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**Motor Coach Indus., Inc., v. Khiabani, 137 Nev. Op. 42 (Aug. 19, 2021)**

Valarie Kuschel

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## **CALCULATING LOSS-OF-SUPPORT AWARDS, THE CAUSATION ELEMENT OF FAILURE TO WARN CLAIMS, AND SPECIAL VERDICT FORMS**

### **Summary**

When determining the causation of a failure to warn claim, the plaintiff must show four elements: (1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, (3) the defect caused the plaintiff's injury. When arguing the product has a defect that renders it unreasonably dangerous, the plaintiff does not have to propose an alternative design. When calculating loss of support, a decedent's gross income must be used. When faced with a special verdict form, both the form and the jury instructions are must be used together. If when read together, the jury instructions and verdict form are sufficient to ensure the jury considered the question of causation, then the jury has properly considered the question of causation. Lastly, if both settling and nonsettling defendants are responsible for the same injury, the nonsettling defendant is entitled to offset the judgement under NRS 17.425. To hold otherwise would permit double recovery.

### **Background**

In spring 2017, Dr. Kayvan Khiabani ("Khiabani") was riding a bicycle when a bus designed and manufactured by appellant— Motor Coach Industries, Inc. ("MCI")—collided with and fatally injured him. According to witnesses, Khiabani was cycling on South Pavilion Center Drive when the bus came within two or three feet of Khiabani. When the front of the bus passed without incident, the bus driver saw Khiabani drifting into the vehicle lane. Although the driver immediately turned the bus away to avoid impact, Khiabani collided with the side of the bus, slid underneath, and was fatally hit by its rear wheel.

Khiabani's estate ("respondents") proceeded against MCI on several product-defect theories, including failure to warn that the boxy design of the bus caused air displacement that created a suction force on objects near the sides of the bus, including cyclists. Respondents argued this "air blast" effect pulled Khiabani under the bus and led to his death. To calculate the loss-of-support damages, the jury was informed of Khiabani's gross pay. MCI requested the jury be informed of Khiabani's net pay instead, but the district court denied this request.

After the close of respondents' presentation of evidence, MCI moved for judgement as a matter of law, partially on the ground that respondents had not sufficiently proven the causation element of the failure-to-warn theory. This motion was denied. The jury ultimately found MCI liable on the failure-to-warn theory and awarded \$18,746,003.62 in damages to respondents, including \$2,700,000 that was awarded for loss of financial support.

After the trial concluded, the local CBS affiliate published an investigative report where reporters alleged Khiabani had lost or was about to lose his job due to a UNR medical school audit. Following the televised report, MCI asked for a limited post-trial discovery, which was denied by the district court. In addition, MCI filed for a motion for a new trial based on new evidence that Khiabani's job and medical license may have been in jeopardy. The district court

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<sup>1</sup> By Valarie Kuschel

denied the motion, saying MCI had every opportunity before trial to seek discovery regarding Khiabani's employment.

## **Discussion**

*Respondents presented sufficient evidence for the causation element of the failure-to-warn claim, and thus the district court properly denied MCI's motions for judgment as a matter of law*

MCI asserted the district court erred in denying the motion that respondents presented insufficient evidence of the causation element of their failure-to-warn claim. In Nevada, those bringing a failure to warn claim must demonstrate the same elements as other strict liability product cases.<sup>2</sup> One must show (1) the product had a defect which rendered it unreasonably dangerous, (2) the defect existed at the time the product left the manufacturer, (3) the defect caused the plaintiff's injury. Here, the Supreme Court held that the plaintiffs did meet their burden.

For the first element, the Court held that plaintiffs do not need to provide the jury with a specific proposed warning in failure-to-warn cases, saying that having the bolster their case with evidence of an alternative design would be "fundamentally unfair."<sup>3</sup> For the second element, MCI contended that any warning was superfluous because the potential for collisions with cyclists is an open and obvious danger. The court rejected this argument, saying that the risk here was not simply that the bus could strike a cyclist. Instead, the risk was the air displacement caused by the shape of the bus that could create a strong suction force while passing a cyclist. For the third and final element, MCI asserted that there was no evidence the bus driver could have avoided the accident even with a warning. The Court rejected this reasoning, saying there was sufficient evidence for a reasonable jury to find that warning would cold have had the driver potentially avoid the collision.

*The district court properly denied MCI's motion for a new trial*

The decision to grant or deny a new trial rests with the sound discretion of the trial court, and the Supreme Court will not disturb that decision absent palpable abuse.<sup>4</sup>

*The district court properly used Khiabani's gross income to calculate the loss-of-support award*

The Nevada Supreme Court has not previously addressed whether juries should use pretax or post-tax income to calculate an award for loss of support. Turning to other jurisdictions, the Court notes that federal jurisprudence bases loss of support awards on post-tax earnings. However, most state courts diverge to utilize pretax income. Noting that all loss-of-support awards are imperfect, the Court determined a deceased person's gross income is the most workable and realistic measure of what salary would be used to support their surviving family.

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<sup>2</sup> Rivera v. Philip Morris, Inc., 125 Nev. 185, 191, 209 P.3d 271, 275 (2009).

<sup>3</sup> Ford Motor Co. v. Trejo, 133 Nev. 520, 524, 402 P.3d 649, 652 (2017).

<sup>4</sup> Edwards Indus., Inc. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

*The failure-to-warn causation issue was submitted to the jury*

MCI argued that the district court should have granted a new trial because the court provided a special verdict form that did not give the jury an opportunity to determine if the respondents had proven the causation element of the failure-to-warn claim. The jury was provided with a special verdict form that contained five interrogatories under the heading “liability.” The first four were related to the design-defect theories of liability, while Interrogatory 5 was related to the failure-to-warn theory of liability. Interrogatory 5 asked, “Did MCI fail to provide an adequate warning that would have been acted upon?” MCI argued that the jury could only answer the question and therefore did not have the opportunity to indicate whether any such failure was the cause of Khiabani’s death.

The court held that although the Interrogatory did not mention causation, the jury instruction provided that “if you find that warnings provided with the bus were inadequate, the defendant cannot be held liable unless Plaintiffs prove by preponderance of the evidence that the individual who might have acted on any warning would have acted in accordance of the warning, and that doing so would have prevented the injury in this case.” When read together, the jury instructions and verdict form are sufficient to ensure the jury considered the question of causation for the failure-to-warn claim.

*The verdict was not inconsistent*

MCI contended that the district court should have granted a new trial because the jury’s answers to interrogatories were inconsistent. Specifically, MCI saw a contradiction in the jury findings that (1) an air blast was not an unreasonably dangerous condition that caused the collision and (2) the failure to warn of an air blast was an unreasonably dangerous condition that caused the collision.

The Court held that there were no inconsistencies because in a failure-to-warn claim the “defect” is the lack of warning, rather than the issue with the product itself. Therefore, a jury could find that the air blast effect alone was not an unreasonably dangerous issue, but the lack of warning about the effect nevertheless made the product unreasonably dangerous.

*No newly discovered evidence merited a new trial*

MCI argued that the news report after the trial brought to light new facts that merited a new trial. However, the district court found that MCI likely could have discovered the evidence with reasonable diligence before or during trial, and therefore a new trial was not merited. MCI argued that the medical school would not have released the information contained in the news articles, but the Court held that was speculation. MCI also argued that if the respondent’s counsel knew Khiabani’s employment was in jeopardy and still argued in court as if it was not, then the counsel perpetrated fraud. The court held that there was no evidence to support such a bold contention.

*MCI was entitled to offset the judgment*

MCI argued that because the respondents had settled with all their other defendants before trial for several million dollars, the jury’s judgment should be offset by the settlement

amount. The district court held that NRS 17.245 does not apply to strictly liable defendants like MCI because they are not entitled to contribution. The Supreme Court determined that when considering whether NRS 17.245 applies in the given matter, district courts must determine whether both the settling and nonsettling defendants are responsible for the same injury.<sup>5</sup> Here, there is no dispute that MCI and the defendants are liable for the same injury. MCI was therefore entitled to offset the judgement under NRS 17.425. To hold otherwise would permit double recovery by the respondents.

*The district court properly denied MCI's motion to retax costs*

MCI contented that the district court awarded improper expenses, but the Supreme Court held that the determination of allowable costs is within the sound discretion of the trial court.<sup>6</sup> Moreover, expert witness fees are generally capped under NRS 18.005(5) at five expert witnesses in an amount of no more than \$1,500 per witness. The court is to consider several factors including the importance of the expert's testimony to the case, the extent of the expert's work, and whether the expert had to conduct independent investigations or testing.<sup>7</sup> In determining these fees, the Court defers to the district court's decision, discerning no abuse of discretion.

### **Conclusion**

The district court properly denied the motions for judgement as a matter of law, for a new trial, and to retax costs. However, the district court incorrectly denied the motion to alter or amend the judgement to offset the settlement proceeds. Therefore, only the judgement was reversed and remanded to the district court.

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<sup>5</sup> 136 Nev. 477, 478, 470 P.3d 204, 206 (2020).

<sup>6</sup> Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 493, 117 P.3d 219, 227 (2005).

<sup>7</sup> Frazier v. Drake, 131 Nev. 632, 650-651, 357 P.3d 365, 377-78 (Ct. App. 2015).