

Tim Martin

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**SIMON LEES, Individually, *et al.*,**

**Plaintiffs,**

**vs.**

**No. CV 2011-09334**

**STOREFRONT SPECIALTIES AND  
GLAZING, LLC, *et al.*,**

**Defendants.**

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**MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' CLAIM THAT  
PLAINTIFF BICYCLIST WAS NEGLIGENT FOR FAILING TO ESCAPE THE  
CONSEQUENCES OF DEFENDANT TRUCK DRIVER'S NEGLIGENCE**

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**INTRODUCTION**

Everyone in our community has the legal right to assume everyone else will comply with the law. The exercise of that right does not constitute negligence. Therefore, whether or not traffic in the motor vehicle lanes was unusually heavy on the morning of November 10, 2009, Plaintiff Simon Lees had the legal right to assume that (1) motorists would comply with the traffic laws, and (2) it was safe for him to commute to work on his bicycle, in the bicycle lane, within the posted speed limit.

The fact that we now know these assumptions were incorrect – and that Plaintiff Simon Lees was in grave and imminent danger – is immaterial to the parties' legal rights and duties. Moreover, if the foreseeability of illegal conduct were a sufficient basis to shift blame to victims, then the jury in virtually every case could be asked to blame the victim. Indeed, it is apparent

from a review of the daily newspaper or a drive down the interstate that an endless array of illegal conduct is foreseeable. But that hardly provides perpetrators with a valid defense. If the contrary were true, jurors could be asked to shift the blame to victims in cases involving all of the following foreseeable risks of illegal conduct:

- It is foreseeable that some drivers run red lights, so a crash victim should have known not to proceed when the light turned green.
- It is foreseeable that some people drive drunk on New Year's Eve, so a crash victim should have known to stay home on that high-risk night.
- It is foreseeable that some people offering lucrative investments are frauds, so a victim should have known better than to trust a fraudster.
- It is foreseeable that some people commit armed robbery, so a victim should have known better than to visit an ATM after dark.
- It is foreseeable that some drivers are distracted, impaired, in a hurry, thoughtless, and even violent, so cyclists should know better than to try to commute in bicycle lanes.<sup>1</sup>

Asking jurors to blame the victims of such illegal behavior, however, would be tantamount to inviting them to apply their own personal safety standards on an *ad hoc* basis, rather than the uniform principles of New Mexico Law that dictate the rights and responsibilities of the parties.

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<sup>1</sup> See Transcript of Videotaped Deposition of Jeffrey Lynch, p. 107, l. 24 through p. 108, l. 8: "If I was Simon and I was in that bike lane, first of all, I would not have been probably riding because of the situation. I probably would have gotten off the bike and walked. Because where I was, was only about a half a block from the main intersection. So--and with the traffic going every direction, I'm just overly cautious. And I would have just gotten off the bike and walked through the intersection and then rode when I knew it was safe. But that's me." See also *id.*, p. 117, l. 15-18: "Q. And ultimately, you think that the reasonable and prudent thing for Simon Lees to have done that day is not to commute by bicycle. A. That's what I would have done." (The portions of the this deposition cited herein are attached collectively as Exhibit 1 hereto.)

Everyone in our community has the legal right to proceed on green, to leave home on New Year's Eve, to make investments, to use ATM machines, to commute to work on their bicycles, etc. And while some members of the jury panel may be more or less risk averse, more or less likely to exercise various rights, more or less sympathetic to bicyclists, etc., those individual differences are immaterial to the performance of their duty as jurors.

Nevertheless, Defendants oppose this Motion and intend to ask the jury members to blame Plaintiff Simon Lees for his own injuries, as well as the injuries suffered by his daughters Claire, Emma and Adelle Lees. Specifically, Defendants plan to contend that Plaintiff Simon Lees was negligent for cycling in the bicycle within the posted speed limit, because Defendants assert that Mr. Lees had the duty to anticipate Defendants' illegal left turn across the bicycle lane and be prepared to escape injury from that negligent maneuver.

As Plaintiffs will discuss below, it is particularly essential that this improper argument be precluded in a case involving a collision between a motor vehicle and a bicycle. The jury pool can be expected to include a number of potential jurors who lack an appreciation for the rules of the road that protect the rights, health and safety of bicyclists, including some potential jurors who harbor bias, prejudice, and hostility toward bicyclists. Of course, Plaintiffs will do their best to identify and exclude any such potential jurors in *voir dire*, but it nevertheless is possible that one or more may survive the process and be seated as jurors. Given the unfortunate fact that prejudice and hostility against bicyclists remains far too common – and in fact appears to be one of the few remaining prejudices members of our community feel free to exhibit in polite company – there is a heightened risk in this case that jurors would be susceptible to an invitation by Defendants to ignore the law. Defendants may not properly attempt to capitalize on this risk.

## **ARGUMENT**

### **I.     THE CRASH OCCURED WHEN DEFENDANT JEFFREY T. LYNCH MADE AN ILLEGAL, BLIND LEFT TURN ACROSS THE BIKE LANE.**

As demonstrated in detail in Plaintiffs' Motion For An Order That Matters Be Admitted Pursuant To Rule 1-036 NMRA 2012, And In The Alternative For Partial Summary Judgment, With Supporting Points And Authority (filed June 1, 2012) and in the Reply in Support of that Motion (filed June 27, 2012), the crash in this case occurred when Defendant Jeffrey T. Lynch made a blind left turn across oncoming bicycle traffic in violation of at least four provisions of the traffic code and three other binding rules of the road. Rather than restate the extraordinary testimony of Defendant Lynch recounted in Plaintiffs' prior motion papers, Plaintiffs respectfully incorporate those filings herein by reference. *See, e.g.*, Motion, pp. 6 - 19, and Reply pp. 6 - 10 (citing Defendant Lynch's testimony on p. 193, acknowledging his "left turn on a blind corner").

The undisputed facts essential to this Motion can be reduced to the following: (1) on November 10, 2009, Plaintiff Simon Lees was traveling to work on his bicycle and Defendant Jeffrey T. Lynch was traveling to work in Defendant Storefront Specialties' Silverado truck; (2) moments prior to the crash, Mr. Lees was West of Oxnard Road heading Eastbound on Montano and Defendant Lynch was East of Oxnard Road heading Westbound on Montano; that is, the two were on Montano approaching Oxnard from opposite directions; (3) when Defendant Lynch reached Oxnard Road, he turned left across two lanes of stopped motor vehicle traffic and the bicycle lane (Lynch Deposition, p. 89, l. 15 through p. 92, l. 15)<sup>2</sup>; (4) at the time Defendant Lynch made that left turn, his view to the West – that is, the direction of oncoming bicycle traffic

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<sup>2</sup>     The diagram referenced in this portion of the testimony is attached as Exhibit 2.

– was blocked beyond two or three vehicles by the two lanes of stopped motor vehicle traffic (*id.*, p. 61, l. 17 through p. 62, l. 10 and p. 189, l. 1-10); (5) Defendant Lynch did not stop before crossing the bicycle lane and even attempt to look for oncoming bicycle traffic from that vantage point (*id.*, p. 91, l. 16 through p. 92, l. 15); (6) if Defendant Lynch had done so, there would have been no crash because Plaintiff Simon Lees would have cycled through the intersection (*id.*, p. 185, l. 12 through p. 186, l. 8); (7) the crash occurred as Defendants’ Silverado truck crossed the bicycle lane (*id.*, p. 92, l. 13-15 and p. 102, l. 20 through p. 103, l. 22); (8) the point of impact was the front quarter panel of Defendants’ truck (*id.*, p. 185, l. 12-21); and (9) Plaintiff Simon Lees was cycling below the posted 40 mile per hour speed limit.<sup>3</sup>

## **II. NEW MEXICO LAW AND PUBLIC POLICY PROTECT BICYCLISTS.**

Public policy in the State of New Mexico and the City of Albuquerque encourages bicycling, and the traffic laws are designed to protect the health and safety of bicyclists. Accordingly, the traffic laws in Albuquerque, New Mexico, provide (among other things) that “[w]henver a motorist is turning across a bicycle lane or path, such motorist shall maintain a proper lookout for bicyclists and shall yield the right-of-way to any bicyclist traveling in a bicycle lane or path . . . .” Albuquerque Traffic Code, Section 8-3-3-12(A). *See also, e.g., id.*,

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<sup>3</sup> The Defendants’ “accident reconstruction expert” has asserted that Plaintiff Simon Lees was cycling at between 35 and 38 miles per hour, which is within the posted speed limit of 40 miles per hour. While it is neither necessary nor procedurally permissible for Plaintiffs’ Motion to challenge that assertion at this time, the truth is that Plaintiff Simon Lees was traveling in the range of approximately 25 miles per hour. Moreover, Plaintiffs intend to prove at trial that (a) Defendants’ “expert” is in the business of providing bad faith, fraudulent “opinions” for profit, (b) his opinions in this case are specifically intended to mislead the trial jury and to cheat the Plaintiffs, and (c) New Mexico Courts should be reluctant to permit this “expert” to testify in any future matters.

Section 8-3-3-13 (“No person shall drive upon or across a bicycle lane or path as permitted by this section except after giving the right-of-way to all bicycles within the lane or path”); Section 8-3-3-10(A) (“In approaching or passing a person on a bicycle, every person operating a motor vehicle shall proceed with caution . . . and keep a safe distance [and] in no event shall a distance of less than five feet be considered a safe distance”); and Section 8-3-3-10(B) (“No person operating a motor vehicle shall harass or endanger a bicyclist”). Moreover, Defendant Storefront’s written Vehicle Fleet Safety Policy specifically provides: “Pedestrians and bicycles in the roadway always have the right of way.” Exhibit 3, hereto. Defendant Lynch admitted that it was his duty to abide by the Albuquerque Traffic Code and Storefront’s Vehicle Fleet Safety Policy. Exhibit 1, p. 132, l. 9-16.

It would be improper for Defendants to invite the jury to disregard these principles.

**III. THE RISK THAT A MOTORIST WILL VIOLATE THE LAW IN HEAVY TRAFFIC IS NOT A “CONDITION” REQUIRING A BICYCLIST TO PROCEED AT A SPEED LOWER THAN THE POSTED SPEED LIMIT.**

No matter how Defendants may seek to sugarcoat their contention, it boils down to this: Defendants intend to ask the jury to turn New Mexico Law squarely on its head by arguing that Plaintiff Simon Lees is negligent for (a) not anticipating that Defendant Lynch would make an illegal turn across the bicycle lane and (b) not being prepared to protect himself from the harm resulting from Mr. Lynch’s illegal conduct.

Specifically, Defendants have telegraphed their intention to argue to the jury that heavy traffic conditions in the motor vehicle lanes required Mr. Lees to reduce his speed enough to be prepared to avoid injury when Defendant Lynch made his blind left turn across the bicycle lane,

into oncoming bicycle traffic. To support this argument, they apparently intend to rely upon Section 8-3-3-16 of the Albuquerque Traffic Code, which provides as follows:

No person shall operate a bicycle at a speed either greater than the lawful speed limit or than is reasonable and prudent under the conditions then existing, whichever is lesser.

But, as a matter of law, this provision cannot be construed to mean that a bicyclist has a legal duty at all times to be moving slowly enough to avoid injury resulting from the unlawful conduct of motorists. If that were the standard, as a practical matter bicyclists' only option would be the one Defendant Lynch offered up in his testimony; namely, do not commute by bicycle. *See supra*. Admittedly, it is abundantly clear from Defendant Lynch's testimony that with drivers like him on the road bicycle commuters such as Plaintiff Simon Lees face significant risks to their lives, health, and safety. But, as discussed above, Defendants' focus on the foreseeability of that risk misses the point: Mr. Lees had the *legal right* to commute by bicycle.

#### **IV. DESPITE STATE LAW AND POLICY, MISUNDERSTANDING, BIAS, PREJUDICE, AND HOSTILITY TOWARD BICYCLISTS REMAIN.**

Plaintiffs have designated Diane Elizabeth Albert, Ph.D., J.D., as a bicycling expert, and her Affidavit in support of this Motion is attached hereto as Exhibit 4. Dr. Albert's expert qualifications are summarized in Exhibit 4. As Dr. Albert states in her Affidavit, the unfortunate fact is that many drivers in our community do not show respect for the rights, health and safety of bicyclists, either as a result of lack of understanding, or from bias, prejudice and even hostility toward bicyclists (citing a range of specific conduct, including intentional violence). *See also* Zachary Cannon, Opinion, *War Between Drivers, Cyclists Serves No End*, ABQ. J., August 30, 2012, at A7 (attached as Exhibit 5).

The jury pool in this case is likely to include drivers who would be particularly receptive to an invitation by the Defendants to disregard the laws designed to protect bicyclists, and be inclined improperly to assign some degree of fault to Plaintiff Simon Lees simply because he was exercising his right to bicycle to work in the bicycle lane. This Court's Order granting Plaintiffs' Motion, however, would preclude Defendants from extending that invitation.

**V. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT.**

Rule 1-056(C) NMRA 2012 in pertinent part provides that "[t]he judgment sought shall be rendered forthwith" if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There is no genuine factual question here, because the issue is purely legal; that is, whether Plaintiff Simon Lees had a duty to be prepared to protect himself from Defendant Jeffrey T. Lynch's tortious failure to yield to Plaintiff bicyclist in the bike lane. Stated differently, the sole issue raised by this Motion is whether Defendants can invite the jury members to shift blame for Defendants' tortious conduct to their victim, based on the theory that their victim was negligent for failing to anticipate and protect himself when Defendant Lynch negligently made a blind left turn across the bicycle lane in Storefront's truck, in violation of multiple provisions of New Mexico Law.

For the reasons stated above, New Mexico Law prohibits Defendants from extending that improper invitation to the jury members, because doing so would jeopardize the proceedings by asking the jurors to disregard New Mexico Law. Indeed, if the Defendants' strategy were to succeed and the jury were to disregard the law by returning a verdict that shifted fault to Plaintiff Simon Lees under these facts, this Court would be called upon to remedy that miscarriage of justice by granting either a new trial or a judgment notwithstanding the verdict. Accordingly, in




addition to the Rule 1-056 mandate that the partial summary judgment sought by Plaintiffs be rendered, the requested judgment would further the interests of efficiency and judicial economy promoted by Rule 1-001 NMRA 2012 by obviating any possibility that such post-verdict relief would be required.

### **CONCLUSION**

WHEREFORE, Plaintiffs Simon Lees, Individually and as Guardian and Next friend of Claire Lees and Emma Lees, and Adelle Lees, respectfully request that this Motion be granted, and that partial summary judgment be entered in their favor on Defendants' claim that Plaintiff Simon Lees was negligent for failing to escape the consequences of Defendants' negligence.

Respectfully submitted,

FALLICKLAW, LTD.

  
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Attorney for Plaintiffs

DATED: September 4, 2012.

I hereby certify that on September 4, 2012, I caused true and correct copies

of the foregoing Motion to be served  
by hand-delivery upon:

Seth Sparks, Esquire  
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and by electronic mail upon:

Lisa Chavez Ortega, Esquire  
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Brandee R. Lynch, Esquire  
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Gregg Vance Fallick

STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT

SIMON LEES, Individually and  
Guardian and Next friend of  
CLAIRE LEES and EMMA LEES;  
and ADELLE LEES,

Civil No. CV 2011-09334

Plaintiffs,

vs.

STOREFRONT SPECIALTIES AND  
GLAZING, LLC; JEFFREY T.  
LYNCH; and PEERLESS INDEMNITY  
INSURANCE COMPANY d/b/a  
Colorado Casualty, a Liberty  
Mutual Agency Corporation and  
a member of the Liberty Mutual  
Group, Inc.,

Defendants.

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**VIDEOTAPED DEPOSITION OF JEFFREY LYNCH**  
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TAKEN AT:

Holiday Inn Hotel and Suites  
Airport West Location  
5001 West Wiley Post Way  
Salt Lake City, Utah 84116

DATE:

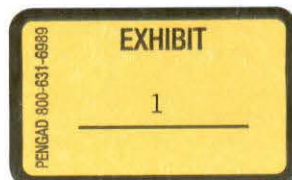
**November 16, 2011**

TIME:

**9:00 a.m.**

REPORTED BY:

Michelle Mallonee, RPR



1 Sheet 5 of 5 of Lynch Exhibit 1. Is that right?

2 Does it say that--

3 A. Yes.

4 Q. --in the lower right-hand corner?

5 A. Yes.

6 Q. Is that an accurate diagram of the  
7 collision?

8 A. Yes.

9 Q. When you made your last complete stop  
10 prior to the collision, did you look to see if it  
11 was safe to turn left?

12 A. Yes.

13 Q. Anything more about what you saw that  
14 you can describe that you haven't already  
15 described?

16 A. I don't think so.

17 Q. From the location where you made that  
18 stop, was your vision of any part of your  
19 surroundings blocked by anything?

20 A. Yes.

21 Q. What was blocking your vision?

22 A. Everything further west on the far, I  
23 guess, would be my far left side. Anything coming  
24 from the east to the west from the sidewalk on, I  
25 couldn't see past through two cars.

1 Q. Okay. So, to be clear, what you're  
2 saying is the traffic that was west of you on  
3 Montano and heading east was what was blocking your  
4 vision.

5 A. Yes.

6 Q. It was blocking your vision of  
7 everything south of those vehicles past the first  
8 two or three vehicles, is that what you are saying?

9 A. Everything south coming from the west  
10 headed east.

11 Q. Why did you proceed with that turn when  
12 your vision of everything from the west heading  
13 east was blocked on that side?

14 A. Because I felt it was safe.

15 Q. The truck you were driving was a  
16 Chevrolet C15 Silverado, correct?

17 A. I don't know what the C15 is.

18 Q. It was a big Chevy Silverado truck.

19 A. I was a Chevy 1500, just light-duty  
20 truck.

21 Q. A driver in that truck sits higher than  
22 a driver in a standard, mid-size car, right?

23 A. Yes.

24 Q. Do you know how much higher?

25 A. I don't.

1 the road. So, I wasn't expecting anybody traveling  
2 the speed that Mr. Simon was going. I was  
3 expecting just your casual riders, casual walkers,  
4 anybody in the area maybe walking to the gas  
5 station. I didn't know what to expect. So, that  
6 was more of generally what I was looking for.

7 Q. I want to make sure I understand your  
8 answer.

9 Does that mean that it had not occurred  
10 to you that someone was riding a bicycle in the  
11 area where your vision was blocked at a speed where  
12 they would arrive at the intersection exactly as  
13 you arrived at the intersection?

14 A. I wasn't expecting that, no.

15 Q. I'm going to ask you to turn back to  
16 the police report that has been marked as Lynch  
17 Exhibit 1 and ask you to go back to sheet 5 of 5,  
18 which is the diagram. And again, I'm going to get  
19 up and hover, if that's okay. Do you still have the  
20 red pen?

21 A. Yes.

22 Q. Okay. The diagram shows two motor  
23 vehicle lanes and one bicycle lane heading  
24 eastbound on Montano at that location. Is that  
25 right?



1 A. Yes.

2 Q. Please point to the northern-most  
3 eastbound lane.

4 A. Right here.

5 Q. Isn't that the southern-most?

6 A. Oh.

7 Q. I just want to make sure that I'm  
8 getting it right.

9 A. Northern.

10 Q. Okay.

11 A. North.

12 Q. So, I want the lane that's going east  
13 and that is closest to the north, which I think is  
14 the lane that was closest to where you were when  
15 you were stopped. Is that true?

16 A. Yes. It's this one right here.

17 Q. Okay. So, would you write the initials  
18 in all caps "NL" in that lane, which is the  
19 northern lane, and initial that?

20 A. (Witness complied.)

21 Q. And then the lane directly south of  
22 that, would you point to that? And would you write  
23 "CL" in all caps in that lane as the center lane?

24 A. (Witness complied.)

25 MS. CONSTANT: And just for the record,

1 you are characterizing that as a center lane. And  
2 he's just writing it down.

3 MR. FALLICK: He's just doing what I've  
4 asked him to do for identification so we can ask  
5 questions about it.

6 BY MR. FALLICK:

7 Q. And would you initial right next to the  
8 "CL," please?

9 A. (Witness complied.)

10 Q. And then to the south of that is the  
11 bike lane, true? That's the southern-most lane.

12 A. Yeah.

13 Q. Would you write "SL" in that lane and  
14 initial it?

15 A. (Witness complied.)

16 Q. Okay. And I'm going to ask you  
17 questions about those lanes.

18 When you began your left turn at Montano  
19 and Oxnard, you first entered the lane marked "NL,"  
20 correct?

21 A. Yes.

22 Q. You didn't stop in lane NL, did you?

23 A. No. I was just idling through NL and  
24 CL.

25 Q. So, you went through NL and you entered



1 CL. And you didn't stop in CL, either, did you?

2 A. No.

3 Q. I think I got another double negative.

4 I apologize.

5 Did you stop in lane CL?

6 A. No, I didn't.

7 Q. And then from CL you entered SL, true?

8 A. Yes.

9 Q. And you didn't stop at any time before  
10 the collision in SL, did you?

11 A. No.

12 Q. I'm sorry. I did it again.

13 Did you stop at any time in SL before  
14 the collision?

15 A. No.

16 Q. As you were driving through those three  
17 lanes, NL, CL, and SL, where were you looking?

18 A. The same direction, through my passenger  
19 mirror--or my passenger window and my front far  
20 right window, looking in the direction of the west  
21 the whole entire time.

22 Q. Were you, at any point before the  
23 collision, able to see beyond the second or third  
24 car in that line of traffic?

25 A. No.

1 at fault for being hit."

2 Who is the "me"?

3 A. I don't know. I didn't--I don't know  
4 anything about that paper.

5 Q. And when it says, "Motorist pulled over,  
6 told me I was not at fault," you don't know who  
7 the "me" or the "I" is in that paragraph.

8 A. In reading that, I'm assuming it's me.  
9 But I don't know where that paper came from or who  
10 wrote it. It wasn't something that I prepared--  
11 having to do with it.

12 Q. Could it be something that you wrote in  
13 handwriting or told someone and they typed up?

14 A. No, I don't think so.

15 Q. So, as you sit here today, you don't  
16 know if Simon Lees was going at an excessive rate  
17 of speed.

18 A. I have no idea what speed he was  
19 traveling.

20 Q. You agree that at the time of the  
21 collision the front of your truck was in the bike  
22 lane and Simon Lees was in the bike lane, correct?

23 A. At the time of the collision, over half  
24 of my truck was in the truck lane and Simon Lees  
25 did hit the side of it, yes.

1 Q. And the point of collision was in the  
2 bike lane.

3 A. Yes.

4 Q. And if you had stopped in the lane that  
5 you've marked as "NL" and made a complete stop in  
6 that lane, that would have taken long enough that  
7 there would have been no collision. Isn't that  
8 true?

9 MS. CONSTANT: Objection. Form.

10 THE WITNESS: Yes.

11 BY MR. FALLICK:

12 Q. And if you had stopped in CL, that  
13 would have taken enough time that there would have  
14 been no collision, true?

15 MS. CONSTANT: Objection. Form.

16 THE WITNESS: Yes.

17 BY MR. FALLICK:

18 Q. And if you had inched up, even once, a  
19 few inches in the bike lane before proceeding,  
20 there would have been no collision. Do you agree?

21 MS. CONSTANT: Objection. Form.

22 THE WITNESS: Yes.

23 BY MR. FALLICK:

24 Q. As you sit here today, do you still  
25 think there's nothing you could have done to avoid

1 frame.

2 BY MR. FALLICK:

3 Q. When do you think Simon Lees first  
4 should have seen you?

5 A. Probably the moment I was in the NL  
6 lane.

7 Q. How do you think he could have seen you  
8 if he's traveling in the bike lane looking where  
9 he's going? How is he going to see you in NL?

10 A. He could see my lights shining through  
11 the intersection. He could also see my big glass  
12 rack on the back of the truck.

13 Q. You think that's in his line of vision  
14 when he's looking where he was going.

15 A. I don't know what he was seeing.

16 Q. Well, put yourself in the bike lane.  
17 If you're on a bike in the bike lane and you are  
18 looking where you're going, do you think you could  
19 see?

20 A. If I was Simon--

21 MS. CONSTANT: Objection. Form and  
22 foundation.

23 THE WITNESS: --and I--sorry.

24 If I was Simon and I was in that bike  
25 lane, first of all, I would not have been probably



1 riding because of the situation. I probably would  
2 have just gotten off the bike and walked. Because  
3 where I was, was only about half a block from the  
4 main intersection. So--and with the traffic going  
5 every direction, I'm just overly cautious. And I  
6 would have just gotten off the bike and walked  
7 through the intersection and then rode when I knew  
8 it was safe. But that's me.

9 BY MR. FALLICK:

10 Q. Well, short of doing that, do you think  
11 that he would have been able to see your truck in  
12 his line of vision if he continues to bicycle down  
13 that hill?

14 MS. CONSTANT: Objection. Form and  
15 foundation.

16 THE WITNESS: I do.

17 BY MR. FALLICK:

18 Q. And how do you think that he can see  
19 your truck, given the line of standing traffic and  
20 that he's driving down the hill, looking where he's  
21 going in the bike lane?

22 MS. CONSTANT: Form and foundation.

23 THE WITNESS: Because he should have  
24 been aware that, for one, the intersection was only  
25 half a block away; for two, there's traffic backed

1 Q. So, you don't think the right-of-way  
2 ultimately matters much.

3 A. It does.

4 Q. Well, if they both do, then explain how  
5 the right-of-way matters.

6 A. Because I think when you're driving, the  
7 same as when you're a bicyclist, when you're on the  
8 road, you have the responsibility to be safe. And  
9 with him having the right-of-way, I feel that the  
10 right-of-way is determined, you know, for one, for  
11 the flow of traffic, to ease it, to make it safe  
12 for people. And, you know-- but ultimately, it's  
13 both of your responsibility to pay attention to  
14 where you're going.

15 Q. And ultimately, you think that the  
16 reasonable and prudent thing for Simon Lees to have  
17 done that day is not to commute by bicycle.

18 A. That's what I would have done.

19 Q. I'm going to mark as Lynch Exhibit 9  
20 the accident reconstruction report prepared by  
21 Ronald J. Feder and dated January 14, 2011, and ask  
22 you if you recognize it.

23 Exhibit-9 marked

24 MR. FALLICK: Would either of you like  
25 this?

1 operate the vehicle in a safe manner and to drive  
2 defensively to prevent injuries and property  
3 damage?

4 A. Yes.

5 Q. At the time of the collision, did you  
6 consider it your duty to abide by New Mexico's  
7 rules of the road?

8 A. Yes.

9 Q. At the time of the collision, did you  
10 consider it your duty to abide by the Albuquerque  
11 traffic code?

12 A. Yes.

13 Q. At the time of the collision, did you  
14 consider it your duty to follow Storefront  
15 Specialties' Vehicle Fleet Safety Policy?

16 A. As long as I'm operating the truck, yes.

17 Q. Now I'm going to ask you a series of  
18 questions about your understanding at the time of  
19 the collision of the rules of the road that you had  
20 a duty to follow.

21 Do you agree it was your duty to make  
22 sure you could clearly see crossing traffic before  
23 entering an intersection?

24 A. In a normal situation, yes.

25 Q. So, you don't think it was always your

1 that.

2 Q. I mean, you know that by the time you  
3 got into the bike lane, he hit you. So--

4 A. Well--

5 Q. And you know he was going--

6 A. He--

7 Q. --at some speed.

8 A. He hit me --

9 MS. LYNCH: Let him finish his--

10 THE WITNESS: Oh, sorry.

11 BY MR. FALLICK:

12 Q. And what I'm saying is--if you had made  
13 a complete stop before entering the bike lane,  
14 knowing that you didn't make a complete stop, and  
15 he hit you in the front quarter panel of your car,  
16 if you had made a complete stop there, that would  
17 have given him time to clear.

18 A. Yeah, if I would have stopped, he would  
19 have had time to pass. But that would have meant  
20 that I would have known he was there and I would  
21 have had to stop because I would have seen him.

22 Q. Or that you could have stopped to crane  
23 your neck to see if there was traffic coming.

24 A. I don't know if that would have worked.  
25 I mean, if I would have stopped, it would have



1 allowed him to pass. But I still would not have  
2 known he was in the bike lane. I don't know if I  
3 could have seen around the car if I would have  
4 stopped.

5 Q. And what I'm saying is, if you had  
6 tried, even if you didn't see him, there would have  
7 been no accident.

8 A. Yeah, he would have passed.

9 (Discussion held off the record.)

10 Q. I'd like you to turn to page 12 of 14  
11 of Plaintiff's Exhibit 9, which is Mr. Feder's  
12 report. And in Paragraph 6 on that page, Mr. Feder  
13 says, "After the collision, Mr. Lynch stopped the  
14 pickup about 21 feet from where the impact occurred  
15 as shown below. The bicycle was moved off the road  
16 between the curb and the sidewalk."

17 Did I read that correctly?

18 A. You said "the bicyclist," and it's "the  
19 bicycle."

20 Q. Yeah. So, let me start over, because I  
21 didn't read it correctly. Trying again.

22 Paragraph 6 on page 12 of 14, "After  
23 the collision, Mr. Lynch stopped the pickup about  
24 21 feet from where the impact occurred as shown  
25 below. The bicycle was moved off the road between

1 Q. And because your vision was blocked, you  
2 could not see whether a bicyclist was approaching  
3 the intersection at Oxnard and Montano, true?

4 A. I could see only a certain distance.  
5 But further than that, no.

6 Q. And a certain distance was two or three  
7 car lengths.

8 A. It was looking angled through windows of  
9 about two or three cars. And then by then, you  
10 start seeing the front of them.

11 Q. You took that left and drove your truck  
12 across the bike lane, true?

13 A. Yes.

14 Q. Without knowing how fast a bicycle might  
15 be traveling, true?

16 A. Yes.

17 Q. Knowing that the speed limit was 40  
18 miles per hour on that road.

19 A. I can't recall what the speed limit was  
20 on that road.

21 Q. Knowing it was at least 30 miles per  
22 hour.

23 A. I would assume.

24 Q. Knowing that commuting bicyclists  
25 sometimes move pretty fast, right?

## 1 CERTIFICATE

2 State of Utah )

3 ss.

4 County of Salt Lake )

5 I hereby certify that the witness in the  
6 foregoing proceeding was duly sworn to testify to  
7 the truth, the whole truth, and nothing but the  
8 truth in the within-entitled cause;

9 That said deposition was taken at the  
10 time and place herein named;

11 That the deposition is a true record of  
12 the witness' testimony;

13 That the testimony of said witness was  
14 reported by me in stenotype and thereafter  
15 transcribed into typewritten form;

16 I further certify that I am not of kin  
17 or otherwise associated with any of the parties of  
18 said cause of action, and that I am not interested  
19 in the event thereof.

20  
21 -----  
22 Michelle Mallonee, RPR, CSR

23 Notary Public Commission Expires

24 June 8, 2012  
25

### Measurements Taken By

### DIAGRAM



Sheet 5 Of 5

2



## VEHICLE FLEET SAFETY POLICY

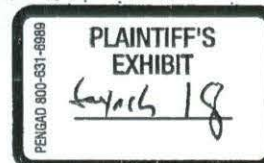
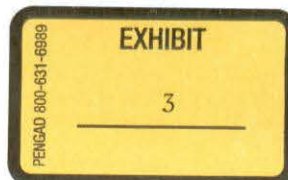
### Policy

The purpose of this Policy is to ensure the safety of those individuals who drive company vehicles. Vehicle accidents are costly to our company, but more importantly, they may result in injury to you or others. It is the driver's responsibility to operate the vehicle in a safe manner and to drive defensively to prevent injuries and property damage. As such, the Company endorses all applicable state motor vehicle regulations relating to driver responsibility. The Company expects each driver to drive in a safe and courteous manner pursuant to the following safety rules. The attitude you take when behind the wheel is the single most important factor in driving safely.

\_\_\_\_\_  
President

### Driver Eligibility

- Company vehicles are to be driven by authorized employees only, except in emergencies, or in case of repair testing by a mechanic. Spouses and other family members are not authorized to drive the Company vehicle.
- Any employee who has a driver's license revoked or suspended shall immediately notify \_\_\_\_\_, and discontinue operation of the company vehicle. Failure to do so may result in disciplinary action, including dismissal.
- All accidents, regardless of severity, must be reported to the police and to \_\_\_\_\_. Failing to stop after an accident and/or failure to report an accident may result in disciplinary action, including dismissal.
- Drivers must immediately report all summonses received for moving violations during the operation of a company vehicle to \_\_\_\_\_.
- All CDL drivers must comply with all applicable D.O.T. regulations, including successful completion on medical, drug, and alcohol evaluations.
- Motor Vehicle Records will be ordered periodically to assess employees' driving records. An unfavorable record will result in a loss of the privilege of driving a Company vehicle. The following system will be used to determine eligibility to operate a Company vehicle:
  - **ALL TYPE 'A' VIOLATIONS** (as defined below) WILL RESULT IN TERMINATION OF DRIVING PRIVILEGES FOR EMPLOYEES AND WILL DISQUALIFY ANY POTENTIAL DRIVER EMPLOYEES.
  - **ANY DRIVERS (EMPLOYEES OR APPLICANTS) SHOWING ONE OF THE FOLLOWING WILL BE RESTRICTED FROM DRIVING COMPANY VEHICLES:**
    - One (1) or more type 'A' Violations in the last 3 years
    - Three (3) or more accidents (regardless of fault) in the last 3 years.
    - Three (3) or more type 'B' violations in the last 3 years
    - Any combination of accidents and type 'B' violations which equal Four (4) or more in the last 3 years.



SS&G 00049



- Drivers of heavy trucks should keep a minimum of a three-second interval when not carrying cargo, and at least four seconds when fully loaded. Following distance should also be increased when adverse conditions exist.
- Drivers must yield the right of way at all traffic control signals and signs requiring them to do so. Drivers should also be prepared to yield for safety's sake at any time. **Pedestrians and bicycles in the roadway always have the right of way.**
- Avoid driving in other driver's blind spots; attempt to maintain eye contact with the other driver, either directly or through mirrors.
- Drivers must honor posted speed limits. In adverse driving conditions, reduce speed to a safe operating speed that is consistent with the conditions of the road, weather, lighting, and volume of traffic. Tires can hydroplane on wet pavement at speeds as low as 40 MPH.
- Turn signals must be used to show where you are heading; while going into traffic and before every turn or lane change.
- When passing or changing lanes, view the entire vehicle in your rear view mirror before pulling back into that lane.
- Be alert of other vehicles, pedestrians, and bicyclists when approaching intersections. Never speed through an intersection on a caution light. Approach a stale green light with your foot poised over the brake to reduce your reaction time should it be necessary to stop. When the traffic light turns green, look both ways for oncoming traffic before proceeding.
- When waiting to make left turns, keep your wheels facing straight ahead. If rear-ended, you will not be pushed into the lane of oncoming traffic.
- When stopping behind another vehicle, leave enough space so you can see the rear wheels of the car in front. This allows room to go around the vehicle if necessary, and may prevent you from being pushed into the car in front of you if you are rear-ended.
- Avoid backing where possible, but when necessary, keep the distance traveled to a minimum and be particularly careful.
  - Check behind your vehicle. Operators of heavy trucks should walk around their vehicle before backing and/or have someone guide you.
  - Back to the driver's side. Do not back around a corner or into an area of no visibility.

### **What To Do In Case of An Accident**

In an attempt to minimize the results of an accident, the driver must prevent further damages or injuries and obtain all pertinent information and report it accurately.

- Call for medical aid if necessary.
- Secure accident scene -- pull onto shoulder or side of road; redirect traffic, set up road flares/reflectors, etc.
- Call the police. All accidents, regardless of severity, must be reported to the police. If the driver cannot get to phone, he should write a note giving location to a reliable appearing motorist and ask him to notify the police.
- Record names and addresses of driver, witnesses, and occupants of the other vehicles and any medical personnel who may arrive at the scene.
- Complete the form locating in the CNA Vehicle Accident Packet. Pertinent information to obtain includes:

**STATE OF NEW MEXICO  
COUNTY OF BERNALILLO  
SECOND JUDICIAL DISTRICT COURT**

**SIMON LEES, Individually and as Guardian  
and Next friend of CLAIRE LEES and  
EMMA LEES; and ADELLE LEES,**

**Plaintiffs,**

**vs.**

**No. CV 2011-09334**

**STOREFRONT SPECIALTIES AND  
GLAZING, LLC; JEFFREY T. LYNCH;  
and PEERLESS INDEMNITY INSURANCE  
COMPANY d/b/a Colorado Casualty, a  
Liberty Mutual Agency Corporation and  
a member of the Liberty Mutual Group Inc.,**

**Defendants.**

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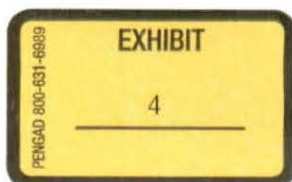
**AFFIDAVIT OF DIANE ELIZABETH ALBERT, Ph.D., J.D.**

---

STATE OF NEW MEXICO    )  
                                          ) ss.  
COUNTY OF BERNALILLO )

Diane Elizabeth Albert, Ph.D., J.D., being duly sworn upon her oath, deposes and says:

1.     Plaintiffs have designated me as an expert witness in this matter about bicycling.
2.     I have been a bicyclist for approximately fifty (50) years. Among other things, I am a National Board Member of the League of American Bicyclists, the President of the Bicycle Coalition of New Mexico, and a member of the Greater Albuquerque Bicycle Advisory Committee. I also am a League Certified Instructor of the League of American Bicyclists.



3. I have knowledge, skill, experience, training, and education that I believe will assist the trier of fact to understand the evidence and to determine facts that may be at issue in this case regarding, among other things, bicycle safety, the risks to bicyclists, and practical considerations regarding bicycle commuting.

4. In my experience, while the majority of motor vehicle drivers show respect for the rights, health and safety of bicyclists, many drivers do not do so. The drivers who do not show respect for the rights, health and safety of bicyclists can be divided into several categories.

5. One category is drivers whose conduct does not indicate any hostility toward bicyclists, but who appear to be willing to disregard the safety of bicyclists because they are in a hurry. For example, I frequently see drivers pass bicyclists and then immediately turn right in front of bicyclists, because the drivers apparently are unwilling to wait until the bicyclists pass.

6. A second category is drivers whose conduct does indicate some level of hostility toward bicyclists. For example, some drivers will pass bicyclists with perhaps an inch to spare in a manner apparently intended to frighten the bicyclists. Others will come very close behind bicyclists and blast their horns to startle the bicyclists. And others even will throw bottles, rocks, etc., at bicyclists while shouting obscenities. In one instance, a young woman drove close to me while I was commuting on my bicycle, threw a bottle at me, and screamed: "Get a car, you old bit[remainder of expletive deleted]."

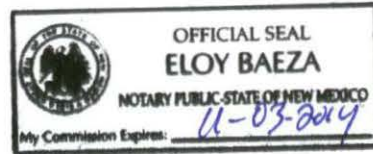
7. A third category is drivers who are extremely hostile and violent toward bicyclists. For example, a driver in California was prosecuted for passing a number of bicyclists, cutting directly in front of them, and then slamming on his brakes right in front of the bicyclists. The driver's actions resulted in serious injuries to the bicyclists.



8. Based on my knowledge and experience, including the matters discussed above, the conduct of a significant minority of drivers displays either (a) a lack of understanding of the rights of bicyclists, and the risks unsafe driving practices present to the health and safety of bicyclists, or (b) hostility toward bicyclists that intentionally disregards the rights, health, and safety of bicyclists.

9. Accordingly, in my opinion, a significant minority of drivers lacks an appreciation of the rules of the road that protect the rights, health, and safety of bicyclists, including the principle of law that – at a minimum – bicyclists have the same rights as motor vehicles to use of the roadways. This results either from a lack of understanding, or from bias, prejudice, and/or hostility toward bicyclists.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, information and belief.



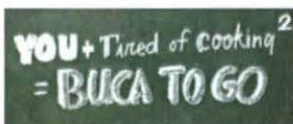
Diane Elizabeth Albert  
Diane Elizabeth Albert, Ph.D., J.D.

SUBSCRIBED AND SWORN TO before me this 4<sup>th</sup> day of September, 2012, in the State of New Mexico, County of Bernalillo, by Diane Elizabeth Albert, Ph.D., J.D.

  
Notary Public

My commission expires:

11-03-2014



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## War Between Drivers, Cyclists Serves No End

By Zachary Cannon / Albuquerque resident on Thu, Aug 30, 2012



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As I was leaving the ABQ Uptown Growers' Market on my bicycle recently, I was confronted with what struck me as anything but an unusual situation. As I prepared to merge into traffic, I had to account for a distracted driver.

After coming to a stop at a stop sign, the driver was looking down, attending to some task. Unable to make eye contact, I cautiously started across the intersection. However, the driver suddenly pulled into the intersection without checking left or right. I had anticipated this possibility and yielded.

Nothing struck me as unusual about what had happened. I had encountered a distracted driver, paid special heed and avoided a potentially hazardous situation. Mission accomplished. Apparently the driver had a different perspective. As I turned right, the driver yelled from the left turn lane: "That's why bikers die."

As the driver yelled at me, I didn't make eye contact, didn't gesture, and didn't stop to engage. I just continued on my way. But I don't want the conversation to end there. I want to engage what I consider to be a small but vocal minority of drivers who have yelled at, honked at, swerved at, even run over – yes intentionally run over – cyclists in some misguided pursuit of justice.

"That's why bikers die." On one level, I couldn't agree more: Cyclists die when automobile drivers let themselves become distracted.

However, I suspect the driver intended something entirely different. She felt I failed to heed the right of way to her, and I thus exemplified those cyclists who have been killed by automobiles.

Captured in the hostile tone of her voice seems to be the implication that not only did I typify all those cyclists who find themselves dead, but that perhaps I might even deserve to die.

As a cyclist, I find that most drivers are extremely courteous. They pass with generous clearance. They tend to seek eye contact at intersections. Often they wave me (and my family) through, even when they clearly arrived at the intersection before us. To all those drivers – the majority of drivers, I believe – I want to say, thank you.

But there is a small but dangerous minority of drivers who seem to view cyclists with hostility; these drivers both endanger cyclists and – based on conversations I've had with other cyclists – have intimidated them and driven them from the roads.

As I have been riding along the road, motorists have yelled at me to either get off the road or ride on the sidewalk on multiple occasions. Many times, aggressive driving has accompanied aggressive language as drivers have either buzzed me or swerved in front of me. Perhaps this shouting occurs because drivers know that cyclists can hear them as opposed to other drivers enclosed in glass and steel. Perhaps these drivers are emboldened by a two-ton weight advantage.

In these situations, drivers exhibit not only an ignorance of the laws that require cyclists to ride on the road and prohibit them from riding on sidewalks. They also demonstrate a disregard for the law as they fail to pass with adequate clearance.

Most distressing, they risk the life of the cyclist in order to prove their point. Do they really believe that keeping cyclists off the roads is something worth killing for? When it comes to rational debate, I'm an eager participant; when it comes to verbal insults, I'm pretty thick-skinned. But when drivers decide to speak with their vehicles and put my life or anyone else's at risk, I think it's time for a clarion call for peace.

I might be riding for recreation, I might be riding back from work, or I might be running to pick up milk. I might be wearing jeans or I might be wearing spandex. I might be riding because I believe it's better for the planet, or I might be riding because I want a better body. I might be riding because I just can't afford a decent car. In any case, I don't believe it really matters. As a cyclist, I have as a place on the road. I belong.



### OPINION

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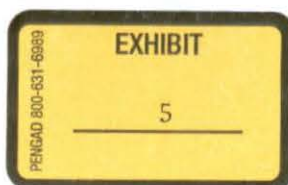
Leonard Pitts

Ruth Marcus

Robert J. Samuelson

Ruben Navarrette

Victor Davis Hanson



While, yes, I might inconvenience you at times with my slower speeds, please don't endanger me. I might commit traffic violations now and then – don't you? – but please don't kill me. I don't hate cars. In fact, I also drive one. I'm not out for revenge. This isn't a call for justice: just a call for peace.

### Suggested Reading:

- [No Harmony Between Cyclists And Motorists](#) 03/19/2012
- [Cyclists Will Be Welcomed Back to Chappell With Bike Lanes](#) 01/23/2012
- [New Firestone Auto Center serves West Side drivers](#) 06/27/2011
- [Cruces School Bus Drivers' Strike Averted](#) 02/21/2012
- [Bike Ban on Stretch of Chappell Irks Cyclists](#) 01/19/2012

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