IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; and JAY FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; and ELAINE CHERNIKOFF,

Respondents.

No 70164

DOCKETING STATEMENT CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id*. Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District County Eighth Department 23

County Clark Judge Stefany A. Miley

District Ct. Case No. A-13-682726-C

2. Attorney filing this docketing statement:

Attorney Daniel F. Polsenberg and Joel D. Henriod Telephone 702-949-8200

Firm LEWIS ROCA ROTHGERBER CHRISTIE LLP

Address 3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169

Attorney Leann Sanders Telephone 702-384-7000

Firm ALVERSON, TAYLOR, MORTENSEN & SANDERS

Address 7401 West Charleston Boulevard
Las Vegas, Nevada 89117

Client(s) First Transit, Inc. and Jay Farrales

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Benjamin P. Cloward Telephone (702) 628-9888

Firm CLOWARD, HICKS & BRASIER, PLLC

Address 4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89107

Attorney Charles H. Allen Telephone (404) 419-6674

Firm CHARLES ALLEN LAW FIRM

Address 950 East Paces Ferry Raod
NE Suite 1625
Atlanta, Georgia 30326

Client(s) Jack Chernikoff and Elaine Chernikoff

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

☐ Judgment after bench trial	☐ Dismissal:
☒ Judgment after jury verdict	☐ Lack of jurisdiction
☐ Summary judgment	☐ Failure to state a claim
☐ Default judgment	☐ Failure to prosecute
☐ Grant/Denial of NRCP 60(b) relief	☐ Other (specify)
☐ Grant/Denial of injunction	☐ Divorce Decree:
☐ Grant/Denial of declaratory relief	☐ Original ☐ Modification
☐ Review of agency determination	☐ Other disposition (specify):

5. Does this appeal raise issues concerning any of the following? No.

☐ Child Custody

☐ Venue

☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is a wrongful death action. The decedent choked to death on insufficiently chewed food while traveling in a paratransit bus owned by defendant First Transit and driven by First Transit's employee defendant Jay

Farrales. The heirs allege that the driver was negligent in not preventing the decedent from eating and for the manner in which he administered aid. They claim the company was negligent in its training of the driver.

The jury found for the heirs and awarded $15 million in damages. The district court entered judgment on the jury verdict on March 8, 2016.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. In this wrongful-death action by the decedent's heirs, did the district court err as a matter of law in barring the jury from apportioning any fault to the decedent?

   a. May heirs in a wrongful-death case avoid apportionment of negligence to the decedent, required pursuant NRS 41.141's instruction to apportion the negligence of "plaintiff's decedent," merely because there is no pending claim on behalf of the decedent's estate?

   b. Did the district court err in considering the decedent incapable of comparative negligence because of a mental disability?

2. Does Nevada follow the Restatement approach that a common carrier's duty to render emergency aid is only one of "reasonable care"?

   a. Did the district court commit prejudicial error in instructing the jury that defendants as common carriers owed the decedent "the highest degree of care consistent with the mode of conveyance used," when the circumstances in this case do not implicate any duty related to transportation?

   b. Did the district court commit prejudicial error in instructing the jury that a common carrier owes "additional care" to passengers whose mental disability increases the "hazards of travel," when the facts of this case do not implicate that duty?

3. As an arm of the state employed to discharge the state's duties under the Americans with Disabilities Act and its regulations, is First Transit entitled to the damages cap under NRS 41.035?

4. Was the jury's excessive $15 million verdict the result of passion, prejudice, and disregard for the court's instructions, requiring a new trial?

5. Did the district court err in awarding prejudgment interest on a verdict that may include future damages?

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues? Yes

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

1. May heirs in a wrongful-death case avoid apportionment of negligence to the decedent, required pursuant NRS 41.141's instruction to apportion the negligence of "plaintiff's decedent," merely because there is no pending claim on behalf of the decedent's estate?

2. Does Nevada follow the Restatement approach that a common carrier's duty to render emergency aid is only one of "reasonable care"?

3. Are paratransit companies employed by the state to discharge the state's duties under the American's with Disabilities Act entitled to the cap on damages under NRS 41.035?

13. Trial. If this action proceeded to trial, how many days did the trial last?

9 days.

Was it a bench or jury trial? Jury

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from 3/8/16 (Exhibit A)

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served 3/9/16 (Exhibit A)

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☐ NRCP 52(b) Date of filing N/A

☒ NRCP 59 Date of filing 3/23/16 (Exhibit B); 3/23/16 (Exhibit C)

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. 578, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion

The post-judgment motions remain pending.

The appeal is premature. Pursuant to NRAP 4(a)(6), however, the notice of appeal from the judgment (Exhibit D) will be deemed timely upon entry of the district court's order resolving the last of the tolling motions.

(c) Date written notice of entry of order resolving tolling motion was served

The motions remain pending.

Was service by: N/A

☐ Delivery

☐ Mail/Electronic/Fax

18. Date notice of appeal filed 4/8/16 (Exhibit D)

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

The time limit for filing the notice of appeal from the "Judgment Upon the Jury Verdict" is governed by NRAP 3A(b)(1).

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a) ☒ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This is an appeal from a final judgment pursuant to NRAP 3A(b)(1).

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

First Transit, Inc.
Jay Farrales
Jack Chernikoff
Elaine Chernikoff

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiffs alleged negligence, *respondeat superior* and negligent hiring, retention and supervision (Exhibit E).

The "Judgment on Jury Verdict," entered March 8, 2016, resolves all claims (Exhibit A).

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following: N/A

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)): N/A

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

First Transit, Inc. and Jay Farrales	Joel D. Henriod
Name of appellants	Name of counsel of record
May 19, 2016	*/s/ Joel D. Henriod*
Date	Signature of counsel of record
Clark County, Nevada	
State and county where signed	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this "Docketing Statement" was filed electronically with the Nevada Supreme Court on the 19th day of May, 2016. Electronic service of the foregoing "Docketing Statement" shall be made in accordance with the Master Service List as follows:

BENJAMIN P. CLOWARD
CLOWARD, HICKS & BRASIER, PLLC
4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89107

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

CHARLES H. ALLEN
CHARLES ALLEN LAW FIRM
950 East Paces Ferry Road
NE Suite 1625
Atlanta, Georgia 30326

ARA SHIRINIAN
10651 Capesthorne Way
Las Vegas, Nevada 89135

Dated this 19th day of May, 2016

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A TO DOCKETING STATEMENT

NEO
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
CLOWARD HICKS & BRASIER, PLLC
721 South 6th Street
Las Vegas, NV 89101
Telephone: (702) 628-9888
Facsimile: (702) 960-4118
Beloward@chbllawyers.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **NOTICE OF ENTRY OF ORDER**

YOU WILL PLEASE TAKE NOTICE that the attached **JUDGMENT UPON THE JURY VERDICT** was entered by this Court in the above-entitled matter on the 8th day of March, 2016.

DATED THIS 9th day of March, 2016.

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of **CLOWARD HICKS & BRASIER, PLLC** and that on the 9 day of March 2016, I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be served as follows:

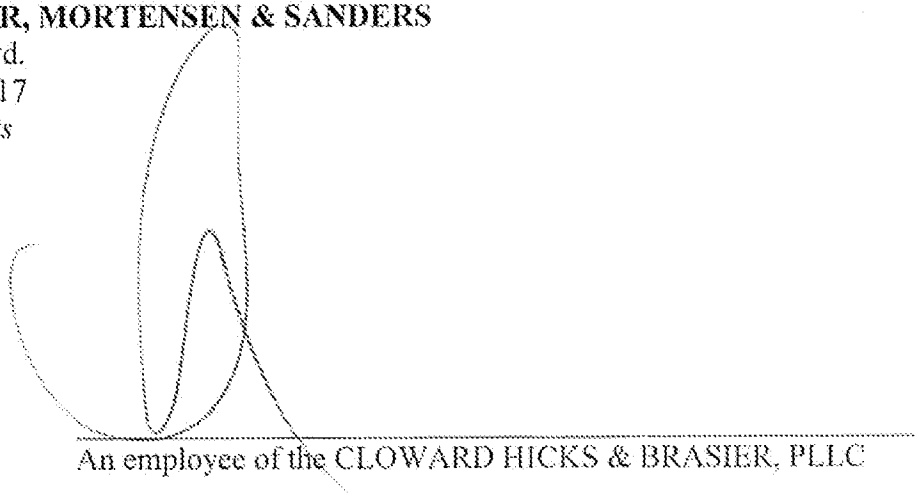
[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or

[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[X] pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

LEANN SANDERS, ESQ.
ALVERSON, TAYLOR, MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Attorneys for Defendants



An employee of the CLOWARD HICKS & BRASIER, PLLC

JGJV
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
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Telephone: (702) 628-9888
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Bcloward@chblawyers.com
Attorneys for Plaintiffs

CHARLES H. ALLEN, ESQ. (*Pro Hac Vice*)
Georgia Bar No. 009883
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Atlanta, GA 30308
Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **JUDGMENT UPON THE JURY VERDICT**

This action came on for trial before the court and the jury, the Honorable Stefany A. Miley, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.[1]

[1] **Exhibit 1**: Jury Verdict

☐ Non-Jury Disposed After Trial Start ☐ Non-Jury Judgment Reached ☐ Transferred before Trial	☐ Jury Disposed After Trial Start ☒ Jury Verdict Reached ☐ Other - _____

IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

Pain and suffering, by Harvey Chernikoff:	$7,500,000.00
Greif, sorrow, loss of companionship, society, Comfort, and loss of relationship suffered by Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF:	+ $7,500,000.00
Total Damages	**$15,000,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum plus 2%[2] from the date of service of the Summons and Complaint[3] on June 7, 2013, through the date of the verdict on February 29, 2016, as follows:

PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00

06/07/13 through 02/29/16 = **$2,149,631.70**
[(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]
[Interest is approximately $2,156.10 per day]

NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:

JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 ($17,149,631.70), which shall bear interest at the current rate of 5.25% per day, until satisfied.

DATED THIS 8 day of March, 2016.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Respectfully submitted:
CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.

[2] **Exhibit 2**: Prime Rate as of January 1, 2013

[3] **Exhibit 3**: Affidavit of Service upon the Defendant

EXHIBIT "1"

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **VERDICT FORM**

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
FEB 29 2016 5:21 pm
BY: Katherine Streuber
KATHERINE STREUBER, DEPUTY

VERDICT FORM

1. Do you find from a preponderance of the evidence that Defendant Jay Farrales was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ✓ No ____

2. Do you find from a preponderance of the evidence that Defendant First Transit, Inc. was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ✓ No ____

If you have answered "No" to questions #1 and #2 above, stop here, answer no further questions, and have the foreperson sign and date this form.

3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ____ No ✓

4. Do you find from a preponderance of the evidence that Plaintiff Elaine Chernikoff was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ____ No ✓

5. Using one hundred percent (100%) as the total combined negligence which acted as a proximate cause of the injuries complained of by Plaintiffs Jack Chernikoff and Elaine Chernikoff, what percentage of the total combined negligence do you find from the evidence is attributable to:

Jay Farrales	0 %
First Transit, Inc.	100 %
Jack Chernikoff	0 %
Elaine Chernikoff	0 %
Totaling	100%

7. Without regard to the above answers, we find that the total amount of the Plaintiffs' damages are divided as follows:

Pain and suffering by HARVEY CHERNIKOFF	$ 7.5 MILLION
Grief, sorrow, loss of companionship, Society, comfort, and loss of relationship suffered by Plaintiffs JACK CHERNIKOFF and ELAINE CHERNIKOFF:	$ 7.5 MILLION
TOTAL	$ 15,000,000

Dated this 29 day of FEBRUARY, 2016.

Fredy A. Acuña
FOREPERSON

EXHIBIT "2"

PRIME INTEREST RATE

NRS 99.040(1) requires:
*"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . . "**
Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%		
January 1, 2014	3.25%	July 1, 2014	3.25%
January 1, 2013	3.25%	July 1, 2013	3.25%
January 1, 2012	3.25%	July 1, 2012	3.25%
January 1, 2011	3.25%	July 1, 2011	3.25%
January 1, 2010	3.25%	July 1, 2010	3.25%
January 1, 2009	3.25%	July 1, 2009	3.25%
January 1, 2008	7.25%	July 1, 2008	5.00%
January 1, 2007	8.25%	July 1, 2007	8.25%
January 1, 2006	7.25%	July 1, 2006	8.25%
January 1, 2005	5.25%	July 1, 2005	6.25%
January 1, 2004	4.00%	July 1, 2004	4.25%
January 1, 2003	4.25%	July 1, 2003	4.00%
January 1, 2002	4.75%	July 1, 2002	4.75%
January 1, 2001	9.50%	July 1, 2001	6.75%
January 1, 2000	8.25%	July 1, 2000	9.50%
January 1, 1999	7.75%	July 1, 1999	7.75%
January 1, 1998	8.50%	July 1, 1998	8.50%
January 1, 1997	8.25%	July 1, 1997	8.50%
January 1, 1996	8.50%	July 1, 1996	8.25%
January 1, 1995	8.50%	July 1, 1995	9.00%
January 1, 1994	6.00%	July 1, 1994	7.25%
January 1, 1993	6.00%	July 1, 1993	6.00%
January 1, 1992	6.50%	July 1, 1992	6.50%
January 1, 1991	10.00%	July 1, 1991	8.50%
January 1, 1990	10.50%	July 1, 1990	10.00%
January 1, 1989	10.50%	July 1, 1989	11.00%
January 1, 1988	8.75%	July 1, 1988	9.00%
January 1, 1987	Not Available	July 1, 1987	8.25%

*** Attorney General Opinion No. 98-20:**

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as

EXHIBIT "3"

AFFT
Richard Harris Law Firm
Benjamin P. Cloward, Esq.
801 S. 4th St.
Las Vegas , NV 89101
State Bar No.: 11087
Attorney(s) for: Plaintiff(s)

Electronically Filed
06/11/2013 09:54:24 AM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY NEVADA

Case No.: A-13-682726-C
Dept. No.: XXIII
Date:
Time:

The Estate of Harvey Chernikoff, Deceased; by Jack Chernikocc as personal representative, individually and as heir; et al.
vs *Plaintiff(s)*

First Transit, Inc. Laidlaw Transit Services, Inc dba First Transit , et al.
Defendant(s)

AFFIDAVIT OF SERVICE

I, Kelly Dannan, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the Summons; Complaint; Civil Cover Sheet; Initial Appearance Fee Disclosure on the 7th day of June, 2013 and served the same on the 7th day of June 2013 at 2:35pm by serving the Defendant(s), First Transit, Inc. Laidlaw Transit Services, Inc dba First Transit by personally delivering and leaving a copy at Registered Agent: The Corporation Trust Company of Nevada, 311 South Division Street, Carson City, Nevada 89703 with Alena Duggan, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

ALEXANDRA SNIPES
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 11-4853-2 - Expires April 26, 2015

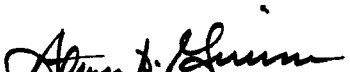
State of Nevada, County of Washoe
SUBSCRIBED AND SWORN to before me on this
11th day of June 2013

Notary Public Alexandra Snipes

Affiant Kelly Dannan #: R-057577
Legal Process Service License # 604
WorkOrderNo 1304659

Legal Process Service 105 Mary Street Reno, Nevada 89509

EXHIBIT B TO DOCKETING STATEMENT



MNTR

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Attorneys for Defendants
First Transit, Inc. and Jay Farrales

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, *vs.* FIRST TRANSIT, INC.; JAY FARRALES; DOES 1-10; and ROES 1-10, inclusive, Defendants.	Case No. A-13-682726-C Dept. No. XXIII

MOTION FOR NEW TRIAL

(and Motion for Leave to Supplement)

Defendants First Transit, Inc. and Jay Farrales move for a new trial or, in the alternative, for remittitur, and to alter or amend the judgment. NRCP 59(a); NRCP 59(e).

Transcripts of the trial are not yet complete. Defendants request leave to supplement the attached points and authorities when the complete record becomes available.

NOTICE OF MOTION

Please take notice that the undersigned will bring the above and foregoing "MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR REMITTITUR AND MOTION TO ALTER OR AMEND" on for hearing before the Court on the 31 day of May, 2016 at 9:30a.m. in Department XXIII of the above-entitled court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 59(a) provides:

> **(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which the party could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or, (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

A new trial is necessary here due to errors of law that materially affected the outcome and because the jury's verdict is excessive, demonstrating passion, prejudice, lack of serious analysis, disregard for this Court's instructions and the influence of misconduct and improper and misleading argument. The verdict is irredeemably tainted and unreliable.

I.

OMITTING THE DECEDENT FROM THE APPORTIONMENT OF FAULT ON THE VERDICT FORM REQUIRES A NEW TRIAL

The Court erred by excluding Harvey Chernikoff from the apportionment of fault on the verdict form. The comparative negligence of the decedent is relevant in a wrongful death case, regardless of whether the decedent himself is technically a party. There is no exception for defendants with mental disabilities. And there was certainly a bona fide issue of comparative negligence in this case.

A. The Jury Must Apportion the Comparative Negligence of "the Plaintiff's Decedent" in a Wrongful Death Case

The Court erred by excluding Harvey comparative negligence from the jury's apportionment of fault. The error of law is manifest in both the verdict form and the jury instruction regarding comparative negligence (Instruction No. 29), which did not even mention the decedent's negligence. This prejudicial error requires a new trial because a reasonable jury could have found that Harvey was more than 50% at fault for his own death.

The language Nevada Revised Statute § 41.141(1) is clear and unambiguous:

> *In any action to recover damages for* ***death*** or injury to persons or for injury to property in which comparative negligence is asserted as a defense, *the comparative negligence of the plaintiff or his* ***decedent*** does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

NRS 41.141(1) (emphasis added). The statute bars recovery to an heir where the comparative negligence of the decedent is greater than the defendant's. NRS 41.141(2)(a).[1] In this sense—interpreting the statute to be in harmony

[1] Prior to the enactment of this statute, any negligence on the part of a plaintiff would bar recovery. *Café Moda, LLC v. Palma*, 128 Nev. __, 272 P.3d 137

with itself—the decedent is treated as "a party" for purposes of fault allocation under NRS 41.141(2)(b), as it is necessarily required to determine whether the "comparative negligence …of the plaintiff's decedent is greater than the negligence of the defendant." NRS 41.141(2)(a).

Under NRS 41.141, "a plaintiff may not recover if the comparative negligence of the plaintiff's decedent is greater than the negligence of the defendant." *Rich v. Taser Int'l, Inc.*, 2012 WL 1080281, at *14 (D. Nev. Mar. 30, 2012) (interpreting NRS 41.141); *Moyer v. United States*, 593 F. Supp. 145, 147 (D. Nev. 1984) ("Since Plaintiffs' decedent was 50% contributorily negligent, each of said awards must be diminished by 50%.").[2]

While this court relied on *Banks ex. rel. Banks v. Sunrise Hospital* to exclude Harvey from the special verdict on apportionment, this court's interpretation conflicts with the controlling statute. *Banks* is not even on point, as the comparative fault of a plaintiff's decedent was not an issue in that case. The "nonparties" in that case were settling co-defendants. 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). There is not even dicta in the *Banks* opinion that suggests that the Supreme Court was rejecting a plain reading of NRS

(2012); *Anderson v. Baltrusaitis*, 113 Nev. 963, 967 n. 3, 944 P.2d 797 (1997). This statute now requires that the fact-finder weigh the negligence of the two parties and if the plaintiff was more znegligent than the defendant, recovery is barred.

[2] While Nevada Supreme Court has never had cause to articulate the uncontroversial proposition that a decedent's comparative negligence is considered in a wrongful death case, its opinions regarding exceptions to the rule reinforce the existence of the rule. *See Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984) (decedent's comparative negligence irrelevant only because claim arose in product defect, an exception to NRS 41.141); *Davies v. Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979) (Decedent's comparative negligence would have required apportionment but for defendant's willful and wanton misconduct); *Fennell v. Miller*, 94 Nev. 528, 531, 583 P.2d 455, 457 (1978) (decedent's contributory negligence precluded any recovery by the heirs in action filed before enactment of NRS 41.141, which would have allowed for apportionment between decedent and defendants).

41.141(1), which requires comparative negligence "of the plaintiff's decedent" be weighed against the fault of the defendant.

This statutory result, including the plaintiff's decedent in the assessment of comparative fault, makes more sense. Otherwise, for example, a drunk and reckless driver could be 99% responsible for his own death in an accident, but under plaintiff's interpretation, the driver's heirs would be entitled to a full recovery from a defendant who was comparatively only 1% responsible. The defendant should bear only his equitable share compared to the fault of the decedent. *Moyer v. United States*, *supra*.

B. Harvey is Held to the Standard of "Ordinary and Reasonable Care" Regardless of his Mental Impairment

It may be emotionally tempting to assume that Harvey's mental disability rendered him incapable of comparative negligence, but that is not the law. "Unless the actor is a child, the actor's mental or emotional disability is not considered in determining whether conduct is negligent." RESTATEMENT (THIRD) OF TORTS § 9 (1999); *see also* RESTATEMENT (SECOND) OF TORTS § 283B (1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."); RESTATEMENT (THIRD) OF TORTS: § 11 ("An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child."). Indeed, even children may be comparatively negligent, as recognized in the so-called "rules of sevens." *Galloway v. McDonalds Restaurants of Nevada, Inc.*, 102 Nev. 534, 537-38, 728 P.2d 826,828-29 (1986). In Nevada, it is for the jury to decide whether "the particular child has the capacity to exercise that degree of care expected of children of the same age." *Id.*

The public policy behind this doctrine is understandable. If mentally disabled people are unable to function in the world without exercising ordinary

care, they should be assisted. Here, First Transit expressly stated that it would not act as a medical agent. And its obligations to provide special assistance to disabled persons pursuant the ADA regard only boarding, safely securing the passengers in their seats, and helping them disembark. *See* 49 C.F.R. § 37.121 (holding that each public entity operating a fixed route system shall provide paratransit . . to individuals with disabilities that is comparable to the level of service provided to individuals without disabilities.") Indeed, it is because of First Transit's limited capabilities and responsibilities that it allows PCA's to accompany disabled passengers.

C. Evidence of Harvey's Comparative Negligence Is Considerable

Even assuming that Harvey's comparative negligence had to be "a bona fide issue" to necessitate apportionment, *Stapp v. Hilton Hotels Corp.*, 108 Nev. 209, 211 n.3, 826 P.2d 954, 956 n.3 (1992), it was an issue that should have been presented to the jury.[3]

Harvey was disobeying an express rule not to eat on the bus, which was posted prominently both on the bus itself and included in the rider's guide. Moreover, the inherent hazard of choking after failing to adequately chew food is obvious. Based on the size of the bolus in Harvey's throat, Harvey must have been gobbling the sandwich. And Harvey did so rapidly and while hunched over in his seat, based on video image from an on-board camera. He may have done this to evade the driver's vision because he was aware of the rule prohibiting food on the bus. Regardless of his motive, however, his crouched position hindered any chance the driver may have had to see him eating and remind him that it was disallowed—assuming the driver even had a duty to do so.

[3] In the range of mental and physical disability, Harvey's impairment was not extreme. He had sufficient capacity to work, to merit a California driver's license and drive under his parents supervision, and to live away from his parents semi-independently, etc.

It is clear that defendant cannot be 100% responsible for Harvey's death. Even though plaintiff's claim is based on the alleged breach of a claimed duty (discussed later) to clear Harvey's throat and resuscitate him, this does not account for complete causation of the death. First, as mentioned above, defendant did not cause the boils to lodge in the throat. Second, even if measures had been undertaken, there remains the factual issue whether they would have been successful. At most, defendant's fault can correspond only to the "lost chance" of saving Harvey from the preexisting, life-threatening peril. In medical cases, for example, where a defendant is charged with failing to discovery and prevent a condition he did not create, the plaintiff must still persuade the jury of the percentage of the decedent's lost opportunity to cure the condition. The recovery is not for the death itself, but rather the "decreased chance of survival" caused by the negligence. *Perez v. Las Vegas Med. Ctr.,* 107 Nev. 1, __, 805 P.2d 589, 592 (1991); *see also* 4 JAMES LOCKHART, CAUSES OF ACTION 2D § 36 (2008) ("[t]he injured party should not be entitled to recover the full amount of damages normally payable for loss of life or limb, but only a proportion of such damages calculated by multiplying the value of life or limb by the percentage of chance of survival or recovery proven to have been lost.").

This is a "lost chance" case, and the jury improperly allocated 100% of the causation to defendant. Because Harvey's clogged airway was the cause of his death, the jury should have allocated to defendant responsibility only after and above that preexisting condition. Defendant's liability would be limited to any small likelihood that Farrales would have succeeded in clearing Harvey's bolus had he attempted to do so and the mere possibility that Harvey could have survived without major brain damage.

This is not a harsh result. In any case, the jury must determine the result. It was error for the district court to exclude the factual issue from the jury. Notions of "last clear chance" and other concepts like "assumption of the

risk" have simply been assumed into comparative fault. Harvey bore a role in the causation in this case, and the jury should have determined these issues.

Because defendants were entitled to have Harvey included in the apportionment of fault, and his fault was certainly a bona fide issue in the case, new trial is necessary.

II.

IT WAS ERROR TO INSTRUCT THE JURY REGARDING HEIGHTENED DUTIES THAT WERE IRRELEVANT TO THE INJURY

Although First Transit is a common carrier and Harvey was disabled, the heightened duties of care related to those statuses were not relevant to the type of injury that occurred. The instructions, therefore, were misleading.

A. Courts Must Define Duty in Light of the Foreseeability of the Harm –"Negligence in the Air" is Not Enough

Courts, not juries, are responsible for defining the legal standard of reasonable conduct in a negligence case, and they must do so "*in the light of the apparent risk.*" *Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997) (emphasis in original). Foreseeability of harm is a predicate to establishing the duty element of a negligence claim.[4] *Ashwood v. Clark County*, 113 Nev. 80, 85, 930 P.2d 740, 743 (1997). In other words, mere "negligence in the air" cannot serve as a standard of care in Nevada.

B. Harvey's Death Did Not Relate to the Type of Harm that a Common Carrier Has a Heightened Duty to Prevent

In light of the nature of Harvey's injury, choking on a sandwich, it was error to instruct the jury that First Tranist and Farrales owed Harvey "the highest degree of care." *See* Instruction No. 32 ("A common carrier has a duty

[4] A cause of action for negligence consists of five elements: (1) duty; (2) breach; (3) actual causation; (4) proximate causation; and (5) damages. *Perez,* 107 Nev. at __, 805 P.2d at 590-91 (1991).

to its passangers to use the highest degree of care consistent with the mode of conveyance.")

1. Heightened duty of care applies to the manner of driving, the provision of safe embarking and debarking, and protection from fellow passengers

A common carrier's heightened duty applies only to the types of actions and circumstances that are inherent to the transportation itself. Thus, the duty applies to the carrier's obligation to carry the passenger safely and properly, to provide for safe embarking and debarking, and protection from the torts and misconduct of third persons, including other passengers. 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:57 (2d ed.) That makes sense, because it is only in those activities and circumstances that the plaintiff has surrendered a degree of autonomy and control and has reason to be reliant on the superior position of knowledge and control of the carrier.

2. No heightened duty to prevent a passenger from exposing himself to a commonplace risk

Undersigned counsel finds no authority that a carrier is under a heightened duty of care to prevent a passenger from exposing himself to a known, common risk. Here, the possibility of *choking on insufficiently chewed food* does not fall within the types of danger that arise because of the mode of transportation. Thus, the carrier has no "highest duty of care" to protect the passenger from himself merely because he is in the carrier's vehicle.

3. The duty of a carrier to render emergency aid involves only a common reasonableness standard

While a common carrier has a "special relationship" with its passenger, which raises an affirmative duty to render aid when the passenger becomes ill or injured, that does not mean that the degree of care required is special. It only means that there *is* a duty where there otherwise would be none:

> The term 'special relationship' has no independent significance. It merely signifies that courts recognize an

> affirmative duty arising out of the relationship where otherwise no duty would exist at all.

RESTATEMENT (THIRD) OF TORTS § 40 cmt. h. The extent of a common carrier's the duty to render aid is only a "duty of reasonable care." *Id.* ("An actor in a special relationship with another," including "a common carrier with its passengers," owes "a duty of reasonable care"); *Abraham v. Port Auth. of New York & New Jersey*, 29 A.D.3d 345, 346 (N.Y. 2006) ("A common carrier is subject to the same duty of care as any other potential tortfeasor, *i.e.*, reasonable care under the circumstances, and is not subject to a higher standard because of this status"); 13 C.J.S. *Carriers* § 520 ("While a carrier must give aid to an individual who becomes ill, however, the carrier need only exercise reasonable care under the circumstances, regardless of whether the carrier is a common carrier.")

"In Nevada, as under the common law, strangers are generally under no duty to aid those in peril." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). There is no general duty to be a "Good Samaritan." Put simply, the "special relationship" does not create a heightened duty, but rather only a duty to render reasonable care where there otherwise would be none at all.

4. Our Supreme Court held that the "duty of reasonable care" in "a special relationship" does not include an obligation to administer the Heimlich maneuver

The case of *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), is particularly instructive, which involved the duty to render aid within the analogous "special relationship" of innkeeper and patron. In *Lee*, the Nevada Supreme Court found that the relationship between a business proprietor and its patrons justifies an exception to the general no-duty rule, but the exception is limited to providing basic first aid and summoning expert medical assistance to a patron in need. *Id.* at 298–99, 22 P.3d at 213–14. Thus, in *Lee*, the Supreme Court affirmed the district court's grant of summary judgment in

favor of the Golden Nugget in a case in which an inebriated restaurant ***patron choked on food and died***. 117 Nev. at 299, 22 P.3d at 214. In *Lee*, as here, the resort attended to its patron and immediately summoned an ambulance; it did not perform the Heimlich maneuver to clear the decedent's airway, however, an omission his widow alleged amounted to negligence. *Id.* at 293–94, 22 P.3d at 210–11. While recognizing that " 'reasonableness' is usually an issue for the jury," the Supreme Court held that, "in some clear cases, the nature and extent of the defendant's duty is properly decided by the court," *id.* at 296, 22 P.3d at 212, and that "GNLV's employees acted reasonably as a matter of law by rendering medical assistance to [the decedent] and summoning professional medical aid within a reasonable time." *Id.* at 299, 22 P.3d at 214 (emphasis added). In so holding, the *Lee* court rejected the argument that Golden Nugget's duty required it to do more than provide basic aid and summon professional medical help: "In this case, GNLVs ***employees were under no legal duty to administer the Heimlich maneuver*** to [the decedent]." *Id.*; *see also Campbell v. Eitak, Inc.*, 2006 PA Super 26, 893 A.2d 749 (2006) (Restaurant met its legal duty to choking patron when it promptly summoned medical assistance for patron); *Drew v. LeJay's Sportsmen's Cafe, Inc.*, 806 P.2d 301 (Wyo. 1991) (same).

Thus, in light the nature of the alleged negligence and injury at issue, it was error to instruct the jury that First Transit and Farrales owed Harvey "the highest degree of care." That general rule did not apply to particular circumstances of the alleged tort.

C. Harvey's Impairment Did Not Warrant the Jury Instruction Regarding Additional Care to Disabled Persons

Similarly, it was misleading, and therefore legal error, to instruct the jury on the sweeping principle that:

> When a carrier is aware that a passenger is mentally disabled so that hazards of travel are increased as to him, it is the duty of the carrier to provide that additional care which the circumstances necessarily require.

Instruction No. 34. "Any greater duty of care to a handicapped passenger . . . may only be imposed when the carrier knows or reasonably should know of the particular handicap." *Washington Metro. Area Transit Auth. v. Reading*, 109 Md. App. 89, 109-11, 674 A.2d 44, 53-54 (1996).

The instruction did not apply to the facts in this case. First, the danger of choking insufficiently chewed food is universal, independent of the "hazards of travel." Second, even assuming that Harvey's mental disability impaired his ability to eat normally, there is no evidence that Farrales knew of *that* weakness. In other words, the type of harm in this case (choking on a sandwich) does not derive from a hazard of travel that poses a unique danger to a typical mentally disabled person, for which the transportation company accepted a special responsibility.

The evidence, moreover, established that First Transit and its drivers are not social workers or care givers. The special responsibilities imposed under the "Americans With Disabilities Act" are limited to the boarding, securing of assistive devices, and disembarking of paratransit busses.[5] The company

[5] *See* 49 C.F.R. § 37.123(e) ("(1) Any individual with a disability who is unable, as the result of a physical or mental impairment (including a vision impairment), and without the assistance of another individual (except the operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable individuals with disabilities.") This wording in the regulation indicates the precise accommodations provided by the paratransit are limited to the boarding, securing of assistive devices, and disembarking of paratransit busses. As a complement to the fixed route system, the only additional accommodations provided are in the boarding and alighting of the bus. There is no promise of additional supervision, first aid training or assistance with medical events. *See id.*

expressly informs in its guidelines that driver not responsible for personal care. (Exhibit A, at 9.) While competent driving requires scanning mirrors, this does not create a duty on the driver to monitor for medical events. The company made clear that personal attendants are welcome to attend to a passenger's *en route* personal needs and make accommodation for them. Drivers must watch road.

D. Plaintiffs' Counsel Abused the Instructions to Argue that they Combined to Create a Super-Heightened "Derek Jeter" Duty

The instructions cannot be deemed harmless error. Plaintiffs' counsel repeatedly relied on the concept of heightened duty during his closing argument. Plaintiffs' counsel argued that the common carrier duty of care was heightened, the equivalent of a standard major league baseball player – better than the ordinary person, but not necessarily the best of the best. Instead of this standard, though, counsel argued that common carriers had a super-heightened duty to the mentally disabled, more like Derek Jeter – the best of the best. He encouraged the jury to apply this super-heightened standard, arguing that First Transit, Inc., as a common carrier, had a super heightened duty to monitor disabled passengers while operating the bus.

The result was an utterly false impression to the jury about the applicable standard of care. "An erroneous instruction as to the duty or standard of care owing by one party to the other is substantial error requiring another trial." *Otterbeck v. Lamb*, 85 Nev. 456, 463, 456 P.2d 855, 860 (1969)

1. Company Rules Did Not Create Special Legal Duties

The duty of "reasonable care" also is not altered by First Tansit's rules or instructions to its drivers. For instance, First Transit's rule against eating—which is merely an extension of RTC's rule applicable to all RTC vehicles alike—did not create a duty, much less a heightened one. That rule in all RTC vehicles is implemented for cleanliness. Choking is not a particular

"consequence against which the regulation was intended to protect." *O'Leary v. Am. Airlines*, 475 N.Y.S.2d 285, 288 (N.Y. App. Div. 1984). Nor can the inclusion of CPR instructions within employee manuals give rise to a heightened duty, "since internal rules and manuals, to the extent they impose a higher standard of care than is imposed by law are irrelevant to establish a failure to exercise reasonable care." *Abraham v. Port Auth. of New York & New Jersey*, 815 N.Y.S.2d 38, 40-41 (N.Y. App. Div. 2006); Cooper v. Eagle River Mem. Hosp., Inc., 270 F.3d 456, 462 (7th Cir. 2001) ("[t]he internal procedures of a private organization do not set the standard of care applicable in negligence cases.") "As a policy matter, it makes no sense to discourage the adoption of higher standards than the law requires by treating them as predicates for liability." *De Kwiatowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1311 (2nd Cir. 2002). Thus, assuming arguendo that the rule against eating on the bus and the inclusion of resuscitation in the company's manuals are even admissible to inform the meaning of "reasonable care" under the circumstances, they do not establish any duties beyond reasonable care. (Exhibit A.)

A new trial is necessary because the jury was so misguided on the relevant standard of care. It is impossible to say that it did not "substantially affect the [defendants'] rights" to a fair trial. *Cook v. Sunrise Hosp. & Med. Ctr.*, 124 Nev. 997, 194 P.3d 1214, 1220 (2008). In light of the above, First Transit has demonstrated that "but for the error, a different result might have been reached." *Carver v. El-Sabawi*, 121 Nev. 11, 14-15, 109 P.3d 1283, 1285 (2005).

III.

THE $15 MILLION VERDICT IS EXCESSIVE AND DEMONSTRATES PASSION AND PREJUDICE

The $15 million verdict constitutes "excessive damages appearing to have been given under the influence of passion and prejudice." NRCP 59(a)(6). Not

only is the amount unjustifiable, but the jury's apportionment of fault and even the short time spent deliberating also exhibit the jury's passion, prejudice and lack of seriousness. Much of that passion is explained, moreover by the improper arguments of plaintiff's counsel.

Under NRCP 59(a)(6), a district court may grant a new trial when it appears that "excessive damages have been given under the influence of passion or prejudice." NRCP 59(a)(6); *see also Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999) (citing *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984)). Although "excessiveness" and "passion and prejudice" are elusive standards,[6] if the amount of the award is so great that it "shocks the judicial conscience," a new trial should be ordered.[7] Among the factors this Court has considered in determining the excessiveness of an award are: (1) the reasonableness of the award in light of the evidence,[8] (2) the size of the award relative to other awards in comparable cases,[9] (3) the relationship of the special damages to the general damages,[10] and (4) inappropriate conduct at trial designed to arouse passion or prejudice in the jury favorable to the plaintiffs.[11] In determining whether an award "shocks the judicial conscience," no single factor is dispositive. The

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[6] *Harris v. Zee,* 87 Nev. 309, 486 P.2d 490 (1971).

[7] *See Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996); *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192.

[8] *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196–97, 866 P.2d 274, 284–85 (1993); *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983).

[9] *Nevada Indep. Broad. Corp.*, 99 Nev. at 419, 664 P.2d at 347; *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 712-13, 542 P.2d 198, 208 (1975).

[10] *Drummond*, 91 Nev. at 713, 542 P.2d at 208.

[11] NRCP 59(a)(2); *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000).

amount of the award itself can also demonstrate passion and prejudice. *See Guaranty Nat'l*, 112 Nev. at 207, 912 P.2d at 272.

A. Awarding $7.5 Million for 45 Seconds of Conscious Pain and Suffering is Outrageous

The jury awarded $7.5 million for the pain and suffering experienced by Harvey. Even construed in a light most favorable to plaintiffs, the evidence shows that Harvey would not have been conscious for more the 45 seconds after he began to choke. A $7.5 million award for such a short moment of time proves that the jury was not thinking coolly and rationally.

Damages for pain and suffering are recoverable only where the victim was consciously aware of her pain and suffering. *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 66 (2004) (nurse's testimony that victim responded to his environment presented sufficient evidence for the jury to consider "whether [the victim] was conscious of his pain and suffering"); *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991) (opining that "a Nevada court would follow the majority of other jurisdictions, and require pain and suffering to be consciously experienced").[12]

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[12] As the court in *Pitman* explained:

> The vast majority of jurisdictions require pain and suffering to be consciously experienced. *See, e.g., Luna v. Southern Pac. Transp. Co.,* 724 S.W.2d 383, 385 (Tex. 1987); *Harrell v. Empire Fire & Marine Ins. Co.,* 449 So.2d 1177 (La. Ct. App. 1984). This comports with the ordinary meanings of the terms "pain" and "suffering," which assume conscious awareness. Indeed, most of the cases that have held that hedonic damages are a part of pain and suffering have also explicitly required that they be consciously experienced. *See, e.g., McDougald,* 538 N.Y.S.2d at 375, 536 N.E.2d at 940 ("cognitive awareness is a prerequisite to recovery for loss of enjoyment of life"); *Willinger,* 393 A.2d at 1190 ("compensation for the loss of life's amenities is recoverable only if the victim survives the accident").

Pitman v. Thorndike, 762 F. Supp. 870, 872 (D. Nev. 1991). Chief Judge Reed also noted that the legislative history of NRS 41.085 made reference to "conscious pain and suffering." *Id.* (citing *Hearings on S. 99 before the Nevada*

While defendant does not dispute that the physical pain, panic, and fear involved in choking are horrible, awarding $7.5 million for 45 seconds of pain and suffering[13] is simply untethered from reality and justice. According to the video image from the bus, Harvey began to slump slowly into the aisle over the course of less than one minute. Plaintiffs' expert Dr. Stein agreed to the sequence of events that establish that time of consciousness would have been no more than 45 seconds—certainly less than three minutes.

If such a short period of time can justify any award at all, it would have to be in the hundreds, not millions. While courts do not apply a stop-watch approach to the length of conscious pain and suffering, there must be an appreciable time of consciousness in order to justify an award. The Ninth Circuit has held that 10 seconds of consciousness is insufficient to warrant any award. *See Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1996). Assuming one additional minute of pain and suffering would cross the legal threshold into a justifiable basis to award damages, it could only be nominal.[14]

State Senate Judiciary Comm. (Jan. 31, 1979) (Attachment C, Letter of Peter Neumann)).

[13] In fact, it is not clear that Harvey experience any pain and suffering associated with choking. The video images do not reveal any significant struggle involving the standard signs of choking leading up to Harvey's death. Harvey does not cough, attempt to cough, try to get out of his seat, clutch his throat or panic in any way. Plaintiffs' expert Dr. Stein admitted that these signs of choking did not occur.

[14] No award of pain and suffering is appropriate at all unless the jury found that Farrales breached a duty of care before Harvey passed out. Plaintiff's presented two theories of duty, breach and causation. The first involved Farrales' "failure" to stop Harvey from eating or to notice any distress before he passed out. The second theory of liability criticized Farrales for not doing enough to rescue Harvey after he lost consciousness. Legally, the award of conscious pain and suffering could only be justified by the first theory.

B. The Award of $7.5 Million to the Parents is Also Excessive

An award of $7.5 million to elderly heirs of an adult-child decedent, who lived apart from them, and who provided them no financial support, is unprecedented. It is also unconscionable.

The award has no connection to the factors set forth in law for evaluating this element of damages, on which this Court instructed the jury—*e.g.*, the ages of the deceased and heirs, respective life expectancies, the probability of financial support, etc. (See Jury Instruction No. 22.) First, the family's remaining time together would not have been long anyway. Jack and Elaine Chernikoff are both in their late seventies. Harvey was in his fifties and had numerous co-morbidities, such as a history of cancer, hypertension, hypercholesterolemia, diabetes, and history of transient ischemic attack.

Second, while defendants do not doubt that plaintiffs' had kind affection for Harvey, and vice-a-versa, they did not spend a lot of time together. Harvey did not live with his parents, and had not lived with them permanently since the age of 18. He lived in California until 2010, while his parents lived in Nevada. The parents travelled ever summer without him.

Third, Harvey did not provide financial support. (That is not an aspersion on Harvey. But it must be pointed out because lost financial support is a major reason for this element of damages.)

The award is inconsistent with the evidence of the degree of grief and sorrow. There has been no psychiatric treatment, no counseling, or resulting illness.

C. Plaintiff Improperly Argued for Recovery Based on the Loss of Harvey's Life

In this case, plaintiff improperly argued for damages that would reflect the value of Harvey's life and basing recovery on Harvey's loss of his own life. The Nevada wrongful death statute, NRS 41.085, allows only certain particular elements of damage, such as conscious pain and suffering of the decedent or the

heir's grief and sorry. It was improper for plaintiffs to argue that the value of Harvey's life could be recovered at all, and certainly not in those elements of recovery.

Recovery for wrongful death is determined by statute, and the Nevada wrongful death statute does not allow recovery of damages based on the principles argued by plaintiffs at trial.

Modern wrongful-death statutory schemes, like Nevada's, adopt the approach from England's Lord Campbell's Act. SPEISER, RECOVERY OF WRONGFUL DEATH § 1:11. Before that breakthrough, "personal actions die[d] with the person." *Id.*

As progeny of that act, wrongful death law allows recovery for two separate and distinct types of harm: (1) the decedent's claims for the *decedent's damages* incurred *up until the time of death* (along with special damages for actual costs incurred because of the death) and (2) the harm suffered by heirs for *their* individual losses. The loss of the decedent's life is not an element of either of those categories.

The Supreme Court of Pennsylvania articulated the rationale for excluding hedonic damages of the decedent in wrongful death cases:

> Unlike one who is permanently injured, one who dies as a result of injuries is not condemned to watch life's amenities pass by. Unless we are to equate loss of life's pleasures with the loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss. It follows that [hedonic damages] that may flow from the loss of life's pleasures should only be recovered for the period of time between the accident and the decedent's death.

Willinger, 393 A.2d at 1191.

Similarly, the decedent's theoretical loss of life's pleasures is not one of the harms which the heirs suffer. SPEISER, REOCOVERY OF WRONGFUL DEATH §

6:45. In *Brereton v. U.S.*, 973 F.Supp. 752, 754 (E.D. Mich. 1997), the court opined:

> The intrinsic value of the decedent's life is an unfit measure of the value of his relationship with the surviving plaintiffs; it is like comparing apples to oranges. To make that valuation the factfinder will need to consider the characteristics of the relationship, not the value society might place on the safety and health of a statistically average individual.

Id.; *cf. Kurncz*, 166 F.R.D. 386, 388 (W.D. Mich. 1996).

The great majority of courts that have confronted this issue also interpret their wrongful death statutes to disallow damages for the loss of life itself (either by limiting them to the period between injury and death, or else properly concluding that hedonic damages as a subset of pain and suffering necessarily requires conscious awareness).[15] In other words, "the overwhelming majority of decisions…have rebuffed efforts to expand wrongful death damages to include

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[15] *See, e.g.*, *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 931 (**Miss**. 2002) (gathering cases); *see also Sterner v. Wesley Coll., Inc.*, 747 F. Supp. 263, 273 (D. **Del**. 1990); *Brown v. Seebach*, 763 F. Supp. 574, 583 (S.D. **Fla**. 1991); *Kemp v. Pfizer, Inc.*, 947 F. Supp. 1139 (E.D. **Mich**. 1996); *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. **Nev**. 1991); *Livingston v. United States*, 817 F. Supp. 601 (E.D. **N.C.** 1993); *Garcia v. Superior Court*, 49 Cal. Rpt. 2d 580, 581 (**Cal**. Ct. App. 1996); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 680 (**Ind**. App. 1991); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (**Iowa** 1985) (evaluating "enjoyment of life" damages for wrongful death action); *Shirley v. Smith*, 933 P.2d 651, 691 (**Kan**. 1997) ("Loss of enjoyment of life is a component of pain and suffering but not a separate category of nonpecuniary damages"); *Phillips v. Eastern Me. Med. Ctr.*, 565 A.2d 306, 309 (**Me**. 1989); *Smallwood v. Bradford*, 720 A.2d 586 (**Md**. 1998); *Anderson/Couvillon v. Neb. Dep't of Soc. Servs.*, 538 N.W.2d 732, 739 (**Neb**. 1995); *Smith v. Whitaker*, 734 A.2d 243, 246 (**N.J.** 1999); *Nussbaum v. Gibstein*, 536 N.E.2d 618 (**N.Y.**1989);; *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 13 (**N.D.** 1988); *Willinger v. Mercy Catholic Med. Ctr.*, 393 A.2d 1188, 1190-91 (**Pa.** 1978); *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 943 (**Tenn**. 1994); *Bulala v. Boyd*, 389 S.E.2d 670, 677 (**Va**. 1990); *Tait v. Wahl*, 987, P.2d 127, 131 (**Wash**. Ct. App. 1999); *Prunty v. Schwantes*, 162 N.W.2d 34, 38 (**Wis**. 1968).

loss of life's pleasures." STUART M. SPEISER, RECOVERY OF WRONGFUL DEATH § 6:45 (4th ed. updated July 2014).

It was misconduct to encourage the jury to base their award on principles that are contrary to the law. *See Lioce v. Cohen*, 124 Nev. 1, 18, 174 P.3d 970, 981 (2008). This is plain error, as it is the explanation for the jury's excessive verdict.

D. Other Indicators of Passion and Prejudice

1. The Jury Awarded Identical Amounts for Dissimilar Claims

It is clear that the jury here did not bring real thought and individual analysis to these claims. Jurors are charged to thoughtfully, carefully and impartially consider the evidence before deciding upon a verdict. Nev. J.I. 11.01 ("Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.") As this court has recognized, "Since the purpose of a general damage award is to compensate the aggrieved party for damage actually sustained, an identical award to multiple plaintiffs who are dissimilarly situated is erroneous on its face." *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 450-51, 514 P.2d 1180, 1182 (1973). That claims are tried together does not make them worth the same amount.

Here, the jury awarded the same amount for Harvey's few minutes of alleged pain and suffering as they did for the parents remaining years. And there was no distinction between the parents. This identity of awards shows that the jury failed to sufficiently analyze the claims. It reflects a lack of real deliberation and the influence of passion and prejudice.

2. The Jury's Allocation of Fault Defies the Evidence, Reflecting Passion, Prejudice and a Lack of Seriousness

The indicia of passion and prejudice may be evident in the jury's allocation of fault, as well as in the amount of the award. *See, e.g., Scott v. County of Los Angeles*, 32 Cal. Rptr.2d 643, 655 (Ca. App. 1994). In this case, the allocation is nonsensical.

The jury checked boxes on the verdict form indicating that the jurors found Farrales to be negligent and that his negligence was (at least technically) a cause of Harvey's death. Nevertheless, the jury then found that Farrales' negligence did not amount to even one percentage point among the contributing causes.

On one hand, after having found that Farrales was negligent and that his negligence was a cause of the damages, the jury's allocation of 0% to him demonstrates either a complete misunderstanding of the instructions or blatant disregard for them.[16] Jurors are not at liberty to find a defendant at fault and a cause of an injury and then disregard that determination in order to direct all liability only to his "deep pocket" co-defendant.[17] *That exemplifies prejudice.*

On the other hand, if the jurors did understood the instructions and did follow them then they necessarily concluded that Farrales' negligence was *de minimis*—it amount to less than one percent of all causes of Harvey's death. And, if that is the case then the judgment against First Transit must be vacated

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[16]To be clear, First Transit maintains that neither Farrales nor First Transit were negligent. The issue is whether the verdict is rational assuming that either defendant was negligent.

[17] In evaluating the propriety of the jury's deliberation, it makes no difference how the legal doctrine of *respondeat superior* may come to bear outside of the jurors' purview. Indeed, if the jurors made their determination based on their intuition of the law, instead of the Court's instructions, that would constitute misconduct by the jury, which would also necessitate a new trial. NRCP 59(a)(2).

as a matter of law pursuant to NRCP 50(b). Judgment would have to be entered in favor of First Transit.

The gravamen of plaintiffs' allegation is that Farreles failed to prevent Harvey from eating his sandwich and then he came to Harvey's aid inadequately. Plaintiffs' causes of action against First Transit rest on (1) vicarious liability for the negligence acts of Farrales *to the extent* that Farrales' omissions contributed to the death, and (2) the theory that Farrales' omissions resulted from inadequate training. If the extent of Farrales' contribution to the injury is *de minimis*, First Transit's resulting vicarious liability would be *de minimis*. And if Farrales' negligence was not a bona fide issue in the case, it does not matter how he was trained.

3. The Allocation of Zero Fault to Jack and Elaine Chernikoff is Inconsistent with the Evidence

Weighing the relative fault of the persons listed on the verdict dispassionately would have resulted in some allocation to Jack and Elaine. They knew of Harvey's capabilities and weaknesses better than anyone. They knew he took the bus. They apparently never counseled with him about the importance of following the rules of the bus, what precautions he should take for his own safety, nor exercised their influence to ensure that a PCA accompany him. The jurors' choice to ignore those facts because they emotionally *wanted* to focus only on First Transit also demonstrates their passion, prejudice and dereliction of their duty to follow the law.

4. Plaintiffs' Trial Tactics Inflamed Passion and Prejudice

A new trial is appropriate in the case of misconduct of the prevailing party. NRCP 59(a)(2), (5). In addition, one of the factors that this court considers in assessing the excessiveness of a verdict is inappropriate conduct at trial designed to arouse passion or prejudice in the jury. NRCP 59(a)(2); *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *DeJesus v. Flick*, 116

Nev. 812, 7 P.3d 459 (2000). Plaintiffs' conduct in this case rose to the level that necessitates a new trial.

While counsel are permitted some latitude in drawing allusions, analogies, deductions and inferences from the evidence, such argumentative devices are improper where they are not supported by the evidence and where their employment is calculated to arouse prejudice or mislead the jury. *Durst v. Van Grady*, 455 N.E.2d 1319, 1323 (Ohio Ct. App. 1982).

5. Counsel Suggested that Jurors Had Committed During Voir Dire to Award $15 Million if they Believed Plaintiffs Satisfied their Prima Facie Case

The courtroom is no place for the sales techniques like "pre-closing." The practice of conditioning potential jurors to dollar amounts (or "anchoring") during *voir dire* is problem to begin with. But later implying to jurors during a closing argument that they had essentially committed to a multi-million dollar award during voir dire crosses the line into misconduct.

a. REFERRING TO THIS AS A MULTI-MILLION CASE IN VOIR DIRE

During voir dire, plaintiffs' counsel improperly made statements, asked questions of jurors, and otherwise referenced that this was a "$___ million" case. Plaintiff's counsel knew full well that, by doing so, he was implanting a numerical value in the minds of the jury to represent plaintiffs' damages before any evidence was ever admitted. This tactic is prejudicial and improper. *See generally* Adam D. Galinksky& Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 657-669 (2001) (hereinafter "*First Offers as Anchors*"); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (defining anchoring as ""the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant

number");[18]Chopra, *The Psychology of Asking a Jury for a Damage Award*, at 1 (as recognized by the plaintiffs' bar, "[a]nchoring can sway decisions even when the anchor provided is completely arbitrary"); *see also* John Malouff& Nicola Shutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989) (mock juries awarded damages largely based upon what plaintiff's counsel requested).

The resulting prejudice is evident in the jury's decision to actually award $15 million. This award is too coincidental considering the fact that plaintiff's counsel never admitted evidence to substantiate the $15 million figure, in particular.

b. TELLING THE JURY THAT IT WAS REQUIRED TO GIVE PLAINTIFF'S COUNSEL WHAT HE ASKED FOR AS LONG AS HE MADE HIS CASE

During closing arguments, plaintiff's counsel referred back to voir dire and argued to the jury that they were obligated to give plaintiffs $15 million by saying something to the effect of, "you told me that if I proved my case, you would give me what I asked for." By doing so, plaintiff's counsel encouraged the jury to disregard the merits of the claim and to issue a verdict based on their

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[18] *See also* W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (June 2001) (describing a mock juror study, which showed that allowing plaintiff's attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested amounts]"); *Reid Hastie et al., Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards,* 23 LAW & HUM. BEHAV. 445 (Aug. 1999) (demonstrating "anchor-and-adjust" phenomenon whereby jurors use award suggested by plaintiff's counsel as starting point and set punitive awards at a compromise figure based on the suggested amount); *cf.* Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, PSYCHOLOGY SCIENCE, Vol. 19, No. 2, 121-127 (2008) (noting that anchoring effects account for a wide variety of numerical judgments, ranging from appraisal of homes, to estimates on risk and uncertainty, and estimates of future performances); Mollie W. Marti & Roselle L. Wissler, Be *Careful What You Ask For: Anchoring Effects in Personal Injury Damages Awards,* 6 J. Experimental Psychol. Applied 91-103 (June 2000) (describing mock juror study in which exaggerated requests for pain-and-suffering damages produced exaggerated awards and concluding that counsel's award recommendations alter jurors' beliefs about what constitutes an acceptable award).

"promise" to plaintiffs' counsel. *See e.g. Lioce v. Cohen*, 174 P.3d 982-83 ("an attorney may not encourage jurors to disregard the merits of the claims before them and issue a verdict because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.")

IV.

THE EXCESSIVE VERDICT ALSO MANIFESTS THE JURY'S DISREGARD FOR THE COURT'S INSTRUCTIONS

The verdict shows a "disregard by the jury of the instructions of the Court." NRCP 59(a)(5). That too calls for a new trial.

A. The Jury Disregarded the Limitation on Harvey's Damages to Conscious Pain and Suffering

Instruction No. 22 informed the jury that it could award for "[a]ny damages for pain, suffering, or disfigurement of the decedent." For that element of damages, the jury awarded $7.5 million for the 1-to-2 minutes that Harvey actually experienced pain and suffering. That exorbitant amount not only reflects the jury's passion and prejudice (*see above*), it also shows a disregard of this jury instruction.

It is important to note that if any part of the $7.5 million relates to the alleged failures of Farrales after Harvey passed out, the judgment must be vacated and a new trial conducted. That is because we cannot know on which factual theory the jury relied in reaching its conclusions as to liability and damages. *FGA, Inc. v. Giglio*, 128 Nev. ___, 278 P.3d 490, 496 (2012) ("general verdict rule" does not apply where a party raises overlapping factual theories in support of one single claim.)

B. The Jury Ignored the Factors for Evaluating the Parents' Loss of Companionship, Society, Comfort and Relationship

The award of $7.5 million to the elderly heirs also shows disregard for the factors set forth Instruction No. 22 for evaluating an heir's claim. The amount indicates no consideration of the ages of the parents and Harvey, or of their relatively short life expectancies, or of the fact that Harvey provided no support, or the reality that Harvey and his parents had lived in different states and only saw each other occasionally. It also appears that the jury failed to thoughtfully factor the possibility that even if Harvey had been revived, *but not within the first few minutes couple of minutes*, he would have had a serious brain injury, rendering him unable to afford the degree of companionship and society that he had before.

C. The Jury Disregarded the Instructions not to Rely on Sympathy and to Apply "Calm and Reasonable Judgment"

The Court instructed the jurors that they had to reach their awards with "calm and reasonable judgment" (Instruction No. 23) and not on the basis of sympathy (Instruction No. 24). The jury manifestly disregarded that charge. They returned the verdict in less than 30 minutes. The awarded two massive, identical figures that demonstrated no regard for the finer points of the case. (*See above*.) The allocation of fault is nonsensical and conflicts with the evidence. (*See above*) And the jury gave plaintiffs the exact amount of money that plaintiffs' counsel asked for in his closing argument, $15 million. Sympathy, passion and prejudice are the only possible explanations for the award.

V.

IN THE ALTERNATIVE, THE VERDICT MUST BE REMITTED

If a new trial is not granted, the Court should at least remit the damages. This court is empowered to review a jury's award. If that award is

clearly excessive, this court can remit the award. *Lee v. Ball*, 116 P.3d 64, 66 (2005) (cit*ing Evans v. Dean Witter Reynolds*, 116 Nev. 598, 5 P.3d 1043 (2000).) At risk of understatement, the damages are excessive in this case. An appropriate award would be $100,000 or less.

Dated this 23rd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2016, I caused a true and correct copy of the foregoing "Motion for New Trial (and Motion for Leave to Supplement)" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

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EXHIBIT C TO DOCKETING STATEMENT

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DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, *vs.* FIRST TRANSIT, INC.; JAY FARRALES; DOES 1-10; and ROES 1-10, inclusive, Defendants.	Case No. A-13-682726-C Dept. No. 23 **DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT** Hearing Date: Hearing Time:

Defendants move to reduce the judgment in light of sovereign immunity and to correct the award of prejudgment interest on future damages. NRCP 59(e).

NOTICE OF MOTION

Please take notice that the undersigned will bring the foregoing "MOTION TO ALTER OR AMEND THE JUDGMENT" before the Court on May 31, 2016 at 9:30a.m. in Department 23 of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

POINTS AND AUTHORITIES

For the reasons stated in defendants' motion for a new trial, this case needs to be tried anew. In the alternative, however, this Court should reduce the judgment in light of sovereign immunity and correct the award of prejudgment interest.

I.

FIRST TRANSIT IS ENTITLED TO THE $100,000 CAP ON DAMAGES BECAUSE IT WAS OPERATING AS AN ARM OF THE STATE IN THE FULFILLMENT OF RTC'S PUBLIC RESPONSIBILITIES

The Nevada legislature has enacted a $100,000 cap on tort damages that extends to political subdivisions of the state and to any entity that functions as an arm of the state. That cap on damages applies to claims against First Transit because the Regional Transportation Commission of Southern Nevada (RTC) is a covered political subdivision, and First Transit is an arm of the state in helping RTC fulfill its responsibilities under state and federal law.

The cap on damages is also mandatory as a matter of federal law because federal regulations implementing the Americans with Disabilities Act (ADA) treat First Transit as an arm of the state that shares Nevada's responsibilities under that act.

A. First Transit is an Arm of the State Entitled to the Statutory Cap on Damages

1. The State's Political Subdivisions Enjoy Sovereign Immunity

Tort claims against a political subdivision for an employee's conduct are capped at $100,000. NRS 41.035(1). Beyond that amount, the employee and the subdivision are immune. *Id.*

Counties and the entities that they operate are political subdivisions for purposes of sovereign immunity. *See Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 751, 961 P.2d 754, 756 (1998) (recognizing immunity

for UMC); *see also Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (2007) (recognizing immunity for CCSD). That includes a regional transportation commission such as the Regional Transportation Commission of Southern Nevada (RTC), which is created and operated by the county. *See* NRS 277A.170; NRS 41.0307(1) (defining "employee" to include an employee of a "commission" of "a political subdivision of the State which is created by law").

2. An Entity that Carries out an Integral Government Function is an Arm of the State Entitled to Sovereign Immunity

Sovereign immunity extends to an "arm of the state," too. *See Graham v. State*, 956 P.2d 556, 562 (Colo. 1998), *cited with approval in Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006). Factors that Nevada has considered include whether the entity is (1) subject to the approval and control of the government; (2) mentioned as a state entity within the Nevada Revised Statutes, and (3) "in possession of some sovereign powers," which the Court has interpreted to mean that the entity carries out "sovereign functions." *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 193–95 & n.32, 128 P.3d 1057, 1061–62 & n.32 (2006) (footnotes omitted) (extending immunity to a community college).

The U.S. Supreme Court recently confirmed that immunity extends to private groups hired to perform public services. In *Filarsky v. Delia*, the Court held that a private attorney hired to interview an city employee suspected of malingering was immune from a § 1983 action. 132 S Ct. 1657, 1665–66 (2012).[1] The Court rejected the argument that only full-time government em-

[1] The Nevada Supreme Court has held that federal precedents on sovereign immunity under the Federal Tort Claims Act are relevant to the interpretation of NRS 41.032. *Scott v. Dep't of Commerce*, 104 Nev. 580, 583, 763 P.2d 341, 343 (1988). In similar fashion, it has looked to other jurisdictions' interpreta-

ployees deserved such immunity, noting that distinguishing between full-time and ad-hoc government employment "creates significant line-drawing problems" and leads to the perverse result that private groups working in tandem with government will "be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Id.*

The *Filarsky* decision echoes the Nevada Supreme Court's concern in *Falline v. GNLV Corp.*, where the Court held that denying statutory immunity to self-insured employers—who perform for their employees the functions of the State Industrial Insurance System—"would constitute an unwarranted, discriminatory source of liability against" those private employers. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) (plurality opinion).

3. First Transit is an Arm of the State in Carrying out Nevada's Duties under the ADA to Provide Transport for Disabled Persons

The Connecticut Supreme Court held that a First Transit subsidiary was an arm of the state entitled to sovereign immunity. *Gordon v. H.N.S. Mgmt. Co., Inc.*, 861 A.2d 1160, 1174–75 (2004). That court relied on factors similar to those Nevada has considered, including the fact that First Transit (1) operates to carry out public transportation, an integral government function, (2) is financially dependent on government, (3) is subject to control and oversight by the government agency, and (4) requires government approval for expenditures. *Id.*; *see also Town of Rocky Hill v. SecureCare Realty, LLC*, 105 A.3d 857, 867 (Conn. 2015).

First Transit is an arm of the state here, too. RTC contracted with First Transit to perform RTC's sovereign function—satisfying its public duties to Clark County's disabled population, specifically:

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tions of state action under § 1983. *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006).

> To assist RTC in complying with the paratransit services provisions of Title II of the Americans with Disabilities Act (ADA), and to enhance the provision of public transportation generally in RTC's service area.

(Contract, Ex. A, § 2(a)(1).) *See generally* 42 U.S.C. § 12143; 49 C.F.R. §§ 37.121(a), 37.123. RTC and First Transit share the task of complying with these federal statutes and regulations, which are required government services. (Contract § 2(c), (d).) They expressly agreed to collaborate on the creation and submission of the federally mandated paratransit plan. (Contract § 11.) *See* 49 C.F.R. § 37.135. First Transit also operates vehicles owned by RTC, uses offices owned by RTC, enforced RTC's rules, transports passengers based on RTC's reservation, collaborates with RTC on marketing and service planning, and provides reports to satisfy RTC's requirements. *Id.*

Beyond all that, First Transit depends on RTC for its income: First Transit only "retain[s] custody of fares," which then RTC uses to pay First Transit's invoices. (Contract §§ 2(d), 12.) First Transit also faces a rigorous audit and oversight process for its expenditures and invoices. (Contract §§ 2(d)(1)(G), 5(c), 7.)[2]

All of these acts, as part of the contract with RTC, entitle First Transit to share in RTC's sovereign immunity and the $100,000 damages cap under NRS 41.035.

B. Denying First Transit the Damages Cap would Conflict with Federal Regulations

Here, it is especially important to respect the First Transit's immunity as an arm of the state because to find otherwise would interfere with federal law. Federal law, including the ADA is supreme in Nevada courts. *See generally* U.S. CONST. art. VI. The federal regulations implementing the ADA require

[2] As the *Gordon* court noted, the fact that First Transit "derives a profit from the enterprise does not affect" the immunity analysis. *Gordon v. H.N.S. Mgmt. Co., Inc.*, 861 A.2d 1160, 1174 (Conn. 2004).

First Transit to "stand in the shoes" of the state for purposes of ensuring Nevada's ADA compliance. 49 C.F.R. § 37.23; App'x D to Part 37: Construction and Interpretation of Provisions of 49 CFR Part 37, at 465–66 (2007). Because First Transit is an arm of the state for the discharge of Nevada's duties under the ADA, it must also be an arm of the state for purposes of immunity in the discharge of those federal obligations.

II.

PREJUDGMENT INTEREST ON THE LOSS-OF-CONSORTIUM CLAIM MUST BE VACATED

"[W]hen a general verdict form does not distinguish between past and present damages, a trial court cannot award prejudgment interest." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549-50 (2005); *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982). Although the jury's verdict for Harvey Chernikoff's pain and suffering represents just past damages, the award for Jack and Elaine Chernikoff's loss of consortium includes both past and future damages but makes no allocation between the two. In this situation, prejudgment interest on the loss-of-consortium award is improper and must be vacated.

CONCLUSION

For the foregoing reasons, the judgment should be reduced to impose the statutory damages cap and vacate the prejudgment interest on plaintiffs' loss-of-consortium claim.

Dated this 23rd day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that on March 23, 2016, I served the foregoing "Motion to Alter or Amend the Judgment" through the Court's electronic filing system and by courtesy e-mail to the following counsel:

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ASwanson@CharlesAllenLawFirm.com

/s/Abraham G. Smith
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT D TO DOCKETING STATEMENT

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CLERK OF THE COURT

NOAS

DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
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(702) 949-8398 (Fax)
DPolsenberg@LRRC.com
JHenriod@LRRC.com

LEANN SANDERS
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7401 West Charleston Boulevard
Las Vegas, Nevada 89117
(702) 384-7000
(702) 385-7000 (Fax)
LSanders@AlversonTaylor.com

Attorneys for Defendants
First Transit, Inc. and Jay Farrales

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, *vs.* FIRST TRANSIT, INC.; JAY FARRALES; DOES 1-10; and ROES 1-10, inclusive, Defendants.	Case No. A-13-682726-C Dept. No. XXIII **NOTICE OF APPEAL**

Please take notice that defendants First Transit, Inc. and Jay Farrales hereby appeal to the Supreme Court of Nevada from:

1. All judgments and orders in this case;

2. "Judgment Upon the Jury Verdict," filed March 8, 2016, notice of entry of which was served electronically on March 9, 2016 (Exhibit A); and

3. All rulings and interlocutory orders made appealable by any of the foregoing.

Dated this 8th day of April, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: */s/ Joel D. Henriod*

DANIEL F. POLSENBERG (SBN 2376)
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7401 West Charleston Boulevard
Las Vegas, Nevada 89117
(702) 384-7000

Attorneys for Defendants First Transit, Inc. and Jay Farrales

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of April, 2016, I caused a true and correct copy of the foregoing "Notice of Appeal" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

BENJAMIN P. CLOWARD
CLOWARD HICKS & BRASIER, PLLC
4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89107
BCloward@CHBLawyers.com

CHARLES H. ALLEN
CHARLES ALLEN LAW FIRM
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NE Suite 1625
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/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT A

EXHIBIT A

NEO
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Nevada Bar No. 11087
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721 South 6th Street
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Facsimile: (702) 960-4118
Beloward@chblawyers.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **NOTICE OF ENTRY OF ORDER**

YOU WILL PLEASE TAKE NOTICE that the attached **JUDGMENT UPON THE JURY VERDICT** was entered by this Court in the above-entitled matter on the 8th day of March, 2016.

DATED THIS 9th day of March, 2016.

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of **CLOWARD HICKS & BRASIER, PLLC** and that on the 9 day of March 2016, I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be served as follows:

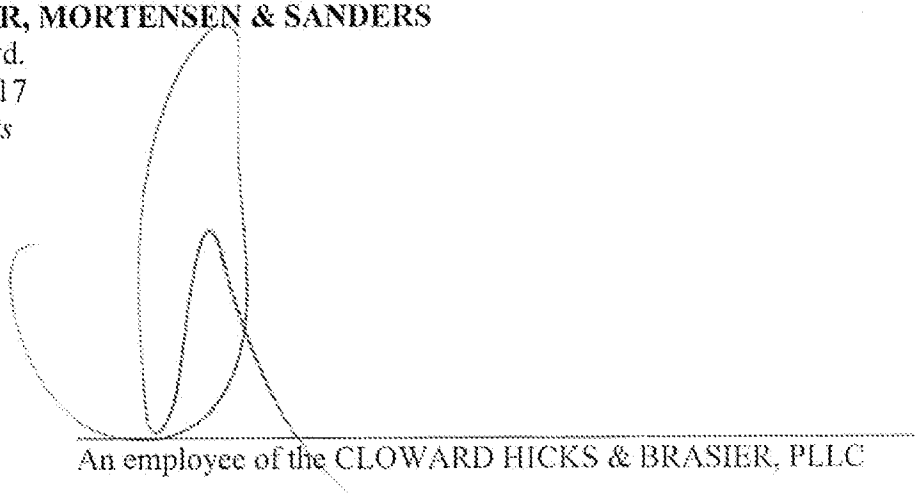
[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or

[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[X] pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

LEANN SANDERS, ESQ.
ALVERSON, TAYLOR, MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Attorneys for Defendants



An employee of the CLOWARD HICKS & BRASIER, PLLC

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CLERK OF THE COURT

JGJV
BENJAMIN P. CLOWARD, ESQ.
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Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **JUDGMENT UPON THE JURY VERDICT**

This action came on for trial before the court and the jury, the Honorable Stefany A. Miley, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.[1]

[1] **Exhibit 1**: Jury Verdict

☐ Non-Jury Disposed After Trial Start ☐ Non-Jury Judgment Reached ☐ Transferred before Trial	☐ Jury Disposed After Trial Start ☒ Jury Verdict Reached ☐ Other - _____

IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

Pain and suffering, by Harvey Chernikoff:	$7,500,000.00
Greif, sorrow, loss of companionship, society, Comfort, and loss of relationship suffered by Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF:	+ $7,500,000.00
Total Damages	**$15,000,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum plus 2%[2] from the date of service of the Summons and Complaint[3] on June 7, 2013, through the date of the verdict on February 29, 2016, as follows:

PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00

06/07/13 through 02/29/16 = **$2,149,631.70**
[(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]
[Interest is approximately $2,156.10 per day]

NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:

JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 ($17,149,631.70), which shall bear interest at the current rate of 5.25% per day, until satisfied.

DATED THIS 8 day of March, 2016.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Respectfully submitted:
CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.

[2] **Exhibit 2**: Prime Rate as of January 1, 2013

[3] **Exhibit 3**: Affidavit of Service upon the Defendant

EXHIBIT "1"

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive,

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

VERDICT FORM

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
FEB 29 2016 5:21 pm
BY, KATHERINE STREUBER, DEPUTY

VERDICT FORM

1. Do you find from a preponderance of the evidence that Defendant Jay Farrales was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ✓ No ____

2. Do you find from a preponderance of the evidence that Defendant First Transit, Inc. was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ✓ No ____

If you have answered "No" to questions #1 and #2 above, stop here, answer no further questions, and have the foreperson sign and date this form.

3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ____ No ✓

4. Do you find from a preponderance of the evidence that Plaintiff Elaine Chernikoff was negligent and that such negligence was a proximate cause of the death of Harvey Chernikoff?

ANSWER: Yes ____ No ✓

5. Using one hundred percent (100%) as the total combined negligence which acted as a proximate cause of the injuries complained of by Plaintiffs Jack Chernikoff and Elaine Chernikoff, what percentage of the total combined negligence do you find from the evidence is attributable to:

Jay Farrales	0 %
First Transit, Inc.	100 %
Jack Chernikoff	0 %
Elaine Chernikoff	0 %
Totaling	100%

7. Without regard to the above answers, we find that the total amount of the Plaintiffs' damages are divided as follows:

Pain and suffering by HARVEY CHERNIKOFF	$ 7.5 MILLION
Grief, sorrow, loss of companionship, Society, comfort, and loss of relationship suffered by Plaintiffs JACK CHERNIKOFF and ELAINE CHERNIKOFF:	$ 7.5 MILLION
TOTAL	$ 15,000,000

Dated this 29 day of FEBRUARY, 2016.

Freddy A. Acuna
FOREPERSON

EXHIBIT "2"

PRIME INTEREST RATE

NRS 99.040(1) requires:
*"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . . "**
Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%		
January 1, 2014	3.25%	July 1, 2014	3.25%
January 1, 2013	3.25%	July 1, 2013	3.25%
January 1, 2012	3.25%	July 1, 2012	3.25%
January 1, 2011	3.25%	July 1, 2011	3.25%
January 1, 2010	3.25%	July 1, 2010	3.25%
January 1, 2009	3.25%	July 1, 2009	3.25%
January 1, 2008	7.25%	July 1, 2008	5.00%
January 1, 2007	8.25%	July 1, 2007	8.25%
January 1, 2006	7.25%	July 1, 2006	8.25%
January 1, 2005	5.25%	July 1, 2005	6.25%
January 1, 2004	4.00%	July 1, 2004	4.25%
January 1, 2003	4.25%	July 1, 2003	4.00%
January 1, 2002	4.75%	July 1, 2002	4.75%
January 1, 2001	9.50%	July 1, 2001	6.75%
January 1, 2000	8.25%	July 1, 2000	9.50%
January 1, 1999	7.75%	July 1, 1999	7.75%
January 1, 1998	8.50%	July 1, 1998	8.50%
January 1, 1997	8.25%	July 1, 1997	8.50%
January 1, 1996	8.50%	July 1, 1996	8.25%
January 1, 1995	8.50%	July 1, 1995	9.00%
January 1, 1994	6.00%	July 1, 1994	7.25%
January 1, 1993	6.00%	July 1, 1993	6.00%
January 1, 1992	6.50%	July 1, 1992	6.50%
January 1, 1991	10.00%	July 1, 1991	8.50%
January 1, 1990	10.50%	July 1, 1990	10.00%
January 1, 1989	10.50%	July 1, 1989	11.00%
January 1, 1988	8.75%	July 1, 1988	9.00%
January 1, 1987	Not Available	July 1, 1987	8.25%

*** Attorney General Opinion No. 98-20:**

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as

EXHIBIT "3"

AFFT
Richard Harris Law Firm
Benjamin P. Cloward, Esq.
801 S. 4th St.
Las Vegas , NV 89101
State Bar No.: 11087
Attorney(s) for: Plaintiff(s)

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY NEVADA

Case No.: A-13-682726-C
Dept. No.: XXIII
Date:
Time:

The Estate of Harvey Chernikoff, Deceased; by Jack Chernikocc as personal representative, individually and as heir; et al.
vs *Plaintiff(s)*

First Transit, Inc. Laidlaw Transit Services, Inc dba First Transit , et al.
Defendant(s)

AFFIDAVIT OF SERVICE

I, Kelly Dannan, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the: Summons; Complaint; Civil Cover Sheet; Initial Appearance Fee Disclosure on the 7th day of June, 2013 and served the same on the 7th day of June, 2013 at 2:35pm by serving the Defendant(s), First Transit, Inc. Laidlaw Transit Services, Inc dba First Transit by personally delivering and leaving a copy at Registered Agent: The Corporation Trust Company of Nevada, 311 South Division Street, Carson City, Nevada 89703 with Alena Duggan, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

ALEXANDRA SNIPES
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 11-4853-2 - Expires April 26, 2015

State of Nevada, County of Washoe
SUBSCRIBED AND SWORN to before me on this
11th day of June 2013

Notary Public Alexandra Snipes

Affiant Kelly Dannan #: R-057577
Legal Process Service License # 604
WorkOrderNo 1304659

Legal Process Service 105 Mary Street Reno, Nevada 89509

EXHIBIT E TO DOCKETING STATEMENT

CIVIL COVER SHEET

A-13-682726-C
XXIII

Clark County, Nevada

Case No. _____
(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
The Estate of HARVEY CHERNIKOFF	FIRST TRANSIT INC.,
Attorney (name/address/phone):	Attorney (name/address/phone):
BENJAMIN P. CLOWARD , 801 S. 4th Street, Las Vegas, NV 89101 702-444-4444	Unknown

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☐ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

Torts

Negligence
- ☐ **Negligence – Auto**
- ☐ **Negligence – Medical/Dental**
- ☐ **Negligence – Premises Liability** (Slip/Fall)
- ☒ **Negligence – Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (Wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair Competition

Probate

- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

Other Civil Filing Types

- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** *(also check applicable civil case box)*
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil Appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☐ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment – Civil
  - ☐ Other Personal Property
  - ☐ Recovery of Property
  - ☐ Stockholder Suit
  - ☐ Other Civil Matters

III. Business Court Requested (Please check applicable category; *for Clark or Washoe Counties only.*)

- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 90)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art. 8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademarks (NRS 600A)
- ☐ Enhanced Case Mgmt/Business
- ☐ Other Business Court Matters

May 31, 2013
Date

#7584
Signature of initiating party or representative

COMP
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
Utah Bar No. 12336
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 385-1400
Facsimile: (702) 385-9408
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

The Estate of HARVEY CHERNIKOFF, Deceased; by JACK CHERNIKOFF as personal representative, individually and as heir; ELAINE CHERNIKOFF individually and as heir, Plaintiffs, vs. FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT; JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **COMPLAINT**

COMES NOW Plaintiff JACK CHERNIKOFF, personal representative of the Estate of HARVEY CHERNIKOFF, individually, and as heir, and ELAINE CHERNIKOFF individually and as heir of the Estate of HARVEY CHERNIKOFF by and through their attorneys, RICHARD A. HARRIS, ESQ, and BENJAMIN P. CLOWARD, ESQ., of RICHARD HARRIS LAW FIRM, and for their causes of action against Defendants, and each of them, allege as follows:

PARTIES

1. That at all times relevant to these proceedings, HARVEY CHERNIKOFF, deceased (hereinafter "HARVEY") was a resident of Clark County, Nevada.

2. That at all times relevant to these proceedings, Plaintiff, JACK CHERNIKOFF the personal representative, individually and as heir of the Estate of HARVEY CHERNIKOFF, was and is a resident of Clark County, Nevada.

3. That at all times relevant to these proceedings, Plaintiff, ELAINE CHERNIKOFF individually and as heir of the Estate of HARVEY CHERNIKOFF, was and is a resident of Clark County, Nevada.

4. That at all times relevant to these proceedings and upon information and belief, Defendants, FIRST TRANSIT, INC., LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT, were corporations doing business in Las Vegas, Clark County, Nevada.

5. That at all times relevant to these proceedings, Defendant JAY FARRALES, was and is a resident of Clark County, Nevada.

6. That the true names and capacities whether individual, corporate, associate, partnership or otherwise of the Defendant herein designated as DOES 1-10, inclusive, are unknown to the Plaintiff who therefore sues said Defendants by such fictitious names. Plaintiff alleges that Defendant DOE 1 -5 were the actual operator/employee of Defendant and in the event said Defendants were acting within the course, scope and authority of such agency or employment, each said Defendant is liable or whose are statutorily or vicariously liable for the acts and omissions of those person(s) and or entities who caused or contributed to the injuries and death of HARVEY CHERNIKOFF as described below Plaintiffs further allege that

Defendants DOES 6-10, are unknown at this time and may be individuals, corporations, associations, partnerships, subsidiaries, holding companies, owners, predecessor or successor entities, joint venturers, parent corporations or related business entities of Defendants, inclusive, who were acting on behalf of or in concert with, or at the direction of Defendants and may be responsible for the injurious activities and wrongfully death of the other Defendants. Plaintiffs allege that each named Defendant and Doe Defendant negligently, willfully, intentionally, recklessly, vicariously, or otherwise, caused, directed, allowed or set in motion the injurious events and wrongful death set forth herein. Each named and Doe Defendant is legally responsible for the events and happenings stated in this Complaint, and thus proximately caused injury, death and damages to Plaintiffs. Plaintiffs request leave of the Court to amend this Complaint to specify the Doe Defendants when their identities become known. Plaintiff will ask leave of this court to insert the true names and capacities of such Defendants when the same have been ascertained and will further ask leave to join said Defendants in these proceedings.

6. That Defendant, JAY FARRALES, was the operator of a certain First Transit Bus at all times relevant to this action, and at all times relevant hereto, was operating the same within the course and scope of his employment with Defendants, FIRST TRANSIT, INC., LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT.

7. That at all times relevant to this action, Defendants, FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT, employed Defendant, JAY FARRALES

8. All the facts and circumstances that give rise to the subject lawsuit occurred in Clark County, Nevada.

9. Plaintiff has found it necessary to retain the services of an attorney to prosecute this action and is therefore entitled to reasonable attorney's fees and costs of suit incurred herein.

FACTS

10. On or about July 29, 2011, HARVEY who had a mental disability was a passenger on Defendant FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT.

11. That while on the bus, Harvey started to eat his lunch and which time he began choking.

12. That Harvey died as a result of choking on the food he consumed.

13. Defendants and each of them knew that HARVEY had a mental disability.

14. Defendants and each of them failed to assist Harvey as he choked.

15. Defendants are a common carrier within the meaning of NRS 706.036.

16. Plaintiff has a disability as defined by NRS 706.361.

17. Defendants and each of them have a duty to its passengers and to HARVEY CHERNIKOFF to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by para-transit bus/van.

18. Plaintiff was a passenger and was a person who, with the actual or implied consent of the carrier, was a passenger the vehicle at issue.

FIRST CAUSE OF ACTION
NEGLIGENCE

19. Plaintiff repeats, realleges, and incorporates by reference each and every allegation contained in the foregoing paragraphs above as if fully set forth herein.

20. Defendant, JAY FARRALES, and Defendants, were acting as common carriers and had a duty to use the highest degree of care to assist Plaintiff while a passenger on the vehicle at issue, according to the laws of the State of Nevada and as a reasonable and prudent common carrier would under similar circumstances.

21. Defendant, JAY FARRALES, and Defendants, breached the duty to use the highest degree of care and act reasonably in this matter when they neglected to take precautionary measures, including but not limited to, failing to contact emergency services and assisting Plaintiff while he choked. Defendant JAY FARRALES and Defendants were negligent and careless.

22. The sole and proximate cause of the subject incident was due to the negligent actions or inactions of the Defendants and Doe Defendant.

23. That HARVEY CHERNIKOFF' s estate is entitled to special damages for medical, funeral and burial expenses in an amount according to proof at trial.

24. From the time of his injuries until his death, HARVEY CHERNIKOFF suffered intense physical and mental pain, shock and agony all to his damage recoverable by his heirs, JACK CHERNIKOFF and ELAINE CHERNIKOFF in an amount in excess of TEN THOUSAND DOLLARS ($10,000.00).

25. As a proximate result of HARVEY CHERNIKOFF death, Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF, have been deprived of his support and the value of the accumulations of his estate had he lived his normal life expectancy, all to Plaintiff JACK CHERNIKOFF and ELAINE CHERNIKOFF , special damage in an amount according to proof at trial.

26. HARVEY CHERNIKOFF was a loving and devoted son, and by reason of the premises, Plaintiffs JACK CHERNIKOFF and ELAINE CHERNIKOFF have suffered extreme grief and sorrow and have been deprived of his companionship, society, comfort and consortium, all to their general damage in an amount in excess of TEN THOUSAND DOLLARS ($10,000.00).

27. Punitive and exemplary damages are warranted in this action as a punishment for reckless and wanton acts that consciously disregarded the safety of HARVEY CHERNIKOFF, to serve as a deterrent to the Defendants and others for committing the same or similar acts that endanger the general safety of patrons and the public in an amount in excess of TEN THOUSAND DOLLARS ($10,000.00).

SECOND CLAIM FOR RELIEF
RESPONDEAT SUPERIOR

28. Plaintiffs incorporate by this reference each and every paragraph previously made in this Complaint, as if here fully set forth.

29. Because Defendant JAY FARRALES was acting within the course and scope of his employment, service or agency, each and every other Defendant is vicariously liable for the injuries and damages sustained by Plaintiff, alleged hercin.

30. That Defendant JAY FARRALES was acting in the course and scope of his employment with Defendant FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT and as such, Defendant FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT is responsible for the negligent acts of its employee under the doctrine of respondent superior.

31. Whenever it is alleged in this Complaint that a Defendant did any act or thing, it is meant that such Defendant's officers, agents, servants, employees, or representatives did such act or thing and at the time such act or thing was done, it was done with full authorization or ratification or such defendant or was done in normal and routine course and scope of business or with the actual apparent and/or implied authority of such Defendant's officers, agents servants, employees, or representatives. Specifically Defendants are liable for the actions of its officers, agents, servants, employees and representatives.

32. Plaintiffs, allege that the Defendants, being a large corporation, can only act through their employees, servants agents, contracts, associates, security personnel, plain clothes employees, bartenders, porters and others paid directly or indirectly by the Defendants for the purpose of running the corporate enterprises, to make a profit, and to service their patrons and invitees.

33. Plaintiffs, allege that the above-described employees and agents of FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT and other Defendants were in various positions on the Defendants premises where they, if properly hired, trained, and supervised, and if properly acting within the scope of their employment, could have acted rather than omitting to act, in such a manner that they could have taken reasonable action to prevent the death of HARVEY CHERNIKOFF.

34. That Defendants breached their duty and negligently, disregarded the safety of HARVEY CHERNIKOFF, by failing, among other things, to have adequate first aid training, to prevent such an occurrence, by failing to have employees adequately trained or competent personnel on duty at the time of the incident to respond to the presence of a medical problem, or

to enforce ruled already in place to prevent HARVEY or others from being allowed to eat food on the bus.

35. As a direct and proximate result, Defendants are responsible for the wrongful death of HARVEY CHERNIKOFF and the special and general damages as stated herein.

THIRD CAUSE OF ACTION
NEGLIGENT HIRING, RETENTION AND SUPERVISION

36. Plaintiffs incorporate by this reference each and every allegation previously made in this Complaint, as if here fully set forth.

37. Defendants were negligent in the selection, hiring, training, supervision and/or retention of JAY FARRALES and Doe Defendants at all times relevant herein.

38. Defendants knew or reasonably should have known that management was engaging in wrongful protocol, safety and/or supervision of their drivers in first aid response of disabled parties and were unfit for their management position.

39. Defendants' management employees engaged in actions including, but not limited to, lack of establishing a policy, and deficient in directing employees to respond to a medical emergency of disabled parties causing a hazardous condition.

40. At all material times, Defendants knew or reasonably should have known that the conduct, acts, or failures to act of management, and the conduct, acts, or failures to act of other employees or agents of Defendant's (including Doe and Roe Defendants,) that managed and supervised directly injured Plaintiff.

41. At all material times, Defendants knew or reasonably should have known that the incidents and conduct of management and other employees described above, would and did proximately result in the wrongful death of HARVEY CHERNIKOFF, including but not limited

to, mental anguish and emotional distress.

42. At all material times, Defendants knew, or in the exercise of reasonable care should have known and could have reasonably foreseen, that unless Defendants intervened to protect HARVEY CHERNIKOFF, and or to adequately supervise, control, regulate, train, discipline, and/or otherwise penalize the conduct, acts, and failures to act, and/or terminate the employment of managers or employees who failed to act, such conduct would continue, thereby subjecting Plaintiffs to injury and severe emotional distress, and would have the effect of encouraging, ratifying, condemning, exacerbating, increasing, and worsening the conduct, acts, and failures to act described above.

43. At all times Defendants had the power, ability, authority and duty to intervene, supervise, train, prohibit, control, regulate, discipline and/or penalize the conduct and/or terminate the employment of Defendants and other agents or employees described above.

44. That of FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT and other Defendants and each of them, owed duties to HARVEY CHERNIKOFF to exercise reasonable care in hiring, training, retention, supervision and management of the personnel responsible for safety at the time and place of the events described above.

45. By their acts and omissions herein, Defendants breached these duties.

46. As a direct and proximate result, Defendants are responsible for the wrongful death of HARVEY CHERNIKOFF and the special and general damages as stated herein.

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FOURTH CLAIM FOR RELIEF

PUNITIVE DAMAGES

47. Plaintiffs incorporate by this reference each and every paragraph previously made in this Complaint, as if here fully set forth.

48. Defendants' actions were wrongful, willful, oppressive, malicious, and done with the intent to harm Plaintiff or in reckless disregard for Plaintiff. Plaintiff is therefore entitled to an award of punitive damages in amount sufficient to punish and deter the defendants and all others firm engaging in such conduct.

49. The acts complained of herein were willfully, unlawfully, violently and maliciously done by Defendants, and each of them, with a capricious and wanton disregard for the health and safety of Plaintiff, thereby entitling Plaintiff to exemplary or punitive damages in an amount in excess of $10,000.00.

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WHEREFORE, Plaintiffs respectfully pray that Judgment be entered against Defendants, and each of them, as follows:

1. General damages in an amount of to be proven at the time of trial;

2. Medical and incidental expenses incurred and to be incurred;

3. For punitive damages in in an amount in excess of $10,000.00;

4. Attorney's fees and cost of suit; and

5. For such other relief as is just and proper.

DATED this 31st day of May, 2013

RICHARD HARRIS LAW FIRM

By: _____
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Attorney for Plaintiff

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DISTRICT COURT

CLARK COUNTY, NEVADA

The Estate of HARVEY CHERNIKOFF, Deceased; by JACK CHERNIKOFF as personal representative, individually and as heir; ELAINE CHERNIKOFF individually and as heir, Plaintiffs, vs. FIRST TRANSIT, INC. LAIDLAW TRANSIT SERVICES, INC dba FIRST TRANSIT; JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive,	CASE NO. A-13-682726-C DEPT. NO. XXIII **INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

The Estate of HARVEY CHERNIKOFF	$ 270.00
JACK CHERNIKOFF	$ 30.00
ELAINE CHERNIKOFF	$ 30.00

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TOTAL REMITTED: **$ 330.00**

DATED this 31st day of May, 2013

RICHARD HARRIS LAW FIRM

By: #9584
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
801 South Fourth Street
Las Vegas, Nevada 89101
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