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.

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Clerk of Supreme Court

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

APPELLANTS' APPENDIX
VOLUME 2
PAGES 203-364

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

11	Notice of Entry of Judgment	4/18/18	1	148-154
18	Notice of Entry of Order Granting Defendant Motor Coach Industries, Inc's Motion for Offset	3/24/23	2	319-339
17	Order Granting Defendant Motor Coach Industries, Inc.'s Motion for Offset	3/16/23	2	301-318
14	Plaintiffs' Answering Brief to MCI's Brief Regarding Offset	1/20/22	2	203-281
12	Plaintiffs' Brief Regarding Offset	12/13/21	1	155-164
16	Recorder's Transcript of Hearing re: Hearing	6/28/22	2	292-300
7	Second Amended Complaint and Demand for Jury Trial	11/17/17	1	101-119
9	Special Verdict	3/23/18	1	138-142

TAB 14

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of Kayvan Khiabani, M.D. (Decedent), the Estate of Kayvan Khiabani, M.D. (Decedent); SIAMAK BARIN, as Executor of the Estate of Katayoun Barin, DDS (Decedent); and the Estate of Katayoun Barin, DDS (Decedent);

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No.: A-17-755977-C

Dept. No.: XIV

ANSWERING BRIEF TO MCI'S BRIEF REGARDING OFFSET

/ / /

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NOW APPEAR Plaintiffs, by and through counsel of record, and hereby submit this answering brief to the Motor Coach Industries, Inc. ("MCI") brief regarding the amount of the offset that should be applied to the judgment entered against MCI. Plaintiffs argue as follows:

(1) MCI fails to address the Lindberg holding that "exposure" to "unique damages" is the touchstone for determining the offset amount;

(2) "exposure" to punitive damages is established by the clear and convincing evidence of Michelangelo's use of a defective driver screening process or, alternatively, by its use of outdated training materials - - not by Hubbard's actions on scene. MCI's citation to the Justice deposition to disprove corporate punitive "exposure" has no merit[1];

(3) "exposure" to attorney fees is established because offers of judgment were served by Plaintiffs before Michelangelo and the other two (2) defendants settled;

(4) Plaintiffs did not "waive" the Lindberg offset argument and MCI's argument that this Court should not apply Lindberg when this case was explicitly remanded for this court to do so is non-sensical;

(5) Lindberg adopted a simple "exposure" test - - not the impossibly convoluted analysis of settlement agreements, insurance policies and tax returns advocated by MCI; and

(6) to determine interest, the offset should be deducted when the settlement proceeds were actually paid. Prejudgment interest must be calculated "at the single rate in effect on the date of the judgment." Lee v. Ball, 121 Nev. 391, 396 (2005).

I. ARGUMENT

A. MCI Fails to Address The Explicit Holding of *Lindberg* That "Exposure" to Punitive Damages Is The Touchstone To Determine Offset

Instead of confronting the Lindberg holding, MCI repeatedly attempts to distinguish Lindberg as being inflexibly restricted only to the scant number of cases where plaintiffs are statutorily entitled to recover treble damages. (MCI Brief, 9:20; saying that Lindberg is a "limited circumstance" that "is inapplicable here."; 8:16-17; arguing that "Unlike J.E. Johns, this Case Does Not Involve a Statutory Entitlement to Treble Damages."; 9:20-21; suggesting that "Unlike

[1] MCI argues that "[t]he Record Demonstrates Co-Defendants Did Not Act with Oppression, Fraud or Malice." (MCI Brief, 18:25)

the treble damages at issue in J.E. Johns, a plaintiff in [sic] never entitled to punitive damages.") The cardinal flaw in MCI's thesis is that Lindberg itself explicitly stated that its "exposure" test applied to "punitive damages" as the Court referenced both statutory treble damages and punitive damages in its holding:

> 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) If the so-called Lindberg "limited circumstance" for an offset do not encompass punitive damages exposure, our High Court would not have directly stated that "punitive damages" exposure is included in the exposure analysis.

In addition to disregarding the plain language of Lindberg, MCI never discusses its reasoning. To determine the offset, Lindberg differentiated between the settling defendant's exposure to actual damages and the settling defendant's exposure to "unique damages", i.e., treble damages, punitive damages or attorney fees. This must be done because "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 damages or punitive damages -- **if** such exposure is unique to the settling defendant." Lindberg, 470 P.3d at 211. (Bold by Court)

"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." MCI concedes that the complaint sought punitive damages against Michelangelo. In addition to the allegations in the complaint, the Bartlett deposition testimony discussed below conclusively establishes that Michelangelo had grave "exposure" to punitive damages that had nothing to do with Hubbard's actions on the day of the accident. The "exposure" evidence in this case is far more compelling than that in Lindberg because Lindberg based its treble damages exposure solely upon the allegations in the complaint. In this case, Plaintiffs have cited both the punitive allegations in the complaint against Michelangelo and have also quoted damning testimony demonstrating such exposure. Plaintiffs also have rebutted MCI's claim that

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other testimony (i.e., the Justice deposition) eradicated punitive damages exposure against Michelangelo as a matter of law.

As for attorney fees, Plaintiffs served offers of judgment to each one of the three (3) settling Defendants. This created an "exposure" to the three (3) settling Defendants to an attorneys fees award. Plaintiffs did not serve an offer of judgment to MCI. Hence, MCI did not have any "exposure" to attorneys fees. Proving this point, the MCI judgment does not include attorney fees.

It is decisive that the Michelangelo settlement resolved its exposure for both punitive damages and attorney fees. 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) MCI concedes that the punitive damages claim against Michelangelo was settled. There is no doubt any claim for fees was also settled. There has been a dismissal with prejudice entered that resolves the punitive damages claim and the attorneys fees claim against Michelangelo. There is no possible dispute in this case that Michelangelo failed to resolve the exposure for punitive damages and attorney fees (just as the Lindberg "sellers resolved their exposure for treble damages."). This ends the analysis as to whether punitive and fee "exposure" was resolved.

Finally, MCI assents that there is a "presumption" that a settling defendant is entitled to an offset of all paid settlement proceeds. (MCI Brief, 7:23-25) Wrong! Not only did Lindberg not create such a "presumption", the term "presumption" or a synonym does not even appear in Lindberg. MCI concocts this so-called "presumption" by citing a 1987 Florida case and a 1980 California case. (MCI Brief, 8:1-7) First, neither case is cited by Lindberg and MCI offers no reason why this Court should apply hoary case law from foreign jurisdictions to analyze offset as opposed to the recent Lindberg decision by our High Court.

The 1987 Florida case that MCI cites; Dionese v. City of West Palm Beach, 500 So.2d 1347, 1349 (Fla. 1987), involved a private agreement between 2 plaintiffs to allocate a settlement between them and a settling defendant a certain way (i.e., the settling parties loaded most of the settlement on one the Plaintiffs' loss of consortium claim and the actual jury verdict on the loss of consortium was only 30% of the settlement allocation). The Dionese Court merely held that

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the damages allocation in the private unilateral agreement was not binding upon the non-settling defendant. Not only did it not create a "presumption", as MCI claims, that word does not appear in the Dionese opinion.

Likewise, the 1980 California case; Knox v. County of Los Angeles, 109 Cal.App.3d 825 (1980), does not create a "presumption" or use that term. Instead of creating a rule allowing all settlement proceeds be used for offset, Knox remanded the case to the district court to make a good faith determination as to how the settlement should be allocated to various claims for relief. For these reasons, there is no Lindberg "presumption" and the foreign caselaw cited by MCI provides no support for its position.

B. The Punitive Damages Claim Against Michelangelo Was Based On Corporate Misconduct In Driver Screening And Driver Training - - Not On Hubbard's Actions

1. The Punitive Claim Was Primarily Based Upon Michelangelo's Policy To Review Only 3 Years of Past Traffic Citations When Hiring New Drivers

The anchor of MCI's entire offset argument is the unfounded assertion that Plaintiffs are "alleging that Hubbard acted with conscious disregard of danger." (MCI Brief, 13:14-15) Based upon this fanciful averment, MCI urges: (1) that the "law of the case" precludes an offset[2] and; (2) that Plaintiffs are "judicially estopped."[3] The simple truth that guts MCI's position is that the punitive claim was based primarily on Michelangelo's failure to properly screen potential drivers by reviewing only 3 years of past driver history instead of a sensible time period such as 10 years of past driver history. It was not grounded on Hubbard's "conscious disregard of danger." Likewise, the punitive damages claim was also founded on Michelangelo's failure to use updated

---

[2] MCI contends that "it is also the law of the case that the settling defendants' conduct was of a nature that cannot be deemed malicious." (MCI Brief, 2:23-25) Moreover, MCI asserts that "B. 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." (MCI Brief, 9:26) MCI also maintains that "[u]nder these findings, plaintiffs cannot now contend Hubbard acted with malice and was liable for punitive damages." (MCI Brief, 11:2-3)

[3] MCI proclaims 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." (MCI Brief, 2:25-27) Likewise, MCI insists that "A. Plaintiffs Are Judicially Estopped from Alleging that Hubbard Acted with Conscious Disregard of Danger." (MCI Brief, 13:14-15)

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training materials. Because the punitive claim was rooted on facts wholly distinct from Hubbard's actions, MCI's purported "law of the case" and "judicial estoppel" argument have no factual basis. In other words, because Plaintiffs are NOT "alleging that Hubbard acted with conscious disregard of danger", there is no basis for MCI's strawman "law of the case" and "judicial estoppel" contentions.

In asserting that there was no punitive conduct committed by Michelangelo, MCI ignores the dispositive testimony of William Bartlett, the PMK of Michelangelo on multiple safety topics:

> Subject #1: 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 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.

(Ex. 1; August 31, 2017 30(B)(6) Notice; Ex. 1, Bartlett Dep., 63:12-16, confirming that he was the PMK on Subject #1).

Bartlett was also the Director of Safety and Risk Management of Michelangelo from January 2015 to March 2017 -- when Hubbard was hired and trained. (Ex. 2; September 8, 2017 Bartlett Dep., 32, 36) Either because Bartlett was the designated PMK or because he was the Safety Director during the key time period, Bartlett's testimony obviously trumps the irrelevant Justice deposition testimony upon which MCI places sole reliance to disprove punitive conduct.

Plaintiffs established at the Bartlett deposition that Michelangelo had an absurd policy of examining traffic violations for a constricted period of just three years before a potential driver was hired. Bartlett explicitly admitted that Michelangelo could easily have reviewed 10 years of prior violations. If Michelangelo had used the sounder screening period, it would have discovered four serious traffic violations by Hubbard that would have resulted in Hubbard being torpedoed from consideration as a driver:

> **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. You wouldn't have hired this guy if you knew he had these **four traffic convictions and he was involved in four accidents**, would you?

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A. It would not look good for him, no.
Q. So you would not hire him? More likely than not you wouldn't have hired him?
A. That's not all we take into consideration, but it wouldn't look good.
Q. And by "wouldn't look good" means you probably wouldn't hire him?
A. It's possible we wouldn't have hired him.
Q. Not only is it possible, it's pretty likely with four traffic convictions -- especially talking on the cell phone, you know -- these are pretty serious convictions; right?
A. Yes.
Q. So given the serious convictions and without knowing anything about the accidents other then that there's personal injuries involved, there's three of them -- or four of them; right?
A. Yes.
Q. I mean, this is not someone that should be driving a bus?
A. It's easy to see that in hindsight, but we didn't have that information at the time of hire.
Q. I'm not suggesting you made a bad decision at the time of the hire --
A. That may be so. That may be so.
Q. I am suggesting that, if you had known about Exhibit 6, the [traffic violation] information in Exhibit 6, you wouldn't have hired this guy?
A. You're very possibly right.

(Ex. 2; Bartlett Dep. 112:16 to 114:5) (Bold added) The conscious disregard of adopting a comically limited review period for past driving citations is entirely the misconduct of the company -- not the driver. Again, these facts created the "exposure" to punitive damages that Michelangelo settled. The foregoing points in and of themselves manifest punitive "exposure" to Michelangelo. See, e.g., Tighe v. Castillo, CV N17C-10-122 AML, 2020 WL 6624977 *4 (Del. Super. Ct. Nov. 12, 2020) (finding that the jury could conclude that the employer was recklessly indifferent in monitoring the employee's driving record and by not requiring any remedial training) There is more.

2. The Punitive Claim Was Also Based Upon The Incredible Failure Of The Bus Company To Know The 2011 State Bicycle Law And Train Its Drivers Regarding The Same

Bartlett conceded that, despite being the PMK and the Director of Safety, Bartlett did not know of the 2011 Nevada bicycle law that required buses go to the far left lane and provide bicycles with 3 foot clearance. Critically, Bartlett confessed that Michelangelo provided no driver training regarding the 2011 bicycle law:

Q. . . . Prior to September 1st [one 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?

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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.

(Ex. 2; Bartlett Dep., 47:4 to 48:3) (Bold added) Bartlett's ignorance of the 2011 Nevada law was outrageous given that he was the PMK on safety:

Q. Okay. With regards to hiring, training, and safety, you're the person most knowledgeable; correct?
A. Yes.

(Ex. 2; Bartlett Dep., 63:22-25) The foregoing testimony established both that the Director of Safety did not know of the 2011 Nevada bicycle law and that it was not part of the driver training.

Bartlett unequivocally testified that that the bicycle law was not put into the driver training materials:

Q. Okay. And since you weren't aware of that, that was never part of the training session for drivers?
A. No.

. . . .

Q. Okay. As I assume they didn't train about this law I just read you either?
A. It's not in the training curriculum, no.

(Ex. 2; Bartlett Dep., 47:9-12; 52:17-29) (Bold added). Bartlett also testified that he copied the driver training materials that Michelangelo used in 2010 from materials used by another bus company at which he previously worked. (Ex. 2; Bartlett Dep., 65:9-21). Failing to update a parroted 2010 training manual for 7 years between 2010 and 2017 with significant new developments such as the 2011 bicycle law was a stunning act of corporate malfeasance that supports a punitive claim. See, e.g., Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 580 N.W.2d 233 (1998) (after a wrongful arrest, the court upheld a punitive damage award where the

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company failed to train its employees of the relevant state shopkeeper laws which led to the employee wrongfully arresting the plaintiff)

Hubbard was hired at Michelangelo on April 20, 2016. (Ex. 2; Bartlett Dep., 91:11-14) Hubbard was trained on April 20-22, 2016. (Ex. 2; Bartlett Dep., 96:17-20) The 2010 training manual poached from another bus company that was still being used in 2016 by Michelangelo did NOT reference the 2011 Nevada bicycle law that was enacted in 2011. (Ex. 2; Bartlett Dep., 122-124) The foregoing facts illustrate that the punitive claim was centered on corporate misconduct as opposed to conscious disregard by Hubbard.

3. The Settlement Offer Was Made Immediately After The Corporate Misconduct Was Revealed And Had Nothing To Do With Hubbard's Actions

While MCI posits that Plaintiffs alleged "that Hubbard acted with conscious disregard of danger" as the sole underpinning for the punitive claim, MCI provides no support whatsoever for this claim and it is temporally impossible. (MCI Brief, 13:14-15) The devastating facts revealed by Bartlett about the farcical driver pre-hiring investigation and the outdated training materials were developed at the Bartlett deposition on September 8, 2017. Three days later, Plaintiffs sent an offer of judgment dated September 11, 2017. (Ex. 3).

Hubbard was not deposed until September 20, 2017 -- 9 days **after** the offer of judgment was served. Hence, the compelling punitive exposure that was developed in the Bartlett deposition triggered the settlement offer -- not anything that Hubbard testified to after the settlement offer regarding his conduct. The September 8, 2017 settlement offer was accepted without any change to the amount of the settlement. For these reasons, MCI's central thesis that the "conduct" of Hubbard was supposedly the cause of the settlement is easily disproven.

4. MCI's Assertation That There Was No Evidence Of Conscious Disregard By Michelangelo Is Based On The Irrelevant Testimony Of The Safety Director Of Michelangelo's Predecessor And A Purported Safety Manual That Was Not Used By Michelangelo Nor Produced In Discovery

MCI boldly insists that "[t]he record demonstrates that plaintiffs could not have proved with clear and convincing evidence that Michelangelo acted with oppression, fraud, or malice." (MCI Brief, 10:24-26) MCI's conclusion is based entirely on a deposition cite to Jeffrey Justice, who MCI describes as "the safety director." (MCI Brief, 19:17) Justice was the Safety Director

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for Ryan Express from 2003 to 2009 -- Ryan being the predecessor in interest to Michelangelo. (Ex. 4; Justice Dep., 9:1-11) But Justice was never employed by Michelangelo -- much less being its Safety Director. As set forth above, William Bartlett -- not Justice -- was the Michelangelo Safety Director from 2015 to March 2017, the time period when Hubbard was hired and trained.

There is no possibility that MCI could have been legitimately confused as to Justice's complete lack of involvement with Michelangelo as Justice repeatedly testified that he had absolutely nothing to with Michelangelo:

> **Q. Isn't it true that you've never had any involvement with Michelangelo Leasing in any way?**
> **A. Personally I have not.**
>
> . . . .
>
> Q. Okay. Do you know anyone who works for Michelangelo Leasing?
> A. No, I do not.
> Q. Okay. Do you know anything about Michelangelo Leasing's Las Vegas operation?
> A. I do not.
> **Q. Do you have any knowledge regarding Michelangelo Leasing's policies and procedures?**
> **A. I do not.**
> Q. Do you have any knowledge how Michelangelo Leasing operates its business?
> A. I do not.
>
> . . . .
>
> **Q. You were never an employee of Michelangelo Leasing; is that correct?**
> **A. No.**

(Ex. 4; Justice Dep., 54:14 to 55:14; 66:18-20) (Bold added) Given the repeated disavowals in the above-cited testimony of any knowledge whatsoever regarding Michelangelo or its procedures, it is sanctionable that MCI describes Justice as **Michelangelo's** safety director. (MCI Brief, 19:17; "Jeffrey Justice, the safety director, testified that Michelangelo provided monthly safety meetings . . . ."). MCI also knew that this was a false claim by virtue of MCI's attendance at the Bartlett deposition because Bartlett clearly said that he was Michelangelo's safety director.

As for MCI's assertion that Justice testified that Michelangelo "provided monthly safety meetings, road tests, and included safety measures in the procedure manual" (i.e., MCI Brief, 19:17-23), Justice actually stated only that Ryan Express (not Michelangelo) had a policy manual. When asked whether the Ryan Express manual had a "section regarding safety", Justice said he

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did not remember it. Importantly, MCI has deceptively edited the Justice testimony that it quotes in its brief to delete the sentence immediately before MCI's cited Justice quote (the omitted sentences revealing that the testimony referred to Ryan Express and not Michelangelo). MCI's duplicitous editing is reprehensible.

This is the ver batim description by MCI of the purported Justice testimony and the truncated Justice quote that MCI presents in its Brief at 19:17-23:

> Jeffrey Justice, the safety director, testified that Michelangelo provided monthly safety meetings, road tests, and included safety measures in the procedure manual.
>
> > Q. . . . Okay. Did the company provide training to newly hired bus drivers?
> > A. We would typically take them out on a road test, make sure that they could handle the vehicle they were driving. (Ex. B, 08.16.2017 Deposition Transcript, 13:23-14:2)

Compare the foregoing deceit with the full Justice testimony, i.e., the two preceding questions and answers that MCI hid because they show that the Justice testimony applied to Ryan Express and also because they establish that the witness had no memory[4] of any "safety section" in the Ryan Express training manual:

> Q. When you were the safety director of **Ryan's Express** in Las Vegas, did the company have a policy and procedure manual?
> A. Yes.
> Q. Did the procedure manual have a section with regards to safety in it?

---

[4] Justice expanded upon his complete lack of memory concerning the Ryan Express policies and procedures:

> Q. Okay. Is it safe to say that you don't remember the majority of the policies and procedures used with Ryan's Express?
> A. That would be correct.
> Q. Same thing -- would it be safe to say that you don't remember the majority of the safety and training that's conducted with Ryan's Express?
> A. That would also be correct.

(Ex. 4, Justice Dep., 53:15-24) Later, Justice admitted that Ryan Express did not provide any classroom training or testing of drivers:

> Q. Great. So other than monthly safety meetings, would I be correct that there was no classroom training or testing of drivers?
> A. No.
> Q. No, I'm not correct, or I am correct?
> A. No, you are correct.

(Ex. 4, Justice Dep., 18:16-21)

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A. It did, but **what it specifically said, I don't really -- don't really remember** all of its because --
Q. Okay. Did the company provide training to newly hired bus drivers?
A. We would typically take them out on a road test, make sure that they could handle the vehicle they were driving.

(Ex. 4, Justice Dep., 13:15 to 14:2) (Bold added) Again, MCI perverted the Justice testimony by omitting the first two sentences that reveal that the testimony pertained to **Ryan's Express** and by substituting MCI's false factual assertions that Justice was **Michelangelo's** safety director and said that **Michelangelo** had a pristine safety manual.

Given Justice's pointed admission that he knew absolutely nothing about the policies and procedures of Michelangelo, MCI's argument that the Justice testimony conclusively proves that Michelangelo had admirable safety procedures precluding punitive damages is laughable. Furthermore, as noted above, MCI's declaration that Justice was a safety director for Michelangelo is debunked by the admission that Justice never worked for Michelangelo. This citation, combined with MCI's misleading editing to remove the preceding question and answer showing that Justice actually worked for Ryan's Express (Ex. 4; Justice Dep. 13:23-28), creates disturbing questions about the candor of the MCI Brief. Regardless, the conclusion is inescapable from the Bartlett testimony that there was a weighty punitive exposure to Michelangelo.

5. The Bartlett Testimony Shows Beyond Doubt That Michelangelo Had Exposure To Punitive Damages

Plaintiffs submit that the Justice testimony is not competent evidence as to Michelangelo's safety manual or procedures for multiple reasons: (1) Justice discussed the Ryan Express procedure manual and the Bartlett testimony establishes that Bartlett brought a completely different 2010 training manual from another bus company to Michelangelo; (2) Justice admits that "I don't really know" when asked the contents of the Ryan Express safety materials; (3) Justice admits to never working for Michelangelo; and (4) Justice admits that he knows nothing about Michelangelo procedures. The Justice testimony certainly does not establish MCI's thesis that Michelangelo was a paragon of bus safety that could not possibly be liable for punitive damages.

Because this was the **only** evidence that MCI offers to support its contention that Michelangelo did not have any punitive damages exposure apart from Hubbard's actions, this

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Court should find that there was a substantial punitive exposure based on the Bartlett testimony cited above. Again, Barlett testified: (1) that Michelangelo limited its background checks to 3 years of a potential drivers past driving history (2) that Michelangelo would not have hired Hubbard if a 10 year background check had been conducted because Hubbard had 4 different serious driving violations, (3) that the outdated Michelangelo procedure manual did not include the 2011 Nevada bicycle law, and (4) that drivers were not trained about the 2011 Nevada bicycle laws,

Under Lindberg, it is only necessary for the district court to find that Michelangelo 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) MCI seeks to avoid such finding by asserting that there was no exposure whatsoever to punitive damages. If there was an exposure to punitive damages, MCI must concede that the punitive damages claim against Michelangelo was settled. Again, a stipulation to dismiss with prejudice all claims against Michelangelo was filed. For the foregoing reasons, this Court should find that Michelangelo had an exposure to punitive damages and that it was resolved.

C. "Exposure" To Attorneys Fees Was Established By The Offers Of Judgment Directed To All Three (3) Settling Defendants But Not To MCI

Plaintiffs presented offers of judgment to all three (3) settling defendants. The $5 Million Dollar offer of judgment to Michelangelo is attached hereto as Ex. 3. The $100,000 offer of judgment to Bell Sports is attached hereto as Ex. 5. The $10,000 offer of judgment to Sevenplus Bicycles, Inc. is attached hereto as Ex. 6. The final settlements against all 3 settling defendants were the exact same amounts as set forth in the respective offers of judgment.

Plaintiffs did not serve an offer of judgment on MCI. Hence, MCI had no "exposure" to a fee award. MCI did not pay any attorneys fees. More specifically, the judgment entered against MCI did not include attorneys fees.

Because of the dispatch of the offers of judgment, all three (3) settling defendants had an "exposure" to attorneys fees under NRCP 68. See Capriati Construction Corp., Inc. vs. Yahavi, 137 Nev.Adv.Opin. 69 ("Under NRCP 68(f)(1)(B), if an offeree rejects an offer of judgment and

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fails to obtain a 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 by the Court) In contingent fee cases, the percentage of the contingent fee is the post-offer attorney fees under NRCP 68. Id.

Capriati Construction Corp., Inc. vs. Yahavi, 137 Nev.Adv.Opin. 69, was decided on November 10, 2021. The Court held as follows:

> 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 continent on the plaintiff prevailing, which will happen only **after** an offer of judgment is rejected -- never before.

(Bold added) For these reasons, under Capriati, there is no debate that the 3 settling defendants were exposed to attorneys fees in the amount of the contingency fee applied to actual damages.

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.[5] This is the amount of attorneys fees that settling defendants were exposed to under Rule 68. Again, offers of judgment were made to all settling defendants. No offer of judgment was sent to 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 to under Lindberg. Accordingly, MCI is not entitled to an offset for the portion of settlement proceeds allocated to attorneys fees

D. The Amount Of The Offset Is Different For Punitive Damages Exposure Alone Or Attorneys Fee Exposure Alone And Different For Combined Exposure To Both Of These "Unique Damages"

1. Offset Amount For Only Punitive Exposure

Plaintiffs previously calculated the offset for just the punitive exposure, i.e., $1,250,000 from the Michelangelo settlement and $1,277,500 from all 3 settlements. This offset amount does **NOT** include any reduction for "exposure" to attorneys fees.

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[5] Like the Capriotti case, the contingent fee in this case was 40%.

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2. Offset For Only Attorneys Fee Exposure

If this Court were to conclude that these was no punitive exposure (as MCI urges) but that the settling Defendants were exposed to attorneys fees (as Capriati holds), the offset would be $3,649,938.80. This was calculated by taking the actual damages of $18,746,000.00 and a 40% fee of $7,498,840.00 and prorating the $5,110,000.00 settlement to the damages and the fee. Pro ration is necessary because MCI is liable for some of the damages (i.e., the compensatory damages) while settling defendants have "exposure" for purposes of determining the offset for both compensatory damages and for attorneys fees.

		Pro Rata Allocation
Compensatory Damages	$18,746,000	.714278571428
40% Fee (Comp. Damages)	$7,498,840	.285721428571
Total	$26,244.841	
Offset	$3,649,999.99	$5,110,000 x . 714278571428

Note that the pro rata approach benefits MCI because it does not allow Plaintiffs to marshall the settlement proceeds solely to the "unique damages" -- which would decrease the offset. Lindberg used a pro rata approach.

3. Offset For Punitive Exposure And Attorneys Fees Exposure

If this Court were to conclude that there was **both** punitive exposure and, in addition, that the settling Defendants were also exposed to attorneys fees (as Capriati holds), the offset would be $1,161,357.00. This was calculated by taking the compensatory damages $18,746,000.00, a 40% fee of $7,498,840.00 and adding 3 times compensatory damages for punitive damages and prorating the $5,110,000.00 settlements to the compensatory damages, the fee and the punitive damages.

		Pro Rata Allocation
Compensatory Damages	$18,746,000	.22727272727
(Pun) 3 X Comp. Damages	$56,238,000	.68181818181
40% Fee (Comp. Damages)	$7,498,840	.0909090909
Total	$82,482,480	
Offset	$1,161,363.63	$5,110,000 x . 22727272727

The $1,161,357 offset is the amount that Plaintiffs urge be applied by the Court.

E. Plaintiffs Can Not "Waive" An Argument By Not Raising It In Their Supreme Court Answering Brief When Lindberg Was Not Decided Until After The Answering Brief Was Filed And Where Both Parties Identified Lindberg As A New Authority Immediately Before Argument

MCI concedes that Lindberg was decided after Plaintiffs filed their Answering Brief but squabbles that this "does not excuse the waiver." (MCI Brief, 17:10-14) The short answer to this is that the Supreme Court held: "we remand for calculation of the offset due." 493 P.3d at 1017. There is nothing in the opinion to suggest that MCI could argue about the application of Lindberg on remand but that Plaintiffs would be precluded from doing so. Furthermore, if MCI was automatically entitled to "all" of the offset with no analysis, there would be no need for a "calculation" on remand.

Neither Plaintiffs nor MCI had the benefit of the Nevada Supreme Court's recent decisions in Lindberg or Capriati at the time of their appeal for the simple reason that those two (2) cases had not yet been decided. Plaintiffs cannot waive an argument that did not exist when filing their appellate brief, especially when even MCI admits that Lindberg should apply now to the current remanded proceedings. Leavitt v. Siems, 130 Nev. 503, 330 P.3d 1 (2014) (establishing that recently decided opinions are controlling because "retroactivity is the default rule [for case law] in civil cases.") (citing to Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 847, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) and United States v. Sec. Indus. Bank, 459 U.S. 70, 79, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982)); Deja Vu Showgirls v. State, Dept. of Tax., 130 Nev. 711, 716, 334 P.3d 387, 390 (2014) (rejecting the appellant's argument that a recent decision could not "be applied to their de novo action because the underlying case was active at the time this court decided [the new opinion].").

Neither of the two Ninth Circuit cases that MCI cites for waiver (MCI Brief, 15:11-14) confronted a newly minted decision by a High Court. Nevertheless, in United States v. Dreyer, 804 F.3d 1266, 1277 (9th Cir. 2015), the Ninth Circuit considered the issue that was concededly not raised by the government because it would "best serve[s] the integrity of the judicial process" since it was an "important issue[s]." Dreyer did not hold that there had been a waiver.

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In re: Cellular 101, Inc., 539 F.3d 1150, 1155 (9th Cir. 2008), involved a waiver premised upon a non-asserted affirmative defense: "[s]ettlement and release is an affirmative defense and is generally waived if not asserted in the answer to a complaint." Most importantly, there was a prior appellate decision between the exact same parties that would have been avoided if the affirmative defense argument had been timely asserted. Finally, and decisively, the Ninth Circuit did not address a new Supreme Court decision on offsets that needed to be applied on remand. MCI's waiver argument has no merit.

F. Lindberg Adopted A Simple "Exposure Test" - - Not The Unmanageable Factual Analysis Of Settlement Agreements, Insurance Policies And Tax Returns That MCI Belatedly Advocates

MCI argues that "plaintiffs bear the burden of proof to justify any diminution in the offset, and they have disclosed no evidence that the settling defendants agreed to apportion part of the settlement to punitive damages--e.g., the settlement agreements themselves or documentation that plaintiffs paid taxes on any portion allegedly attributable to punitive damages." (MCI Brief, 2:28 to 3:4) MCI amplifies this argument later and argues that the "intention" of Michelangelo must be scrutinized, that Plaintiffs' 2018 tax returns need be examined and that it is important whether the settlement was paid by insurance in whole or in part. (MCI Brief, 20-21).

MCI cites no case holding that Plaintiffs have the "burden of proof" on offsets. Given that MCI is seeking the offset through a motion to amend or alter judgment, MCI – as the movant – would typically have the burden of persuasion – not Plaintiffs. If there is a "burden of proof" on punitive exposure, Plaintiffs have certainly met it with the citations to the Bartlett deposition. If there is a "burden of proof" on the attorneys fees exposure, Plaintiffs have met it by attaching the offers of judgment and citing Capriati.

In further response to the assertion that Plaintiffs must produce settlement agreements with allocations, Lindberg adopted a simple "exposure" test. Lindberg did not adopt a test that focused either on allocation language in the settlement agreement, on insurance policies or on after-the-fact tax return filings. Of critical importance, the Lindberg Court was certainly aware that other jurisdictions rely upon factors such as settlement agreement allocations in determining offsets because Lindberg cited the Texas case of Mobil Oil Corp. v. Ellender, 968 S.W.2d 917,

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927 (Tex. 1998) for another proposition. (See Plaintiff's Brief, 5:19-24) But Lindberg explicitly adopted an "exposure" test and did not follow the Texas allocation rule.

There can be no doubt that the Texas Supreme Court clearly stated that Texas law requires an allocation test completely different than the exposure test adopted in Lindberg. The Texas Supreme Court said:

> There, we hold that to limit a nonsettling party's dollar-for-dollar settlement credit to an amount representing actual damages, the settling party must tender a valid settlement agreement allocated between actual and punitive damages to the trial court before judgment. Otherwise, the nonsettling party is entitled to a credit equaling the entire settlement amount.

Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 928 (Tex. 1998). Despite citing Ellender for another proposition (See Plaintiff's Brief, 5:19-24), Lindberg did not adopt the Ellender allocation test. Indeed, Lindberg did not even discuss the settlement agreement between the plaintiff and the settling defendant in the case before it.

Not only is the analysis of settlement agreements or tax returns proposed by MCI not supported by Lindberg in any way, it would be an unmanageable procedure to determine offsets; especially in complex personal injury cases. For example, there are disputing tax advisories on whether and which portions of personal injury damages and punitive damages are taxable. Plaintiffs have attached hereto the November 19, 2021 IRS publication on the "Tax Implications of Settlements and Judgments" cited by MCI. (MCI Brief, 21:3-6) (Ex. 7). Even a brief examination of the IRS publication on point quickly reveals that clarity is lacking. (Ex. 7; "However, the facts and circumstances surrounding each settlement payment must be considered to determine the purpose for which the money was received because not all amounts received from a settlement are exempt from taxes") Yet MCI pretends that tax treatment is simple and an examination of tax returns would somehow be illustrative. Not true.

In this case itself, our High Court, quoting the New York Supreme Court, has explained why MCI's repeated attempts to transmute personal injury litigation into a battle of tax experts has no merit:

> No crystal ball is available to juries to overcome the inevitable speculation concerning future tax status of an individual or future tax law itself. Trial strategies and tactics in wrongful death actions should not be allowed to deteriorate into battles between a new wave of experts consisting of accountants

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> and economists in the interest of mathematical purity and of rigid logic over less precise common sense.

Motor Coach Industries, Inc. v. Khiabani, 493 P.3d 1007, 1014 (2021) The rationale for precluding MCI from calling a parade of accountants and tax experts to resolve post-trial issues such as offset is equally compelling. Since MCI offers no case law whatsoever advocating for a settlement agreement, tax return or insurance policy based offset test, this court should not journey into this quagmire[6].

G. To Determine Interest, The Offset Should Be Deducted When The Settlement Proceeds Were Actually Paid, And Prejudgment Interest Must Be Calculated Using The Single Rate In Effect On The Date Of The Judgment.

MCI argues that this Court should apply the offset on the date of judgment, even though the actual settlement proceeds were not paid until several months later. MCI contends that this result is supported by Ramadanis v. Stupak, 107 Nev. 22 (1991). As explained in Plaintiffs' opening brief, Ramadanis does not answer the question before this Court (i.e., whether an offset should be applied when the settlement proceeds are actually paid or several months earlier). Ramadanis did not involve a situation where the settlement proceeds were paid long after the judgment and the Nevada Supreme Court did not address this potential scenario.

To the extent that Ramadanis is instructive, the decision supports Plaintiffs' position and demonstrates that the offset should be applied when the settlement proceeds are actually received. In Ramadanis, the Court rejected an algebraic method for calculating prejudgment interest after

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[6] MCI asserts that "[i]t is well established that insurance policies do not cover punitive damages." (MCI 21:10-11) This is not true when an insurer has rejected a demand within policy limits and then punitive damages are awarded. In such cases, the insurer must pay both the compensatory and punitive damages. See e.g., Carpenter v. Auto. Club Interinsurance Exch., 58 F.3d 1296, 1302-03 (8th Cir. 1995) (providing that when an insurer, "fails to settle a claim against its insured within the policy limits, when it is possible to do so, such insurer is liable to the insured for any judgment recovered against him (or her) in excess of such policy limits . . . **including the punitive damages awards**." (internal quotation marks omitted)) (bold added). See also Commercial Union Ins. Co. v. Ford Motor Co., 599 F. Supp. 1271, 1274-75 (N.D. Cal. 1984) ("The insurer is not permitted to "gamble" at the expense of the insured's interest by refusing to settle a case within the policy limits "when there is a substantial likelihood of recovery in excess of those limits," and if it does, it will be liable to the insured for **the full amount of any excess verdict**, as well as any consequent economic loss, emotional distress, or physical injury." (Bold added)) In this case, after the offers of judgment were served and expired, the insurers for the three(3) settling defendants would have been liable for a compensatory and punitive verdict in excess of the offer amounts.

an offset in favor of a non-algebraic method. The primary difference between the two methods relates to whether plaintiffs get the benefit of prejudgment interest on pretrial settlement proceeds. Under the algebraic method, plaintiffs get the benefit of prejudgment interest on their pretrial settlement proceeds and any offsets to non-settling defendants are reduced by the amount of that interest. Under the non-algebraic method, plaintiffs do not get the benefit of interest on their pretrial settlement proceeds.

The Ramadanis Court acknowledged the "advantages and disadvantages" of both approaches but adopted the non-algebraic method. Depending on the circumstances, the algebraic method could determine that a majority of pretrial settlement proceeds are interest, which would be unfair to non-settling defendants. Ramadanis, 805 p.2d 65, 66 n.3, citing Margadonna v. Otis Elevator Co., 542 A.2d 232, 236 n.2 (R.I.1988) (laying out a potential scenario where two-thirds of the pretrial settlement proceeds are determined to be interest) The non-algebraic formula deprives plaintiffs of prejudgment interest on their pretrial settlement proceeds. But the Ramadanis Court found this to be more fair than the alternative because a "a plaintiff may choose to waive his or her right to prejudgment interest in favor of the **certainty and immediacy of settlement payments**." While the Ramadanis Court found that the district court properly deducted the pretrial settlement amount before calculating prejudgment interest, that decision was based on the express presumption that the settlement proceeds are actually paid **before** judgment is entered.

If the settlement proceeds are **not** paid before judgment is entered, the Ramadanis decision and rationale would not make sense. It is only fair to deprive plaintiffs of prejudgment interest on pretrial settlement proceeds if they actually receive "the **certainty and immediacy of [the] settlement payments**."

MCI's proposed prejudgment interest calculation is also wrong because it uses periodic biannual interest rates between June 1, 2017 (service of the summons) and April 17, 2018 (entry of judgment). (*See* MCI 23:9-24) The Nevada Supreme Court has repeatedly held that this type of computation is reversible error:

> The district court calculated the rate of prejudgment interest using periodic biannual legal rates of interest in effect between May 27, 1999, and March 24, 2003. This was error. Under the plain language of NRS 17.130(2), the district

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court should have calculated prejudgment interest **at the single rate in effect on the date of judgment**.

Lee v. Ball, 121 Nev. 391, 396 (2005) (Bold added)

As instructed by Lee, prejudgment interest must be calculated using "the single rate in effect on the date of [the] judgment" and using varying periodic rates is error. In this case, the interest rate in effect on the date of the April 17, 2018 judgment was 6.50%. Regardless of the offset amount or the date on which the offset is applied, prejudgment interest must be calculated using the single interest rate of 6.50%.

II. CONCLUSION

"Exposure" to "unique damages" is the offset test adopted by Lindberg. This is a simple bright line test that can be resolved by first examining the complaint to determine if there is "exposure [that] is unique to the settling defendant." Here, the complaint sought punitive damages against Michelangelo ("exposure") and MCI concedes that MCI won the punitive claim ("no exposure").

In addition to the complaint allegations, the deposition testimony by Bartlett (the Safety Director for Michelangelo) conclusively establishes that Michelangelo had "exposure" to punitive damages that had nothing to do with Hubbard's actions on the day of 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.

MCI's argument that the Justice testimony indisputably eliminates any possible punitive "exposure" has no merit because Justice was never employed by Michelangelo and did not know anything about the Michelangelo policies and procedures. In contrast, Bartlett was the Safety Director for Michelangelo when Hubbard was hired and was also produced as the 30(B)(6) witness on safety policies and procedures. Bartlett confessed that Michelangelo used defective standards to screen new hires and that Michelangelo used hopelessly outdated training materials.

It is decisive that Michelangelo resolved its exposure 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). MCI concedes that the punitive damages claim against Michelangelo

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was settled. In addition, there has been a dismissal with prejudice entered that finally resolved the punitive damages claim against Michelangelo. There is no possible argument in this case that Michelangelo did not resolve the exposure for punitive damages - - just as the Lindberg "sellers resolved their exposure for treble damages." Under these facts, **ignoring the fee exposure**, the offset should be 1/4 of the settlement amounts, i.e., $1,277,500.00[7], because the punitive exposure for Michelangelo was capped at three time compensatory damages.

The settling defendants had "exposure" to attorney fees because offers of judgment were served on all three (3) settling defendants. There was no offer of judgment presented to MCI. The MCI judgment does not include attorneys fees. Under Capriati, the Rule 68 attorney fee exposure is forty percent (40%) of the actual damages.

If the Court determines that there was an "exposure" to both punitive damages and, in addition, an exposure to fees, the offset should be $1,161,357.00. Plaintiffs submit that the offset should be $1,161,357.00 because Michaelangelo was exposed to both punitive damages and to attorneys fees. MCI was not.

For purposes of calculating interest, the offset should be applied on the actual date of settlement payment -- not four months earlier. In addition, prejudgment interest must be calculated using "the single rate in effect on the date of the judgment."

DATED this 20th day of January, 2022

KEMP, JONES LLP

/s/ Will Kemp
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ERIC PEPPERMAN, ESQ. (#11679)
-and-
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[7] MCI claims that there were no punitive damages sought against the helmet and bicycle defendants. (MCI Brief, 3:21-22) This is error. Plaintiffs cited the complaint punitive allegations against both defendants in their initial brief. (Plaintiffs' Brief, 4:17-18) Again, these punitive allegations can be found in Para. 77 of the complaint; which is attached to Plaintiffs' Brief as Ex. 1.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2022, the foregoing **ANSWERING BRIEF TO MCI'S BRIEF REGARDING OFFSET** was served on all parties currently on the electronic service list via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2.

/s/ Jessica P. Lopez
An Employee of Kemp Jones, LLP

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Exhibit 1

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KA TA YOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

VS.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No.: A-17-755977-C
Dept. No.: XIV

SECOND AMENDED NOTICE OF TAKING THE DEPOSITION OF THE 30(B)(6) WITNESS FOR MICHAELANGELO LEASING INC. d/b/a RYAN'S EXPRESS

Date: 9/7/17
Time: 11:00 a.m.

PLEASE TAKE NOTICE that on the above date and time at Christiansen Law Offices, located at 810 S. Casino Center Blvd., Las Vegas, Nevada, 89101, Plaintiffs, Aria Khiabani, minor by and through her natural mother, Katayoun Barin and Katayoun Barin, individually, by

and through their counsel of record, PETER S. CHRISTIANSEN, ESQ., KENDELEE L. WORKS, ESQ. and WHITNEY J. BARRETT, ESQ., of CHRISTIANSEN LAW OFFICES, will take the videotaped deposition of the designee(s) of **MICHAELANGELO LEASING INC. d/b/a RYAN'S EXPRESS**, pursuant to Nevada Rules of Civil Procedure 30(b)(6) for the subjects listed below. This deposition will be taken upon oral examination on the subjects listed below, before a notary public, or before some other officer authorized by law to administer oaths. This deposition may be videotaped.

If you are a public or private corporation, partnership, association, or governmental agency, you are ordered to designate one or more officers, directors, managing agents, or other persons who consent to testify on your behalf. The person(s) you designate will be examined, and are ordered to testify, on the matters set forth below that are known or reasonably available to the organization. NRCP 30(b)(6).

It is requested that **MICHAELANGELO LEASING INC. d/b/a RYAN'S EXPRESS ("ML")** identify the designee (or designees) for each subject at least 14 days prior to the deposition so that depositions can be coordinated, if possible, with any person who will also be deposed as a regular (percipient) witness or who will be appearing as the designee for more than one subject and bring said documents to the deposition.

30(b)(6) SUBJECT MATTER
Subject #1: 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 hiring, training, supervision and retention of any employee and/or independent contractor, including in particular, Defendant Edward Hubbard, and drivers and/or operators of any bus, motor coach and/or other commercial vehicle. **Documents to be produced:** Copies of all policies, pamphlets, manuals, memos, binders, publications, video, computer based training, power point presentations, written or email correspondence, reports, recommendations concerning this topic.
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. **Documents to be produced:** Copies of all policies, pamphlets, manuals, memos, binders,

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publications, video, computer based training, power point presentations, written or email correspondence, reports, recommendations concerning this topic.

Subject #3: For the time period beginning one year prior to Defendant Edward Hubbard's employment with ML through the present, all ML document retention policies and procedures regarding the personnel file of any independent contractor/ employee, including in particular, Defendant Edward Hubbard.

Documents to be produced: Copies of all policies, memos, written or email correspondence, meeting agendas, meeting minutes, reports, recommendations and every other document concerning this topic.

Subject #4: For the time period beginning January 2016 through present, ML's contractual and/or other business relationships with any other entity that may be responsible for Plaintiff's damages, including but not limited to all Defendants named in the instant litigation.

Documents to be produced: Copies of all contracts, memos, written or email correspondence, meeting agendas, meeting minutes, reports, recommendations, and every other document concerning this topic.

Subject #5: For the time period beginning January 2016 through present, ML's contractual and/or other business relationships with ThermoFisher Scientific, Red Rock Casino Resort and Spa, and/or Stations Casinos.

Documents to be produced: Copies of all contracts, memos, written or email correspondence, meeting agendas, meeting minutes, reports, recommendations, and every other document concerning this topic.

Subject #6: For the time period beginning January 2016 through present, all ML policies and procedures regarding the investigation of incidents, accidents and/or collisions, including, but not limited to the preservation of evidence (video, black box, ECM, EDR, etc.), reports generated, and any attendant investigation.

Documents to be produced: Copies of all policies, memos, written or email correspondence, meeting agendas, meeting minutes, reports, recommendations, contracts and every other document concerning this topic.

Subject #7: Any and all investigative efforts undertaken with respect to the April 18, 2017 collision involving Defendant Driver Edward Hubbard and Kayvan Khiabani, which is the subject of the instant lawsuit, including but not limited to, preservation of evidence (video, black box, ECM, EDR, driver logs etc.), witness interviews, witness statements, coordination or contact with law enforcement and/or the retention of any outside investigator.

Documents to be produced: Copies of all memos, written or email correspondence, meeting agendas, meeting minutes, reports, statements, surveillance, contracts or other documents from external consultants concerning this topic.

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Subject #8: For the time period beginning January 2008 through present, prior incidents and accidents involving buses, motor coaches and/or other commercial vehicles owned, leased and/or operated by ML and/or its agents or employees.

Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, and/or reports concerning this topic.

Subject #9: For the time period beginning January 2016 through present, all ML policies and procedures regarding cameras, video, GPS systems, black box, ECM, EDR, etc. on any bus, motor coach and/or other commercial vehicle, including utilization of those systems for monitoring of any bus, motor coach and/or other commercial vehicle, and any reports generated therefrom.

Documents to be produced: Copies of all policies, memos, written or email correspondence, meeting agendas, meeting minutes, and every other document concerning this topic including reports, thimble reports, contracts, recommendations or other documents from external sources concerning this topic, including documents specific to the Subject Bus being operated by Defendant Driver Edward Hubbard on April 18, 2017 at the time of the subject collision.

Subject #10: All facts and documents upon which you base the contentions set forth in your First Affirmative Defense.

Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.

Subject #11: All facts and documents upon which you base the contentions set forth in your Second Affirmative Defense.

Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.

Subject #12: All facts and documents upon which you base the contentions set forth in your Third Affirmative Defense.

Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.

Subject #13: All facts and documents upon which you base the contentions set forth in your Fourth Affirmative Defense.

Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.

Subject #14: All facts and documents upon which you base the contentions set forth in

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your Fifth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #15: All facts and documents upon which you base the contentions set forth in your Sixth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #16: All facts and documents upon which you base the contentions set forth in your Seventh Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #17: All facts and documents upon which you base the contentions set forth in your Eighth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #18: All facts and documents upon which you base the contentions set forth in your Ninth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #19: All facts and documents upon which you base the contentions set forth in your Tenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #20: All facts and documents upon which you base the contentions set forth in your Eleventh Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #21: All facts and documents upon which you base the contentions set forth in your Twelfth Affirmative Defense.

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Documents to be produced: Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #22: All facts and documents upon which you base the contentions set forth in your Thirteenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #23: All facts and documents upon which you base the contentions set forth in your Fourteenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #24: All facts and documents upon which you base the contentions set forth in your Fifteenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #25: All facts and documents upon which you base the contentions set forth in your Sixteenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.
Subject #26: All facts and documents upon which you base the contentions set forth in your Seventeenth Affirmative Defense. **Documents to be produced:** Copies of all documents, memos, written or email correspondence, meeting agendas, meeting minutes, reports, and every other document concerning this topic.

To facilitate these depositions and the schedules of the deponents, Plaintiffs are willing to consider changing or rearranging dates and times of these depositions, within reason, upon the identification of the designee for each subject. Please note that the depositions will not be vacated unless alternative dates are provided 72 hours prior to the above scheduled time and the alternative dates for the new deposition are within 14 days of the scheduled time above.

Said deposition shall take place upon oral examination, pursuant to Rules 26 and 30 of the Nevada Rules of Civil Procedure, before a Notary Public, or before some other officer authorized by law to administer oaths. Please take further notice that pursuant to Rule 30(b)(2) of the Nevada Rules of Civil Procedure, Plaintiff may take the deposition in person, telephonically, or by videoconference, and may record the testimony at the deposition by sound, sound-and-visual, or stenographic means. Oral examination will continue from day to day until completed.

Dated this 31st day of August, 2017.

CHRISTIANSEN LAW OFFICES

By _____
PETER S. CHRISTIANSEN, ESQ.
KENDELEE L. WORKS, ESQ.
WHITNEY J. BARRETT, ESQ.
Attorneys for Plaintiffs Aria Khiabani, minor by and through her natural mother, Katayoun Barin and Katayoun Barin, individually

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of CHRISTIANSEN LAW OFFICES, and that on this 31st day of August, 2017 I caused the foregoing document entitled **AMENDED NOTICE OF TAKING THE DEPOSITION OF THE 30(B)(6) WITNESS FOR MICHAELANGELO LEASING INC. d/b/a RYAN'S EXPRESS** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

An Employee of Christiansen Law Offices

Exhibit 2

A. Yes, sir.

Q. What was your job with them?

A. I was the director of safety and risk management.

Q. And then after that you worked for?

A. Michelangelo Leasing.

Q. Okay. When did that start, if you know?

A. January 2015.

Q. And how long did that continue?

A. Until March of '17.

Q. '17. Okay. And when you were with Ryan's -- strike that.

When you were with Michelangelo or Michelangelo -- I'm not even sure. I missed that art class -- were you also the director of safety and risk management?

A. At Michelangelo, yes.

Q. Do you know the date Mr. Hubbard was hired?

A. No.

Q. Okay. If I show you his personnel file, could you figure that out?

A. Likely.

Q. Okay. All right. We'll get to that.

What were your duties and responsibilities when you were the director of safety and risk

Las Vegas during that two-year period?

A. Not without seeing it.

Q. And then when you were with Michelangelo Leasing, how many -- first of all, how long were you there?

A. I was there from January of '15 to March of '17.

Q. So a little over two years?

A. Yes.

Q. And what service area did they operate in?

A. There were locations in Phoenix, Torrance, and Las Vegas.

Q. Is there a reason Tucson always gets left out of this? I mean, being a U of A grad --

A. I don't know.

Q. All right. How many accidents did they have, Michelangelo Leasing, from January 2015 to March 2017?

A. I don't know without looking.

Q. Okay. Was it dozens? Hundreds?

A. Probably similar to Ryan's.

Q. Probably around a hundred?

A. It was basically the same company, so it would probably be the same.

Q. So it would be the same region?

A. Okay.

Q. Okay. All right. Let me just ask it a different way then. Prior to -- what is today? Prior to September 1st, 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 came out back in 2011, whose job would it have been at that time?

A. Had I been aware, it would have been mine.

Q. Okay. Is that something that drivers should have been trained about, assuming that is the law?

A. We cover dealing in close quarters with other vehicles and passengers -- and pedestrians, training in other ways during our training.

Q. Okay. But do you think you should have told the drivers that that was the law in Nevada, that they have to move over to the left lane?

A. I think it's understood.

Q. Okay. So assuming, for the sake of argument -- you went to investigate this accident?

A. No, sir.

Q. You didn't. Do you know anything about the accident?

A. No, sir.

Q. Do you know where it occurred?

A. Roughly.

Q. Okay. What we have here today is a big blowup of the accident site that was not taken on the day of the accident. I don't want to mislead you. That borders where Charleston is and the Red

Rock is, say, where that water bottle is (indicating).

So assuming, for the sake of argument, that the bus proceeded to overtake a bicyclist and stayed in the right-hand lane the entire time and that the left-hand lane was available to it, first of all, would you agree with me that that violates the law in the state of Nevada?

MR. STEPHAN: I make an objection it lacks foundation, calls for an expert opinion, calls for a legal conclusion on the part of the witness. Can I just make this a continuing so I don't interrupt?

MR. KEMP: Well, usually what we do is just say form and foundation and it incorporates all that stuff.

MR. STEPHAN: Okay.

MR. KEMP: Yeah, you can have a continuing objection --

MR. STEPHAN: Thank you very much.

MR. KEMP: -- to this area.

MR. STEPHAN: Yes.

BY MR. KEMP:

Q. All right. Go ahead.

A. Could you repeat?

Q. Let me read you the law in the state of

Nevada first. This is NRS 484B.270. 2(a), quote, "When overtaking or passing a bicycle or electric bicycle proceeding in the same direction, the driver of a motor vehicle shall exercise due care and, A, if there's more than one lane for traffic proceeding in the same direction, move the vehicle to the lane to the immediate left if the lane is available and moving into the lane is reasonably safe," unquote. That's the law in the state of Nevada.

Would you agree with me that it would be a violation of the law for a bus to continue all the way up the right-hand lane for 300 feet and overtake a bicyclist?

A. Yes.

Q. And --

A. What was your question again? I want to make sure I answer it correctly.

Q. Whether that would violate the law as I just read.

A. No. I don't believe it would violate the law.

Q. Why is that?

A. I don't know if he can get over or not.

Q. You don't know if it's reasonably safe?

A. Exactly.

Q. Okay. Assuming it's reasonably safe, it would be a violation of the law?

A. No. That's in the opinion of the person driving the bus. I wasn't there.

Q. You think the person driving the bus should interpret whether or not the law was violated?

A. If he's aware of the law, he should follow it.

Q. Okay. And since you didn't train him as to the law, how would he become aware of the law?

A. Well, it's part of the traffic code. Drivers who hold driver's licenses are required to be knowledgeable of the traffic codes.

Q. Do you hold a driver's license?

A. Yes, sir.

Q. You didn't know about the law?

A. No, sir.

Q. And you're the director of training and risk management?

A. That's correct.

Q. So you expect all of the other drivers to know more about the law than you, the teacher, does?

A. Some of them do.

Q. But that's what you expect?

A. Yes, sir.

Q. Okay. When is the last time you drove a bus?

A. Last week.

Q. Okay. Last week prior to September 1st -- strike that.

Prior to September 1st, have you driven other buses?

A. I've driven buses throughout my career.

Q. During the year 2017?

A. Yes, sir.

Q. Okay. And that is for the current company you're with?

A. Arrow Stage Lines, yes, sir.

Q. Okay. Do they have a training requirement too for classroom training?

A. Yes, sir.

Q. Okay. So I assume they didn't train about this law I just read you either?

A. It's not in the training curriculum, no.

Q. Okay. So you have driven buses in 2017 at a time point where you were not aware that this was a legal requirement?

A. That's correct.

Q. Okay. All right. Now, earlier you talked about common sense or common practice or something?

Q. For the record, the subjects are 1, 2, 3, 6 as modified by Mr. Freeman's email dated September 7th that's marked as Exhibit 2. Okay?

A. Yes.

Q. Okay. Now, first of all, I've never had a PMK that wasn't still working for the company. So I haven't really thought this through.

You know you're presenting him here as the PMK?

MR. FREEMAN: Yes.

BY MR. KEMP:

Q. Subject 1, you were the person most knowledgeable prior to Mr. Hubbard's employment for all the policies and procedures of Michelangelo; correct?

A. Yes, sir.

MR. FREEMAN: As far as Number 1?

MR. KEMP: Yeah.

MR. FREEMAN: Okay.

MR. KEMP: Is that modified?

BY MR. KEMP:

Q. Okay. With regards to hiring, training, and safety, you're the person most knowledgeable; correct?

A. Yes.

if you know?

A. I used them when I was with Ryan's Express.

Q. So you first used them at Ryan's Express?

A. Yes.

Q. Were they already there or did you purchase them when you were at Ryan's Express?

A. I acquired them from Coach America which was the last company I worked for.

Q. When did you leave them again?

A. 2010.

Q. Okay. And you say you acquired them from Coach America. Does that mean you brought them with you?

A. When they went bankrupt, I had possession of them.

Q. Okay. You got them from a bankruptcy sale or you just kind of kept them?

A. They were in my bag.

Q. Okay. All right. And you think that was in 2010?

A. Yes, sir.

Q. Okay. Now, the video -- and we're going to look at one in a minute -- appears to be kind of dated to me. I mean, you look at the hairstyle of the people in there, it kind of looks like -- I

A. That was completed during training. That's one of the first things we do in the training class is start the driver qualification file creation.

Q. But there's nothing here that says what date he was trained, is there?

A. The date of employment is 4/20.

Q. 4/20 what?

A. And he signed it on 4/20.

Q. The date of employment is 4/20 what?

A. I'm sorry?

Q. The date of employment is what?

A. 4/20/16. And he signed the date of a certification as 4/20/16, so he signed it on his date of hire.

Q. Is he actually paid while he's trained?

A. Yes.

Q. On the front page, it says, "Rate, 14.00." Do you see that?

A. Yes.

Q. What does that mean?

A. It looks to me like they started him out at $14 an hour.

Q. Is that typical for what drivers were being paid at that time?

A. Yes.

employers having a written workplace safety program. It's fairly simple in its form, but we have it to satisfy the Nevada requirements. But our safety program is much more in-depth, and you'll see it as we go along here, which is the next page.

The safety policy and procedures acknowledgement. The safety policies and procedures are the policies and procedures that the driver must adhere to during his daily work. It talks about safety. It talks about reporting accidents. It talks about all of the things that would pertain to a driver throughout his daily activities.

Q. This is 859 you're referring to?

A. Yes, sir.

Q. Okay.

A. So he received that --

Q. Do you see anything in there with regards to what was his first day of classroom training?

A. 4/20.

Q. You think that was classroom training?

A. Yes.

Q. Okay. And I think you earlier said it was a three-day classroom training and the rest was driving the bus?

A. Right.

Q. Nothing is stopping you from it. You could ask for 10, 20, 30 years back --

A. No, you can't. You can go back ten years.

Q. Okay. You could have asked for ten years back.

A. But that's not what the requirement of the application asks for.

Q. You agree with me you could have gone back ten years; right?

A. I wouldn't have gone back ten years.

Q. You could have?

A. I wouldn't have.

Q. But you could have?

A. I could have done a lot of things, but I wouldn't have.

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. You wouldn't have hired this guy if you knew he had these four traffic convictions and he was involved in four accidents, would you?

A. It would not look good for him, no.

Q. So you would not hire him? More likely than not you wouldn't have hired him?

A. That's not all we take into consideration, but it wouldn't look good.

Q. And by "wouldn't look good" means you probably wouldn't hire him?

A. It's possible we wouldn't have hired him.

Q. Not only is it possible, it's pretty likely with four traffic convictions -- especially talking on the cell phone, you know -- these are pretty serious convictions; right?

A. Yes.

Q. So given the serious convictions and without knowing anything about the accidents other than that there's personal injuries involved, there's three of them -- or four of them; right?

A. Yes.

Q. I mean, this is not someone that should be driving a bus?

A. It's easy to see that in hindsight, but we didn't have that information at the time of hire.

Q. I'm not suggesting you made a bad decision at the time of the hire --

A. That may be so. That may be so.

Q. I am suggesting that, if you had known about Exhibit 6, the information in Exhibit 6, you wouldn't have hired this guy?

A. You're very possibly right.

Q. All right. Have you had a chance to go back through the modules in the recent last couple days or --

A. No.

Q. Okay. Let's get this out of the way while we're waiting. If I don't give these out, Mr. Bartlett, I'll have them all weekend.

(Exhibit 7 marked.)

(A discussion was held off the record.)

BY MR. KEMP:

Q. Directing your attention -- let me show you a video. Let's start with the Pears testimony. This is testimony from the right front passenger as to the conversation he had with this driver before the accident.

(Video played as follows:

QUESTION: And the bus driver, he actually -- you and he -- and I know this is an unpleasant topic. I know there was some discussion relative to the cyclist before the collision between the driver, you, and Mr. Plantz. Fair?

ANSWER: Yes.

QUESTION: Tell me what that was, sir.

A. It's a defensive driving module that stands for look ahead, look around, leave room, and communicate.

MR. KEMP: Go ahead, Pat.

(Video played as follows:

Hello. Welcome to this module on intersections (video fast-forwarded) and when that information changes, you need to quickly adapt. You can't change other drivers, but you can compensate for them and the changes in your surroundings only if you keep your eyes moving.

The fourth rule is always let the intersection clear and make sure it will remain clear before you enter it. You should do this whether you're driving straight through or you're turning into a cross street. It's helpful to look at the wheels of other vehicles so you can tell if they're starting to move or not. Once you're sure that the intersection is clear, use the left-right-left rule. Since most collisions come from the left, this is where your intersection clearance check should begin. Never assume the

right-of-way. Look left, look right, and look to the left again. Rock and roll in your seat to widen your field of vision and make sure that the vehicle ahead of you has pulled away before proceeding through the intersection.

Here's an example of why it is so important to make sure the intersection is clear: This motor coach operator is at a four-way stop and is going to turn left. An oncoming car has stopped, then proceeded past the motor coach through the intersection. The operator looks left of the intersection, then checks the car that crossed on the right. He looks at the cars' wheels to make sure the driver is not starting to move. Then he looks left again and proceeds through the intersection to make the left turn. All clear, right? Wrong. The operator failed to see that the vehicle that just passed him from the oncoming lane did not completely clear the intersection. The bicycle darted across the road in front of that driver causing him to stop short in the motor coach

operator's blind spot and right in the path of the motor coach's tail swing. This is one reason why it is so important to look left, right, left, as well as rock and roll in your seat while using your mirrors. The three basic types of intersections we'll discuss are unregulated) --

MR. KEMP: That's enough, Pat.

BY MR. KEMP:

Q. That's the only thing pertaining specifically to a bike that we could find on any of these modules. Do you know of anything else pertaining to a bike?

A. No.

Q. And the voice that was doing that, is that your voice or is that --

A. That's my voice.

Q. Okay. And with regards to the coach, you had said -- Coach America, did you see that on the bus?

A. Yes, I did.

Q. So that was the original training pod that came from Coach America?

A. Yes.

Q. Now, it referenced a rock-and-roll

Exhibit 3

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DISTRICT COURT
COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

PLAINTIFFS' JOINT OFFER OF JUDGMENT TO DEFENDANTS MICHELANGELO LEASING, INC. AND EDWARD HUBBARD

TO: Defendants MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD, and

TO: Eric Freeman, Esq. of the law firm SELMAN BREITMAN LLP, their counsel of record.

Pursuant to Rule 68 of the Nevada Rules of Civil Procedure, Plaintiffs KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent) (collectively, "Plaintiffs"), by and through their attorneys of record, Will Kemp, Esq. and Eric Pepperman, Esq. of the law firm KEMP, JONES, & COULTHARD, LLP, and Peter S. Christiansen, Esq. and Kendelee L. Works, Esq. of CHRISTIANSEN LAW OFFICES, hereby jointly offer to accept a judgment in their favor against Defendants MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD in the amount of **Five Million Dollars and No Cents ($5,000,000.00)**, inclusive of all costs of suit, attorneys' fees, and interest. If and only if United Fire Insurance Company has made payments or executed settlement agreements on Policy Number 506 850 3918 arising out of this accident that reduce the Limits of Insurance for this accident, the Five Million Dollar demand is automatically reduced by the amount of such payments or executed settlement agreements up to and including the maximum amount of $50,000.00, e.g., if there are $50,000 of payments or executed settlements, the offer is reduced to $4.95 Million.

This Offer of Judgment is jointly made by all Plaintiffs to both Defendants MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD, collectively. No partial acceptance of this Offer of Judgment may be made, and any attempt to accept only part of this Offer will be construed as a rejection of the entire Offer.

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/ / /

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This Offer of Judgment is made for the purposes specified in Rule 68 of the Nevada Rules of Civil Procedure and is not to be construed as an admission of anything whatsoever. This Offer of Judgment shall be deemed withdrawn for the purposes of NRCP 68 if not accepted by Defendants MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS and EDWARD HUBBARD within ten (10) days from the date of service hereof.

DATED this 11th day of September, 2017.

KEMP, JONES & COULTHARD, LLP

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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **OFFER OF JUDGMENT** is hereby acknowledged this 11 day of September, 2017.

SELMAN BREITMAN LLP

By _____

Eric Freeman, Esq.
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Exhibit 4

DISTRICT COURT

COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),	)	Case No. A-17-755977-C
Plaintiffs,	)	Dept. No. XIV
v.	)	
MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING, INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20,	)	
Defendants.	)	

VIDEOTAPED DEPOSITION OF JEFFERY E. JUSTICE

Taken at the instance of the Plaintiffs

August 16, 2017
10:06 a.m.
1312 N. Monroe
Spokane, Washington

Job Number: 411170

Q. Okay. During the time period 2003 through 2009, how long were you a driver?

A. I stopped driving, I believe it was, September 2005.

Q. And at that time you became involved with safety, you said?

A. Correct.

Q. Did you have a title?

A. Yeah. Big --

Q. What was it?

A. Safety director.

Q. And were you the safety director for any specific area?

A. Las Vegas.

Q. Did that -- for all of Clark County as opposed to just Vegas and --

A. Basically wherever our buses went, I was responsible for those buses and drivers from that location.

Q. And so you were the safety director between -- as I understand it, it was September of 2009; is that right?

A. From September of 2009 to maybe six months after I was safety. Then there was a little misunderstanding between me and the owner of the company

Q. Okay. All right. What were your duties and responsibilities as safety director when you were in Clark County?

A. Check driver logs, make sure the vehicle inspection reports were done, go out and make sure the drivers were doing what they were supposed to and not being unsafe.

Q. Anything else you can think of?

A. There was a lot more involved in it, but I -- it's -- you know, trying to remember everything, every little thing I did, it's -- you know, it's hard this far out --

Q. Sure.

A. -- being that I don't do it anymore.

Q. When you were the safety director of Ryan's Express in Las Vegas, did the company have a policy and procedure manual?

A. Yes.

Q. Did the procedure manual have a section with regards to safety in it?

A. It did, but what it specifically said, I don't really -- don't really remember all of it because --

Q. Okay. Did the company provide training to newly hired bus drivers?

A. We would typically take them out on a road

test, make sure that they could handle the vehicle they were driving.

Q. By "road test," do you mean go out in a bus?

A. Yeah.

Q. Okay.

A. Make sure they, you know, drove safely and not reckless, and there was a probation period for new drivers.

Q. Okay. And when you took them out on a road test, did you do that as the safety director, or did someone else do that?

A. It was me.

Q. All right. And so how long did those tests take?

A. Anywhere from 15 minutes to, let's say, possibly an hour, taking them on various roadways and highways just to get an idea.

Q. Okay. Other than that, was there any other training?

A. Do you mean new drivers as in no experience or new with the company?

Q. New hires.

A. Training as far as, you know, company policies and procedures and what we expected as far as, you know, not to do while you're out there driving and representing

Q. Okay.

A. They did not stay in one spot.

Q. Okay. Can you state those for me?

A. The original yard where they were at was -- I think it was a Henderson address. Then they moved to North Las Vegas, and they moved to another location in South Las Vegas.

Q. And they abandoned the North Las Vegas entirely?

A. I'm sorry. What was that?

Q. They abandoned the North Las Vegas location, and they went to the South Las Vegas location?

A. They sold the property and moved to a new one.

Q. Sold the property in North Las Vegas?

A. Yes.

Q. Great. So other than monthly safety meetings, would I be correct that there was no classroom training or testing of drivers?

A. No.

Q. No, I'm not correct, or I am correct?

A. No, you are correct.

Q. Okay. And that be would true whether they are a new hire or they were an existing hire; there was no ongoing training going on other than safety meetings?

A. Can you repeat that? You broke up a little.

would talk -- kept in touch with -- at a certain point.

Q. Okay.

A. And then my father is in the industry, and he hears rumors; so he calls.

Q. Okay. You haven't been in the bus industry since 2010?

A. Correct.

Q. Okay. You know, I see when you were talking about policies and procedures and some of the training and safety measures that are used, you said you didn't remember. Is that -- you haven't thought much about the bus industry since -- for a good seven years; is that right?

A. Correct.

Q. Okay. Is it safe to say that you don't remember the majority of the policies and procedures used with Ryan's Express?

MR. KEMP: Form.

THE WITNESS: That would be correct.

Q. (BY MR. FREEMAN) Same thing -- would it be safe to say that you don't remember the majority of the safety and training that's conducted with Ryan's Express?

MR. KEMP: Same objection.

THE WITNESS: That would also be correct.

Q. (BY MR. FREEMAN) Have you ever heard of

Michelangelo Leasing, Inc.?

A. I remember Michelangelo from when I was a driver, you know, seeing the buses on the road and things of that --

Q. It was another company?

A. What was that?

Q. I said, "It was another company?"

A. It would just be -- it would have been another company that I would see on the road.

Q. Okay. Did they have any affiliation with Ryan's Express?

A. Not at the time that I worked there, that I recall.

Q. Isn't it true that you've never had any involvement with Michelangelo Leasing in any way?

A. Personally I have not.

Q. Well, personally. Any other -- any other way?

A. No, not that I recall. I mean, I --

Q. You've led -- I'm sorry. What was it?

A. I mean, I don't --

Q. You --

A. I don't order buses or -- I mean, like I said, I know that Michelangelo existed for quite some time.

Q. Okay. Do you know anyone who works for Michelangelo Leasing?

A. No, I do not.

Q. Okay. Do you know anything about Michelangelo Leasing's Las Vegas operation?

A. I do not.

Q. Do you have any knowledge regarding Michelangelo Leasing's policies and procedures?

A. I do not.

Q. Do you have any knowledge regarding Michelangelo Leasing's training program and safety program?

A. I do not.

Q. Do you have any knowledge how Michelangelo Leasing operates its business?

A. I do not.

Q. You mentioned the company Silverado. Have you heard of Silverado Stages?

A. I have.

Q. Okay. Where have you heard about that?

A. It's the same as knowing about Michelangelo. When I was a driver, I'd run across other bus -- Silverado buses and their drivers.

Q. It was another bus company?

A. It's another bus company.

Q. And you don't have any knowledge regarding Silverado Stages' safety or training programs?

accident reports involving pedestrians from 2003 to 2009; is that correct?

A. Correct.

Q. And it's your testimony today that there were no accident reports from 2003 to 2009 involving bicyclists; is that correct?

A. Correct.

Q. And it's your testimony today that there were no accident reports from 2003 to 2009 involving the rear tire causing bodily injury to pedestrians; is that correct?

A. Correct.

MR. KEMP: I have no further questions.

MR. FREEMAN: Just one more.

FURTHER EXAMINATION

BY MR. FREEMAN:

Q. You were never an employee of Michelangelo Leasing; is that correct?

A. No.

Q. And you were never an employee of Silverado Stages?

A. No.

MR. FREEMAN: Thank you.

MR. NUNEZ: No questions.

Exhibit 5

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DISTRICT COURT
COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

PLAINTIFFS' JOINT OFFER OF JUDGMENT TO DEFENDANT BELL SPORTS, INC.

TO: Defendant BELL SPORTS, INC., and

TO: Michael E. Stoberski, Esq. of the law firm OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, its counsel of record.

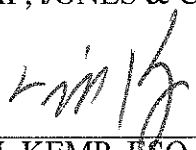
Pursuant to Rule 68 of the Nevada Rules of Civil Procedure, Plaintiffs KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent) (collectively, "Plaintiffs"), by and through their attorneys of record, Will Kemp, Esq. and Eric Pepperman, Esq. of the law firm KEMP, JONES, & COULTHARD, LLP, and Peter S. Christiansen, Esq. and Kendelee L. Works, Esq. of CHRISTIANSEN LAW OFFICES, hereby jointly offer to accept a judgment in their favor against Defendant BELL SPORTS, INC. in the amount of **One Hundred Thousand Dollars and No Cents ($100,000.00)**, inclusive of all costs of suit, attorneys' fees, and interest.

No partial acceptance of this Offer of Judgment may be made, and any attempt to accept only part of this Offer will be construed as a rejection of the entire Offer.

This Offer of Judgment is made for the purposes specified in Rule 68 of the Nevada Rules of Civil Procedure and is not to be construed as an admission of anything whatsoever. This Offer of Judgment shall be deemed withdrawn for the purposes of NRCP 68 if not accepted by Defendant BELL SPORTS, INC. within ten (10) days from the date of service hereof.

DATED this 11th day of September, 2017.

KEMP, JONES & COULTHARD, LLP



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RECEIPT OF COPY

RECEIPT OF A COPY of the foregoing **OFFER OF JUDGMENT** is hereby acknowledged this 11 day of September, 2017.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

By _____

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Exhibit 6

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DISTRICT COURT
COUNTY OF CLARK, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a California corporation; SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

PLAINTIFFS' JOINT OFFER OF JUDGMENT TO DEFENDANT SEVENPLUS BICYCLES, INC.

TO: Defendant SEVENPLUS BICYCLES, INC. d/b/a Pro Cyclery, and

TO: Michael J. Nunez, Esq. of the law firm MURCHISON & CUMMING, LLP, its counsel of record.

Pursuant to Rule 68 of the Nevada Rules of Civil Procedure, Plaintiffs KEON KHIABANI and ARIA KHIABANI, minors by and through their natural mother, KATAYOUN BARIN; KATAYOUN BARIN, individually; KATAYOUN BARIN as Executrix of the Estate of Kayvan Khiabani, M.D. (Decedent), and the Estate of Kayvan Khiabani, M.D. (Decedent) (collectively, "Plaintiffs"), by and through their attorneys of record, Will Kemp, Esq. and Eric Pepperman, Esq. of the law firm KEMP, JONES, & COULTHARD, LLP, and Peter S. Christiansen, Esq. and Kendelee L. Works, Esq. of CHRISTIANSEN LAW OFFICES, hereby jointly offer to accept a judgment in their favor against Defendant SEVENPLUS BICYCLES, INC. in the amount of **Ten Thousand Dollars and No Cents ($10,000.00)**, inclusive of all costs of suit, attorneys' fees, and interest.

No partial acceptance of this Offer of Judgment may be made, and any attempt to accept only part of this Offer will be construed as a rejection of the entire Offer.

This Offer of Judgment is made for the purposes specified in Rule 68 of the Nevada Rules of Civil Procedure and is not to be construed as an admission of anything whatsoever. This Offer of Judgment shall be deemed withdrawn for the purposes of NRCP 68 if not accepted by Defendant SEVENPLUS BICYCLES, INC. within ten (10) days from the date of service hereof.

DATED this 11th day of September, 2017.

KEMP, JONES & COULTHARD, LLP

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By _____ Bar No. 11730/for

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Exhibit 7

IRS

Tax Implications of Settlements and Judgments

The general rule of taxability for amounts received from settlement of lawsuits and other legal remedies is Internal Revenue Code (IRC) Section 61 that states all income is taxable from whatever source derived, unless exempted by another section of the code. IRC Section 104 provides an exclusion from taxable income with respect to lawsuits, settlements and awards. However, the facts and circumstances surrounding each settlement payment must be considered to determine the purpose for which the money was received because not all amounts received from a settlement are exempt from taxes. The key question to ask is: "What was the settlement (and its corresponding payments) intended to replace?"

IRC Section and Treas. Regulation

IRC Section 61 explains that all amounts from any source are included in gross income unless a specific exception exists. For damages, the two most common exceptions are amounts paid for certain discrimination claims and amounts paid on account of physical injury.

IRC Section 104 explains that gross income does not include damages received on account of personal physical injuries and physical injuries.

IRC Section 104(a)(2) permits a taxpayer to exclude from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or physical sickness

Reg. Section 1.104-1(c) defines damages received on account of personal physical injuries or physical sickness to mean an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution.

Resources (Court Cases, Chief Counsel Advice, Revenue Rulings, Internal Resources)

CC PMTA 2009-035 – October 22, 2008 PDF Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements

Publication 4345, Settlements – Taxability PDF This publication will be used to educate taxpayers of tax implications when they receive a settlement check (award) from a class action lawsuit.

Rev. Rul. 85-97 - The entire amount received by an individual in settlement of a suit for personal injuries sustained in an accident, including the portion of the amount allocable to the claim for lost wages, is excludable from the individual's gross income. Rev. Rul. 61-1 amplified.

Rev. Rul. 96-65 - Under current Section 104(a)(2) of the Code, back pay and damages for emotional distress received to satisfy a claim for disparate treatment employment discrimination under Title VII of the 1964 Civil Rights Act are not excludable from gross income. Under former Section 104(a)(2), back pay received to satisfy such a claim was not excludable from gross income, but damages received for emotional distress are excludable. Rev. Rul. 72-342, 84-92, and 93-88 obsoleted. Notice 95-45 superseded. Rev. Proc. 96-3 modified.

Analysis

Awards and settlements can be divided into two distinct groups to determine whether the payments are taxable or non-taxable. The first group includes claims relating to physical injuries, and the second group is for claims relating to non-physical injuries. Within these two groups, the claims usually fall into three categories:

1. Actual damages resulting from physical or non-physical injury;
2. Emotional distress damages arising from the actual physical or non-physical injury; and
3. Punitive damages

Prior to August 21, 1996, IRC Section 104(a)(2) did not contain the word "physical" with regard to personal injuries or sickness. The Code was amended (SBJPA, PL 104-188) to exclude from gross income "the amount of any damages (other than punitive) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness". The Service has consistently held that compensatory damages, including lost wages, received on account of a personal physical injury are excludable from gross income with the exception of punitive damages. Rev. Rul. 85-97 and also see *Commissioner v. Schleier*, 515 U.S. 323, 329-30 (1995).

Damages received for non-physical injury such as emotional distress, defamation and humiliation, although generally includable in gross income, are not subject to Federal employment taxes.

Emotional distress recovery must be on account of (attributed to) personal physical injuries or sickness unless the amount is for reimbursement of actual medical expenses related to emotional distress that was not previously deducted under IRC Section 213. See *Emerson v, Comr.*, T.C. Memo 2003-82 & *Witcher v. Comr.*, T.C. Memo 2002-292.

As a result of the amendment in 1996, mental and emotional distress arising from non-physical injuries are only excludible from gross income under IRC Section104(a)(2) only if received on account of physical injury or physical sickness.

Punitive damages are not excludable from gross income, with one exception. The exception applies to damages awarded for wrongful death, where under state law, the state statue provides only for punitive damages in wrongful death claims. In these cases, refer to IRC Section 104(c) which allows the exclusion of punitive damages. *Burford v. United States,* 642 F. Supp. 635 (N.D. Ala. 1986).

Employment-related lawsuits may arise from wrongful discharge or failure to honor contract obligations. Damages received to compensate for economic loss, for example lost wages, business income and benefits, are not excludable form gross income unless a personal physical injury caused such loss.

Discrimination suits for age, race, gender, religion, or disability can generate compensatory, contractual and punitive awards, none of which are excludible under IRC Section104(a)(2).

As a general rule, dismissal pay, severance pay, or other payments for involuntary termination of employment are wages for federal employment tax purposes.

The General Instructions for Certain Information Returns provides that for information return reporting purposes, a payment made on behalf of a claimant is considered a distribution to the claimant and is subject to information reporting requirements. Consequently, defendants issuing a settlement payment or insurance companies issuing a settlement payment are required to issue a Form 1099 unless the settlement qualifies for one of the tax exceptions.

In some cases, a tax provision in the settlement agreement characterizing the payment can result in their exclusion from taxable income. The IRS is reluctant to override the intent of the parties. If the settlement agreement is silent as to whether the damages are taxable, the IRS will look to the intent of the payor to characterize the payments and determine the Form 1099 reporting requirements.

Treatment of Payments to Attorneys - IRC 6041 and 6045 state that when a payor makes a payment to an attorney for an award of attorney's fees in a settlement awarding a payment that is includable in the plaintiff income, the payor must report the attorney's fees on separate information returns with the attorney and the plaintiff as payees. Therefore, Forms 1099-MISC and Forms W-2, as appropriate, must be filed and furnished with the plaintiff and the attorney as payee when attorney's fees are paid pursuant to a settlement agreement that provides for payments includable in the claimant's income, even though only one check may be issued for the attorney's fees.

Issue Indicators or Audit Tips

Research public sources that would indicate that the taxpayer has been party to suits or claims.

Interview the taxpayer to determine whether the taxpayer provided any type of settlement payment to any of their employees (past or present).

Review court documents or relevant documents to:

- Determine the nature of the claim and the character of the payment.
- Determine whether the payment, in whole or in part, is INCOME to the recipient.
- Determine whether the payment, in whole or in part, is WAGES.
- Determine whether the taxpayer has a reporting requirement, and if so, whether form required is a 1099 or W-2.

Request documentation of how the taxpayer reported the payment and whether the appropriate employment taxes were paid. Request copies of the original petition, complaint or claim filed showing grounds for the lawsuit and the lawsuit settlement agreement.

Review the original petition, complaint or claim and lawsuit agreement for:

- Clear characterization of payments
- Settlement checks or a schedule of payments
- Documentation showing the amount of legal fees paid, including any written fee agreements
- Disbursement schedule or a clear statement of how the funds were disbursed
- Documentation of letters or statements that address the taxation of the settlement proceeds.

Page Last Reviewed or Updated: 19-Nov-2021

TAB 15

BREF

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Attorneys for Motor Coach Industries, Inc,

DISTRICT COURT
CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their Guardian MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as Executor of the Estate of KAYVAN KHIABANI, M.D. (Decedent), THE ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARKIN, AS EXECUTOR OF THE STATE OF KATAYOUN BARIN, DDS (Decedent); and the ESTATE OF KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. D/B/A RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS INC. D/B/A GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. D/B/A PRO CYCLERY, a Nevada corporation; DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

(FILED UNDER SEAL)

MCI'S RESPONDING BRIEF REGARDING OFFSET

Hearing Date: January 13, 2022
Hearing Time: 10:00 a.m.

Plaintiffs' whimsical argument might be amusing but for the importance a litigant's rights, the Nevada Supreme Court's consistent abhorrence of windfalls, and the danger of a second reversal based on another pet theory about offsets.

I.

PLAINTIFF'S "BRIGHTLINE TEST": IF THE COMPLAINT AGAINST THE SETTLING DEFENDANT PRAYED FOR PUNITIVE DAMAGES, ONLY 25% OF THE SETTLEMENT PROCEEDS OFFSET THE JUDGMENT

Based only the ambiguous word "exposure" in *Lindberg* and dictum that briefly mentioned to the possibility of allocation for punitive damages in settlements—in the context of analyzing settlement proceeds on a claim that involved treble damages as a matter of law—plaintiffs now argue that whenever a plaintiff settles with a co-defendant against whom punitive damages were pled, only 25% of the settlement proceeds will offset the judgment:

> [T]he touchstone for an offset determination is "exposure"—a simple brightline test that can be applied by examining the claims made in the complaint against the settling defendants. C.f. Black's Law Dictionary, defining "exposure" as "[a] situation that can create liability or an obligation to pay."
>
> On the "exposure" in this case, the Second Amended Complaint, Para 58, sought punitive damages against Michaelangelo . . .
>
> * * *
>
> Focusing on the punitive claim against Michelangelo, the maximum possible punitive award would be 3 times compensatory under NRS 42.005 because the claim against Michelangelo sounded in negligence . . .
>
> * * *
>
> Hence, when you have exposure of 1 part compensatory damages and 3 parts punitive, 1 divided into 4 equals of the $5 million settlement. . . . Thus, the

> largest possible offset to MCI under Lindberg would be the $1.25 Million for Michelangelo's payment.

("Brief Regarding Offset," filed Dec. 13, 2021, at 4:8-26.) Their emphasis on "exposure" is misplaced.

A. The Reference to Punitive Damages is Dictum

"A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'" *St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009), quoting *Stanley v. Levy & Zentner Co.*, 60 Nev. 432, 448, 112 P.2d 1047, 1054 (1941). Put simply, "cases are not authority for propositions not considered." *Guo v. Moorpark Recovery Serv.*, LLC, 275 Cal. Rptr. 3d 94, 99 (Cal. App. 2021).

Lindberg made only passing reference to punitive damages: "…exposure beyond actual damages—such as treble or punitive damages—if such exposure is unique to the settling defendant." *J.E. Johns & Associates v. Lindberg*, 136 Nev. 477, 470 P.3d 204 (2020). Punitive damages were not at issue. Rather, the *Lindberg* court was analyzing only settlement proceeds from a claim that brought treble damages automatically, as a matter of statutory entitlement. *J.E. Johns & Associates v. Lindberg*, 136 Nev. 477, 470 P.3d 204 (2020).

Treble damages are similar but different from punitive damages, which is why the *Lindberg* opinion mentions them separately in the example. And they are materially different. With statutory trebled damages, *there is never any question* that the compensatory damages will be trebled. And the math is simple. On the other hand, as set forth in MCI's initial brief, a plaintiff is never entitled to punitive damages, even if a tortfeasor's conduct might warrant them. *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000).

The reference to punitive damages in *Lindberg* is merely an observation that a settlement *might* allocate for punitive damages, as well. And the court

certainly was not wrestling with the question of how any alleged allocation for punitive damages in a settlement must be proven to reduce an offset

B. The Term "Exposure" is Ambiguous

The *Lindberg* court did not say that "exposure" would include any extreme theoretically possible. That is how plaintiffs read it. But it does not follow. And it is unprecedented, which is why they do not cite a single case from anywhere in the country supporting their view.

That interpretation is counter to the authorities the *Lindberg* court relied upon in reaching its conclusion. The *Lindberg* court relied on two Texas cases in its analysis. In *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998), the Texas Supreme Court held that a nonsettling defendant seeking a settlement credit under the one-satisfaction rule has the burden to prove its right to such a credit. Once the nonsettling defendant demonstrates a right to a settlement credit, the burden shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. The plaintiff can rebut the presumption that the nonsettling defendant is entitled to settlement credits by presenting evidence showing that the settlement proceeds are allocated among defendants, injuries, or damages such that entering judgment on the jury's award would not provide for the plaintiff's double recovery. *Ellender*, 968 S.W.2d at 928 (requiring a showing of an allocation between actual and punitive damages). A written settlement agreement that specifically allocates damages to each cause of action will satisfy this burden. *Ellender*, 968 S.W.2d at 928.

The other case relied upon by the *Lindberg* court entailed the same body standard for determining whether and how much of a settlement might include punitive damages. *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 107 (Tex. 2018) ("Because [plaintiff] did not offer any evidence allocating those settlement amounts, and the record does not reflect any such allocation,

[plaintiff] failed to rebut the presumption that [the non-settling defendant] is entitled to settlement credits equal to those amounts.")

Those citations are presumed to be indicate approval. *C.f., Butler v. Balolia*, 736 F.3d 609, 613 (1st Cir. 2013) (when federal court must surmise how a state's highest court would rule on any issue, "the federal court may pay particular attention to sources cited approvingly by the state's highest court in other opinions.") They cannot be disregarded.

C. Plaintiffs Mischaracterize *J.E. Johns* and Offer Contradictory "Evidence" of Punitive Damage Exposure

Plaintiffs allege that *J.E. John* created a "bright line test" to determine whether a defendant is entitled to the entire offset. (Mot. at 4:8 – 10). Plaintiffs contend this test requires the court to determine a party's exposure to punitive damages and then determine if that exposure is unique. Not only do plaintiffs mischaracterize *J.E. Johns* but the only evidence plaintiffs point to is the Second Amended Complaint. Yet this "evidence" contradicts plaintiffs' theory.

Plaintiffs first argue that the settling defendants were exposed to punitive damages because the Second Amended Complaint sought punitive damages against *all* defendants, including MCI. (Mot. at 4: 12 – 16). Plaintiffs then argue that punitive damages were unique to only the settling defendants and not MCI. (Mot. at 5: 4 – 6). This contradictory evidence simply demonstrates that more evidence is required to determine whether a particular settling defendant intended their settlement to include punitive damages.

II.

MCI IS ENTITLED TO THE ENTIRE OFFSET

Plaintiffs motion fails to point to any evidence that the settling defendants accounted for punitive damages. The plain language of the NRS 17,245 presumes that a defendant is entitled to an offset of the entire settlement. To rebut that presumption, plaintiffs have to prove either a

statutory entitlement to apportionment—as was the case in *J.E. Johns & Assoc.* but is not here—or that the settling defendants and plaintiffs actually did allocate a certain amount to punitive damages. *See* NRS 17.245. Plaintiffs' motion relies solely on its mischaracterization of *J.E. Johns* and the allegations alleged in the Second Amended Complaint. Plaintiffs have failed to meet their burden. Accordingly, MCI is entitled to the entire offset.

A. Plaintiffs Cannot Prove that the Settlement Allocated for Punitive Damages

It is plaintiffs burden to prove that the settlement funds received from co-defendants included an allocation to punitive damages. *See Matter of Texas General Petroleum Corp.*, 52 F.3d 1330, 1340 (5th Cir. 1995). The plain language of the statute presumes that a defendant is entitled to an offset of the entire settlement. To rebut that presumption, plaintiffs have to prove that the settling defendants and plaintiffs actually did allocate a certain amount to punitive damages. See NRS 17.245; *Dionese v. City of West Palm Beach*, 500 So.2d 1347, 1349 (Fla. 1987) (where a settlement agreement fails to apportion proceeds among the separate and distinctive causes of action, the total amount of the settlement must be set off from the entire verdict).

Here, plaintiffs cannot point to any evidence that the settling co-defendants intended to include punitive damages in the settlement amount. Their self-serving representations are not enough. Plaintiffs have disclosed *no evidence* that the settling defendants at the time agreed to apportion part of the settlement to punitive damages—*e.g.*, the settlement agreements themselves or documentation that plaintiffs paid taxes on any portion allegedly attributable to punitive damages.

B. Additional Evidence is Required to Determine if any Portion of the Settlement Funds Included Punitive Damages

The court cannot determine whether any of the settling co-defendants

intended the settlement funds to include punitive damages without further discovery. The best way for a plaintiff to satisfy his burden is to offer as proof the written settlement, which should specifically stipulate the allocation of damages to each cause of action." *Hess Oil V.I. Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir. 1988).

In the present case, as all co-defendants contributed funds from their respective insurance policies, it is dubious that the apportionment would have included uncovered punitive damages. MCI is entitled to additional discovery to determine which portion, if any, of the settlement funds applied to punitive damages.

III.

THE CURRENT VALUE OF THE JUDGMENT FOLLOWING APPLICATION OF OFFSET

The prejudgment interest must be calculated following proper allocation of the settlement proceeds. Plaintiffs ignore the plain language of NRS17.130(2) and contort the holding in *Ramadanis* to argue that the offset should not be deducted until August 13, 2018—the date in which the settlement proceeds were actually paid. Plaintiffs argue that *Ramadanis* holds a party must receive the "certainty and immediacy of [any] settlement payments." *Ramadanis* never mentions this principle but instead refers to a parties decision to waive prejudgment interest rather than risk receiving a favorable judgment. Indeed, in holding that that prejudgment interest is calculated after settlement proceeds are deducted from jury's assessment of compensatory damages, the *Ramadanis* court expressed concerns for the possibility of unfairness to the non-settling defendant. *Id.* at fn. 3.

Similarly here, plaintiffs proposal to calculate the offset on the date settlement is received would be unfair to non-settling defendants. Plaintiffs place the all the risk on non-party to the settlement agreement. This court

should not stretch the *Ramadanis* beyond its holding. Instead it should simply deduct the settlement proceeds and then calculate prejudgment interest pursuant to NRS 17.130(2) using the April 17, 2018 date of judgment.

By defendant's calculation, the correct amount of prejudgment interest is $182,826.85. The present value of the judgment is $17,524.764.77. That represents interest on plaintiffs' past compensatory damages of $3,306,828.62 at the statutory rate of 5.75% from June 1, 2017 through June 30, 2017 for a total of $15,628.16; the statutory rate of 6.25% from July 1, 2017 through December 31, 2017 for a total of $104,187.75; the statutory rate of 6.50% from January 1, 2018 through April 17, 2018 for a total of $63,010.94.

CONCLUSION

MCI is entitled to an offset of $5.1 million. Plaintiffs have not and cannot demonstrate that any of the settlement funds were allocated to punitive damages. As such, the judgment should be offset by the entire settlement amount.

Dated this 20th day of January, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By */s/ Joel D. Henriod*

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2022, I served the foregoing "Brief Regarding Offset" on counsel by the Court's electronic filing system and by courtesy email to the persons and addresses listed below:

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TAB 16

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Steven D. Grierson
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RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF KATAYOUN BARIN, Plaintiff(s), vs. MOTOR COACH INDUSTRIES INC, Defendant(s).	CASE NO: A-17-755977-C DEPT. NO: XIV

BEFORE THE HONORABLE ADRIANA ESCOBAR,
DISTRICT COURT JUDGE
TUESDAY, JUNE 28, 2022

RECORDER'S TRANSCRIPT OF HEARING RE: HEARING

(See appearances on page 2.)

RECORDED BY: STACEY RAY, COURT RECORDER

APPEARANCES:

For Plaintiff Estate of Kayvan Khibani M.D.:	WILLIAM SIMON KEMP, ESQ. ERIC PEPPERMAN, ESQ.
For Plaintiff Estate of Katayoun Barin:	PETER S. CHRISTIANSEN, ESQ.
For Defendant Motor Coach Industries Inc.:	DANIEL F. POLSENBERG, ESQ.

Las Vegas, Nevada; Tuesday, June 28, 2022

[Case called at 9:52 a.m.]

THE COURT: Page 3 is Estate of Katayoun Barin versus Motor Coach Industries Inc. Let's start with Plaintiff's Counsel, your appearances for the record please.

MR. KEMP: Your Honor, Will Kemp and Eric Pepperman for Plaintiffs.

MR. PEPPERMAN: Good morning, Your Honor.

THE COURT: Good morning, Mr. Kemp and good morning, Mr. Pepperman.

MR. POLSENBERG: And Dan Polsenberg for the Defendant, Your Honor.

THE COURT: Okay. Good morning, Mr. Polsenberg.

MR. POLSENBERG: Good morning.

THE COURT: Do I have anyone else that you anticipate will be appearing for the Defendant?

MR. POLSENBERG: I don't think so, Your Honor.

THE COURT: No. You're correct. I don't think so either. Okay. All right. I've taken a thorough look at this case. And so, honestly, I have tremendous amounts here, but it look -- it looks -- so this Court finds that -- I believe that the Defense arguments are correct here. So let me just give you more information on that. All right.

So first the offset. Okay. And then I, you know, I'll probably even augment the order with this to be sure that everything that I'm

thinking about is -- is in the order. But first and foremost, so looking at NRS 17.130 -- no. That's the interest. Hold on one second. Sorry. First the offset. Okay. All right. So here -- with respect to MCI and the offset -- so the Nevada Supreme Court's language that the District Court should have granted MCI's motion to amend the judgment to offset the settlement proceeds paid by other Defendants and they remanded this for the calculation of the offset. So first, that. So the total amount of the settlement proceeds, after reading all of this several times, you know, at one point, MCI knows that the offset at issue involved a statutory requirement for -- in the *Johns* case -- there are a couple cases that have been cited, and, in those cases, there was a clear statutory requirement that allowed treble damages. And here, that is not the case.

Further, in the case that was cited by the Supreme Court, it's also discussed by the -- excuse me -- Plaintiffs, the discussion of punitive damages is something more that's dictum. It's not -- It's not really what the case was about in this Courts view. In this case, the jury found no punitive damages. And the Plaintiffs -- well, there's an estoppel issue, which I think is correct, from alleging that the settlement -- settling Defendant's conduct justified punitive damages based on their previous representation to the Court and the orders procured from this Court.

I don't believe that the -- that the settling Defendants, without the jury making a finding of punitive damages, can be charged with punitive damages absent a settlement that include -- that the amount for

5 million and the $100,000 -- I can't remember right now if it was both Plaintiffs -- if each one was 50,000 or if each one of the other two Defendants -- excuse me -- their settlement was either 100,000 each or a cumulative amount of that 100,000. But in any case, the Plaintiffs would bear the burden of proof to justify any diminution of the outset.

There's no evidence, that I see anywhere, that -- that the jury, number one, found punitive damages. Number two, I don't believe that the Supreme Court was discussing punitive damages. The statute in that other -- in the case was -- it provided for treble damages. And I do believe that the Supreme Court's discussion of punitive damages was more in the area of dictum. So -- and also, -- and, you know, it's a point that is important. Generally when an insurance policy pays an award, I don't believe I've ever seen one that includes apportionment for punitive liability on behalf of their insured.

So, you know, I had my marching orders. I was tasked with reviewing this all over again. And number one, when considering NRS 17.245, the District Court must determine whether both the settling and non-settling Defendants were responsible for the same injury. In this case, I don't think there's any question about that. I don't think the Plaintiff believes it wasn't the same injury -- or the Defendants. So that -- that's already a given. And then the MCI -- or the Defendant MCI is entitled to an offset -- a complete offset of the 5 million because the jury calculated the total damages for that single injury, and Respondents had already received partial payment from the settlement Defendant.

Now here's the thing. So we have to go back -- I have notes.

We have the future damages and we have the past -- let me just go to my statute -- my notes on the statute. So here, you know, number one, I don't see evidence -- first of all, the jury found no punitive damages. Number two, I don't have any evidence from the Plaintiffs that the settlements with the $5 million settlement or the -- for any of the parties, included or discussed punitive damages. And then also, again, I don't think that a carrier, or at least I haven't been shown, that a carrier would provide a settlement with respect to the punitive damages.

I don't believe that we need more discovery to justify anything additional. I haven't seen any fact or case law that would -- that would warrant not -- that would warrant finding punitive damages against the settling Defendants in this case. And as the -- as the law, we all know very well and so forth, that would be in the area of the finding of the jury, the finder of fact. And it didn't happen. So also, with respect to -- and the language in the statute is pretty -- it's plain; it's straightforward -- it's straightforward. Okay.

So here, I have now NRS 17.130 computation of judgment interest. Number two, when no rate of interest is provided by contract or otherwise by law, or specified in the judgment, the amount representing -- excuse me -- the judgment draws interest from the time of service of the summons and complaint until satisfied except for any amount representing future damages which draws interest only from the time of the entry of the judgment until satisfied.

And then it goes on to state that at a rate equal to the prime rate at the largest bank in Nevada ascertained by the Commissioner of

Financial institutions on January 1 or July 1st -- excuse me -- as the case may be immediately preceding the date of judgment, plus two percent. The rate must be adjusted accordingly for each January 1st and July 1st thereafter until the judgment is satisfied. So the general rule is that the interest runs from the date of summons and complaint -- the date of service of the summons and complaint and then anything that includes future damages runs from the time of the entry of judgment until satisfied. And that's what we're going to have -- that's what's going to happen in this case.

So I haven't sat down -- I was reading this several -- I've read this several times and was ready for this, before, when we had to reschedule because the parties were in another hearing I believe. I think it's been rescheduled a couple of times. But -- so we have to start off with number one, what was -- what the jury's -- what the deliberations -- I believe it was 18 million. Whatever that was, minus the 5 million, plus the other -- plus the other Defendants settlement. And then we need to, essentially, very simply, plug them into these formulas.

I believe that in their briefs, the MCI -- the parties for MCI discussed an approach to this. The prejudgment interest must be calculated following proper allocation of the settlement proceeds, and by the Defendants calculation, the correct amount of prejudgment interest is 182,826.85. This is all in the brief. The present value of the judgment is $17,524,764.77 and goes on. What I'd like the parties to do is to be sure that the Court's order is -- is -- please make sure you send it -- and I'd like to adopt the Defendant's reasoning, every -- and the other things

discussed here.

But also, I'd like the parties to make sure that you take a look at the calculations given this -- I believe, and I realize, that the 5,000 should've been offset from the -- 5 million -- excuse me -- the amount of the jury award, the settling amount should've been -- by all seven Defendants, should've been offset from the very beginning. And then I'd like you to calculate this accordingly and please send a proposed order with all of those details, meticulously redoing the numbers. And -- but I think it needs to be calculated from the beginning -- the offset -- the entire amount.

MR. POLSENBERG: Very good, Your Honor. I'll prepare an order. I'll run it past Will and Eric.

THE COURT: Okay.

MR. POLSENBERG: Thank you, Your Honor.

THE COURT: All right. I -- yes?

MR. POLSENBERG: I was just saying thank you. Have a good morning.

THE COURT: Oh, you're welcome. Have a great day, Counsel.

ATTORNEY: Thank you, Your Honor.

THE MARSHAL: Page 12.

THE COURT: Yes? Is it Mr. Pepperman speaking?

MR. PEPP: Oh no, Your Honor. Thank you. Have a good day.

THE COURT: Okay. Thank you. You too. Mr. Kemp, Mr.

Pepperman and Mr. Polsenberg. Okay. Have a great day.

MR. CHRISTIANSEN: Good morning, Judge. Pete Christiansen is present as well. Thank you.

[Proceedings concluded at 10:07 a.m.]

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Stacey Ray

Stacey Ray
Court Recorder/Transcriber

TAB 17

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DISTRICT COURT

CLARK COUNTY, 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),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION; MICHELANGELO LEASING INC. D/B/A RYAN'S EXPRESS, AN ARIZONA CORPORATION; EDWARD HUBBARD, A NEVADA RESIDENT; BELL SPORTS INC. D/B/A GIRO SPORT DESIGN, A DELAWARE CORPORATION; SEVENPLUS BICYCLES, INC. D/B/A PRO CYCLERY, A NEVADA CORPORATION; DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

(PROPOSED)

ORDER GRANTING DEFENDANT MOTOR COACH INDUSTRIES, INC.'S MOTION FOR OFFSET

Hearing Date: June 28, 2022
Hearing Time: 10:00 a.m.

Defendant Motor Coach Industries, Inc has moved the Court for an Offset of the settlement proceeds paid by other defendants in its Brief Regarding Offset filed December 13, 2021. In addition to this motion, the corresponding answering brief and responding brief, the Court also heard oral argument June 28, 2022, regarding the offset. The Court now, having considered the briefs and materials submitted by the parties, oral argument, and the record before the Court, the Court orders as follows:

FINDINGS OF FACT

1. The decedent Dr. Khiabani died when his bicycle collided with a motor coach designed by defendant Motor Coach Industries, Inc. ("MCI"). Defendant Edward Hubbard was driving the vehicle for his employer, Michelangelo Leasing Inc. d/b/a Ryan's Express ("Michelangelo"), taking passengers from the airport to the Red Rock Casino Resort.

2. The plaintiff-heirs sued MCI, Michelangelo, and Hubbard, as well as the manufacturer and seller of the helmet that Dr. Khiabani was wearing at the time of the accident. The helmet was manufactured by Bell Sports, Inc. d/b/a Giro Sport Design. The helmet was sold by SevenPlus Bicycles, Inc. d/b/a Pro Cyclery,

3. In their operative Second Amended Complaint ("SAC"), Plaintiffs alleged the following claims: (i) Strict Liability: Defective Condition or Failure to Warn against Defendant MCI, (ii) Negligence against Defendants Michelangelo and Hubbard, (iii) Negligence per se against Defendants Michelangelo and Hubbard, (iv) Negligent Training Against Michelangelo, (v) Strict Liability: Defective Condition or Failure to Warn against Defendants Bell Sports and SevenPlus, and (vi) Breach of Implied Warranty of Fitness for a Particular Purpose against Defendants

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Bell Sports and SevenPlus.

4. Plaintiffs' complaint also alleged claims for punitive damages. With respect to Michelangelo, Plaintiffs alleged that, "[i]n carrying out its responsibility to adequately hire and train its drivers, Michelangelo acted with fraud, malice, oppression, and/or conscious disregard of the safety of others." 11/17/17 SAC, ¶ 62.

5. Prior to trial, Plaintiffs settled with everyone but MCI. In exchange for a full release of all possible claims and damages against the settling defendants, Plaintiffs received $5 million from Michelangelo and Hubbard, $100,000 from Bell Sports, and $10,000 from SevenPlus Bicycles. The Court granted motions for good faith settlement determinations with respect to each settlement, and Plaintiffs' claims against MCI proceeded to trial in February 2018.

6. The $5 million settlement proceeds from Michelangelo and Hubbard, were satisfied through Michelangelo's insurance. Although the settlement was reached in principle prior to trial, the $5 million was not paid until approximately four months after trial. Plaintiffs actually received the settlement proceeds on August 13, 2018.

7. Following a several-week trial on Plaintiffs' claims against MCI, the jury returned a verdict in favor of Plaintiffs under their failure-to-warn theory. The jury awarded compensatory damages in the amount of $18,746,003.62. The jury did not award any punitive damages against MCI. On April 17, 2018, the court entered judgment on the jury's verdict.

8. On June 6, 2018, MCI filed a motion to alter or amend the judgment. In its motion, MCI argued that the judgment amount should be offset by the $5,110,000.00 paid by the settling defendants

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pursuant to NRS 17.245(1)(a) and NRS 41.141(3). Plaintiffs opposed the motion on grounds that product manufacturers are ineligible to offset settlement proceeds from co-defendants. The Court denied the motion and did not offset the judgment by any amounts paid by the settling defendants.

9. On April 24, 2019, MCI filed an appeal. In its appeal, MCI challenged the judgment and several of the Court's rulings, including the order denying its motion to offset the judgment by the full $5,110,000.00 paid by the settling defendants.

10. On August 20, 2020, the Nevada Supreme Court issued its opinion in *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204 (2020). The *Lindberg* opinion was issued after briefing on MCI's appeal was completed but before oral arguments.

11. On March 1, 2021, the Nevada Supreme Court heard oral arguments on MCI's appeal. During oral arguments, Plaintiffs conceded that the "same injury" underlies their claims against both the settling and nonsettling defendants and, therefore, NRS 17.245(1)(a) applied to offset their judgment as to MCI under *Lindberg*. Plaintiffs also argued that *Lindberg* applied to the offset calculation as well because the settlement proceeds resolved Defendants' exposure to damages that were beyond actual damages and unique to the settling defendants.

12. On August 19, 2021, the Nevada Supreme Court issued its *en banc* decision in this case. The Supreme Court concluded as follows:

> The district court properly denied the motions for judgment as a matter of law, for a new trial, and to retax costs, and we affirm the judgment and post-judgment orders as to those matters. However, the district court incorrectly denied the motion to alter or amend the judgment to offset the

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settlement proceeds paid by other defendants. We therefore reverse the judgment as to its amount and remand to the district court to determine the amount of the offset to which MCI is entitled and enter a corrected judgment thereon. *Motor Coach Indus., Inc. v. Khiabani by & through Rigaud*, 137 Nev. Adv. Op. 42, 493 P.3d 1007, 1017 (2021).

13. The amount of the offset also affects the calculation of interest on the judgment. On December 13, 2021, the parties filed simultaneous briefs on these two issues—the amount of the offset and the calculation of interest. On January 20, 2022, the parties filed simultaneous answering briefs. A hearing was held on June 28, 2022.

CONCLUSIONS OF LAW

I.

THE OFFSET UNDER NRS 17.245

14. NRS 17.245(1)(a) provides as follows:

> 1. 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: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but 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...

15. In *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204, 208 (2020), the Nevada Supreme Court recently addressed the application of NRS 17.245(1)(a).

16. In *Lindberg*, an aggrieved home buyer sued both the home sellers 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

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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. Id. at 206. Before trial, "the Lindbergs settled with the sellers for $50,000 and with the Lindbergs' agents for $7,500." Id.

17. Following a three-day bench trial against the remaining defendants (the sellers' agents), "the district court awarded the Lindbergs $27,663.95 in damages—the cost of installing the proper-sized septic system [] pursuant to NRS 645.257." Id. "The district court also awarded $48,116.84 in attorney fees and costs, plus interest, for a total award of $75,780.79." Id. at 207.

18. "The sellers' agents then filed an NRCP 59(e) motion to amend or alter the judgment," which was granted in part. Id. The district court reasoned that "NRS 17.245(1)(a) entitled the sellers' agents to offset the judgment by the settlement amounts, 'finding that all defendants, settling and remaining, were responsible for the same injury.'" Id. Following a hearing on the proper calculation of the offset, "the district court offset the $27,552.95 award [to fix the 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.'" Id. at 210.

19. Both parties appealed, claiming "that the district erred in determining the amount to be offset from the original judgment under NRS 17.245(1)(a). Id. at 207. The Lindbergs argued that NRS

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17.245(1)(a) did not apply to offset the judgment "because the statute requires a finding of joint tortfeasor liability for all defendants for the same injury." Id. "The sellers' agents challenge[d] the district court's offset calculation, arguing that the district court erred by failing to offset the judgment by the full amount paid by the sellers." Id.

20. In rejecting the Lindbergs' argument, the Nevada Supreme Court held that "NRS 17.245(1)(a) does not require that a party be found liable." Id. at 208 (quotation omitted). "Instead, as the district court properly determined, the relevant question governing the applicability of NRS 17.245(1)(a) for the purposes of settlement offsets is whether both the settling and remaining defendants caused the *same injury*. Id. (Citation omitted) (italics in original). "To provide additional guidance, [the Supreme Court echo[ed] the district court's reasoning to further hold that independent causes of action, multiple legal theories, or facts unique to each defendant do not foreclose a determination that both the settling and nonsettling defendants bear responsibility for the *same injury* pursuant to NRS 17.245(1)(a)." Id. (Citation omitted) (italics in original). Because the district court's "same injury" finding was supported by substantial evidence, the Supreme Court affirmed the application of NRS 17.245(1)(a) in *Lindberg*. Id. at 210.

21. "Having concluded that the district court properly determined that NRS 17.245(1)(a) applie[d] to offset the Lindbergs' judgment as to the sellers' agents, [the Supreme Court next] consider[ed] whether the district court appropriately calculated the offset amount." Id. "Whether 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

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the nonsettling defendants, present[ed] a question of law that [the Court] review[ed] de novo." Id. (Citation omitted). On this issue, the Nevada Supreme Court found as follows:

> *While the plain language of the statute could be interpreted as permitting the reduction of the entire settlement amount obtained—without regard to the type of exposure resolved by the settling defendants—we reason that such an interpretation violates the spirit of NRS 17.245(1)(a). (Citation omitted) (italics in original). The principal purpose of equitable settlement offsets under the statute is to prevent double recovery to the plaintiff—or in other words, to guard against windfalls.*
>
> *Because the principal purpose of equitable settlement offsets is to avoid windfalls, we determine that it would be inconsistent with the legislative intent of NRS 17.245(1)(a) to then permit the blanket deduction of entire settlement amounts without scrutinizing the allocation of damages awarded therein. Specifically, actual damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); see also Actual Damages, Black's Law Dictionary (11th ed. 2019) (defining "actual damages" as those "that repay actual losses"). Treble damages, on the other hand, represent "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." Treble Damages, Black's Law Dictionary (11th ed. 2019). 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. *Cf. Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998) (explaining that a nonsettling defendant "cannot receive credit for settlement amounts representing punitive damages" due to their individual nature). To conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant. *Id.* at 210-11.

22. On remand, there is no dispute that MCI is entitled to an offset under NRS 17.245(1)(a), but the parties disagree over the application of *Lindberg* and the proper calculation of the offset amount.

23. Plaintiffs contend that *Lindberg* applies to the court's offset calculation in this case. *See* Plaintiffs' 12/13/21 Brief Regarding Offset, 2:5-3:24. They argue that, in paying the $5 million settlement amount, Michelangelo and Hubbard resolved their exposure to damages beyond actual damages that are unique to Michelangelo and/or Hubbard. *Id.* at 3:25-4:26. Specifically, "the principal settling defendant (Michelangelo) paid $5 million to settle the compensatory and punitive damages claims asserted against it." *Id.* at 3:26-27. Plaintiffs also served offers of judgment on each of the settling defendants. Plaintiffs' 1/20/22 Ans. Brief, 4:3-4. This created an additional "exposure" to an award of attorneys' fees, which was also resolved as part of the settlement payment. *Id.* at 4:4-5. This attorneys' fees "exposure" was unique to the settling defendants, as Plaintiffs did not serve an offer of judgment on MCI. *Id.* at 4:5-6. As in *Lindberg*, Plaintiffs contend that the offset calculation in this case should account for the resolution of

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this exposure to punitive damages and attorneys' fees, as these damages are beyond actual damages and unique to Michelangelo and/or Hubbard. Id. at 4:8-9.

24. MCI argues that *Lindberg* does not apply here because the *Lindberg* case involved "a statutory entitlement to treble damages." MCI's 12/13/21 Brief Re Offset, 8:16-17. MCI contends that, unlike statutory treble damages, "the allowance or denial of exemplary or punitive damages rests entirely in the discretion of the trier of fact." Id. at 9:6-7, citing *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000). MCI asserts that the Nevada Supreme Court did not instruct this court to calculate the offset under *Lindberg* but rather "unambiguously directed the court to offset all the settlement proceeds." Id. at 6:25-26.

25. The court agrees with MCI. *Lindberg* does not apply, and the judgment will be offset by the entirety of the $5,110,000.00 in settlement proceeds. In *Lindberg*, there was a clear statute that allowed for treble damages. And here, that is not the case. In this court's view, the *Lindberg* case was not about punitive damages, and any discussion about punitive damages was dictum.

26. 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. When an insurance policy pays an award, the settlement generally does not include an apportionment for punitive liability on behalf of their insured. The court has not seen any fact or case law that would warrant finding punitive damages against the settling defendants in this case, as that would be in the area of the jury or

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finder of fact, and that did not happen here.

27. MCI also argues that "Plaintiffs are judicially estopped from alleging that Hubbard acted with conscious disregard of danger" because they presented evidence that Hubbard would have taken actions to avoid the accident if warned about the motor coach's air displacement. MCI's 12/13/21 Brief Regarding Offset, 13:14-19. Plaintiffs respond that the punitive damages exposure was based on Michelangelo's "corporate misconduct in driver screening and driver training—not on Hubbard's actions." 1/20/22 Ans. Brief, 5:10-11.

28. The Court agrees with MCI. Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." In re Frei Irrevocable Tr. Dated Oct. 29, 1996, 133 Nev. 50, 390 P.3d 646, 652 (2017) (emphasis added). The court does not have to formally "adopt" the party's argument before judicial estoppel applies. See id. Plaintiffs are judicially estopped from alleging that the settling Defendant's conduct justified punitive damages based on their previous representation to the court and the orders procured from this court.

/ / /

/ / /

II.

Interest Calculation Following Application of Offset

29. The prejudgment interest must be calculated following proper allocation of the settlement proceeds. By defendant's calculation, the correct amount of prejudgment interest is $182,826.85. as detailed

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below.

THE OFFSET IS APPLIED TO THE VERDICT BEFORE PREJUDGMENT INTEREST IS CALCULATED

30. For the purpose of calculating interest, Plaintiffs argued that the offset should be applied as of the date in which the settlement payments were actually received (August 13, 2018). MCI argued that the offset should be deducted as of the date of judgment and prior to the calculation of prejudgment interest, even though Plaintiffs did not receive the settlement proceeds until several months later.

31. In Nevada, prejudgment interest is calculated after settlement proceeds are deducted from jury's assessment of compensatory damages. *Ramadanis v. Stupak*, 107 Nev. 22, 23-24, 805 P.2d 65, 65-66 (1991); *c.f.* NRS 41.141(3) (directing the court to subtract settlement proceeds "the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts," without reference prejudgment interest). Settlements with co-defendants are not presumed to include both principal and interest to date of settlement. *Ramadanis*, 107 Nev. at 23-24, 805 P.2d at 65-66.

32. Additionally, under Nevada law, the appropriate amount of the punitive damages under NRS 42.005 can only be calculated using the *net* compensatory damages following the offset. *Coughlin*, 879 F. Supp. at 1051 ("[T]he language 'compensatory damages awarded' in the punitive damages statute refers to the reduced [i.e., after-offset,] compensatory damages award Plaintiff . . . is to receive according to Nevada's comparative negligence statute[, NRS 41.141(3)].").

Apportionment of Offset

33. Plaintiffs' past compensatory damages were $4,546,003.62.

The pro rata share of the $5 million offset attributable to those damages (24·25%)[1] is $1,239,175·00 bringing the award of past compensatory damages to $3,306,828·62, on which prejudgment interest accrued·

34· Plaintiffs' future compensatory damages were $14,200,000·00· The pro rata share of the $5 million offset attributable to those damages (75·75%)[2] is $3,870,825·00 bringing the award of future compensatory damages to $10,329,175·00·

Calculation of Prejudgment Interest

35· The amount of prejudgment interest awardable to plaintiff is $182,826·85· That represents interest on Plaintiffs' past compensatory damages of $3,306,828·62 at the statutory rate of 5·75% from June 1, 2017 through June 30, 2017 for a total of $15,628·16; the statutory rate of 6·25% from July 1, 2017 through December 31, 2017 for a total of $104,187·75; the statutory rate of 6·50% from January 1, 2018 through April 17, 2018 for a total of $63,010·94·

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[1] Of the total $18,746,003.62 in compensatory damages found by the jury, the past damages to plaintiffs ($4,546,003.62) account for %24.25.

[2] Of the total $18,746,003.62 in compensatory damages found by the jury, the future damages to plaintiffs ($14,200,000.00) account for %75.75.

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ORDER

1. It is therefore ORDERED that the judgment will be offset by $5,110,000 million.

2. It is further ORDERED that the amount of prejudgment interest awardable to plaintiff is $182,826.85.

IT IS SO ORDERED.

Dated this 16th day of March, 2023

DISTRICT COURT JUDGE

109 28D F090 04C5
Adriana Escobar
District Court Judge

Submitted by:

/s/ Eric Pepperman

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DISTRICT COURT
CLARK COUNTY, NEVADA

Keon Khiabani, Plaintiff(s) vs. Motor Coach Industries Inc, Defendant(s)	CASE NO: A-17-755977-C DEPT. NO. Department 14

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No. A-17-755977-C

Dept. No. 14

NOTICE OF ENTRY OF "ORDER GRANTING DEFENDANT MOTOR COACH INDUSTRIES, INC.'S MOTION FOR OFFSET"

Please take notice that on the 16th day of March, 2023, an "Order Granting Defendant Motor Coach Industries, Inc.'s Motion for Offset" was entered in this case. A copy of the order is attached.

Dated this 24th day of March, 2023.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2023, a true and correct copy of the foregoing Notice of Entry of Order was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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DISTRICT COURT

CLARK COUNTY, 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),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION; MICHELANGELO LEASING INC. D/B/A RYAN'S EXPRESS, AN ARIZONA CORPORATION; EDWARD HUBBARD, A NEVADA RESIDENT; BELL SPORTS INC. D/B/A GIRO SPORT DESIGN, A DELAWARE CORPORATION; SEVENPLUS BICYCLES, INC. D/B/A PRO CYCLERY, A NEVADA CORPORATION; DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

(PROPOSED)

ORDER GRANTING DEFENDANT MOTOR COACH INDUSTRIES, INC.'S MOTION FOR OFFSET

Hearing Date: June 28, 2022
Hearing Time: 10:00 a.m.

Defendant Motor Coach Industries, Inc has moved the Court for an Offset of the settlement proceeds paid by other defendants in its Brief Regarding Offset filed December 13, 2021. In addition to this motion, the corresponding answering brief and responding brief, the Court also heard oral argument June 28, 2022, regarding the offset. The Court now, having considered the briefs and materials submitted by the parties, oral argument, and the record before the Court, the Court orders as follows:

FINDINGS OF FACT

1. The decedent Dr. Khiabani died when his bicycle collided with a motor coach designed by defendant Motor Coach Industries, Inc. ("MCI"). Defendant Edward Hubbard was driving the vehicle for his employer, Michelangelo Leasing Inc. d/b/a Ryan's Express ("Michelangelo"), taking passengers from the airport to the Red Rock Casino Resort.

2. The plaintiff-heirs sued MCI, Michelangelo, and Hubbard, as well as the manufacturer and seller of the helmet that Dr. Khiabani was wearing at the time of the accident. The helmet was manufactured by Bell Sports, Inc. d/b/a Giro Sport Design. The helmet was sold by SevenPlus Bicycles, Inc. d/b/a Pro Cyclery,

3. In their operative Second Amended Complaint ("SAC"), Plaintiffs alleged the following claims: (i) Strict Liability: Defective Condition or Failure to Warn against Defendant MCI, (ii) Negligence against Defendants Michelangelo and Hubbard, (iii) Negligence per se against Defendants Michelangelo and Hubbard, (iv) Negligent Training Against Michelangelo, (v) Strict Liability: Defective Condition or Failure to Warn against Defendants Bell Sports and SevenPlus, and (vi) Breach of Implied Warranty of Fitness for a Particular Purpose against Defendants

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Bell Sports and SevenPlus.

4. Plaintiffs' complaint also alleged claims for punitive damages. With respect to Michelangelo, Plaintiffs alleged that, "[i]n carrying out its responsibility to adequately hire and train its drivers, Michelangelo acted with fraud, malice, oppression, and/or conscious disregard of the safety of others." 11/17/17 SAC, ¶ 62.

5. Prior to trial, Plaintiffs settled with everyone but MCI. In exchange for a full release of all possible claims and damages against the settling defendants, Plaintiffs received $5 million from Michelangelo and Hubbard, $100,000 from Bell Sports, and $10,000 from SevenPlus Bicycles. The Court granted motions for good faith settlement determinations with respect to each settlement, and Plaintiffs' claims against MCI proceeded to trial in February 2018.

6. The $5 million settlement proceeds from Michelangelo and Hubbard, were satisfied through Michelangelo's insurance. Although the settlement was reached in principle prior to trial, the $5 million was not paid until approximately four months after trial. Plaintiffs actually received the settlement proceeds on August 13, 2018.

7. Following a several-week trial on Plaintiffs' claims against MCI, the jury returned a verdict in favor of Plaintiffs under their failure-to-warn theory. The jury awarded compensatory damages in the amount of $18,746,003.62. The jury did not award any punitive damages against MCI. On April 17, 2018, the court entered judgment on the jury's verdict.

8. On June 6, 2018, MCI filed a motion to alter or amend the judgment. In its motion, MCI argued that the judgment amount should be offset by the $5,110,000.00 paid by the settling defendants

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pursuant to NRS 17.245(1)(a) and NRS 41.141(3). Plaintiffs opposed the motion on grounds that product manufacturers are ineligible to offset settlement proceeds from co-defendants. The Court denied the motion and did not offset the judgment by any amounts paid by the settling defendants.

9. On April 24, 2019, MCI filed an appeal. In its appeal, MCI challenged the judgment and several of the Court's rulings, including the order denying its motion to offset the judgment by the full $5,110,000.00 paid by the settling defendants.

10. On August 20, 2020, the Nevada Supreme Court issued its opinion in *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204 (2020). The *Lindberg* opinion was issued after briefing on MCI's appeal was completed but before oral arguments.

11. On March 1, 2021, the Nevada Supreme Court heard oral arguments on MCI's appeal. During oral arguments, Plaintiffs conceded that the "same injury" underlies their claims against both the settling and nonsettling defendants and, therefore, NRS 17.245(1)(a) applied to offset their judgment as to MCI under *Lindberg*. Plaintiffs also argued that *Lindberg* applied to the offset calculation as well because the settlement proceeds resolved Defendants' exposure to damages that were beyond actual damages and unique to the settling defendants.

12. On August 19, 2021, the Nevada Supreme Court issued its *en banc* decision in this case. The Supreme Court concluded as follows:

> The district court properly denied the motions for judgment as a matter of law, for a new trial, and to retax costs, and we affirm the judgment and post-judgment orders as to those matters. However, the district court incorrectly denied the motion to alter or amend the judgment to offset the

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settlement proceeds paid by other defendants. We therefore reverse the judgment as to its amount and remand to the district court to determine the amount of the offset to which MCI is entitled and enter a corrected judgment thereon. *Motor Coach Indus., Inc. v. Khiabani by & through Rigaud*, 137 Nev. Adv. Op. 42, 493 P.3d 1007, 1017 (2021).

13. The amount of the offset also affects the calculation of interest on the judgment. On December 13, 2021, the parties filed simultaneous briefs on these two issues—the amount of the offset and the calculation of interest. On January 20, 2022, the parties filed simultaneous answering briefs. A hearing was held on June 28, 2022.

CONCLUSIONS OF LAW

I.

THE OFFSET UNDER NRS 17.245

14. NRS 17.245(1)(a) provides as follows:

> 1. 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: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but 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...

15. In *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204, 208 (2020), the Nevada Supreme Court recently addressed the application of NRS 17.245(1)(a).

16. In *Lindberg*, an aggrieved home buyer sued both the home sellers 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

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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. *Id.* at 206. Before trial, "the Lindbergs settled with the sellers for $50,000 and with the Lindbergs' agents for $7,500." *Id.*

17. Following a three-day bench trial against the remaining defendants (the sellers' agents), "the district court awarded the Lindbergs $27,663.95 in damages—the cost of installing the proper-sized septic system [] pursuant to NRS 645.257." *Id.* "The district court also awarded $48,116.84 in attorney fees and costs, plus interest, for a total award of $75,780.79." *Id.* at 207.

18. "The sellers' agents then filed an NRCP 59(e) motion to amend or alter the judgment," which was granted in part. *Id.* The district court reasoned that "NRS 17.245(1)(a) entitled the sellers' agents to offset the judgment by the settlement amounts, 'finding that all defendants, settling and remaining, were responsible for the same injury.'" *Id.* Following a hearing on the proper calculation of the offset, "the district court offset the $27,552.95 award [to fix the 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.'" *Id.* at 210.

19. Both parties appealed, claiming "that the district erred in determining the amount to be offset from the original judgment under NRS 17.245(1)(a). *Id.* at 207. The Lindbergs argued that NRS

17.245(1)(a) did not apply to offset the judgment "because the statute requires a finding of joint tortfeasor liability for all defendants for the same injury." Id. "The sellers' agents challenge[d] the district court's offset calculation, arguing that the district court erred by failing to offset the judgment by the full amount paid by the sellers." Id.

20. In rejecting the Lindbergs' argument, the Nevada Supreme Court held that "NRS 17.245(1)(a) does not require that a party be found liable." Id. at 208 (quotation omitted). "Instead, as the district court properly determined, the relevant question governing the applicability of NRS 17.245(1)(a) for the purposes of settlement offsets is whether both the settling and remaining defendants caused the *same injury*. Id. (Citation omitted) (italics in original). "To provide additional guidance, [the Supreme Court echo[ed] the district court's reasoning to further hold that independent causes of action, multiple legal theories, or facts unique to each defendant do not foreclose a determination that both the settling and nonsettling defendants bear responsibility for the *same injury* pursuant to NRS 17.245(1)(a)." Id. (Citation omitted) (italics in original). Because the district court's "same injury" finding was supported by substantial evidence, the Supreme Court affirmed the application of NRS 17.245(1)(a) in *Lindberg*. Id. at 210.

21. "Having concluded that the district court properly determined that NRS 17.245(1)(a) applie[d] to offset the Lindbergs' judgment as to the sellers' agents, [the Supreme Court next] consider[ed] whether the district court appropriately calculated the offset amount." Id. "Whether 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

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the nonsettling defendants, present[ed] a question of law that [the Court] review[ed] de novo." Id. (Citation omitted). On this issue, the Nevada Supreme Court found as follows:

> While the plain language of the statute could be interpreted as permitting the reduction of the entire settlement amount obtained—without regard to the type of exposure resolved by the settling defendants—we reason that such an interpretation violates the spirit of NRS 17.245(1)(a). (Citation omitted) (italics in original). The principal purpose of equitable settlement offsets under the statute is to prevent double recovery to the plaintiff—or in other words, to guard against windfalls.
>
> Because the principal purpose of equitable settlement offsets is to avoid windfalls, we determine that it would be inconsistent with the legislative intent of NRS 17.245(1)(a) to then permit the blanket deduction of entire settlement amounts without scrutinizing the allocation of damages awarded therein. Specifically, actual damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); see also Actual Damages, Black's Law Dictionary (11th ed. 2019) (defining "actual damages" as those "that repay actual losses"). Treble damages, on the other hand, represent "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." Treble Damages, Black's Law Dictionary (11th ed. 2019). 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. *Cf. Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998) (explaining that a nonsettling defendant "cannot receive credit for settlement amounts representing punitive damages" due to their individual nature). To conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant. *Id.* at 210-11.

22. On remand, there is no dispute that MCI is entitled to an offset under NRS 17.245(1)(a), but the parties disagree over the application of *Lindberg* and the proper calculation of the offset amount.

23. Plaintiffs contend that *Lindberg* applies to the court's offset calculation in this case. *See* Plaintiffs' 12/13/21 Brief Regarding Offset, 2:5-3:24. They argue that, in paying the $5 million settlement amount, Michelangelo and Hubbard resolved their exposure to damages beyond actual damages that are unique to Michelangelo and/or Hubbard. *Id.* at 3:25-4:26. Specifically, "the principal settling defendant (Michelangelo) paid $5 million to settle the compensatory and punitive damages claims asserted against it." *Id.* at 3:26-27. Plaintiffs also served offers of judgment on each of the settling defendants. Plaintiffs' 1/20/22 Ans. Brief, 4:3-4. This created an additional "exposure" to an award of attorneys' fees, which was also resolved as part of the settlement payment. *Id.* at 4:4-5. This attorneys' fees "exposure" was unique to the settling defendants, as Plaintiffs did not serve an offer of judgment on MCI. *Id.* at 4:5-6. As in *Lindberg*, Plaintiffs contend that the offset calculation in this case should account for the resolution of

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this exposure to punitive damages and attorneys' fees, as these damages are beyond actual damages and unique to Michelangelo and/or Hubbard. Id. at 4:8-9.

24. MCI argues that *Lindberg* does not apply here because the *Lindberg* case involved "a statutory entitlement to treble damages." MCI's 12/13/21 Brief Re Offset, 8:16-17. MCI contends that, unlike statutory treble damages, "the allowance or denial of exemplary or punitive damages rests entirely in the discretion of the trier of fact." Id. at 9:6-7, citing *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000). MCI asserts that the Nevada Supreme Court did not instruct this court to calculate the offset under *Lindberg* but rather "unambiguously directed the court to offset all the settlement proceeds." Id. at 6:25-26.

25. The court agrees with MCI. *Lindberg* does not apply, and the judgment will be offset by the entirety of the $5,110,000.00 in settlement proceeds. In *Lindberg*, there was a clear statute that allowed for treble damages. And here, that is not the case. In this court's view, the *Lindberg* case was not about punitive damages, and any discussion about punitive damages was dictum.

26. 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. When an insurance policy pays an award, the settlement generally does not include an apportionment for punitive liability on behalf of their insured. The court has not seen any fact or case law that would warrant finding punitive damages against the settling defendants in this case, as that would be in the area of the jury or

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finder of fact, and that did not happen here.

27. MCI also argues that "Plaintiffs are judicially estopped from alleging that Hubbard acted with conscious disregard of danger" because they presented evidence that Hubbard would have taken actions to avoid the accident if warned about the motor coach's air displacement. MCI's 12/13/21 Brief Regarding Offset, 13:14-19. Plaintiffs respond that the punitive damages exposure was based on Michelangelo's "corporate misconduct in driver screening and driver training—not on Hubbard's actions." 1/20/22 Ans. Brief, 5:10-11.

28. The Court agrees with MCI. Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." In re Frei Irrevocable Tr. Dated Oct. 29, 1996, 133 Nev. 50, 390 P.3d 646, 652 (2017) (emphasis added). The court does not have to formally "adopt" the party's argument before judicial estoppel applies. See id. Plaintiffs are judicially estopped from alleging that the settling Defendant's conduct justified punitive damages based on their previous representation to the court and the orders procured from this court.

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/ / /

II.

Interest Calculation Following Application of Offset

29. The prejudgment interest must be calculated following proper allocation of the settlement proceeds. By defendant's calculation, the correct amount of prejudgment interest is $182,826.85. as detailed

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below.

THE OFFSET IS APPLIED TO THE VERDICT BEFORE PREJUDGMENT INTEREST IS CALCULATED

30. For the purpose of calculating interest, Plaintiffs argued that the offset should be applied as of the date in which the settlement payments were actually received (August 13, 2018). MCI argued that the offset should be deducted as of the date of judgment and prior to the calculation of prejudgment interest, even though Plaintiffs did not receive the settlement proceeds until several months later.

31. In Nevada, prejudgment interest is calculated after settlement proceeds are deducted from jury's assessment of compensatory damages. *Ramadanis v. Stupak*, 107 Nev. 22, 23-24, 805 P.2d 65, 65-66 (1991); *c.f.* NRS 41.141(3) (directing the court to subtract settlement proceeds "the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts," without reference prejudgment interest). Settlements with co-defendants are not presumed to include both principal and interest to date of settlement. *Ramadanis*, 107 Nev. at 23-24, 805 P.2d at 65-66.

32. Additionally, under Nevada law, the appropriate amount of the punitive damages under NRS 42.005 can only be calculated using the *net* compensatory damages following the offset. *Coughlin*, 879 F. Supp. at 1051 ("[T]he language 'compensatory damages awarded' in the punitive damages statute refers to the reduced [i.e., after-offset,] compensatory damages award Plaintiff . . . is to receive according to Nevada's comparative negligence statute[, NRS 41.141(3)].").

Apportionment of Offset

33. Plaintiffs' past compensatory damages were $4,546,003.62.

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The pro rata share of the $5 million offset attributable to those damages (24·25%)[1] is $1,239,175·00 bringing the award of past compensatory damages to $3,306,828·62, on which prejudgment interest accrued·

34· Plaintiffs' future compensatory damages were $14,200,000·00· The pro rata share of the $5 million offset attributable to those damages (75·75%)[2] is $3,870,825·00 bringing the award of future compensatory damages to $10,329,175·00·

Calculation of Prejudgment Interest

35· The amount of prejudgment interest awardable to plaintiff is $182,826·85· That represents interest on Plaintiffs' past compensatory damages of $3,306,828·62 at the statutory rate of 5·75% from June 1, 2017 through June 30, 2017 for a total of $15,628·16; the statutory rate of 6·25% from July 1, 2017 through December 31, 2017 for a total of $104,187·75; the statutory rate of 6·50% from January 1, 2018 through April 17, 2018 for a total of $63,010·94·

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[1] Of the total $18,746,003.62 in compensatory damages found by the jury, the past damages to plaintiffs ($4,546,003.62) account for %24.25.

[2] Of the total $18,746,003.62 in compensatory damages found by the jury, the future damages to plaintiffs ($14,200,000.00) account for %75.75.

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ORDER

1. It is therefore ORDERED that the judgment will be offset by $5,110,000 million.

2. It is further ORDERED that the amount of prejudgment interest awardable to plaintiff is $182,826.85.

IT IS SO ORDERED.

Dated this 16th day of March, 2023

DISTRICT COURT JUDGE

109 28D F090 04C5
Adriana Escobar
District Court Judge

Submitted by:

/s/ Eric Pepperman

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Keon Khiabani, Plaintiff(s) vs. Motor Coach Industries Inc, Defendant(s)	CASE NO: A-17-755977-C DEPT. NO. Department 14

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, 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); Plaintiffs, *vs.* MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION; MICHELANGELO LEASING INC. D/B/A RYAN'S EXPRESS, AN ARIZONA CORPORATION; EDWARD HUBBARD, A NEVADA RESIDENT; BELL SPORTS INC. D/B/A GIRO SPORT DESIGN, A DELAWARE CORPORATION; SEVENPLUS BICYCLES, INC. D/B/A PRO CYCLERY, A NEVADA CORPORATION; DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20. Defendants.	Case No. A-17-755977-C Dept. No. XIV **NOTICE OF APPEAL**

NOTICE OF APPEAL

Please take notice that Plaintiffs hereby appeal to the Supreme Court of Nevada from:

1. The district court's March 16, 2023 Order Granting Defendant Motor Coach Industries, Inc.'s Motion for Offset. A Notice of Entry of Order was filed on March 24, 2023, and is attached as **Exhibit "1."**
2. Any judgments, rulings, and/or interlocutory orders made appealable by the foregoing.

DATED this 12th day of April, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2023, I served a true and correct copy of the foregoing **Notice of Appeal** via the Court's electronic filing system only, pursuant to the Nevada Electronic Filing and Conversion Rules, Administrative Order 14-2, to all parties currently on the electronic service list.

/s/ Maria T. San Juan
An Employee of KEMP JONES, LLP

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EXHIBIT 1

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Motor Coach Industries, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

KEON KHIABANI and ARIA KHIABANI, minors, by and through their guardian, MARIE-CLAUDE RIGAUD; SIAMAK BARIN, as executor of the ESTATE OF KAYVAN KHIABANI, M.D., (Decedent); the ESTATE OF KAYVAN KHIABANI, M.D. (Decedent); SIAMAK BARIN, as executor of the ESTATE OF KATAYOUN BARIN,DDS (Decedent); and the Estate of KATAYOUN BARIN, DDS (Decedent),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., a Delaware corporation; MICHELANGELO LEASING INC. d/b/a RYAN'S EXPRESS, an Arizona corporation; EDWARD HUBBARD, a Nevada resident; BELL SPORTS, INC. d/b/a GIRO SPORT DESIGN, a Delaware corporation; SEVENPLUS BICYCLES, INC. d/b/a PRO CYCLERY, a Nevada corporation, DOES 1 through 20; and ROE CORPORATIONS 1 through 20,

Defendants.

Case No. A-17-755977-C

Dept. No. 14

NOTICE OF ENTRY OF "ORDER GRANTING DEFENDANT MOTOR COACH INDUSTRIES, INC.'S MOTION FOR OFFSET"

Please take notice that on the 16th day of March, 2023, an "Order Granting Defendant Motor Coach Industries, Inc.'s Motion for Offset" was entered in this case. A copy of the order is attached.

Dated this 24th day of March, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2023, a true and correct copy of the foregoing Notice of Entry of Order was served by e-service, in accordance with the Electronic Filing Procedures of the Eight Judicial District Court.

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DISTRICT COURT

CLARK COUNTY, 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),

Plaintiffs,

vs.

MOTOR COACH INDUSTRIES, INC., A DELAWARE CORPORATION; MICHELANGELO LEASING INC. D/B/A RYAN'S EXPRESS, AN ARIZONA CORPORATION; EDWARD HUBBARD, A NEVADA RESIDENT; BELL SPORTS INC. D/B/A GIRO SPORT DESIGN, A DELAWARE CORPORATION; SEVENPLUS BICYCLES, INC. D/B/A PRO CYCLERY, A NEVADA CORPORATION; DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20.

Defendants.

Case No. A-17-755977-C

Dept. No. XIV

(PROPOSED)

ORDER GRANTING DEFENDANT MOTOR COACH INDUSTRIES, INC.'S MOTION FOR OFFSET

Hearing Date: June 28, 2022
Hearing Time: 10:00 a.m.

Defendant Motor Coach Industries, Inc has moved the Court for an Offset of the settlement proceeds paid by other defendants in its Brief Regarding Offset filed December 13, 2021. In addition to this motion, the corresponding answering brief and responding brief, the Court also heard oral argument June 28, 2022, regarding the offset. The Court now, having considered the briefs and materials submitted by the parties, oral argument, and the record before the Court, the Court orders as follows:

FINDINGS OF FACT

1. The decedent Dr. Khiabani died when his bicycle collided with a motor coach designed by defendant Motor Coach Industries, Inc. ("MCI"). Defendant Edward Hubbard was driving the vehicle for his employer, Michelangelo Leasing Inc. d/b/a Ryan's Express ("Michelangelo"), taking passengers from the airport to the Red Rock Casino Resort.

2. The plaintiff-heirs sued MCI, Michelangelo, and Hubbard, as well as the manufacturer and seller of the helmet that Dr. Khiabani was wearing at the time of the accident. The helmet was manufactured by Bell Sports, Inc. d/b/a Giro Sport Design. The helmet was sold by SevenPlus Bicycles, Inc. d/b/a Pro Cyclery,

3. In their operative Second Amended Complaint ("SAC"), Plaintiffs alleged the following claims: (i) Strict Liability: Defective Condition or Failure to Warn against Defendant MCI, (ii) Negligence against Defendants Michelangelo and Hubbard, (iii) Negligence per se against Defendants Michelangelo and Hubbard, (iv) Negligent Training Against Michelangelo, (v) Strict Liability: Defective Condition or Failure to Warn against Defendants Bell Sports and SevenPlus, and (vi) Breach of Implied Warranty of Fitness for a Particular Purpose against Defendants

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Bell Sports and SevenPlus.

4. Plaintiffs' complaint also alleged claims for punitive damages. With respect to Michelangelo, Plaintiffs alleged that, "[i]n carrying out its responsibility to adequately hire and train its drivers, Michelangelo acted with fraud, malice, oppression, and/or conscious disregard of the safety of others." 11/17/17 SAC, ¶ 62.

5. Prior to trial, Plaintiffs settled with everyone but MCI. In exchange for a full release of all possible claims and damages against the settling defendants, Plaintiffs received $5 million from Michelangelo and Hubbard, $100,000 from Bell Sports, and $10,000 from SevenPlus Bicycles. The Court granted motions for good faith settlement determinations with respect to each settlement, and Plaintiffs' claims against MCI proceeded to trial in February 2018.

6. The $5 million settlement proceeds from Michelangelo and Hubbard, were satisfied through Michelangelo's insurance. Although the settlement was reached in principle prior to trial, the $5 million was not paid until approximately four months after trial. Plaintiffs actually received the settlement proceeds on August 13, 2018.

7. Following a several-week trial on Plaintiffs' claims against MCI, the jury returned a verdict in favor of Plaintiffs under their failure-to-warn theory. The jury awarded compensatory damages in the amount of $18,746,003.62. The jury did not award any punitive damages against MCI. On April 17, 2018, the court entered judgment on the jury's verdict.

8. On June 6, 2018, MCI filed a motion to alter or amend the judgment. In its motion, MCI argued that the judgment amount should be offset by the $5,110,000.00 paid by the settling defendants

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pursuant to NRS 17.245(1)(a) and NRS 41.141(3). Plaintiffs opposed the motion on grounds that product manufacturers are ineligible to offset settlement proceeds from co-defendants. The Court denied the motion and did not offset the judgment by any amounts paid by the settling defendants.

9. On April 24, 2019, MCI filed an appeal. In its appeal, MCI challenged the judgment and several of the Court's rulings, including the order denying its motion to offset the judgment by the full $5,110,000.00 paid by the settling defendants.

10. On August 20, 2020, the Nevada Supreme Court issued its opinion in *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204 (2020). The *Lindberg* opinion was issued after briefing on MCI's appeal was completed but before oral arguments.

11. On March 1, 2021, the Nevada Supreme Court heard oral arguments on MCI's appeal. During oral arguments, Plaintiffs conceded that the "same injury" underlies their claims against both the settling and nonsettling defendants and, therefore, NRS 17.245(1)(a) applied to offset their judgment as to MCI under *Lindberg*. Plaintiffs also argued that *Lindberg* applied to the offset calculation as well because the settlement proceeds resolved Defendants' exposure to damages that were beyond actual damages and unique to the settling defendants.

12. On August 19, 2021, the Nevada Supreme Court issued its *en banc* decision in this case. The Supreme Court concluded as follows:

> The district court properly denied the motions for judgment as a matter of law, for a new trial, and to retax costs, and we affirm the judgment and post-judgment orders as to those matters. However, the district court incorrectly denied the motion to alter or amend the judgment to offset the

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settlement proceeds paid by other defendants. We therefore reverse the judgment as to its amount and remand to the district court to determine the amount of the offset to which MCI is entitled and enter a corrected judgment thereon. *Motor Coach Indus., Inc. v. Khiabani by & through Rigaud*, 137 Nev. Adv. Op. 42, 493 P.3d 1007, 1017 (2021).

13. The amount of the offset also affects the calculation of interest on the judgment. On December 13, 2021, the parties filed simultaneous briefs on these two issues—the amount of the offset and the calculation of interest. On January 20, 2022, the parties filed simultaneous answering briefs. A hearing was held on June 28, 2022.

CONCLUSIONS OF LAW

I.

THE OFFSET UNDER NRS 17.245

14. NRS 17.245(1)(a) provides as follows:

> 1. 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: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but 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...

15. In *J.E. Johns & Assoc. v. Lindberg*, 136 Nev.Adv.Op. 55, 470 P.3d 204, 208 (2020), the Nevada Supreme Court recently addressed the application of NRS 17.245(1)(a).

16. In *Lindberg*, an aggrieved home buyer sued both the home sellers 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. Id. at 206. Before trial, "the Lindbergs settled with the sellers for $50,000 and with the Lindbergs' agents for $7,500." Id.

17. Following a three-day bench trial against the remaining defendants (the sellers' agents), "the district court awarded the Lindbergs $27,663.95 in damages—the cost of installing the proper-sized septic system [] pursuant to NRS 645.257." Id. "The district court also awarded $48,116.84 in attorney fees and costs, plus interest, for a total award of $75,780.79." Id. at 207.

18. "The sellers' agents then filed an NRCP 59(e) motion to amend or alter the judgment," which was granted in part. Id. The district court reasoned that "NRS 17.245(1)(a) entitled the sellers' agents to offset the judgment by the settlement amounts, 'finding that all defendants, settling and remaining, were responsible for the same injury.'" Id. Following a hearing on the proper calculation of the offset, "the district court offset the $27,552.95 award [to fix the 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.'" Id. at 210.

19. Both parties appealed, claiming "that the district erred in determining the amount to be offset from the original judgment under NRS 17.245(1)(a). Id. at 207. The Lindbergs argued that NRS

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17.245(1)(a) did not apply to offset the judgment "because the statute requires a finding of joint tortfeasor liability for all defendants for the same injury." Id. "The sellers' agents challenge[d] the district court's offset calculation, arguing that the district court erred by failing to offset the judgment by the full amount paid by the sellers." Id.

20. In rejecting the Lindbergs' argument, the Nevada Supreme Court held that "NRS 17.245(1)(a) does not require that a party be found liable." Id. at 208 (quotation omitted). "Instead, as the district court properly determined, the relevant question governing the applicability of NRS 17.245(1)(a) for the purposes of settlement offsets is whether both the settling and remaining defendants caused the *same injury*. Id. (Citation omitted) (italics in original). "To provide additional guidance, [the Supreme Court echo[ed] the district court's reasoning to further hold that independent causes of action, multiple legal theories, or facts unique to each defendant do not foreclose a determination that both the settling and nonsettling defendants bear responsibility for the *same injury* pursuant to NRS 17.245(1)(a)." Id. (Citation omitted) (italics in original). Because the district court's "same injury" finding was supported by substantial evidence, the Supreme Court affirmed the application of NRS 17.245(1)(a) in *Lindberg*. Id. at 210.

21. "Having concluded that the district court properly determined that NRS 17.245(1)(a) applie[d] to offset the Lindbergs' judgment as to the sellers' agents, [the Supreme Court next] consider[ed] whether the district court appropriately calculated the offset amount." Id. "Whether 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

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the nonsettling defendants, present[ed] a question of law that [the Court] review[ed] de novo." Id. (Citation omitted). On this issue, the Nevada Supreme Court found as follows:

> While the plain language of the statute could be interpreted as permitting the reduction of the entire settlement amount obtained—without regard to the type of exposure resolved by the settling defendants—we reason that such an interpretation violates the spirit of NRS 17.245(1)(a). (Citation omitted) (italics in original). The principal purpose of equitable settlement offsets under the statute is to prevent double recovery to the plaintiff—or in other words, to guard against windfalls.
>
> Because the principal purpose of equitable settlement offsets is to avoid windfalls, we determine that it would be inconsistent with the legislative intent of NRS 17.245(1)(a) to then permit the blanket deduction of entire settlement amounts without scrutinizing the allocation of damages awarded therein. Specifically, actual damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001); see also Actual Damages, Black's Law Dictionary (11th ed. 2019) (defining "actual damages" as those "that repay actual losses"). Treble damages, on the other hand, represent "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." Treble Damages, Black's Law Dictionary (11th ed. 2019). 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. *Cf. Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998) (explaining that a nonsettling defendant "cannot receive credit for settlement amounts representing punitive damages" due to their individual nature). To conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant. *Id.* at 210-11.

22. On remand, there is no dispute that MCI is entitled to an offset under NRS 17.245(1)(a), but the parties disagree over the application of *Lindberg* and the proper calculation of the offset amount.

23. Plaintiffs contend that *Lindberg* applies to the court's offset calculation in this case. *See* Plaintiffs' 12/13/21 Brief Regarding Offset, 2:5-3:24. They argue that, in paying the $5 million settlement amount, Michelangelo and Hubbard resolved their exposure to damages beyond actual damages that are unique to Michelangelo and/or Hubbard. *Id.* at 3:25-4:26. Specifically, "the principal settling defendant (Michelangelo) paid $5 million to settle the compensatory and punitive damages claims asserted against it." *Id.* at 3:26-27. Plaintiffs also served offers of judgment on each of the settling defendants. Plaintiffs' 1/20/22 Ans. Brief, 4:3-4. This created an additional "exposure" to an award of attorneys' fees, which was also resolved as part of the settlement payment. *Id.* at 4:4-5. This attorneys' fees "exposure" was unique to the settling defendants, as Plaintiffs did not serve an offer of judgment on MCI. *Id.* at 4:5-6. As in *Lindberg*, Plaintiffs contend that the offset calculation in this case should account for the resolution of

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this exposure to punitive damages and attorneys' fees, as these damages are beyond actual damages and unique to Michelangelo and/or Hubbard. Id. at 4:8-9.

24. MCI argues that *Lindberg* does not apply here because the *Lindberg* case involved "a statutory entitlement to treble damages." MCI's 12/13/21 Brief Re Offset, 8:16-17. MCI contends that, unlike statutory treble damages, "the allowance or denial of exemplary or punitive damages rests entirely in the discretion of the trier of fact." Id. at 9:6-7, citing *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000). MCI asserts that the Nevada Supreme Court did not instruct this court to calculate the offset under *Lindberg* but rather "unambiguously directed the court to offset all the settlement proceeds." Id. at 6:25-26.

25. The court agrees with MCI. *Lindberg* does not apply, and the judgment will be offset by the entirety of the $5,110,000.00 in settlement proceeds. In *Lindberg*, there was a clear statute that allowed for treble damages. And here, that is not the case. In this court's view, the *Lindberg* case was not about punitive damages, and any discussion about punitive damages was dictum.

26. 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. When an insurance policy pays an award, the settlement generally does not include an apportionment for punitive liability on behalf of their insured. The court has not seen any fact or case law that would warrant finding punitive damages against the settling defendants in this case, as that would be in the area of the jury or

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finder of fact, and that did not happen here.

27. MCI also argues that "Plaintiffs are judicially estopped from alleging that Hubbard acted with conscious disregard of danger" because they presented evidence that Hubbard would have taken actions to avoid the accident if warned about the motor coach's air displacement. MCI's 12/13/21 Brief Regarding Offset, 13:14-19. Plaintiffs respond that the punitive damages exposure was based on Michelangelo's "corporate misconduct in driver screening and driver training—not on Hubbard's actions." 1/20/22 Ans. Brief, 5:10-11.

28. The Court agrees with MCI. Judicial estoppel prevents a party from taking inconsistent positions when "the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." In re Frei Irrevocable Tr. Dated Oct. 29, 1996, 133 Nev. 50, 390 P.3d 646, 652 (2017) (emphasis added). The court does not have to formally "adopt" the party's argument before judicial estoppel applies. See id. Plaintiffs are judicially estopped from alleging that the settling Defendant's conduct justified punitive damages based on their previous representation to the court and the orders procured from this court.

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II.

Interest Calculation Following Application of Offset

29. The prejudgment interest must be calculated following proper allocation of the settlement proceeds. By defendant's calculation, the correct amount of prejudgment interest is $182,826.85. as detailed

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below.

THE OFFSET IS APPLIED TO THE VERDICT BEFORE PREJUDGMENT INTEREST IS CALCULATED

30. For the purpose of calculating interest, Plaintiffs argued that the offset should be applied as of the date in which the settlement payments were actually received (August 13, 2018). MCI argued that the offset should be deducted as of the date of judgment and prior to the calculation of prejudgment interest, even though Plaintiffs did not receive the settlement proceeds until several months later.

31. In Nevada, prejudgment interest is calculated after settlement proceeds are deducted from jury's assessment of compensatory damages. *Ramadanis v. Stupak*, 107 Nev. 22, 23-24, 805 P.2d 65, 65-66 (1991); *c.f.* NRS 41.141(3) (directing the court to subtract settlement proceeds "the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts," without reference prejudgment interest). Settlements with co-defendants are not presumed to include both principal and interest to date of settlement. *Ramadanis*, 107 Nev. at 23-24, 805 P.2d at 65-66.

32. Additionally, under Nevada law, the appropriate amount of the punitive damages under NRS 42.005 can only be calculated using the *net* compensatory damages following the offset. *Coughlin*, 879 F. Supp. at 1051 ("[T]he language 'compensatory damages awarded' in the punitive damages statute refers to the reduced [i.e., after-offset,] compensatory damages award Plaintiff . . . is to receive according to Nevada's comparative negligence statute[, NRS 41.141(3)].").

Apportionment of Offset

33. Plaintiffs' past compensatory damages were $4,546,003.62.

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The pro rata share of the $5 million offset attributable to those damages (24·25%)[1] is $1,239,175·00 bringing the award of past compensatory damages to $3,306,828·62, on which prejudgment interest accrued·

34· Plaintiffs' future compensatory damages were $14,200,000·00· The pro rata share of the $5 million offset attributable to those damages (75·75%)[2] is $3,870,825·00 bringing the award of future compensatory damages to $10,329,175·00·

Calculation of Prejudgment Interest

35· The amount of prejudgment interest awardable to plaintiff is $182,826·85· That represents interest on Plaintiffs' past compensatory damages of $3,306,828·62 at the statutory rate of 5·75% from June 1, 2017 through June 30, 2017 for a total of $15,628·16; the statutory rate of 6·25% from July 1, 2017 through December 31, 2017 for a total of $104,187·75; the statutory rate of 6·50% from January 1, 2018 through April 17, 2018 for a total of $63,010·94·

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[1] Of the total $18,746,003.62 in compensatory damages found by the jury, the past damages to plaintiffs ($4,546,003.62) account for %24.25.

[2] Of the total $18,746,003.62 in compensatory damages found by the jury, the future damages to plaintiffs ($14,200,000.00) account for %75.75.

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ORDER

1. It is therefore ORDERED that the judgment will be offset by $5,110,000 million.

2. It is further ORDERED that the amount of prejudgment interest awardable to plaintiff is $182,826.85.

IT IS SO ORDERED.

Dated this 16th day of March, 2023

DISTRICT COURT JUDGE

109 28D F090 04C5
Adriana Escobar
District Court Judge

Submitted by:

/s/ Eric Pepperman

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DISTRICT COURT
CLARK COUNTY, NEVADA

Keon Khiabani, Plaintiff(s) vs. Motor Coach Industries Inc, Defendant(s)	CASE NO: A-17-755977-C DEPT. NO. Department 14

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 3/17/2023

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