgment against one tortfeasor and potential offsets from settling tortfeasors. For this reason, a charge that the unique exposure must be **adjudicated** for a settlement amount to be allocated to a "unique" exposure that reduces the offset is folly.

The Lindberg settling defendants did not have their liability adjudicated. One of the primary motivations for most defendants that settle is to avoid a liability determination. It cannot be denied that there was no adjudication in Lindberg: "**[b]efore proceeding to trial, the Lindbergs settled with the sellers and the Lindbergs agents** and the court entered stipulations and orders for dismissal of all claims arising between those parties." Lindberg 470 P.3d at 206 (Bold added) This is the identical procedural posture that the bus operator and the two other settling defendants occupy.

The death knell to the argument that offsets cannot be determined absent on adjudication of the settling tortfeasors liability comes from Lindberg:

> Furthermore, because NRS 17.245(1)a) applies to "two or more persons liable in tort for the same injury," and because the plain language of the statute imposes no requirement as to the relationship of the defendants,

> we reject the Lindbergs' contention that the application of settlement offsets pursuant to NRS 17.245(1)(a) first requires a finding of joint tortfeasor liability. See Allstate Ins. Co. v. Fackett, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) ("To determine legislative intent, this court first looks at the plain language of a statute"). In fact, we have already said as much in Banks, where we rejected the argument that a finding of liability on behalf of a settling defendant was required to offset a judgment under NRS 17.245(1)(a). 120 Nev. at 845-46, 102 P.3d at 68. **Because "[t]he express language of the statute contemplates that the defendant and plaintiff have worked out a settlement prior to a final judgment of liability," we reasoned that NRS 17.245(1)(a) "does not require that a party be found liable."** Id. at 846, 102 P.3d at 68.

Lindberg, 470 P.3d at 208 (Bold added); see also Banks v. Sunrise Hosp., 120 Nev. 822, 843, 102 P.3d 52, 67 (2004) ("The express language of the statute [NRS 17.245 (1)(a)] contemplates that the defendant and plaintiff have worked out a settlement prior to a final judgment of liability. **Therefore, the plain meaning of the statute does not require that a party be found liable."**) (Bold added) For this reason, the decree by the District Court that there must be an adjudication by a jury of the unique exposure of the settling defendant before the offset can be reduced is clear error.[5]

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[5] This is the pertinent ruling by the District Court:

> 25. In this case, the jury found no punitive damages. **Without the jury making a finding of punitive damages, the settling Defendants cannot be charged with punitive damages** absent a settlement that specifies the amount.

[2 App. 0310:20-23]. The simple reason that the jury did not determine punitive liability for the bus operator is that it settled to avoid a trial on this issue.

C. There Was No "Estoppel" Because The Punitive Claim Was Based Upon Corporate Misconduct – Not Driver Conduct

MCI raised an estoppel argument as to the punitive exposure but not as to the fee exposure. The lynchpin of MCI's "estoppel" argument was the unfounded assertion that the Khiabanis alleged that **the driver** "acted with conscious disregard of danger." [1 App. 0177:14-15]. Based upon this fanciful assertion, MCI argued: (1) that the "law of the case" precludes a credit[6] and; (2) that Plaintiffs are "judicially estopped."[7] The simple truth that guts MCI's position is that the punitive claim was squarely based on (1) the failure of the bus **operator** to perform applicant background checks of driving records for a reasonable time period and (2) its failure to properly update training materials. Decisively, the Complaint alleged that the bus **operator** acted with conscious disregard – not the bus **driver**. [1 App. 0010:18-23; 1 App. 0111:23-0112:2]. The punitive claim was never based on the actions of

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[6] MCI urged that "it is also the law of the case that the settling defendants' conduct was of a nature that cannot be deemed malicious." [1 App. 0166:23-25]. MCI also argued that "[under these findings, plaintiffs cannot now contend Hubbard acted with malice and was liable for punitive damages." [1 App. 0175:2-3]. Likewise, MCI asserted that "It is Law of the Case that Hubbard Acted Unaware of Danger and Would Have Acted Differently if He Had Known, Inconsistent with Punitive Damages as a Matter of Law." [1 App. 0173:26-27].

[7] MCI argued that "plaintiffs are judicially estopped from alleging the settling defendants' conduct justified punitive damages based on their previous representations to this Court and the orders they procured from this Court." [1 App.0166:25-27].

the bus driver. Therefore, MCI's "law of the case" and "judicial estoppel" argument had no factual basis and should have been swiftly rejected by the District Court.

II. CONCLUSION

Lindberg spotlights that "the principal purpose of equitable settlement offsets is to avoid windfalls…." Lindberg, 476 P.3d at 210. It held that "….it would be inconsistent with the legislative intent of NRS 17.245(a)(1) to then permit the blanket deduction of entire settlement amounts without scrutinizing damages awarded therein." Id. Lindberg decries depriving a plaintiff of "the portion of a settlement award that resolves a settling defendant's exposure beyond actual damages – such as treble or **punitive damages** – if such exposure is unique to the settling defendant." Id. (Bold added) This Court warned that "[t]o conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant." Id. (Bold added) . By stripping $5.11 Million from the compensatory damages awarded to the Khiabani orphans, the District Court erroneously handed out a huge bonanza to MCI by granting a "blanket deduction of entire settlement amounts."

"Exposure" is the test adopted by Lindberg. This is a simple test that can be resolved by first reading the complaint to determine if there is "exposure [that] is unique to the settling defendant." The complaint herein alleged that the bus **operator** acted with conscious disregard but MCI won the punitive claim. In

addition, the bus operator 30(b)(6) witness testimony conclusively establishes that the bus operator had substantial "exposure" to punitive damages that had nothing to do with the actions of the driver during the accident. The "exposure" evidence in this case is much more compelling than Lindberg because Lindberg based its treble damages exposure solely upon the allegations in the complaint and here the punitive exposure is established not only by the complaint but also by very incriminating testimony from a 30(b)(6) witness.

All three settling defendants were exposed to fees because the settlements were sparked by offers of judgment that equaled the settlement amounts. The bus operator was exposed to punitive damages but MCI was not found liable for punitive damages. Both statutory attorneys' fees arising out of the offers of judgment and punitive damages were unique exposures for the settling defendants that required an offset calculation under Lindberg. Instead, they were ignored by the District Court based on the mistaken premise that Lindberg is "dicta" as to every unique exposure but treble damages under NRS 113.130.

It is decisive that the bus operator resolved its exposure for fees and for punitive damages. As Lindberg states: "Here, the district court reasoned that the settlement amount took into account the risk of treble damages, or in other words, **the sellers resolved their exposure for treble damages**." 470 P.3d at 211. (Bold added) There has been a dismissal with prejudice entered that finally resolved both

any attorneys fee claim and any punitive damages claim against the bus operator. Under these facts, this Court should remand and instruct the District Court to perform the required offset calculation under Lindberg for the statutory attorney fee exposure and for the punitive damages exposure that was unique to the settling defendants.[8]

DATED this 20th day of November, 2023

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[8] There are 3 possible offset calculations: (1) an offset only for attorneys fee exposure ($3,649,938.00); (2) an offset only for punitive damages exposure ($1,277,500); or (3) an offset for both the combined fee and punitive damages exposures ($1,161,357.00). The offset was calculated using a 40% contingent fee. The mathematics supporting all of the foregoing calculations were presented to the District Court. [1 App. 0158-59; 2 App. 0215-17].

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using size 14 font in Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6727 words.

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

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the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Kemp Jones LLP, and pursuant to NRAP 25(b) and NEFCR 9, that on this 20th day of November, 2023, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows:

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