

1 MR. ALVERSON: How could he possibly say that?

2 THE COURT: The next one he kind of touched on when
3 he talked about the order, but I don't know --

4 MR. ALVERSON: I don't have a problem with you doing
5 that one.

6 MS. SANDERS: No.

7 THE COURT: Okay. And then I think that that fluid
8 issue was covered.

9 MR. ALVERSON: It was.

10 MS. SANDERS: I think it was.

11 THE COURT: Okay. We'll make a record at the break.

12 (End bench conference.)

13 THE COURT: So ladies and gentlemen, I have to tell
14 you the reason I -- the counsel does get to see the questions
15 that are presented, and the reason is, is some questions this
16 individual is qualified to answer and some they are not.
17 Okay. So there is going to be a question that the doctor is
18 not going to be presented. It has nothing to do with anything
19 other than this is not the appropriate person to answer that
20 question. Okay. And that's from Mr. Darrell Shakespear,
21 Number 8.

22 The next one is Denise Hinds, badge number -- it
23 looks like Juror No. 4. The question, Doctor, is: Would you
24 please state again what -- what one would do if a person is
25 unconscious, not breathing, but there is a pulse.

1 THE WITNESS: Okay. Unconscious, not breathing,
2 there is a pulse, you start doing what you can to make sure
3 that they're able to breathe.

4 So one is you position the airway. So if people's
5 head is forward like this [indicating], they can't breathe,
6 you try and tilt the head back [indicating]. You open the
7 mouth. Sometimes we do what's called the jaw lift, where if
8 you're standing behind them and you've kind of opened their
9 mouth and move their bottom jaw forward [indicating]. We call
10 it the jaw thrust. You try and make sure their mouth is open.

11 And then if you try and assist them with breathing
12 if they're not breathing, you do rescue breathing. You pinch
13 their nose [indicating]. The reason you pinch their nose is
14 if you're breathing into the mouth, you don't want the air to
15 just come out the nose, unless it's a little baby you put your
16 mouth over their nose and their mouth.

17 But anyway, for an adult, you pinch the nose, you
18 breathe into the mouth and you look to see if the chest is
19 rising [indicating]. If the chest isn't rising, you look and
20 see if there's anything you can do about repositioning the
21 head, or if there's anything in the mouth that you can see,
22 taking it out.

23 You don't just put a finger in if you don't see
24 anything. But if you see something there, you look in and you
25 try and grab it. And by doing that jaw thrust, if someone has

1 like their tongue is just like blocking their airway, it kind
2 of opens the jaw and moves the tongue out of the way so that
3 the air can go in and out freely [indicating].

4 THE COURT: And the other question, I do believe it
5 was covered by counsel, but let me just double-check. It's
6 from Mr. -- it's also from Mr. Darrell Shakespear. It says,
7 Did the medical examiner take fluids from the body that may
8 have shown enzymes for a heart attack? And I believe the
9 doctor covered that. Did you get your question answered, sir?

10 JUROR NO. 8: No, Your Honor. So they touched on
11 it, but I did not get a definitive answer.

12 THE COURT: Okay. Let the doctor answer it like
13 that then.

14 THE WITNESS: They could have checked for it, but
15 the test was never done. They checked for other things, but
16 they did not -- unless I'm missing it, they did not. Specific
17 enzymes are called troponin and the CK and B.

18 The problem is let's say someone has a heart attack
19 right now, and they stay alive. It might take four hours or
20 six hours of them being alive and having damage going on to
21 the heart until those levels would become abnormal. But all
22 that having been said, I did not see, once again, unless I'm
23 missing it and someone can point out if I am, I did not see
24 that they actually tested for those.

25 JUROR NO. 8: Your Honor, if I may ask --

1 THE COURT: Well, if it's -- I need for you to write
2 it down actually.

3 JUROR NO. 8: Okay.

4 THE COURT: Thanks.

5 JUROR NO. 8: Hold on.

6 THE COURT: And that leads me, I don't know if
7 counsel's going to have some follow-up questions based upon
8 what was asked the doctor. But ladies and gentlemen, the
9 doctor will probably be leaving shortly. If you have any
10 additional questions, please write them down at this time.

11 Can you get it from him, please, and just show it to
12 counsel.

13 (Pause in proceeding.)

14 THE COURT: All right. Counsel, you want to come
15 look at the question real quick?

16 (Bench conference transcribed as follows.)

17 THE COURT: Okay. That was touched upon. Well,
18 that question wasn't, but that issue was.

19 MR. ALVERSON: That's fine.

20 THE COURT: Okay.

21 (End bench conference.)

22 THE COURT: All right. So this is from
23 Mr. Shakespear, Juror No. 8. The question is: Would an
24 internal autopsy have been able to give these levels or the
25 definitive answer? And I believe that's with respect to

1 whether or not he had a heart attack.

2 JUROR NO. 8: Yes, Your Honor.

3 THE WITNESS: Once again, the levels they can draw
4 whether or not they do the internal exam or not. As far as to
5 say 100 percent if there was a blockage of an artery, they
6 would need to do an internal exam to say that within 100
7 percent.

8 THE COURT: Does that answer your question?

9 JUROR NO. 8: Yes, Your Honor. Thank you.

10 THE COURT: All right. This will be court exhibit.
11 All right. Counsel, do you have any follow-up questions of
12 the doctor?

13 MS. SANDERS: Nothing from me.

14 MR. ALLEN: No, Your Honor.

15 THE COURT: All right. Doctor, thank you for your
16 time, sir. You're free to go.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: Now, Counsel, we only have 30 more
19 minutes. Do you have another witness ready to go? What do
20 you want to do?

21 MR. CLOWARD: We're going to call Jack Chernikoff.

22 THE COURT: We'll probably cut it off about -- so
23 let's go for about 20 minutes, until about 4:50, because I've
24 got to get my staff off the clock and everything by 5:00, and
25 they have some wrapping up to do when we finish for the day.

1 I think we can get 20 minutes done. We can get started,
2 because they're here next week as well, correct?

3 MR. CLOWARD: Yeah. Whatever the Court wants to do.

4 THE COURT: That's fine. Let's get started.

5 JACK CHERNIKOFF, PLAINTIFF'S WITNESS, SWORN

6 THE CLERK: Please state and spell your full name
7 for the record.

8 THE WITNESS: Jack Chernikoff, C-h-e-r-n-i-k-o-f-f.

9 MR. ALLEN: Please the Court.

10 DIRECT EXAMINATION

11 BY MR. ALLEN:

12 Q Mr. Chernikoff, are you Harvey's father?

13 A Yes.

14 Q The Court's instructed us that we have about 20
15 minutes today. Okay. So what I would like to do is I'd like
16 you to talk to the jury about your son.

17 A Sure.

18 Q Is that okay?

19 A Sure.

20 Q Tell us, how old are you?

21 A Seventy-nine.

22 Q And how old were you when Harvey was born?

23 A That's a very good question. I was 21 years old.

24 Q And when you were 21, when Harvey was born, was he
25 your first child?

1 want to explain that to them?

2 A I might need to stand on a chair with you. But
3 basically, if someone -- if you would actually turn sideways.
4 So if someone is choking and they're starting to look like
5 they're really in distress, like once again, not to use my
6 example as everyone's example, but if there's a little bit of
7 water and I'm breathing okay and someone comes up to help me,
8 I'd go it's okay, you know, I don't need help.

9 But if someone's really struggling, they're going to
10 want your help. So you bend them forward a little, and the
11 reason you're bending them forward is so that if something
12 comes out it doesn't just come up in the mouth to go back down
13 again. You bend them forward, you take your hand and go one,
14 two, three, four, five, and you're trying to kind of like
15 shake and jostle the chest a bit to help get something out.

16 Q Thank you, Doctor.

17 A You're welcome.

18 Q Moving on. It's important that these blows are
19 quite firm, because you're attempting to create a vibration in
20 the chest which will hopefully move the object out. Explain
21 that.

22 A You don't want to -- it's not an, oh, nice light
23 massage. You don't want to break the person's back, but you
24 want to kind of make it firm enough [indicating] that you're
25 actually kind of moving the chest a bit trying to help get

1 something out.

2 Q Thank you, Doctor. Then where, Some people are
3 concerned about hurting the person, but the risk of doing this
4 is very slim. Explain that to us.

5 A You'd have to hit someone on the back pretty darn
6 hard to really hurt them, unless you're talking about a little
7 baby. And you're talking about the options of possibly giving
8 someone a bruise on their back versus someone dying from
9 choking. So given the weight of the severity of those two,
10 you go ahead and you hit them pretty hard.

11 Once again, you're not using a closed fist like this
12 [indicating]. You're using an open hand, so you're covering a
13 larger area of their back and it's going to be less force in
14 one little certain area, so it's unlikely to cause injury.

15 Q Next sentence, it says, Back blows sometimes don't
16 work is because they have not been delivered with enough
17 force. Tell us about that.

18 A Same thing. You're not trying to give them a
19 massage. You're not going like that [indicating]. You're
20 actually trying to hit them hard enough to move something
21 that's in their lungs out or in their airway out.

22 Q Thank you, Doctor. The next bullet, we're going to
23 enlarge that. After you've given the five blows, check inside
24 the mouth in case the object has come into the mouth and you
25 haven't noticed or the person has not been able to tell you.

1 Tell us about that.

2 A You want to see if there's something in their mouth.
3 Hey, open up your mouth, is there something in there, come on,
4 let's spit it out, come on. Then you want to be very, very
5 careful putting your fingers into the mouths of people that
6 are awake. It's not a good idea.

7 But if there's something that's in the mouth, you
8 can say, okay, open up, cough, cough, cough it out, especially
9 if it's like a child or someone who kind of panics, they
10 have -- they got the dime up that they'd been choking on and
11 they don't want to let you know they had the dime in their
12 mouth. You go, okay, come on, spit it out.

13 Q And you check inside the mouth in case the object
14 has come up into the mouth and you haven't noticed. What does
15 that mean, come up into the mouth?

16 A So up into the front part of the mouth where you're
17 able to see it come up out of the either if it was in the back
18 of the mouth or down by the vocal cords or below the vocal
19 cords. You're trying to get it up and forward. Because if
20 you think of it from this way, it's down here and you're
21 trying to get it to come up and then forward and out.

22 Q And so the actions we just talked about
23 [indicating], five blows would do that?

24 A Hopefully.

25 Q If not, we've got some more options, right?

1 A Yes, sir.

2 Q And so you're trying to get that up out of there
3 into the mouth. And then the next sentence it says, Or the
4 person has not been able to tell you. So explain to the jury
5 about if you haven't noticed or the person has not been able
6 to tell you, tell the jury about why training is important to
7 be able to understand that.

8 A Once again, doing the whole process, if you've been
9 educated, if you've been trained and you're in the difficult
10 emergent situation, you're going to be more prepared and know
11 what to do.

12 Q The next sentence, if we can highlight that. If the
13 five blows don't work, try a procedure known as the abdominal
14 thrust or Heimlich maneuver. Did I read that right, Doc?

15 A Yes, sir.

16 Q And what does that mean?

17 A Well, Heimlich maneuver is the same thing as
18 abdominal thrust. Heimlich was the name of a doctor who first
19 came up with it. And that's where we talked about going
20 around behind the person.

21 Q How about if you show it to me again.

22 A Okay. I won't do it. I won't squeeze hard.

23 Q I'm a big man.

24 A I can actually reach around you.

25 Q Not as big as I used to be.

1 A Okay. So if you reach here, you find where his
2 bottom of his breast bone is, and I put my hands together and
3 I have my fists in, and I'm going to pull in and up, in and
4 up, but I'm going to do it hard, boom, boom, like that.

5 Q What are you trying to accomplish when you do that?

6 A I'm trying to squeeze in your belly to push -- well,
7 first I'm going to have you lean forward a little bit, squeeze
8 in your abdomen so that the abdomen pushes up on what's called
9 your diaphragm. The diaphragm is the bottom part of your
10 lungs, or what's the dome that's below your lungs.

11 Q Like right here [indicating]?

12 A Yes, sir. And that's what kind of moves as part of
13 your breathing in trying to push the belly in, to push up on
14 that diaphragm to help force air out.

15 Q And above the diaphragm is the lungs?

16 A That's the lungs, correct. And if I was not able to
17 reach around his belly well, I could go up on the chest itself
18 and pull in, do it in the chest.

19 Q And would that do the same thing, get the lung --
20 the air to push out and get the object out?

21 A Yes, sir. And especially if it was someone who is
22 obese. I'm a little vertically challenged height-wise. So if
23 it was someone who I couldn't get my hands all the way around
24 the belly, I could go around and get them around the chest. I
25 might ask them to kneel down on their knees, be able to grab

1 around the chest and pull in hard. Because generally people's
2 chest will be, if they're very obese, the chest will be a
3 little bit smaller than the belly.

4 Q What we've gone through so far is -- how long has it
5 been fairly well known, these maneuvers to help somebody?

6 A Heimlich came up with them in the 1970s, I believe.

7 Q And --

8 A Or came up with his maneuver, the abdominal thrust.

9 Q And before that was what? Was there anything?

10 A That was before my time.

11 Q All right. And how effective has it been?

12 A It's been helpful. It doesn't save everyone, but it
13 helps save many people.

14 Q We'll talk about whether it would have saved Harvey
15 in a little bit; is that right?

16 A Yes.

17 Q And in your opinion this would have?

18 A Especially the earlier it's done the better, yes.

19 Q Okay. And we'll talk about that further. Anything
20 else, this how to treat choking paragraph that is this middle
21 section of page 70 in the training manual?

22 A I don't think so, sir.

23 Q Okay. Let's move along for the jury. The next
24 paragraph says, How to do abdominal thrusts, Heimlich
25 maneuver, if we'll just highlight that. And if you could,

1 let's just read it out loud and make sure we didn't miss
2 anything. How to do abdominal thrust, Heimlich maneuver.
3 Stand behind the person who's choking. Put your arms around
4 the stomach. We did that.

5 Make a fist and grab your fist with the other hand.
6 Position the fist in the abdomen just above the navel. Pull
7 inward and upward up to five times, and again check in the
8 mouth to see if the object has been dislodged. And we talked
9 about that before, but now with this manual you've got
10 checking the mouth twice so far, correct?

11 A Yes, sir.

12 Q So you got it first when you suspect there's food in
13 there, and then as you [inaudible]?

14 A Yes, sir.

15 Q Okay. Now let's move right for, if we can move
16 exhibit upward and highlight the bottom portion of this, this
17 area from here to here. It says, If the obstruction does not
18 clear after three cycles of back blows and abdominal thrusts,
19 call 911. Tell us about that.

20 A If it -- so the first thing you want to do is you
21 want to go to the patient, the person, victim and try and help
22 them right away. You don't want to say, oh, gee, they're
23 choking, I'm going to run over and call 911 first.

24 Q Why not?

25 A Because you want to do the first things you can to

1 see if you can get it out real quickly. Now, if there's more
2 than one person --

3 Q [Inaudible] long shot, doing it first?

4 A No. It's there's many cases that will be effective.
5 Now, if there are two people available, you do it
6 simultaneously. You go over to the person and you yell,
7 somebody call 911. And while someone else is calling, you go
8 up and you work on the patient and you try and go ahead and
9 help things get out.

10 If you've already done it and you've done three
11 cycles, you've cut the back blows -- and you can alternate
12 them. You can do back blows, do the Heimlich maneuver, do the
13 back blows again, do the Heimlich maneuver, and you do a third
14 time back blows, do the Heimlich. If after that it hasn't
15 worked, it's kind of like, you know, what's the definition of
16 insanity. Well, doing the same thing over and over again
17 hoping you're going to get the result.

18 So if you've done the three times and it hasn't
19 worked, chances are as you keep going more and more and more
20 times it's not going to work, call 911, because now you really
21 know you're going to need them, and then you can go back and
22 try them again.

23 Q Well, we got five blows on the back, we got three
24 attempts at the Heimlich. How much time are we talking?

25 A A minute, two minutes.

1 Q A minute or two minutes. Okay. Now the next
2 section that I'd like to highlight is that last sentence. It
3 says, If at any stage the person becomes unconscious, you must
4 start CPR. Did I read that right?

5 A Yes, sir.

6 Q So they introduce a new procedure called CPR.
7 What is -- tell the jury what CPR is.

8 A CPR stands for cardio pulmonary resuscitation. So
9 cardio means the heart and pulmonary means the lungs. And
10 resuscitate means you're trying to improve them or bring them
11 back. So if someone's unconscious, then you have to go along
12 the suspicion that there's not been enough oxygen going to
13 their brain and you're going to try and do CPR.

14 Back around 2010 the recommendations were to do, you
15 know, mouth breathing. You go and you open their mouth and
16 try to blow into their lungs, and then you do the chest
17 compressions. And if you're not able to get any air into
18 their lungs when you breathe in, then you try and do the chest
19 compressions. You see if there's anything you can do to
20 improve their airway, to clear their airway.

21 Sometimes because the head's forward like this, so
22 you try and tilt the head back to open their airway.
23 Sometimes it's because something is stuck in their mouth. A
24 long, long time ago they said to do a blind sweep. That means
25 you just stick your finger in and see if there's something in

1 there. 2010 and since then they're saying don't just put your
2 finger in for no reason, but if you see there's something
3 there, it's either the big piece of sandwich or a hot dog or
4 something there, you can get it out.

5 And as you're doing the CPR, by pushing on their
6 chest while they're lying down on their back, that may pop
7 something up out of their lung which now you may see and try
8 and get it out. And if you're concerned about getting your
9 finger all gooey and stuff you can wrap it in your shirt, your
10 T-shirt or something, put in to get it out.

11 Q Well, help me out. It may be the hour and the brain
12 slid away from me. But it seemed like the very first part of
13 this is if somebody's conscious.

14 A Yes, sir.

15 Q And then if they're not conscious we go to CPR?

16 A Yeah. People really don't like it if you do CPR on
17 them while they're awake.

18 Q And so we showed them how to do the Heimlich with
19 me. If I'm unconscious, if you put me from this chair down on
20 the ground, can you show the jury what CPR is?

21 A Sure. Well, the first thing is if they're sitting
22 in a chair, you want to get them out. You want to have them
23 lying down. If someone's sitting up in a chair, one, you
24 can't do CPR effectively. Two, you want to be able to get
25 blood to the brain as easily as you can. And if they're lying

1 down, the brain and the heart are at the same level and blood
2 doesn't have to go uphill. But if they're sitting upright,
3 you got to get the blood from the heart to go up to the brain.

4 So the first thing you do is lie them down. You
5 have someone who's really hot at a baseball game or a concert,
6 or they just saw Justin Bieber and they passed out, you lie
7 them down flat so the blood can get to their brain more
8 easily.

9 Q So if I'm lying down, can you just show the jury
10 what you would do to get as far as the pressure.

11 A So you go down, the first thing you do is, hello,
12 are you awake, are you awake, can you hear me, somebody call
13 911, get help. You look, you see are they able to breathe.
14 And if they're not able to breathe, you go ahead, you
15 reposition their airway. You go ahead and you can try and do
16 mouth breathing, where you pinch the nose. I put -- I'm not
17 going to do this. You put your mouth on their mouth and you
18 breathe in.

19 Then you go over to their chest, you find the bottom
20 of their sternum. That's the middle part of the chest. Go
21 two fingers above there, one hand on top of the other, and you
22 grab your fingers up so you're putting all your force right in
23 the middle. You go one, two, three, four, and you do chest
24 compressions. And then you alternate. You go back to
25 breathing, chest compressions.

1 After you've done this cycle, if you notice that
2 you're not able to get any air in, you look in the mouth and
3 say, oh, there is a big piece of the sandwich or a hotdog or
4 whatever, and if I can see it I can reach in and get it out,
5 not if they're awake and their mouth is moving.

6 Q And how long would that take?

7 A The first cycle takes approximately one minute.

8 Q And the pushing on this area is the same area you're
9 pushing on with the Heimlich?

10 A Well, actually, the Heimlich would be down in the
11 belly. It's actually between. Above the navel is the
12 bellybutton. So it's between the bellybutton and the lower
13 part of the chest where you would do the Heimlich. Over here
14 we're actually up on the chest itself.

15 So you're trying to do two things. One, you're
16 trying to pump blood because the heart may not be pumping.
17 And two, you're trying to push air that's in the chest and
18 move it forward. Now, to move back a step because I jumped
19 ahead a little bit, if you're able to feel a pulse, so I feel
20 that there is a pulse so, you know, you feel poom, poom, that
21 means the heart's pumping. If the heart's pumping, I don't
22 have to do the chest compressions.

23 If they just stop breathing, I can just help them
24 with the breathing part. If they've lost consciousness,
25 they're not breathing and there's no pulse, that's where you

1 do the breathing part, that's the pulmonary resuscitation and
2 the chest compression.

3 Having said all this, this is just a little caveat,
4 this is not an official CPR course. I do recommend everyone
5 go get official CPR training, especially if you have kids or
6 elderly people living in --

7 Q Where can they go to learn?

8 A You can call the American Red Cross. You can call
9 the American Heart Association. There are various hospitals,
10 schools that give classes.

11 Q Thank you. Anything else as far as educating the
12 jury as to how page 70 would have saved Harvey?

13 A Within a reasonable degree of medical certainty, if
14 this had been done and the sooner it had been done, the better
15 chance you would have of finding this big piece of sandwich
16 and of getting it out, or having Harvey cough it out and be
17 able to go ahead and have saved Harvey. Mr. Chernikoff, I
18 should say.

19 MR. ALLEN: I'm asking the family if they would
20 leave the courtroom.

21 (Party plaintiffs exit the courtroom.)

22 BY MR. ALLEN:

23 Q At this time, Doctor, I'd like to show just a part
24 of the video, and I'd like to go through with the jury the
25 part of the video so you can tell us what Harvey -- what this

1 condition Harvey's in, when he's in that condition, and at
2 what point in time he's salvageable, he's salvageable or you
3 could save his brain and his life, okay?

4 A Yes, sir.

5 Q Now, what I wanted to do is we'll occasionally stop
6 it and I'll ask you some questions.

7 A Yes, sir.

8 Q And if you need to stop it, we'll stop it at any
9 moment with you. And for the record, we're starting at 7:57
10 a.m. and 40 seconds.

11 (Video plays for the jury.)

12 THE WITNESS: This is Mr. Chernikoff over there
13 who's now eating a sandwich. And if you watch it, it kind of
14 appears the eating fairly quickly.

15 (Video plays for the jury.)

16 BY MR. ALLEN:

17 Q Now, he's eating -- I want to ask you to tell the
18 video operator when to stop when you see signs of a distress
19 or choking; is that fair?

20 A Yes, sir.

21 (Video plays for the jury.)

22 BY MR. ALLEN:

23 Q Stop the video right here. Just to be clear to the
24 jury, you're not here as a transportation expert, right?

25 A Correct.

1 Q To tell what should or shouldn't have been done, or
2 you never put together any rules, handbooks, taught any
3 drivers of paratransits; is that correct?

4 A No, sir.

5 Q We're just here to talk about your medical issues;
6 is that correct?

7 A Yes, sir.

8 MR. ALLEN: Okay. Continue on.

9 ** (Video plays for the jury.)

10 THE WITNESS: If we can turn the volume down a
11 little bit, please. I have a...

12 (Video plays for the jury.)

13 THE WITNESS: So we're coming up very shortly now.

14 (Video plays.)

15 THE WITNESS: Right around there it's hard to tell.

16 MR. ALLEN: Stop.

17 THE WITNESS: It's hard to tell if here or a few
18 seconds later, but somewhere in there is when it looks like
19 he's starting to have some distress. And if you go forward,
20 you'll see what I mean.

21 (Video plays.)

22 THE WITNESS: There it kind of looks like he's
23 uncomfortable. It kind of looks like he's trying to get up,
24 but has his seat belt on and is not really able to. That's at
25 six seconds after 8:00 o'clock.

1 BY MR. ALLEN:

2 Q So at that point in time, in your opinion, he is
3 choking?

4 A It appears that -- it appears that he is choking,
5 yes.

6 MR. ALLEN: Continue on.

7 (Video plays.)

8 THE WITNESS: You see him kind of rubbing his head
9 like something's going on and he's not quite sure what to do.
10 Kind of reaching out towards that person there.

11 MR. ALLEN: Stop it right there.

12 BY MR. ALLEN:

13 Q You've seen the autopsy report, true?

14 A Yes, sir.

15 Q And we're going to talk about that in a little bit.
16 Based upon the autopsy report, everything you reviewed, can
17 you tell the jury --

18 THE COURT: I'm sorry. I thought there wasn't an
19 autopsy.

20 MR. ALVERSON: There wasn't an autopsy.

21 THE COURT: Is it the coroner's report?

22 MR. ALLEN: There's an autopsy report, Your Honor.

23 MR. CLOWARD: There is.

24 MS. SANDERS: It's not a -- there was not an autopsy
25 done.

1 MR. ALLEN: There is an autopsy report.

2 THE COURT: Well, I guess we can address it later,
3 but I was confused from earlier. I just didn't know if you
4 misspoke.

5 MR. ALLEN: And I'll help. I'll clear it up here
6 with this witness. We'll do it right now.

7 BY MR. ALLEN:

8 Q You reviewed something from a coroner. What was it?

9 A There was a coroner -- so a coroner is, as I
10 understand, and the judge may be able to understand or explain
11 better than I can, is someone who's an official representative
12 of the government of a county or state or jurisdiction who
13 evaluates deaths in different circumstances, and along with
14 often a medical examiner, and the medical examiner will
15 normally be a doctor. So the medical examiner will examine
16 the body, and the coroner will examine various other aspects
17 and determine is it a natural death or a homicide or suicide
18 or suspicious or what have you.

19 An autopsy means an examination of the person who
20 has died, and there's generally three parts to an autopsy.
21 You have an external examination where you look at what you
22 can see on the body without actually cutting them. You feel
23 if there was something broken. You see if there was a broken
24 arm. You see if there is an arrow sticking in the bone, if
25 there's a big piece of food stuck in the throat.

1 You also have what's called an internal examination.
2 In this -- and that means where you cut into the person and
3 look at the various organs. And then there's a third part
4 where they remove fluid samples, such as pulling blood out
5 from the person, pulling fluid out from the eyes and actually
6 checking the chemicals that are in there. And they might
7 remove urine to look for different poisons or abnormal blood
8 values that might have led to the death.

9 So you have those three parts; external examination,
10 internal examination, and then the blood samples. The form
11 that I saw from the medical examiner --

12 Q I'm going to interrupt you.

13 A Yes, sir.

14 MR. ALLEN: May I approach the witness.

15 BY MR. ALLEN:

16 Q Without showing this to the jury, is the form that
17 you're talking about that you saw from the medical examiner,
18 is it this form?

19 A Yes, sir.

20 Q And this is something that you reviewed to --

21 A Yes, sir.

22 Q -- reach your opinions; is that correct?

23 A Yes, sir.

24 Q What's the title of that document?

25 A On the top right-hand corner it says, Autopsy

1 Report.

2 Q Thank you, Doctor. Proceed. I didn't mean to --

3 A And then in this case what happened is they had two
4 of those parts of the exam. They had the external examination
5 of the body and they had the examination of those body fluids,
6 looking for evidence of severe medical abnormalities or
7 chemicals that might have caused death. They did not do the
8 internal examination.

9 Q And that was on the first page; is that correct?

10 A Those are on the three pages that -- there's also
11 a -- separately there were some laboratory values that were
12 drawn that are not on these three pages.

13 Q Then there's the last part that's called what, the
14 final diagnosis?

15 A Yes, sir.

16 Q And that's signed by the medical examiner?

17 A That is correct.

18 Q Have you reviewed that?

19 A Yes, sir.

20 Q Is your opinion the same as the medical examiner?

21 A Yes, sir.

22 Q And what is that?

23 A Final diagnosis: Choking. Large impacted food
24 bolus, and I'll explain that in a minute, 50 grams recovered
25 from the oral cavity in the upper airway. So what impacted

1 means is it was kind of stuck. There was a big thing of food
2 that was stuck. When it says bolus, that just means a big
3 glob or a lump of something. And then it says 50 grams. And
4 in our normal lives in America we're not used to using grams.
5 50 grams is just a little bit less than 2 ounces.

6 So if you think of a Quarter Pounder hamburger,
7 which by the way is a quarter pound before it's cooked. Once
8 it's cooked it kind of loses a bunch of the fat and juices, so
9 it's a little bit smaller than a quarter pound when it's done.
10 So if you think of a quarter-pound hamburger patty, and that
11 would be 4 ounces, and you cut that in half, that would be 2
12 ounces, and that's about the size of this piece of food that
13 they found in the back of the throat which the medical
14 examiner says had a very strong smell of peanut butter.

15 So basically it was this large peanut butter
16 sandwich, piece of peanut butter sandwich that was stuck in
17 the back of the throat. And it says in the oral cavity, so
18 that's the part above the vocal cords and in the upper airway,
19 which by my understanding from his deposition meant between
20 and below the vocal cords. There was some below the vocal
21 cords in the trachea, some right there where the vocal cords
22 are, and some that was in the back of the mouth above the
23 vocal cords.

24 Q Thank you, Doctor, for explaining that.

25 MR. ALLEN: Thank you, Your Honor, for pointing that

1 out.

2 BY MR. ALLEN:

3 Q We were at 8:00 a.m. and 22 seconds, and what was
4 the last question I asked you? The choking?

5 A Yes, sir.

6 Q Okay. That's where we were. May we proceed.

7 (Video plays.)

8 THE WITNESS: Now you see he's obviously in distress
9 and he's starting to kind of get really weak and lean over.

10 MR. ALLEN: Let's stop the video right there. Did
11 somebody raise their hand?

12 THE COURT: We do have a question, but we can
13 address it when you're finished.

14 MR. ALLEN: Okay. I didn't know whether I should
15 stop. Okay.

16 THE COURT: I'll just gather them up and we can look
17 at all of them at once. Thank you. Continue, Counsel.

18 MR. ALLEN: Please the Court.

19 BY MR. ALLEN:

20 Q Now, what I wanted to point out at 8:00:38, I think
21 the jury's heard terms about unconscious or conscious and
22 responsive or unresponsive. Remind us what those terms mean.

23 A So conscious basically means someone's awake and
24 responsive. Unconscious means they're passed out and
25 unresponsive, they won't respond to you. And if someone's

1 still moving, you would think there is still some amount of
2 being conscious. You don't really know exactly unless you're
3 there and you're talking to them, which we don't have that
4 ability here.

5 So what you'd do is you'd say, well, if they're
6 still moving there's still some evidence that they would be
7 responsive. Once they're not moving anymore, then it would be
8 reasonable to say they're most likely unresponsive at that
9 point.

10 Q And so for the point we're talking about, being
11 conscious for the maneuvers that we went through. So what I'd
12 like you to do is as we play the video from this point in
13 time, tell me when he becomes unconscious or unresponsive such
14 that we need to go down here and do the CPR.

15 A Yes, sir. To the best of my ability from what we
16 can see.

17 Q Yes, sir.

18 (Video plays.)

19 THE WITNESS: So there's still movement going on
20 there. He's getting weaker, leaning more and more to the
21 side. He's still able to hold his head up somewhat, so he
22 hasn't gone totally limp yet. Still not totally slumped over.
23 Still some movement going on there. The bus is not moving
24 yet. Now the bus is --

25 MR. ALLEN: Let's stop the video right there.

1 BY MR. ALLEN:

2 Q So the driver's gotten back on the bus and started
3 the bus, and up until this point in time he was conscious?

4 A There was still movement, which would make you think
5 that he most likely was still at least had some level of
6 consciousness.

7 Q So as he took the three steps up on the bus and
8 looked at his left at Harvey, he was conscious before he got
9 behind the wheel of the car?

10 MS. SANDERS: Objection. Calls for speculation.

11 THE COURT: I'm sorry. I couldn't hear the question
12 either.

13 BY MR. ALLEN:

14 Q The question is, as he took three steps up on the
15 bus, if he had turned to his left, in your opinion, was he
16 still conscious at that moment, as you just opined?

17 A When he step --

18 THE COURT: Now, hold on. There's an objection.

19 MS. SANDERS: Objection. Calls for speculation.

20 It's also going beyond the scope when he's talking about what
21 Jay did or didn't do.

22 MR. ALLEN: He's already testified as to he's still
23 conscious. Now my question then was tell me when he becomes
24 unconscious. There was no objection to that.

25 THE COURT: I'm going to sustain that. I don't

1 think he's set forth a basis to be able to answer that
2 question. Sustained.

3 MR. ALLEN: On what basis?

4 THE COURT: I don't think that he has a basis to
5 answer that question. I think it would be speculation.

6 BY MR. ALLEN:

7 Q All right. Doctor, you've explained to us earlier
8 signs and symptoms of somebody being conscious versus
9 unconscious; is that correct?

10 A Yes, sir.

11 Q And signs of being conscious, did you tell us
12 earlier were somebody that was able to go against gravity?

13 A So there's -- there is being totally awake and
14 conscious. There's being totally unresponsive. And then
15 there's a little bit of a gradation where you kind of start
16 fading a little bit, where you go from being totally awake and
17 conscious to being unconscious.

18 Q I may have used the wrong term. But so we have from
19 conscious to unconscious to unresponsive? Help us understand
20 that.

21 A Let's say unconscious and unresponsive, let's say
22 those are the same.

23 Q Yes.

24 A So if we back up a few seconds, please. Right
25 there. There it's --

1 Q [Inaudible.] Yes.

2 A At 18 seconds, after it's obvious that he's awake
3 and conscious and responsive. You can go ahead and move
4 forward.

5 Q Is he awake?

6 A He's still responsive. He's still moving. We know
7 that once we get past about eight minutes -- excuse me.

8 Q Stop right there. Stop. What is he?

9 A Right there when he gets on it appears that he would
10 have still been awake and responsive.

11 Q And if the driver had turned to his left, he would
12 have seen him?

13 A Yes.

14 Q Continue the video, please.

15 (Video plays.)

16 THE WITNESS: And there we're getting a decreasing,
17 less responsive, less consciousness. We know that once his
18 body stops moving that he's unconscious, unresponsive.

19 BY MR. ALLEN:

20 Q Tell us when that is.

21 A There's a point where his head kind of appears, I
22 think it's about 17 seconds after. It's still moving. And I
23 think it's about 17 seconds when he kind of totally slumps
24 over, where he's not able to maintain his body upright
25 anymore. Right around there. His head's now actually down

1 below the level of the chair. He's not able to control his
2 body musculature to keep his head up at all at that point.

3 Q And for the jury's notes, at 8:01:22, what is he?

4 A He now would be unconscious, as best as we can tell
5 from this video.

6 Q Thank you. Continue on the video.

7 (Video plays.)

8 BY MR. ALLEN:

9 Q And at that point in time when he's unconscious,
10 that's when we do the CPR; is that correct?

11 A Correct. Now, there are some movements that are
12 going on, and the question at this --

13 Q Stop it right there. And up until this point in
14 time, at 8:01:22, had either the first aid been done, any of
15 the first aid been done on the training manual page 70, would
16 Harvey still be with us today?

17 A Within a reasonable degree of medical certainty,
18 yes.

19 Now, at this point forward there's still some
20 movements that go on, on the body, but the bus is moving.
21 It's hard to say what's him moving and what's the bus moving.
22 We know he's not lifting his head up, but we know that at
23 least up until the 8:01:22, that he was able to maintain his
24 body posture up above the chair at least at that point.

25 Q The second question I want to ask you has to do with

1 your brain expertise. At this point in time, would he at
2 8:01:22, would he, if all that was initiated from page 70 had
3 been done, would Harvey's brain have been the way it was
4 before this event, within a reasonable degree of medical
5 probability?

6 A With a reasonable degree of medical certainty, as
7 was asked at my deposition, I did what I could to find out the
8 timelines, and most of what I was able to find is somewhere --

9 MS. SANDERS: Your Honor, I'm going to object.

10 MR. ALLEN: [Inaudible] --

11 THE COURT: Hold on. What's the objection?

12 MR. ALLEN: -- answer my question, at this point in
13 time.

14 THE WITNESS: Yes.

15 MS. SANDERS: Counsel, excuse me. I have an
16 objection.

17 MR. ALVERSON: I think we have to approach the bench
18 on this one, Your Honor.

19 MR. ALLEN: I thought you were going to object he
20 wasn't answering my question.

21 MR. ALVERSON: Well, we know where the answer to the
22 question is going.

23 MS. SANDERS: Well, perhaps you should wait for my
24 objection before you make a speculation.

25 (Bench conference transcribed as follows.)

1 THE COURT: What's the objection?

2 MS. SANDERS: My objection is that this line of
3 questioning is beyond the scope of his designation. And I
4 asked him the same questions in his deposition and he didn't
5 give me an answer to any of these questions about timelines
6 and how long it takes to -- for somebody to --

7 THE COURT: Did he point to anything similar in his
8 expert report?

9 MS. SANDERS: No.

10 MR. CLOWARD: Judge, I didn't even hear what
11 Ms. Sanders said.

12 THE COURT: Saying it exceeds the scope of his
13 expert designation.

14 MR. CLOWARD: Okay. We can pull that out and take a
15 look at it. We don't believe that it does.

16 MS. SANDERS: And I asked the same kinds of
17 questions in his deposition and he was unable to give me an
18 answer. So now if he's going to give an answer to some of
19 those questions, now I have an objection because they did not
20 supplement his report to give any of those answers.

21 MR. ALLEN: I think, Your Honor, it's clearly in his
22 report that he's giving opinions as to causation --

23 MR. ALVERSON: I think we need to keep our voice
24 down.

25 MR. ALLEN: -- and with a reasonable medical

1 certainty --

2 THE COURT: Shh.

3 MR. CLOWARD: Charles.

4 MR. ALLEN: I'm sorry. I've got -- I'm hard of
5 hearing, so I have a hard time regulating my --

6 THE COURT: That's okay. I am too as of this week.

7 MR. ALLEN: -- regulating my voice.

8 THE WITNESS: I can step away if you wish.

9 MR. ALLEN: I believe it's clearly laid out here in
10 his opinions, Your Honor. And I believe what the question she
11 refers to goes as to causation from her question goes to a
12 cross-examination causation, because he clearly gives opinions
13 up until the time that the bus --

14 THE COURT: Hold that thought for a second.

15 (End bench conference.)

16 THE COURT: Ladies and gentlemen of the jury, why
17 don't you take a ten minute --

18 It's a good time to take a break. We'll do all
19 these at once.

20 Please come back -- actually, come back at 3:05.
21 Again, don't talk about the case, don't research the case,
22 don't form or express an opinion on this case, please. Thank
23 you.

24 (Jurors recessed at 2:52 p.m.)

25 THE WITNESS: Would you like me to step out, Your

1 Honor?

2 THE COURT: You can stay up here currently.

3 (Outside the presence of the jury.)

4 THE COURT: So Ms. Sanders, if I remember correctly,
5 he was just about to ask about, you know, if the bus driver
6 had done certain things would his brain be intact and
7 everything else. And he does indicate in the discussion --
8 let's see.

9 "Had the bus driver noted Mr. Chernikoff's condition
10 in a timely manner, attempted the Heimlich maneuver and/or CPR
11 in a timely manner or if he had contacted 911 emergently,
12 Mr. Chernikoff would have survived the incident and would not
13 have died."

14 MS. SANDERS: He did say that in his deposition.
15 But now he's going into a specific question -- actually, the
16 doctor probably shouldn't be here.

17 THE COURT: Yeah, that's probably a good idea.
18 Doctor, please step out.

19 MR. ALLEN: Maybe in that small room, Dr. Stein. Do
20 you need to use the restroom, sir?

21 THE WITNESS: I don't know if I --

22 MR. ALLEN: Do you want to go downstairs?

23 THE COURT: Up one or down one.

24 MR. ALLEN: Go one floor down and then the stairway
25 is down the hallway.

1 THE COURT: Just take him in the back.

2 (Marshall assists the witness.)

3 THE COURT: So what are you going to -- what are you
4 planning on asking in this line?

5 MR. ALLEN: It's the exact question. [Inaudible] as
6 well as to if his brain would still be -- still be intact.
7 She asked him on page 64 --

8 THE COURT: Well, he doesn't mention that in his
9 report. He just says he would have survived. Survived
10 doesn't necessarily mean that his brain's intact.

11 MR. ALLEN: Yes, Your Honor. She asked him at
12 deposition do you have an opinion whether or not the
13 likelihood of revival without neurologic or sequela increases
14 after a four minute time frame even if CPR. That was a point
15 in time in which the incident of brain injury increases. I
16 don't remember if the cutoff was four minutes, five minutes or
17 six minutes. So clearly in his deposition he talks about
18 that, and it's [inaudible].

19 MS. SANDERS: Now, the other thing that happened in
20 the deposition is I asked him many statistical questions about
21 from the time that somebody goes unconscious to the time when
22 they suffer cardiac arrest, how many minutes is that. He
23 could not answer any of those kinds of questions. I'd have to
24 look it up, I'd have to do the research.

25 So if he's going to stay general, I guess I don't

1 have a problem with it as long as we're allowed the same kind
2 of leeway with Dr. MacQuarrie. But if he's now going to ask
3 him questions that he was not able to ask at the time of --
4 answer at the time of the deposition, then I have a problem
5 with that.

6 MR. ALLEN: And that's why I interjected when I did,
7 prematurely in your opinion, but I wanted to --

8 THE COURT: So I think you guys agree.

9 MR. ALLEN: I agree, that's why I asked him that
10 question, sir, just answer my question. And he gives me up to
11 a four minute time frame in his deposition. I'm not going to
12 go into medical literature and statistics. He did say in his
13 deposition that he would need more research on that, and I
14 think that's what the doctor was feeling at this point in
15 time, he needed to explain that. Which of course I think Ms.
16 Sanders can handle that on cross-examination.

17 THE COURT: Okay. It sounds like you guys have an
18 agreement that --

19 MR. ALLEN: Yes.

20 THE COURT: While you're up here, let's just address
21 the questions for the doctor. Okay. If you guys, I don't
22 know. Here, if you want to read them, pass them along.

23 MR. ALVERSON: Why don't we just hold off all these
24 until after the cross-examination.

25 THE COURT: You know, I'm fine doing them all at the

1 same time, and we can either ask the doctor at the end of
2 direct, or if those are questions that are going to come up
3 during cross, we can always do them at the end of the
4 examination.

5 MR. CLOWARD: I'd rather wait.

6 MR. ALVERSON: I'd rather wait until all --

7 THE COURT: If you want to review them, that way you
8 know what they're looking for.

9 MR. CLOWARD: They might be moot.

10 MR. ALVERSON: Yeah.

11 MR. CLOWARD: Is there a way we could get copies of
12 those right now while we're on a break?

13 THE COURT: Yeah. You can get copies of those.
14 Those are going to be court exhibits though.

15 MR. CLOWARD: I just think we can read it while
16 we're taking a break.

17 THE COURT: Lisa, do you mind making a copy. She
18 has to touch them because she's in charge of all those.

19 (Court recessed at 2:57 p.m. until 3:07 p.m.)

20 (Jurors reconvene at 3:08 p.m.)

21 THE COURT: Doctor, you are still under oath at this
22 time.

23 Ladies and gentlemen, very quickly, I know that
24 three of you did give me questions and we will get to those
25 questions. Looking at them, I think some of the questions may

1 be answered upon further direct or cross-examination. If
2 they're not, then we'll go ahead and present them to the
3 doctor before he leaves.

4 Counsel, if you'd like to continue.

5 MR. ALLEN: Please the court, Your Honor.

6 DIRECT EXAMINATION (continued)

7 BY MR. ALLEN:

8 Q Doctor, before we left, the question I had in hand
9 was at 8:01:36, had page 70 been initiated on the employee
10 training manual, was Harvey's brain, would it have come back
11 to be just like it was before he choked --

12 MS. SANDERS: Objection. Calls for speculation.

13 BY MR. ALLEN:

14 Q -- within a reasonable degree of medical
15 probability?

16 THE COURT: Do you still have the objection?

17 MS. SANDERS: Yes.

18 THE COURT: I'll allow it.

19 THE WITNESS: For clarification, it was 8:01:36.
20 Within a reasonable degree of medical certainty, yes, his
21 brain would have come back to where it was.

22 MR. ALLEN: Now if I could continue on with the
23 video. Doctor, we're going to watch the video.

24 And we're going to continue running the video,
25 Brian. Okay.

1 BY MR. ALLEN:

2 Q We're going to continue running the video, and I'd
3 like you to stop the video at the time in which, within a
4 reasonable degree of medical probability, his life was still
5 salvageable or could have been saved had the first aid choking
6 training manual from First Transit had been initiated.

7 (Video plays.)

8 THE WITNESS: About there you can stop.

9 BY MR. ALLEN:

10 Q Stop. And the video stopped at 8:00 o'clock,
11 8:00 a.m., seven minutes and two seconds. And what is your
12 opinion within a reasonable degree of medical probability
13 whether Harvey could have been saved had page 70 been
14 initiated?

15 A At this point his -- within a reasonable degree of
16 medical certainty his life could have been saved, yes, at this
17 point.

18 Q Now I want you to assume -- you reviewed the Clark
19 County Fire Department EMS run sheet; is that correct?

20 A Yes, sir.

21 Q And just for purposes of time, I want you to assume
22 without continuing to run the video that they arrive at 8:00
23 a.m. and 15 minutes and 14 seconds. So eight minutes and 12
24 minutes later. Within a reasonable degree of medical
25 probability or certainty, was there anything the EMS had with

1 them that could have brought Harvey back to life then?

2 A At the time when they arrived, eight minutes and 15
3 seconds later, it would have been too late.

4 Q Too late. Doctor, I want to ask you a few questions
5 and -- a few more questions, and then allow defense counsel to
6 talk to you. And what I'd like to do is I'd like to write on
7 the board a couple things.

8 A Yes, sir.

9 Q You've told us your opinions as to causation,
10 meaning what the cause of death was. You told us what you
11 reviewed. I can see if you considered other things in your
12 opinion, all right?

13 A Yes, sir.

14 Q If somebody was to come into the courtroom -- if
15 somebody was to come into this courtroom and tell this jury
16 that Harvey Chernikoff had a heart attack, tell the jury what
17 your opinion is on that.

18 A Okay. So a heart attack generally means that
19 there's a blockage in one of the arteries going to the heart.
20 That's the general understanding of what a heart attack is.
21 And with what we know in this case, especially with the food
22 there blocking his airway, it would be extremely, extremely
23 unlikely that it was a heart attack that caused the death. We
24 usually look at things, we say --

25 Q Slow you down, Doctor. Was there something that you

1 reviewed in the First Transit employee handbook that might
2 help the jury understand your opinion as to whether Harvey had
3 a heart attack that we can show the jury?

4 A There is page 69 of the employee handbook.

5 Q Page 69. Would page 69 be helpful to educate the
6 jury as to why in your opinion he didn't have a heart attack?

7 A This is something that I think would help for a jury
8 to understand in addition to my medical knowledge of the
9 situation.

10 Q Could you step down, and if Brian can kind of do the
11 same thing with the doctor, and let's walk through it. This
12 is page 69 of Plaintiff's Exhibit 2. It says, Heart attack
13 [inaudible]; is that right, Doctor?

14 A Yes, sir.

15 Q The first sentence says, "Signs per the American
16 Heart Association can mean a heart attack is happening." Who
17 is the American Heart Association?

18 A The American Heart Association is formed by doctors
19 and other specialists in caring for patients who have problems
20 with the heart and doing research with heart disease. It's a
21 very well-respected organization.

22 Q Is that one of those organizations that teach people
23 how to do CPR and --

24 A Yes. Yes, sir.

25 Q And they've got to do those kind of guidelines?

1 A Yes, sir.

2 Q First bullet says, "Chest discomfort. Most heart
3 attacks involve a discomfort in the center of the chest that
4 last more than a few minutes, or it goes away and comes back.
5 You can feel uncomfortable pressure, squeezing, fullness and
6 pain." Tell the jury what that means.

7 A We all -- we used to say, well, if you have patients
8 kind of talking that they have chest pain, and people describe
9 things in different ways when they're having a heart attack.
10 They might say pain or pressure, tightness, squeezing,
11 somebody big is sitting on my chest, or I just have real
12 discomfort in my chest. So generally they will have symptoms
13 like that.

14 It may come along with people feeling nauseated. It
15 may come along with them breaking out in a sweat. Sometimes,
16 just because of the way the wiring in the body works, you
17 can't always locate where things are that are hurting inside
18 of you. So sometimes people will have pain in their
19 shoulders, they'll have pain in their arm. There's nothing
20 wrong with their shoulder or their arm. It's just the way the
21 body kind of perceives pain.

22 These are things that we often think of as signs
23 that people should be aware of that if they have these that
24 they need to go to a hospital and be seen by a doctor or call
25 911. Don't drive yourself to the hospital, because if you're

1 driving and something bad happens while you're driving, you
2 can't take care of yourself, so calling 911 is the best thing.

3 Q And why is there pain in the center of the chest?

4 A In the center of the chest is one of the most common
5 places where people have the pain.

6 Q What's there? Is that where my heart is?

7 A Your heart is actually there and a little bit over
8 to the left side, but the pain is kind of generally felt what
9 we call in the middle part, in the sternum, or going down into
10 the arm. It's not exactly where the heart is, but it's kind
11 of the way the brain registers where the pain is coming from.

12 Q The illustration there of a man grasping his --

13 A Clutching the chest is a very common thing that
14 people will do when they're having severe chest pain from a
15 heart attack.

16 Q Did you see any of that on the video of Harvey?

17 A No, sir.

18 Q It says, next bullet, "Discomfort in other areas of
19 the upper body, symptoms can include pain or discomfort in one
20 or both arms, the back, the neck or the jaw, jaw or stomach."
21 What are they talking about there?

22 A Likewise, the wiring of the nerves inside the body,
23 it's kind of hard to tell where pain is exactly. So when
24 people have a heart attack, sometimes they feel, like I said,
25 their arm can hurt. Sometimes their upper stomach. We get

1 real concerned when people come in and they say I've got this
2 horrible pain, it's going up in my jaws on both sides.

3 Sometimes the pain goes through the back. Just
4 because of the way the body's internal nervous system is
5 wired, we'll get pain in these other areas. There's nothing
6 wrong with the jaw. There's nothing wrong with the arm.
7 There's nothing wrong with the back. It's all coming from the
8 heart.

9 It's just the way the heart ends up sending signals
10 up in the brain, and the brain's not quite sure how to
11 interpret it. It says, well, I don't know what heart pain
12 feels like, I'm going to tell him his stomach or his arm or
13 his back is hurting.

14 Q Next, Doctor, the shortness of breath with or
15 without chest discomfort. Tell us what shortness of breath
16 is.

17 A Shortness of breath, also called shortness of air,
18 you feel like you're not getting enough air. Especially
19 people who are older may have a feeling that they just can't
20 breathe well. Women tend to have these other symptoms more
21 than just chest pain. So shortness of breath, when people
22 come in, especially if you think they have reasons, you think
23 they have risk for heart disease, so we get very concerned.

24 Q And can you demonstrate shortness of breath for us?

25 A It's one of those things that we call a symptom.

1 It's something that the person feels. And when you
2 demonstrate something, that's more of what you call a sign,
3 meaning something we can see. So the person feels that they
4 can't get enough air.

5 Q And how is that different than that obstruction that
6 we were talking about?

7 A With the obstruction there's a reason they're short
8 of breath, is that they can't get the air in. They have that
9 real panicky expression often, and you have abnormal sounds.
10 Either you hear this wheezing or stridor sound I made before,
11 or they're not able to move air at all.

12 Someone's having a heart attack and they're short of
13 breath, generally they're breathing fast, kind of looking
14 panicky, but you can hear that they're breathing. You can
15 feel -- if you put your hand in front of their mouth, you can
16 feel that air is moving in and out of their mouth.

17 Q And you used a new word for the jurors. You can
18 hear stridor?

19 A The stridor is when someone has something that's
20 blocking their airway, when I hear them going [indicating]
21 when they're breathing out, making that abnormal sound.
22 Whereas wheezing is when [inaudible] and you hear the abnormal
23 sound [indicating].

24 Q And can the stridor be so subtle that it would be
25 hard to hear with all the noise that we heard on this video?

1 A It could be.

2 Q And shortness of breath, is that something that
3 people can walk around with?

4 A It -- yeah, and sometimes people have emphysema or
5 they've had pneumonia, or there are other lung disease
6 [inaudible] and they may have shortness of breath for a long
7 period of time. It just kind of gets progressive, gets worse,
8 and finally they say, hey, I need to go see a doctor. It all
9 depends on what's causing it and how bad it is. Sometimes
10 it's real sudden and real severe and you call 911.

11 Q The last bullet there, Doctor, says, "Other signs
12 may include breaking out in a cold sweat, nausea or
13 lightheadedness." Explain that to us.

14 A People with heart attacks often get nauseated.
15 Nausea is a feeling like you need to vomit. Breaking out in a
16 cold sweat [inaudible] fancy terms [inaudible] diaphoresis.
17 If you're just sitting there and sometimes you see these
18 people with a heart attack and they're just dripping with
19 sweat, and you wipe their head off and they just start, you
20 know, having real [inaudible] profuse sweating with the heart
21 attack.

22 Q And you told us earlier you reviewed the autopsy.
23 Didn't they do some blood work?

24 A Yes, sir.

25 Q And in that blood work, was there anything in that

1 blood work like enzymes that would have said, hey, heart
2 attack?

3 A I neither reviewed -- if you have them to see, I
4 don't remember specifically that there was.

5 Q [Inaudible] we'll get that for you.

6 MR. ALLEN: Your Honor, can we show the doctor
7 Exhibit A3 from the joint binder?

8 THE COURT: Is that the one you looked at
9 previously?

10 MR. ALLEN: I just want to show it to him.

11 THE COURT: The three page report?

12 MR. CLOWARD: It's the full, the full report, 21
13 pages.

14 THE COURT: Is there any objection to that, Counsel?

15 MS. SANDERS: I haven't seen it all. I'm pulling
16 it.

17 What is it, Counsel?

18 MR. CLOWARD: It's the --

19 MR. ALVERSON: The coroner's report?

20 MR. CLOWARD: Yeah, the full one.

21 MR. ALLEN: We'll pull it up for you electronically,
22 Doctor.

23 MR. CLOWARD: You probably need to ask. Do we
24 publish that to the jury, or --

25 THE COURT: Is there any objections?

1 MR. CLOWARD: -- do you just want him to review it?

2 MR. ALLEN: Just want him to review it.

3 MR. CLOWARD: Okay.

4 BY MR. ALLEN:

5 Q Doctor, here's the 26 page coroner's report that's
6 exhibits, and I'll just spade it down for you to where the
7 enzymes are. Just take your time. It's right there.

8 A I don't see specifically where they're mentioned.

9 Q So you did review Mr. Chernikoff's past medical
10 records?

11 A Yes, sir.

12 Q What was -- did you base your opinion upon the fact
13 that Mr. Chernikoff did not have a heart attack in part
14 because of his past medical records?

15 A So you look at a combination of things. You look at
16 the overall what we call the scenario, the overall picture of
17 things, and you say what is the most likely thing that
18 happened. And we know there was one thing that was definite,
19 which is he had a big glob of food in the back of throat that
20 was blocking his airway. And then you say, well, what about a
21 heart attack, do people with a heart attack usually just pass
22 out within a minute, minute and a half of their symptoms
23 starting? No.

24 You know, we have people that come in the ER --
25 well, first, one-third of people that have heart attacks never

1 realized they've had the heart attack at the time. They have
2 a blockage in an artery in the heart, and then on testing, you
3 know, six months, a year or five years later, they get a test
4 that shows that there's damage to part of their heart, they're
5 like, oh, that must have been when I thought I had indigestion
6 a year ago.

7 We don't see evidence that he's grabbing on his
8 chest. He was seen by a cardiologist, that's a heart doctor,
9 the year prior who did not -- was not concerned that he had
10 heart disease at that time. They did a test that's called the
11 ankle-brachial index. What does that mean? That means they
12 check the blood pressure in the arm, the blood pressure in the
13 leg, and they compare them to see if there's any evidence of
14 any blockage in the blood vessels to the leg. There was no
15 evidence of that. The cardiologist said that test was normal.

16 People who have significant blockage in their legs
17 are more likely to have heart disease. Harvey did not have
18 that. We know patients with diabetes and high cholesterol
19 have an increased risk of heart disease, but it's much more
20 common to have increased risk if you have what we call
21 complications with diabetes. And what does that mean? Well,
22 the word "opathy" in medicine means illness of.

23 So people that have retinopathy, disease of the
24 retina, the back of their eyes. People with diabetes can go
25 blind, have vision problems. People with neuropathy, diseases

1 of the nerves, they get numbness in their toes, abnormal
2 feelings. They can step on little nails and get cuts in their
3 feet and get bad infections. Harvey did not have any evidence
4 of retinopathy, did not have any evidence of neuropathy.

5 The last one is what we call nephropathy. That
6 means kidney disease. One of the most common reasons people
7 go on dialysis is because of kidney problems from diabetes.
8 Harvey did not have any of those. So in summary, he did not
9 have peripheral vascular disease, he did not have diabetic
10 disease of the eyes, did not have diabetic disease of the
11 kidneys, did not have diabetic disease of the nerves that we
12 know of. He had no symptoms that go along with a heart
13 attack.

14 People that have heart attacks don't generally
15 become unresponsive in a minute and a half without complaining
16 of anything, and we do know that there was a big piece of food
17 that was stuck in the mouth. So we look for what's called a
18 unifying diagnosis, can you come up with one diagnosis that
19 will explain everything. And in this case the one diagnosis
20 that most clearly explains everything is that he died because
21 he choked on the big piece of peanut butter sandwich that was
22 stuck and blocking his airway.

23 Q So in your opinion, we can just say no to a heart
24 attack?

25 A No to heart attack.

1 Q Consider it ruled out?

2 A Considered it -- it would be extremely, extremely
3 unlikely. So when we rule things out, we say is there any
4 reason to think that that's what's going on in this case, no.

5 Q Another issue that might be heard by this jury is if
6 a witness comes into this courtroom and states that Harvey had
7 a seizure. What's your opinion on that?

8 A So a seizure means if you can think of it as like a
9 short-circuiting of the electrical wiring in your brain and
10 your body starts having abnormal movements. When people are
11 passing out, if you've ever seen someone faint, and which I've
12 seen and I've fainted once or twice myself from an injury, my
13 wife will tell you as you're passing out, your body has a
14 couple of jerking movements which happen while you're passing
15 out, because there's not enough blood going to your brain.

16 There's no reason to believe that this started as a
17 seizure. This started as him kind of feeling uncomfortable,
18 leaning to the side, as he's getting less and less responsive
19 there's some jerking movements. There's nothing to suggest
20 that this started off as a seizure.

21 Q So seizure, you considered it; is that true?

22 A Yes, sir.

23 Q And you ruled it out?

24 A Yes, sir.

25 Q Let me ask you back to the heart attack. Assuming

1 Harvey did have a heart attack, how -- do you have an opinion
2 whether knowing CPR as outlined in page 70 and being educated
3 as to page 69, whether a trained individual such as the driver
4 in this case, if he was trained, whether those things, whether
5 CPR would have helped?

6 MS. SANDERS: I'm going to object. Page 70 doesn't
7 say anything about training for CPR.

8 THE COURT: I'm not sure where you're going,
9 Counsel. Are you at the bottom of 70, where it talks about --

10 MR. ALLEN: Page 70, start CPR.

11 THE COURT: Okay.

12 BY MR. ALLEN:

13 Q If they had known page 70, where it says CPR, and
14 Harvey had a heart attack, how would CPR had been initiated
15 helped Harvey?

16 THE COURT: I'll allow you to ask that question.

17 THE WITNESS: If someone does have a heart attack,
18 meaning that there's a blockage in the artery to their heart
19 and they've become unresponsive, that means that they're now
20 having a very abnormal heart rhythm or their heart is stopped.

21 Doing CPR will help to keep the blood flowing
22 somewhat, will increase their chances of being able to get to
23 a hospital to have the artery opened, and that all depends on
24 how long it takes for EMS to get there, for them to give
25 oxygen, to try and get a defibrillator on him, get the heart

1 started and that.

2 BY MR. ALLEN:

3 Q Assume the driver was trained on page 70, thought he
4 had a heart attack, and page 69 about the heart attack, and it
5 did end up being as it was, he had the food in his throat, how
6 would that have made a difference?

7 A If he had started CPR either on his own or called
8 911 early and 911 had walked him through how to do CPR, which
9 we have happen on patients, he would have recognized that he
10 can't get any air into Harvey and that he within a reasonable
11 degree of medical certainty would have found this large glob
12 of food there in the mouth, which he would have been able to
13 reach in and get out to open up the airway.

14 Q So he would have looked in the airway and gotten the
15 food out?

16 A Yes, sir.

17 Q If somebody was to come in and just give a blanket
18 statement that based upon reviewing the video, that there was
19 no evidence on the video for anybody to have any reason to
20 check the airway, would you agree with that?

21 A No, sir.

22 Q Why is that?

23 A It's ignoring the evidence that's present. It's
24 looking at things and ignoring what you're actually seeing,
25 ignoring the fact that a large piece of peanut butter sandwich

1 was found there stuck in the throat and there was no
2 suggestion -- generally if people have a heart attack, they're
3 able to speak up and say, hey, my chest is hurting or
4 something else is going on.

5 Q So you disagree with that [inaudible]?

6 A Yes, sir.

7 Q If somebody was to come in and state to this jury
8 that's impossible for any physician to state within a
9 reasonable degree of medical probability that the death here
10 was caused by choking, would you agree with that?

11 A Not at all, sir.

12 Q Why not?

13 A If you use the colloquial term it's ridiculous, to
14 say that it's ridiculous to say that you can't say what he
15 died of. It's clearly obvious what he did die of.

16 MR. ALLEN: And I appreciate your patience,
17 everybody's patience. I'm going to check my notes. I think
18 I'm just about finished, Your Honor.

19 I'd ask you -- hang on. Let me confer with -- let
20 me confer with co-counsel. Please the Court.

21 (Pause in proceedings)

22 MR. ALLEN: The jury heard in opening -- scratch
23 that.

24 BY MR. ALLEN:

25 Q If somebody was to come in here and say that the

1 fact that it took ten minutes for the coroner to get the food
2 out of Harvey's airway would mean that the Heimlich would not
3 have worked, what would you say to that?

4 A So when we talk about the Heimlich, we talk about
5 trying to squeeze on the belly and get things up while the
6 person is still conscious. When you're at the time of the
7 autopsy, we're talking about a day later. And if you think of
8 what happens with peanut butter and jelly sandwich a day and a
9 half later, when it's exposed to the air and such, or it's
10 sitting in the side of a mouth of a person who's dead, it's
11 not going to be the same thing.

12 While the -- with it being evident that it was there
13 and kind of soft and mushy like a sandwich would be, it would
14 be reasonable to think that either the person would have been
15 able to cough it out, or if you assisted them once they became
16 unconscious and reached in, and you'd have been able to grab
17 part of it and pull it out.

18 As we've seen on the photograph, which I don't know
19 if you've shown the jury, you can see that there's food
20 sitting there dripping from his mouth at the time that the
21 coroner came to the bus and found him sitting up there. So
22 it's a totally different thing, taking something out a day
23 later. You know, it's kind of like, well, what does a fish
24 smell like when you catch it? Well, when you just catch it
25 out of the water it smells one way. A day and a half later it

1 smells totally different.

2 Q And the last question, sir, for the record, have all
3 your opinions been to a reasonable degree of medical
4 probability or certainty, or a more likely than not basis?

5 A Yes, sir.

6 MR. ALLEN: And Your Honor, for housekeeping
7 matters, I'd like to move the records from the Clark County
8 Coroner's Office, A3-0001 into evidence at this time.

9 THE COURT: Any objections?

10 MS. SANDERS: No objection.

11 THE COURT: Admitted.

12 (Plaintiff's Exhibit A3 admitted.)

13 MR. ALLEN: I'll pass the witness.

14 MS. SANDERS: May I just clarify, are you talking
15 about Exhibit A3, because I think there's a couple of
16 different things.

17 MR. ALLEN: Yes. It's the coroner's, the full
18 coroner's report.

19 MS. SANDERS: Is that A3 that you were talking
20 about?

21 MR. CLOWARD: Yeah.

22 MR. ALVERSON: A3?

23 MR. ALLEN: A3, for the record.

24 THE COURT: All right. It's admitted.

25 MS. SANDERS: Mr. Allen, can you move the --

1 MR. ALLEN: I'll move it. I'll get it for you.
2 Where would you like it?

3 MS. SANDERS: Just out of the way, so I can...
4 How about flipping that page over. Thank you.

5 CROSS-EXAMINATION

6 BY MS. SANDERS:

7 Q Good afternoon, Dr. Stein.

8 A Good afternoon.

9 Q You have never met or talked to the plaintiff,
10 perhaps you did today, but at the time we took her deposition
11 you had never met or talked to the plaintiff, had you?

12 A That is correct.

13 Q And you'd never talked to the coroner who performed
14 the examination of the body?

15 A That is correct.

16 Q As far as your expert review work, isn't it true
17 that in 90 to 95 percent of the cases you review you act on
18 behalf of the patient or the plaintiff; is that correct?

19 A I act on 90 and 95 percent of the cases that end up
20 coming to me are from the plaintiff, and that's about the
21 percentage where I end up being on behalf of them. I'm more
22 than willing to do plaintiff or defense work.

23 Q But in actuality, 90 to 95 percent of your expert
24 work is for the plaintiff?

25 A Yes.

1 Q Now, I think you told us in your deposition that
2 you've never actually performed the Heimlich maneuver, true?

3 A I do not believe so. Most of the times when the
4 patient comes to me, those simpler procedures have already
5 occurred and they require my higher level of medical expertise
6 to perform things, and usually they're already unresponsive.

7 Q So the answer is no, you've never performed the
8 Heimlich?

9 A That is correct.

10 Q And you've never taught it to medical students,
11 correct?

12 A That is correct.

13 Q Now, the Heimlich maneuver is not 100 percent
14 effective, is it?

15 A That is correct.

16 Q And neither is CPR?

17 A That is correct.

18 Q Now, you'd agree with me, wouldn't you, that in
19 order to even think about performing the Heimlich maneuver,
20 you have to have some reason to believe that the person is
21 choking?

22 A Correct.

23 Q And I think you told me in your deposition that when
24 you looked at this videotape, and you looked at it many times,
25 didn't you?

1 A Yes.

2 Q And you didn't see anything that you would say is an
3 obvious sign of choking, correct?

4 A You could see he's uncomfortable, you can see he's
5 making some abnormal movements. You can't kind of hear him
6 making the obvious choking gasping type noises.

7 Q So nothing that would be obvious to somebody looking
8 at a person and saying, gee, he's choking, I better do
9 something?

10 A With the caveat that when you put it together that
11 you know he's eating the sandwich, you can say he's choking.
12 But without having him -- without having seen him eating the
13 sandwich, without realizing that there's this lunch pail next
14 to him, no.

15 Q And you reviewed the deposition of Jay Farrales,
16 didn't you?

17 A Yes.

18 Q And you know that --

19 A Actually, if you can just move that over a little
20 bit. I'm having a little problem seeing you.

21 Q I'm precluded from doing that.

22 A Oh, okay. That's fine.

23 MS. SANDERS: Our marshal says don't touch this. So
24 I'm going to follow his instruction and not touch it.

25 THE WITNESS: Or maybe just move your --

1 MS. SANDERS: This thing?

2 THE WITNESS: Maybe if you just move it over a
3 little bit.

4 MS. SANDERS: Okay.

5 THE WITNESS: There, that's better. My apologies.

6 MS. SANDERS: I didn't want to obstruct counsel's
7 view.

8 MR. ALVERSON: They're okay with that.

9 BY MS. SANDERS:

10 Q You read Jay Farrales's deposition, true?

11 A Yes.

12 Q And you know that his testimony is that he didn't
13 see Harvey Chernikoff eating the sandwich, correct?

14 A Correct.

15 Q And you don't have any reason to believe that that's
16 not correct testimony, do you?

17 A I do not have any reason to think that's incorrect.

18 Q Now, I asked you in your deposition about the signs
19 and symptoms of what you might expect to see with a choking
20 victim. Do you recall that?

21 A Yes.

22 Q And at the time you told me that the usual signs and
23 symptoms would be for a person of normal intellect, but that
24 with a person that's a 50-year-old with mental retardation and
25 could read at the kindergarten level, you don't know that it

1 would be the same. Do you recall giving me that testimony?

2 A Yes.

3 Q Now, Doctor, you don't have to have a particular
4 reading level in order to experience symptoms of choking, do
5 you?

6 A Symptoms or signs?

7 Q Either one.

8 A No.

9 Q Okay. Even a baby chokes, right?

10 A Correct.

11 Q Okay. Dogs choke, animals choke?

12 A Correct.

13 Q They don't have to have any kind of reading level to
14 let them know something's obstructing their throat, right?

15 A One is a question of them choking, and actually
16 people with intellectual disabilities will be at higher risk.
17 The other is, you know, will they necessarily show the
18 universal sign of going like this [indicating] when they're
19 choking.

20 Q Isn't that more or less reflexive automatic? A baby
21 will do that, won't it?

22 A I don't think a baby would do that.

23 Q Okay. And you would expect some kind of gagging
24 sound, something like that?

25 A If the airway has some amount of air that's able to

1 move in and out, yes. If they're unable to move air in and
2 out, no.

3 Q But you would nevertheless expect to see some kind
4 of reflexive reaction, wouldn't you?

5 A You would expect to see some degree of discomfort,
6 yes.

7 Q Now, there's nothing that you reviewed that
8 indicated to you that Harvey Chernikoff would be incapable of
9 expressing any kind of signs of physical distress, is there?

10 A No, there is not that I know of.

11 Q And you saw nothing that would be outwardly
12 indicative of him suffering any kind of pain, correct?

13 A He appeared uncomfortable.

14 Q You didn't hear any gagging?

15 A Once again, if you can't move air, you can't gag or
16 make -- go ahead.

17 Q Can you answer the question. Based on the video and
18 your review of it, you did not hear or see anything indicating
19 gagging?

20 A I did not hear coughing. The video was not of
21 enough detail to say whether or not there was gagging going
22 on.

23 Q Okay. You didn't see anything that indicated like a
24 gagging type of movement, did you?

25 A There was some abnormal movements. It's hard for me

1 to say if those were or were not gagging.

2 Q Okay. Nothing that indicated he was -- he wasn't
3 clutching his throat, he wasn't pounding his chest, nothing of
4 any kind of hand movements to indicate a problem, correct?

5 A No.

6 Q And no noises of any kind, right?

7 A Not that I could hear.

8 Q Now, Jay Farrales testified that he didn't see
9 Harvey eating on the -- eating the sandwich on the bus,
10 correct?

11 A Correct.

12 Q And so for Jay, there would be no reason for him to
13 even believe that Harvey was choking when he comes back on the
14 bus, correct?

15 A At the time when he first walks back on the bus,
16 that would be correct.

17 Q And so there would be no reason to check his mouth
18 for food, correct?

19 A Well, that depends. Once you walk over to him and
20 you see there is an empty lunchbox or a lunchbox next to him
21 that has a crumpled up, I believe it was aluminum foil, and
22 there is a smell of peanut butter, then that would be
23 different. But from just looking at him when you're walking
24 onto the bus he would not have seen that necessarily.

25 Q Now, you're making an assumption about what you

1 think he may have been able to smell, correct? You don't know
2 that he would have been able to smell peanut butter, do you?

3 A I don't have any reason to think he wouldn't.

4 Q Okay. And just because he has a lunchbox there
5 doesn't mean that -- anything, does it? Don't people carry
6 lunchboxes quite frequently?

7 A Correct. But except on a bus when you're not
8 supposed to be eating and if you put things together, you look
9 for clues, you say there's lunchbox going on here, he's not
10 breathing. Either way, if on page 69, if he said, well, I
11 thought he was having a heart attack, he's not waking up, the
12 bottom of page 69 says start CPR, which would include checking
13 for the airway.

14 Q Okay. So you're getting from a lunchbox beside him
15 that he should have thought, in spite of the fact that there's
16 no physical evidence of choking, that he should have thought
17 about choking anyway?

18 A It should have been in what we call in the
19 differential, in your thought of what's going on.

20 Q Now, in your viewing of the video, you didn't see
21 any food coming out of Harvey Chernikoff's mouth, did you?

22 A I didn't, but then again, it wasn't of a sufficient
23 clarity and zooming in to really be able to see what was
24 exactly in his mouth while he was in the sitting up position.

25 Q And you don't really have any way to know whether

1 just even if he had, even if Jay had suspected choking, that
2 just clearing his mouth would have removed that obstruction?
3 You don't have any way to know that, do you?

4 A You look at the evidence that's in fact. You look
5 at what was there, that the coroner sees food protruding from
6 the mouth, that it was still a soft -- a soft sandwich at that
7 point. And you have to go on a reasonable degree of medical
8 certainty and you look at the evidence in fact. Within a
9 reasonable degree of medical certainty he would have been able
10 to clear it.

11 Q Now, Jay is not a doctor, is he?

12 A No.

13 Q And you would not expect him to have the same kind
14 of expertise as a medical doctor, would you?

15 A No, I would not.

16 Q Did you ever read the deposition of Dr.
17 Lingamfelter?

18 A Yes, I have.

19 Q When did you do that?

20 A In the past couple of days.

21 Q Now, when the EMTs came on the bus, they didn't
22 check Harvey's mouth for food either, did they?

23 A They checked to see whether or not his heart was
24 beating. And when they got there and it was about 15 minutes
25 after the onset, they saw that his heart had stopped and they

1 didn't see any need to attempt resuscitation. And if they're
2 not going to be attempting resuscitation, there was no need
3 for them to look in the mouth.

4 Q Okay. The answer is no, correct?

5 A Correct.

6 Q If somebody is riding on a bus, would you find it
7 unusual for that person to have a lunchbox with them?

8 A I am not experienced in riding on a bus with
9 patients who are being transported because they have physical
10 or mental disabilities. So I would not be able to say whether
11 they would or would not, especially if there's signs on the
12 bus that say no eating or drinking.

13 Q Well, having a lunchbox with you doesn't mean that
14 you're going to be eating or drinking on the bus, does it?

15 A No, it does not.

16 Q And for all you know, he's going to work somewhere
17 and he's taking his lunch with him, correct?

18 A That's a possibility, yes, ma'am.

19 Q Now, you agreed with the cause of death as being
20 choking based on your review of the videotape, correct?

21 A Review of the videotape and --

22 Q And the coroner's finding?

23 A Yes.

24 Q None of those -- neither of those things were
25 available to Jay Farrales at the time that he was driving

1 Harvey Chernikoff that day, were they?

2 A No, that is correct.

3 Q Now, Doctor, I asked you this question in your
4 deposition, but isn't it true that without an autopsy you
5 can't rule out other possible causes of death such as heart
6 attack or stroke or, you know, anything like that?

7 A So without an internal examination can you
8 absolutely 100 percent exclude them? No. Are they below the
9 degree of medical probability already based on what we know?
10 Yes. Is it worth going and putting a body through a full
11 autopsy to find those if you already have a very obvious cause
12 of death? It would not have been necessary.

13 Q But you could not rule those things out without an
14 autopsy, correct?

15 A Well, it depends. Because in medicine we often rule
16 things out to within 2 percent. Okay. And if it's less than
17 2 percent, unless in unusual circumstances we -- usually we
18 say we've sufficiently ruled it out. So if we do it to within
19 the 2 percent level, you could rule it out. As far as
20 absolute certainty, no, you could not.

21 Q So in your deposition, when I asked you this
22 question, would it be possible for you to rule out a possible
23 myocardial infarction without an autopsy being performed, you
24 said, "To within a 100 percent accuracy exclude that it would
25 not be possible. To say it was well below the level of

1 medical certainty, I can say within a reasonable degree of
2 medical certainty."

3 A Which is basically what I just said.

4 Q Not 100 percent, correct?

5 A Correct. With a 98 percent, 99 percent, yes. 100
6 percent, no.

7 Q Now, Harvey Chernikoff was diabetic, was he not?

8 A Yes, he was.

9 Q He was hypertensive?

10 A That's a question. He was on the medicine
11 benazepril, which is often used for people that have diabetes
12 to help protect their kidneys. If you look at the
13 cardiologist's consultation from May of 2010, it says past
14 history of hypertension, no.

15 So that's a question to ask the previous medical
16 advisers. I try to look for other places where it
17 specifically said hypertension, and I did not see that
18 mentioned. The only place I could find it, unless someone
19 else finds differently, was in the cardiologist's record where
20 it said no hypertension.

21 Q There were other medical records available, weren't
22 there, and Harvey Chernikoff had been diagnosed with
23 hypertension, correct?

24 A That's the part I'm saying I have not specifically
25 seen. I looked through what I had and I tried to find that.

1 I saw in other places where it'd say the medicines he was on
2 and it would mention the diabetes. And I may have missed it
3 and if someone can show it to me, I'd be pleased to review it.
4 I did not specifically see anywhere else where it specifically
5 used the term "hypertension."

6 Q He had been diagnosed with high cholesterol?

7 A Yes.

8 Q He was male?

9 A Yes.

10 Q He was over 50?

11 A Yes.

12 Q And he had a family history of heart disease,
13 didn't he?

14 A He did. I'm not sure as to exactly what degree.
15 Generally we think of heart disease being a significant family
16 history if it's premature heart disease, meaning below the age
17 of 55 in a male or below the age of 65 in a woman, around --
18 those are around the numbers, if I have that correct.

19 Q Okay. Were you aware that his maternal grandmother
20 had died of a heart attack?

21 A I knew she had heart disease. I'm not sure exactly
22 at what age, but yes.

23 Q And you're aware that Mr. Chernikoff, Jack
24 Chernikoff has himself had heart problems, in fact had surgery
25 for it?

1 A In his seventies, yes.

2 Q Now, all of these things are risk factors for heart
3 attack, aren't they?

4 A As to how much risk -- and it's -- premature
5 coronary artery disease definitely is. When it gets into
6 older people having heart disease, how much that's a risk
7 factor for a younger person is much less and some people
8 question that. But premature coronary artery disease, which I
9 do not know if there was a family history of premature
10 coronary artery disease, would be a risk factor.

11 Q Now, you agree that a person can die of a heart
12 attack without necessarily having any prior history of heart
13 disease, correct?

14 A Correct.

15 Q And people can die of a heart attack without any
16 warning at all, correct?

17 A Correct. Unusual, but it can happen, yes.

18 Q Now, the -- on the video you see things that now
19 with the benefit of 20/20 hindsight you believe are
20 indications of the start of distress, correct?

21 A Yes.

22 Q Now, when those things were happening, you would
23 agree that Jay was off the bus, he was assisting the other
24 passenger, wasn't he?

25 A They were starting when he was off the bus, or

1 around the time when the person was coming off of the bus.
2 Because Harvey seems to be like reaching up towards the other
3 person.

4 Q Well, you say that he was reaching up, you see a
5 hand movement. You can't necessarily interpret that hand
6 movement to mean that he's reaching up, can you?

7 A Why don't we put it back up and we can kind of see.
8 I interpret it as -- he wasn't making those movements at all
9 at any other point, and the person's walking by there, he's
10 feeling uncomfortable [indicating]. It appears obvious to me
11 that he was trying to reach out towards that other person.

12 Q Doctor, did you review the entirety of the video?

13 A Way back when, yes, after I initially reviewed it, I
14 looked and focused on the time period around the incident.

15 Q Did you recall seeing other times on the video where
16 Harvey was moving around, had his arms hanging into the aisle,
17 was shifting around? Do you recall seeing any of that?

18 A There was some. I don't remember all the specifics.

19 Q Doctor, would you agree with me that deprivation of
20 oxygen for a period of as little as four minutes can lead to
21 brain injury and death?

22 A As little as four minutes can start leading to brain
23 injury. My understanding is that around ten minutes is when
24 you get at risk of brain death. Four to six minutes is about
25 the onset of when you are at risk for getting brain injury.

1 Q Now, when the EMTs arrived, they didn't attempt to
2 resuscitate Harvey, did they?

3 A No, they did not.

4 Q And you told me in your deposition that you were
5 kind of surprised by that.

6 A Yes.

7 Q And that you thought that there was some possible
8 chance that they could have revived him even at that time. Do
9 you recall that testimony?

10 A Some chance would have been fairly unlikely, but
11 there would have been some chance.

12 Q Now, as an emergency room doctor you see patients
13 every day that have suffered some kind of injury or trauma of
14 an emergent nature; that's what you do, correct?

15 A Correct.

16 Q And most of those things are unexpected, aren't
17 they?

18 A Most, yes.

19 Q Injuries, sudden chest pain, different things like
20 that?

21 A Yes.

22 Q And you can't save all of the people who come into
23 the emergency room with those kinds of symptoms, can you?

24 A No. There are always some people who die naturally.
25 Eventually everyone dies.

1 Q And it's true that you can't save everybody even
2 when you have all the advanced medical training that you have;
3 isn't that true?

4 A That is correct.

5 Q And all of the trained medical staff that are
6 present in an emergency room, true?

7 A True.

8 Q And you can't save everybody just because you have
9 advanced medical equipment, can you?

10 A That is correct.

11 Q And that's true of choking victims as well, true?

12 A True. Nationwide it's about 4 percent of people
13 that have choking will end up dying from the choking.

14 Q And that's true whether or not the Heimlich maneuver
15 and/or CPR has been attempted in the field or not; isn't that
16 true?

17 A Can you clarify the question, please?

18 Q Even if somebody is in a restaurant for example,
19 starts to choke and the Heimlich is tried, that person
20 eventually comes to the emergency, you can't save everybody
21 that has had the Heimlich maneuver applied, can you?

22 A Correct. As I said, my understanding is about
23 4 percent of people nationwide that have choking for which EMS
24 is called die.

25 Q Now, Doctor, as part of your job when you discharge

1 a patient, you sometimes give them medical advice and
2 instructions, don't you?

3 A Yes.

4 Q And you expect them to follow your instructions so
5 that they'll do as well as they can medically, correct?

6 A I hope that they will. They don't always, but we
7 hope that they do.

8 Q Well, and you can't force a patient to do the things
9 that you ask them to do, can you?

10 A This is correct.

11 Q And you can't remind them of the things that you've
12 told them to do unless you know that they're not doing it,
13 correct?

14 A Well, you can remind them of them or ask their
15 families too whether they've done it or not, but you won't
16 know if they've done it unless you ask them.

17 Q So you -- but you would agree with me, you can't
18 really remind them of the instructions you've given them
19 unless you know that they're not doing it?

20 A They're separate issues. You can remind them
21 whether they've been doing it or not. You may not necessarily
22 know you need to remind them unless they inform you that they
23 haven't been doing it.

24 Q You had mentioned in your deposition that what you
25 saw with Harvey eating the sandwich, you characterized it as

1 wolfing the sandwich down. Do you recall that?

2 A Yes.

3 Q In your opinion, would he have been wolfing the
4 sandwich down because he was trying to hide the fact that he
5 was eating the sandwich from the driver?

6 A I do not know.

7 Q You talked a little bit before, when we were talking
8 about the exhibit here, about back blows. Now, back blows
9 aren't 100 percent effective in relieving choking either, are
10 they?

11 A No, they're not.

12 Q You didn't see -- you described different things
13 earlier when you were talking about choking, and you described
14 this kind of panicky feeling, panicked look. You didn't see
15 that with Harvey Chernikoff when you looked at the video, did
16 you?

17 A You saw signs of distress. You saw him appearing
18 uncomfortable. I can't say exactly, once again with the
19 limitations of the angle and the clarity of the video, the
20 exact looks. You can tell that he was uncomfortable.

21 Q Brian, could you put up page 70 again.

22 Doctor, you took about 40 minutes earlier going
23 through with Mr. Allen this page. Some of the things that are
24 identified on there -- I can't see it myself. When you get
25 old your eyesight goes.

1 A I can identify.

2 Q Okay. This is better. Okay. With regard
3 specifically to Harvey, the first line, the person trying to
4 cough or breathe; you didn't hear any coughing?

5 A Not that I could hear -- my screen just went blank
6 for whatever reason. Okay. It's back up.

7 Q Is that the right one?

8 And with regard to these things that you went
9 through in great detail, there wasn't an opportunity for Jay
10 to encourage Harvey to cough, was there?

11 A That depends on what time he went over to his side.

12 Q Well, let's talk about that. At the time that you
13 first saw signs of distress, Jay was off the bus, wasn't he?

14 A No. That -- well, the --

15 Q He was assisting the other lady.

16 A The overweight woman was walking towards the front
17 of the bus and Harvey was reaching towards her, and around
18 that, somewhere in that time period is when Mr. Farrales went
19 off of the bus.

20 Q Okay. So he didn't see any of the things that
21 you're now describing as possible distress, correct?

22 A Not that I know of, except for when he came back on
23 the bus and Harvey is very much far, far leaning over to the
24 side.

25 Q Now, are you saying that at that point when he gets

1 back on the bus, if he had seen Harvey he would have
2 encouraged him to cough, sat him up, done the Heimlich
3 maneuver, are you saying that Harvey would have been able to
4 recover enough in order for those maneuvers to be done?

5 A There was some amount of responsiveness that was
6 left. We don't know exactly if Harvey would have been able to
7 cough it out on his own or would have had the Heimlich
8 maneuver performed at that point, because that opportunity
9 never occurred.

10 Q He was already leaned into the aisle, wasn't he?

11 A Leaning towards the aisle, but had enough ability to
12 maintain his bodily posture that he wasn't totally slumped
13 down. His head was still up above the side and then once he
14 lost that ability to maintain those body muscles, his head
15 went down below the other seat.

16 Q Okay. So you're saying that if Jay had seen him at
17 that point, that he would have been able to sit him up, make
18 him cough, ask him to cough, do all these things that are
19 identified on page 70?

20 A Actually, if you listened to what I said, what I did
21 say was there was some amount of responsiveness that was
22 there. We do not know for certain whether or not Harvey would
23 have been able to have coughed or have to been able to have
24 the Heimlich maneuver performed upon him while he was awake
25 because that never occurred.

1 Q And you've agreed with me, I think, that from what
2 you see on the video and the jury has seen it as well, there
3 weren't any of the most common signs that you see with a
4 choking victim, correct?

5 A That is correct.

6 Q So nothing that would indicate to Jay that this
7 patient or this passenger was choking, correct?

8 A Other than to go back and as we said, that there was
9 food and lunchbox that was there that was open, a crumpled
10 aluminum foil wrapper, a person who's unresponsive who if had
11 gotten a close enough look, you know, a day later they could
12 tell there was a strong smell of peanut butter emanating from
13 the object, that they would have been able to suspect that
14 there was choking that was going on.

15 Q You're making a lot of assumptions, aren't you,
16 Doctor?

17 A I'm stating things within a reasonable degree of
18 medical certainty as to what would have been some of the
19 things that would have clued someone off.

20 Q The lunchbox was not open at the time that -- that
21 Harvey finished eating the sandwich. Do you remember him
22 putting the wrapper back in and closing -- setting the
23 lunchbox aside?

24 A We need to go to the incident report. I don't
25 remember exactly if it was open or not open. If it was

1 closed, then I misspoke. I apologize.

2 Q You talked before about sometimes people who are
3 trained in first aid kind of panic and they don't remember,
4 don't have the presence of mind to know what to do. Do you
5 recall that?

6 A People who are untrained are more likely to panic
7 than people who are trained. The more training you have, the
8 less likely you are to panic.

9 Q And even if you are trained, sometimes that
10 knowledge doesn't come back to you right away; isn't that
11 true --

12 A Correct.

13 Q -- if you're in an emergency situation like that?

14 A Correct.

15 Q The Heimlich maneuver doesn't help to save everyone
16 from a choking incident, does it?

17 A That is correct.

18 Q When you were going through the employee handbook,
19 did you see anything indicating that employees would be
20 trained in CPR?

21 A I did not. There was something, there was like a
22 checklist of different things that would be taught that people
23 could check off on, and I believe that CPR, first aid were one
24 of those things to be checked. I did not see that Mr.
25 Farrales had that checked off on his checklist. As to exactly

1 what was and was not taught or supposed to be taught, that's
2 outside of what I'm supposed to be opining on.

3 Q My question was specific to the handbook. Did you
4 see anything in the handbook that indicated that employees
5 would be trained in CPR?

6 A I did not.

7 Q You indicated earlier that if there's still some
8 movement, that that means that the person is still responsive
9 on some level.

10 A On some level there's some amount of responsiveness.

11 Q Does an unconscious person ever move involuntarily?

12 A People -- and these are fine points. People can be
13 unconscious, not awakening, but still have some degree of
14 response, yes.

15 Q Doctor, can cardiac arrest and respiratory arrest
16 occur simultaneously?

17 A So this is how it goes. If you're -- if something
18 happens that makes you stop breathing, people get a massive
19 drug overdose of heroin and they'll stop breathing, their
20 heart will keep going and then eventually, if nothing happens,
21 their heart will stop.

22 If someone's heart stops, they're only going to be
23 breathing for another few seconds before they stop breathing.
24 So you can't have them both, heart -- respiratory arrest and
25 cardiac arrest. Usually you have one that occurs first.

1 followed by the other.

2 Q Well, okay. Thank you for clarifying. They can
3 follow very closely, can't they?

4 A Yes, depending on what it is. Usually, once again,
5 if the breathing stops first, you've got a bit more time until
6 your heart stops. If your heart stops first, you only have a
7 very little bit of time until your breathing stops.

8 Q And it's true, isn't it, that in this case you don't
9 know when Harvey Chernikoff's heart actually stopped?

10 A Within a reasonable degree of medical certainty his
11 heart stopped well after his breathing stopped.

12 Q Well, that could be two seconds after, correct?

13 A If you look at people who die from asphyxiation and
14 lack of oxygen, generally it's more than a few minutes from
15 the time the breathing stops until the heart stops.

16 Q It can occur within a few seconds, can't it, Doctor?

17 A It would be very unusual.

18 Q It can happen, can't it?

19 A Anything in the world is possible. This would be
20 extremely unlikely.

21 Q Brian, how about pulling up the heart attack
22 information from the handbook for me, please. Sixty-nine, I
23 think. I might have to go over here. I can't see it. Now,
24 these things that were identified are informational, correct,
25 the kind of things to look for?

1 A Yes.

2 Q Okay. Now, the chest discomfort, that's something
3 that the patient or the person suffering would be feeling,
4 correct?

5 A That is correct.

6 Q It's not something that you would necessarily see if
7 I look at you. I'm not going to be able to tell if you're
8 having some discomfort, correct?

9 A So in medicine we separate things into what we call
10 signs and symptoms. Symptoms is what the person feels; I have
11 a headache, I feel short of breath, my foot hurts. A sign is
12 something that you can look at as a doctor, oh, their arm is
13 in a bad position, or their -- you can measure if their blood
14 pressure is up.

15 So as far as a sign of chest discomfort, you can't
16 tell unless they're like [indicating]. If they're clutching
17 their chest, that would be a sign. Otherwise it would depend
18 on the person telling you what they felt.

19 Q Okay. And the same thing with discomfort in other
20 areas, that's something the person is feeling, pain or
21 discomfort in their arms, the back, the neck, the jaw?

22 A That is correct.

23 Q That's not something that you observing them would
24 necessarily see?

25 A That is correct.

1 Q Same thing with shortness of breath, a person could
2 be suffering shortness of breath, but it may not be clear to
3 somebody looking at them, correct?

4 A That is correct.

5 Q Same thing with other signs, cold sweat, nausea,
6 lightheadedness --

7 A Cold sweat you can see. If someone's sweating
8 profusely and you see beads of sweat coming up on their
9 forehead, that you can see.

10 Q You'd have to be pretty close to them to see it,
11 wouldn't you?

12 A It depends on how much you are. Some people, you
13 walk in the room and you go, whoa, you're having a heart
14 attack.

15 Q You don't know what Harvey Chernikoff was feeling at
16 the time, do you?

17 A No.

18 Q So you don't know whether or not any of these, these
19 signs or symptoms were things that he was experiencing,
20 correct?

21 A We know he did not voice any of them.

22 Q He didn't voice any indications of choking, did he?

23 A No, but if you can't move air you can't speak.

24 Q He didn't -- we've gone through it before, but he
25 didn't give any indication of what you would expect to see

1 with choking, did he?

2 A He did not grab at his throat.

3 Q No panicky expression that you saw?

4 A He looked uncomfortable. When he was sitting there
5 rubbing his head and moving around, you could tell he was
6 uncomfortable. I could not tell the exact expressions. I
7 could tell that he was uncomfortable.

8 Q Did you watch the video earlier and see Harvey
9 rubbing his head?

10 A I believe he may have done that. I don't remember
11 all the specifics once again, from earlier.

12 Q A person rubbing his head doesn't necessarily mean
13 that he's uncomfortable, does it?

14 A No. But you put everything into context.

15 Q This is the interpretation that you have now having
16 looked at the video however many times and having reviewed the
17 coroner's report, correct?

18 A Yes.

19 Q All information that Jay didn't have?

20 A Correct.

21 MS. SANDERS: I don't have any other questions.

22 Thank you.

23 THE COURT: Redirect.

24 MR. ALLEN: Please the court, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. ALLEN:

2 Q Doctor, very briefly, defense counsel asked you
3 about whether or not the bus driver was a medical doctor. Do
4 you remember that question?

5 A Yes, sir.

6 Q Page 70. Does Mr. Farrales need to be a medical
7 doctor to perform page 70?

8 A No, sir.

9 Q If Mr. Farrales is properly trained by First
10 Transit, could he have saved Harvey's life without being a
11 medical doctor?

12 A Yes, sir.

13 Q She also asked you about this, page 69. The same
14 question. Does he have to be a medical doctor to save
15 Harvey's life if properly trained by this company?

16 A No, sir, he would not have to be a doctor.

17 Q Doctor, we looked at earlier several opinions that
18 you had. And those opinions were that Harvey did not die of a
19 heart attack, did not die of a seizure, that there was
20 evidence to check the airway. Defense counsel had you on
21 cross-examination for approximately 50 minutes asking you
22 questions. Are your opinions still the same?

23 A They are still the same, sir.

24 Q Is your opinion still the same, just like the
25 medical examiner's opinion, that Harvey died from choking?

1 A Yes, sir.

2 Q Dr. Stein, please step down and look at this, and
3 you can confirm that these are your opinions as I wrote these
4 on the board; no heart attack, no seizure, Harvey died of
5 choking, and there was evidence to check the airway?

6 A Yes, sir.

7 Q And I wrote your name there?

8 A Yes, sir.

9 Q The last question. Of all those 45, 50 minutes'
10 worth of questions, did defense counsel say anything or do
11 anything to change any opinions that you gave this jury within
12 a reasonable degree of medical probability?

13 A No, sir.

14 MR. ALLEN: Thank you. No further questions.

15 THE COURT: Actually, Counsel, you guys were
16 presented with the questions from the jury. I think that one
17 was clearly answered on cross, but I think two still need to
18 be addressed by the doctor. Was there anything before I
19 present them to the doctor?

20 MR. CLOWARD: We have no objections to all three of
21 them.

22 THE COURT: I can't hear you. I'm sorry.

23 (Bench conference transcribed as follows.)

24 THE COURT: Any objections to the last two?

25 MR. CLOWARD: We have no objections.

1 THE COURT: Juror No. 8 and 4, I think, still need
2 to be addressed.

3 MR. ALVERSON: Well, the first one is essentially he
4 can answer.

5 THE COURT: [Inaudible] the problem is.

6 MS. SANDERS: What is the question?

7 THE COURT: I don't think he's going to be able to
8 answer it [inaudible] he gave the response of how -- opined
9 that these [inaudible].

10 MS. SANDERS: But not from whether he should eat
11 or -- not about whether or not he should -- he said right at
12 the beginning that he's not going to express any opinions
13 about what the driver did or didn't do and, you know, anything
14 having to do with his training. And counsel brought that out,
15 so I didn't ask any of the questions that I had.

16 I asked a lot of those questions in his deposition
17 and he said he's not a transportation expert, he's not going
18 to talk about what the driver did or didn't do. So I didn't
19 ask those questions because he already had said that. So that
20 question to me looks like talking about whether what the
21 driver was or wasn't doing.

22 THE COURT: [Inaudible.]

23 MR. ALVERSON: I don't know that the doctor can talk
24 about that or not.

25 MS. SANDERS: Well, and he shouldn't talk about it.

1 that Harvey seems to be napping. There are several other
2 people that get on and off the bus. So there is a lot of
3 interaction there. At about this time though, Harvey takes
4 out of his lunchbox a sandwich and starts to eat it.

5 Now, let me veer off of this for just a minute.

6 Mr. Cloward mentioned this, but one of the rules that you will
7 hear about during the course of this case is that passengers
8 were not to eat on the bus. And that's part of what they call
9 the comfort rules by First Transit, and it's also included in
10 the RTC rider's guide, which has a list of rider rules
11 included in it.

12 Now, once somebody goes through that eligibility
13 process with RTC and has been approved to ride the
14 paratransit, they're sent a copy of this guidebook which has
15 the rider rules. It's got other information in it about how
16 to schedule a ride, that kind of thing.

17 Now, Mrs. Chernikoff will tell you that she recalls
18 receiving that rider's guidebook, but that she didn't read it
19 thoroughly. So she did not read the part about the rider's
20 rules. She didn't read it to Harvey. She didn't explain it
21 to him. Mr. Chernikoff didn't look at it. It appears the
22 caregiver didn't look at it. So they were not aware of the
23 rules against eating on the bus.

24 Now, we all live our lives according to a whole
25 bunch of rules every day, and that's true whether we

1 specifically acknowledge them or not. Any of us who drive a
2 car are expected to follow all the rules for safety on the
3 road. We're expected to just know those and follow those. As
4 people who live in a society, we're expected to know societal
5 rules and follow those rules; don't kill anybody, don't steal
6 from anybody, don't trespass. The list is really long.

7 And in this case the rule against eating on the bus
8 was put in place, and it makes sense, more for reasons of
9 cleanliness, not having spills that would potentially be a
10 hazard for slip and falls, and for general comfort of other
11 passengers. Certainly it is recognized that choking if you're
12 eating is a possibility, and that's true regardless of where
13 you are, whether you're in a car by yourself, whether you're
14 in your own kitchen, movie theater, you name it. Anytime we
15 put something in our mouth the risk of choking is there.

16 Now, with regard though, to the paratransit service,
17 passengers are expected themselves to know the rules and to
18 follow the rules. In this case Harvey Chernikoff himself did
19 not follow the rule. He violated the rule against eating on
20 the bus. He pulled a sandwich out of his lunchbox, as you can
21 see there, and ate the sandwich very quickly, in the space of
22 a minute and a half to less than two minutes.

23 At 7:59:36 roughly, Harvey put the lunchbox aside,
24 he packed everything back into the lunchbox and set it off to
25 the side. About the same time though, Jay was coming up to a

1 stop to let off his other passenger. There was only one other
2 passenger on the bus at the time besides Harvey, and it was
3 her stop. So in the time frame between 7:59:58 and 8:00:29,
4 Jay is seeing -- assisting the other passenger off the bus.
5 He gets off a little bit, he helps her down and is helping get
6 off to her stop.

7 What the video shows is that 8:00:30, Harvey starts
8 to just kind of list towards the center aisle. Jay will tell
9 you Jay was off the bus, he got back on, and Jay will tell you
10 truthfully that when he got back on the bus he didn't look at
11 Harvey. He didn't look at him because he had only been off
12 the bus for a couple of seconds, and he knew that there was
13 nothing drastic that had happened to his passenger in the
14 couple of seconds that he had been off the bus.

15 There was no expectation of anything out of the
16 ordinary having happened to him. He was still in the same
17 place. He wasn't moving around. He wasn't acting like he was
18 in distress. He appeared to be sleeping. And you'll see from
19 the video that earlier in the ride Harvey and several other
20 passengers had fallen asleep, taken naps, and when they were
21 doing that they were kind of shifting around, as often happens
22 when we fall asleep in places. And so it wasn't anything that
23 was unusual at the time.

24 Now, Jay was focused on his driving. He went and
25 completed his manifest and got into the chair to continue on

1 with his driving. It wasn't until a few minutes later that,
2 when Jay stopped at a stoplight and turned around to check on
3 Harvey, that he saw that he was slumped into the aisleway. He
4 called to Harvey. He tried to reach for him. He got up and
5 went to check on him, but Harvey was totally unresponsive.

6 Now, Jay understandably, I think, had no clue what
7 was wrong with his passenger. He'd been fine. He'd been
8 talkative. He'd been moving around just a few minutes
9 earlier. And then he was down without a sound, without a
10 gesture, without any hint of a problem.

11 Now, whatever happened to Harvey happened in the
12 space of about a minute, and it happened while Jay was off the
13 bus assisting another passenger. When he got on the bus he
14 was focused on his driving, he was focused on the roadway, the
15 traffic. That's his job.

16 Of course, when Jay found Harvey to be unresponsive,
17 he immediately pulled over. He called dispatch. He asked for
18 an ambulance to be sent. And the paramedics did respond, but
19 apparently they found that he was -- Harvey was already dead
20 because they didn't even try to resuscitate him.

21 Before I leave this slide, one thing that I do need
22 to mention is that during the time that Harvey is eating the
23 sandwich, Jay is focused on his driving. He is moving. Jay
24 will tell you, and this evidence is undisputed, that he did
25 not see Harvey eating that sandwich. And you can see from the

1 video that he's kind of hunched down, he eats it very, very
2 quickly.

3 It is absolutely undisputed that Jay did not see
4 that action going on. And plaintiffs will try to convince you
5 that Jay had a duty to enforce that rule against no eating.
6 But if you can't see it, you can't stop it, and Jay did not
7 see that, that activity going on.

8 Now, the coroner. The coroner, Dr. Lingamfelter,
9 who you'll hear from, performed only an external examination
10 of the body. As we mentioned, there was no autopsy performed
11 in this case. What Dr. Lingamfelter found was what he
12 described as an enormous aggregate of partially chewed food.
13 It smelled like peanut butter and it was a 50 gram bolus or
14 chunk that he found.

15 Now, you'll hear evidence as the case progresses
16 about just how big 50 grams is. It took Dr. Lingamfelter ten
17 minutes with the help of an assistant to remove that bolus of
18 food from Harvey's airway. He had to use a special tool to
19 do it. This was because it was so tightly impacted in his
20 airway. Now, based on that finding alone, Dr. Lingamfelter
21 concluded that Harvey died as a result of choking death.

22 Now, most of us have an image in our head about what
23 it means to choke. We talked a little bit about that
24 yesterday. Grabbing your throat, gagging, coughing, some kind
25 of frantic movement to indicate you've got a problem,

1 something that indicates panic, moving around.

2 In this case however, even with the benefit of 20/20
3 hindsight and knowing the coroner's report and knowing that he
4 concluded this was a choking death, every witness you will
5 hear from, both expert witnesses and lay witnesses will tell
6 you that when they looked at that video, and most of them
7 have -- what did I do -- most of them have looked at that
8 video several times specifically looking for any indications
9 of it.

10 But everybody who's looked at that video will tell
11 you that they saw no indication whatsoever of anything that
12 would be a sign or symptom of choking. They saw no gagging,
13 no coughing, no clutching the throat, no movements indicating
14 any kind of a problem. They didn't even see any evidence of
15 visible food in the area. Nothing to indicate that Harvey was
16 choking.

17 Now we all have the benefit of 20/20 hindsight.
18 We're all Monday morning quarterbacks now. But Jay didn't
19 even see Harvey eating the sandwich. He had nothing to
20 indicate that his passenger was doing anything like that. He
21 didn't have the benefit of the video that showed what was
22 going on. He certainly didn't have the benefit of the
23 coroner's report identifying that there was a problem.

24 When he discovered Harvey slumped into the aisle and
25 unresponsive, he had no clue what was going on with his

1 passenger. And I'll say it again. Harvey was talking, he was
2 acting normally just a few minutes before, and without a
3 single sound, without a single gesture, without a single
4 indication of distress, no discernible hint of a problem, he
5 was down.

6 Now, to his credit, Jay didn't panic. He was
7 certainly rattled, and he'll tell you about that. He knew
8 that something was definitely wrong with his passenger, so he
9 did the safe thing. He moved the bus out of traffic. He was
10 stopped at a stoplight when he first noticed Harvey.

11 He pulled over to the side, called dispatch
12 immediately, told them he had an emergency and asked for
13 immediate medical assistance. And he did exactly what he was
14 trained to do. And the evidence will show that that was the
15 safest and best course of action to take under those
16 circumstances.

17 Now, the plaintiffs will try to tell you that First
18 Transit had some obligation to provide first aid training to
19 their drivers, and that had they done that Harvey Chernikoff
20 would still be alive. But again, the evidence will not
21 support them on that. The evidence will show that first aid
22 training was not required by federal regulations.

23 As you might imagine, RTC and First Transit were
24 both subject to federal laws, federal statutes regulating
25 their provision of services, and there was nothing under those

1 federal statutes that required first aid training. It was not
2 required by any kind of Nevada regulations. They were also
3 subject to state laws and statutes. And again, no
4 requirement --

5 MR. CLOWARD: Your Honor, I'm just going to object.
6 She's -- I mean, discussing what is the law and what isn't the
7 law, that's not proper for an opening statement.

8 MS. SANDERS: I'm not discussing the law applying to
9 this case. I'm discussing the regulations that are applicable
10 here to --

11 THE COURT: That's fine. I just think you're
12 indicating the evidence will show.

13 MS. SANDERS: The evidence will show that there was
14 no regulation by the state -- by the local Clark County or Las
15 Vegas requirements for providing first aid.

16 The ADA is a federal statute that I mentioned before
17 that applies to providing paratransit service. There's
18 nothing in the ADA that indicates that the drivers are to be
19 trained in first aid. And it was not required, you'll see
20 from the evidence, by the contract between RTC and First
21 Transit. When they contracted originally back in 2007, there
22 was a whole list of things that RTC required for their driver
23 training, and first aid was not among those.

24 Now, you'll hear that first aid is something that in
25 some jurisdictions in some locations First Transit can and

1 does train their drivers in, but it is not something that was
2 required in Las Vegas. The evidence will show that First
3 Transit entered into a collective bargaining agreement in
4 2010, and that the collective bargaining agreement did not
5 require first aid training. And first aid was not something
6 that was required or taught in the Las Vegas market.

7 Now, Mr. Cloward pointed out that there is some
8 information in the first aid -- or excuse me, the First
9 Transit handbook talking about the Heimlich maneuver, and
10 certainly employees were expected to look at that, be familiar
11 with information in the entire handbook, but it was not
12 something that they were trained on in the Las Vegas market.
13 You will hear evidence about why that was, why first aid was
14 not taught in the Las Vegas market and what they did instead
15 as far as responding to any kind of medical emergency.

16 The second reason the first aid would not have made
17 a difference is that first aid, even if Jay had been trained
18 in the Heimlich maneuver, would not have changed the outcome
19 in this case. Now, they'll try to tell you that the Heimlich
20 maneuver and/or CPR, if it had been used with Harvey, would
21 have changed the outcome or would have saved his life.

22 But you'll hear the testimony of Dr. Michael
23 MacQuarrie. He's a board certified specialist in emergency
24 and critical care. He's been practicing for over 30 years up
25 in Truckee, and part of his teaching responsibilities is to

1 train EMTs and paramedics.

2 Now, Dr. MacQuarrie has reviewed the video. He's
3 reviewed all the medical and other evidence in the case, and
4 he'll testify that first aid, whether the Heimlich maneuver,
5 CPR or a combination of the two would not have been useful or
6 effective in Harvey Chernikoff's situation and would not have
7 changed the outcome first of all because, of course, there was
8 no indication whatsoever that Harvey was choking.

9 He simply slumped to the side and gave no indication
10 of choking, not even dry heaving, as Mr. Cloward mentioned.
11 He's -- it's very quiet, very slow movement. And in order to
12 even use the Heimlich maneuver, you have to have some
13 indication that there's a problem, that there's a choking
14 incident going on. We don't have that.

15 Harvey was also at least unconscious by the time he
16 slumped over, and the evidence will show that the Heimlich
17 maneuver is not something that you would do with somebody who
18 is unconscious. You need to have somebody that is able to
19 assist you a little bit in order for the Heimlich to even be
20 effective.

21 Likewise, CPR would not have been of assistance
22 here. There was no reason for Jay to even think of a choking
23 incident, no reason for him to check Harvey's mouth to see if
24 there was any food there, and he would not have been able to,
25 the evidence will show, remove any kind of food because it was

1 so tightly impacted in his airway. Nothing that first aid may
2 have helped Jay with would have changed the outcome in this
3 case.

4 Now, in fact, Dr. MacQuarrie questions whether or
5 not this was truly a death that was fully attributable to
6 choking. In his expert opinion the actions that Harvey
7 exhibited at the time, as you'll see from the video, were much
8 more consistent with a sudden event, a sudden fatal event, and
9 he thinks it was probably a heart attack, and he'll tell you
10 the rationale for that. Now, certainly first aid would not
11 have done anything to be of assistance to somebody who's
12 suffering a massive heart attack.

13 Every medical expert in this case, and that includes
14 Dr. Lingamfelter, it includes plaintiff's own expert,
15 Dr. Stein, will agree that without an autopsy there's no way
16 to rule out the actual cause of death. Something like a heart
17 attack is something that you would need to do a full autopsy
18 in order to be able to find evidence of it.

19 Now, the reason there wasn't an autopsy done in this
20 case is because the plaintiffs for religious reasons did not
21 want an autopsy done. And like I said before, that's
22 certainly their choice. We certainly don't blame them for
23 that. But without an autopsy they cannot prove that this was
24 truly a choking death. And we don't know if it was a choking
25 death, if it was a heart attack, if it was something else.

1 But what we do know and what the evidence will show is that
2 there's nothing that Jay or First Transit could have done to
3 change that outcome.

4 Now, Mr. Cloward showed you various little pieces
5 and clips of testimony that he says will show you from Jay
6 Farrales and from Jennifer McKibbins' testimony that he says
7 will prove to you that they violated safety rules. And I want
8 to talk a little bit about that, because you saw little pieces
9 that were taken out of context in many cases that did not give
10 you the full story, the full explanation of the testimony, and
11 so you don't have the whole picture.

12 Plaintiff will try to cobble together a story to try
13 and convince you that the defendants in this case violated
14 safety rules and that Harvey Chernikoff's death was the
15 result. But please don't be misled by inferences, by
16 half-truths. You'll hear the full story with all the
17 explanations, the conduct, the rationale, the policies, and
18 you can judge for yourself the conduct of these defendants.

19 We all have the benefit of knowing all the facts
20 now, and so it's very easy to go back and second guess the
21 conduct of the defendants when you're looking for somebody to
22 blame. But I ask that you keep an open mind. I ask that you
23 look at the evidence in the light of the information that Jay
24 and First Transit had at the time that these events were
25 actually going on. That's the focus you need to keep when

1 you're evaluating the liability and the damages issues in this
2 case.

3 At the close of evidence you'll be asked to
4 deliberate and return your verdict. And when you weigh all
5 the evidence, when you set aside sympathy, when you use your
6 common sense, I believe you'll agree that the only fair and
7 just verdict is one in favor of the defendants, Jay Farrales
8 and First Transit.

9 THE COURT: Thank you. Plaintiff, is your first
10 witness here?

11 MR. CLOWARD: I think we were actually going to call
12 Ms. McKibbins first.

13 THE COURT: All right. Come on up, ma'am.

14 So Counsel, have you talked about how you're going
15 to conduct the examination? Are you guys going to recall her
16 in your case in chief?

17 MS. SANDERS: Yes.

18 THE COURT: So it'll just be a cross by you guys
19 now. That's fine.

20 JENNIFER MCKIBBINS, PLAINTIFF'S WITNESS, SWORN

21 THE CLERK: Please state and spell your full name.

22 THE WITNESS: Jennifer McKibbins, J-e-n-n-i-f-e-r,
23 M-c-k-i-b-b-i-n-s.

24 THE COURT: Whenever you're ready, Counsel.

25 MR. CLOWARD: Thank you, Your Honor.

1 DIRECT EXAMINATION

2 BY MR. CLOWARD:

3 Q How are you today, Ms. McKibbins?

4 A I'm well, thank you.

5 Q Good. And just so that the jurors understand,
6 you're testifying today in the capacity of a corporate
7 representative, not as Jennifer McKibbins, right?

8 A Correct.

9 Q All right. So I just talked to the jurors about
10 some things in opening statements. I want to just go through
11 some of those, some of those things. Do you remember being
12 deposed in this case?

13 A I do.

14 Q Mr. Allen sat down with you and asked you some
15 questions and you told us certain things, true?

16 A For two days, yes.

17 Q You agree with me that new employees are expected to
18 know what's in the manuals they are given, specifically what's
19 in the employee handbook, true?

20 A As it pertains to what we do, yes.

21 Q You agree that First Transit gives RTC a copy of the
22 employee handbook so that RTC knows what First Transit will do
23 under the contract with RTC, true?

24 A Correct.

25 Q And you agree that when the handbook is changed from

1 year to year, or whenever it's changed, whether it's on a
2 yearly basis or every six months, whenever it's changed, the
3 updated contract is given from First Transit to RTC, true?

4 A I'm sorry. The updated contract or the updated
5 handbook?

6 Q The updated employee handbook.

7 A The updated handbook, yes, is given to them.

8 Q You agree that the handbook is given to RTC so that
9 they have a copy of any updated policy that First Transit may
10 have or any change in policy that First Transit may have,
11 true?

12 A Yes.

13 Q Let's talk about the safety rules that I discussed
14 in my opening statement. I told these jurors that there was a
15 policy that operators are required to check their mirrors
16 while driving and that includes the interior of the bus, true?

17 A That's true.

18 Q And one of the reasons you explained in the
19 deposition to check the mirrors on the interior is to ensure
20 that passengers are following the rules and regulations, true?

21 A That is true.

22 Q And you agree that one of the rules that must be
23 followed is to not eat or drink on the bus, true?

24 A Yes, that is true, but there is more to it than
25 that.

1 Q Let me --

2 MR. CLOWARD: Your Honor, may I publish the
3 deposition?

4 THE COURT: Any objections?

5 MS. SANDERS: No.

6 THE COURT: That's fine.

7 MR. CLOWARD: Volume I and II, the one with the
8 exhibits. May I approach?

9 THE COURT: You may. Will you just let defense
10 counsel know which page you're referencing, please.

11 MR. CLOWARD: Certainly, Your Honor.

12 THE COURT: Thank you.

13 MR. CLOWARD: We're going to go with page 55,
14 lines 12 through 25. May I approach the witness?

15 THE COURT: You may.

16 MR. CLOWARD: Ms. McKibbins, I'm just going to read
17 to you --

18 MS. SANDERS: May I. There was objections in this
19 section, and I think that those need to be taken into
20 consideration before this is read.

21 MR. CLOWARD: Your Honor, she provided an answer
22 after the objections were given, so I think it's --

23 THE COURT: What were the -- is it in my documents?

24 MR. CLOWARD: The objections?

25 THE COURT: No, no, the deposition.

1 MR. CLOWARD: No, I don't believe so. I can
2 approach with the copy so you can read it.

3 THE COURT: May I see the deposition, please.

4 MR. CLOWARD: It's line 11 through 25, Your Honor.

5 THE COURT: Counsel, I think that you need to lay a
6 foundation for that question as far as -- you've already
7 established that the books go out each year on the rules. Can
8 you maybe ask some foundation on her knowledge of the First
9 Transit rules, lay a foundation further?

10 MR. CLOWARD: Okay.

11 THE COURT: Because that's what that question deals
12 with.

13 MR. CLOWARD: Sure.

14 BY MR. CLOWARD:

15 Q Okay. Ms. McKibbins, as Ms. Sanders pointed out to
16 the jurors, part of your job at the time the deposition was
17 taken, you were actually the director of safety for the Las
18 Vegas operations, correct?

19 A No.

20 Q Tell me what your job title was.

21 A At the time of my deposition or the time of the
22 incident?

23 Q The time of the deposition.

24 A On the deposition I was the director of corporate
25 safety for First Transit.

1 Q So you're the person that's responsible for knowing
2 pretty much all of the safety rules for First Transit; is that
3 fair?

4 A That's fair.

5 MR. CLOWARD: Your Honor --

6 THE COURT: I'll allow the question based upon that
7 foundation.

8 MR. CLOWARD: Thank you.

9 BY MR. CLOWARD:

10 Q So Ms. McKibbins, I'm going to start on page 55,
11 line 12. I'm going to just read it to you and then ask you a
12 simple follow-up. Actually, I'm going to start on line 11,
13 sorry.

14 A No problem.

15 Q "Assuming that Mr. -- that the video shows
16 Mr. Farrales, the bus driver, assisting Mr. Chernikoff with
17 drinking on the bus, in your opinion is that a violation of
18 the First Transit rules?" Your answer was, Yes. Did I read
19 that correctly?

20 A Yes.

21 Q And then another question is, this is on line 19,
22 "Okay. And as a violation, why is that a violation?" Your
23 answer was, "It's an RTC policy that the passengers not eat or
24 drink on the bus." Did I read that correctly?

25 A You did.

1 Q And then the next question is, "And it's the rule of
2 First Transit to enforce that, true?" And your answer was,
3 Yes. Did I read that correctly?

4 A Yes.

5 Q Thank you. Ms. McKibbins, you agree at your
6 deposition you told us it's important to enforce that rule
7 because you don't want passengers to eat on the bus because
8 they could choke and hurt themselves, true?

9 A That's one of the reasons, yes.

10 Q And you testified that it's actually foreseeable, a
11 foreseeable harm of eating on the bus is that somebody could
12 choke and if they choke they could choke to death, true?

13 A That's true.

14 Q And one way that First Transit enforced a rule such
15 as that is by scanning the interior of the bus every five
16 seconds, true?

17 A When you scan the mirrors every five seconds, I
18 would like to explain what that actually means, because
19 scanning every five seconds, it's not a fair statement of what
20 our training is. May I explain?

21 Q I'm going to actually ask you to refer to something
22 in the deposition. We're going to go to Volume II now.

23 A Is that in this also?

24 Q It's the smaller one. Yeah, that one. So we're
25 going to look at page 181, look at lines 5 through 13. Okay.

1 Ms. McKibbins, on line 5 it says --

2 MS. SANDERS: May I object once again. The context
3 for this question is something that is post incident and has
4 been excluded.

5 MR. CLOWARD: Your Honor, there is no objection in
6 the deposition.

7 THE COURT: Are you using it to impeach her or
8 refresh her recollection?

9 MR. CLOWARD: No. Yeah, I think it's -- it's
10 important for the jurors to know what the policy is. If you
11 look at line 11 through 13 --

12 MS. SANDERS: Your Honor, may we approach rather
13 than bring this in front of the jury?

14 THE COURT: Come up, yeah.

15 (Bench conference transcribed as follows.)

16 MS. SANDERS: What this line of questioning has to
17 do with is a -- is information that was from a bid that came
18 after Harvey Chernikoff's death. And at the time that she was
19 deposed she was asked about it. We later filed a motion.

20 I mean, it wasn't subject to being excluded at the
21 time that the deposition was taken, but we later filed a
22 motion in limine and that was granted having to do with
23 anything that is post incident. So asking this is kind of out
24 of context and not really allowed pursuant to the later motion
25 that was brought and that Your Honor granted.

1 MS. HYSON: If you look at the questions before what
2 he's getting to, it's based on a specific exhibit which is
3 Bates stamped RTC, and the pages that he's asking about were
4 specifically excluded by a motion in limine.

5 MR. CLOWARD: Your Honor, the follow-up question
6 was, And as a First Transit trainer you trained your drivers
7 to do that, true? She was designated as someone to talk about
8 the policies and procedures that were in place at the time of
9 the incident. Our deposition notice was 20, you know, 15
10 pages long. This is fair game.

11 THE COURT: Wait, hold on. Does that document have
12 anything to do with her training?

13 MS. SANDERS: Well, this has to do specifically with
14 training, but it's --

15 THE COURT: Is it training --

16 MS. SANDERS: -- it's 2011.

17 MS. HYSON: It's training that was in 2014.

18 MR. CLOWARD: Can we have just one person address
19 this? I don't think it's fair to get tag-teamed.

20 THE COURT: Okay. So is something changed between
21 the incident and later on, 2014?

22 MR. CLOWARD: No, that's the point. He asks the
23 follow-up question, and as a First Transit trainer you trained
24 your drivers to do that. She says yes.

25 MS. SANDERS: Yeah, in 2011.

1 THE COURT: Why don't we just --

2 MR. ALLEN: [Inaudible.]

3 MR. CLOWARD: Yeah. He uses the document to state
4 the example and then asks her in general and she says yes.
5 There's nothing --

6 THE COURT: Why don't you just ask her what the
7 policy was in 2011, when the incident occurred?

8 MR. CLOWARD: Well, because that's not fair for her
9 to get away from what's in the deposition. I mean, she
10 basically says this is a First Transit policy and that's as a
11 trainer what she does.

12 THE COURT: Then why don't you ask her what the
13 policy was in 2011, then ask her when to her knowledge she
14 knows when that policy went into effect.

15 MR. CLOWARD: Okay.

16 THE COURT: And did she give the same thing out.

17 MS. SANDERS: Yeah. The question here is related to
18 a specific document, so it's kind of out of context.

19 THE COURT: Well, I think he can ask her. I think
20 there's enough foundation as to what the policy was in 2011,
21 and if she knows how long that policy's been in effect and how
22 they go about getting that out to their employees.

23 MR. ALLEN: If I may, Your Honor.

24 (Mr. Alverson leaves the bench.)

25 THE COURT: Whose copy did I take?

1 MR. CLOWARD: That's hers.

2 MS. SANDERS: I think you took the witness's copy.

3 THE COURT: Oh, I'm sorry. Here, ma'am.

4 MR. ALLEN: If I may, Your Honor, just to speed
5 things up. I took all these depositions.

6 THE COURT: Okay.

7 MR. ALLEN: And I was provided -- this is her
8 30(b)(6) rule deposition, to know all the training and all
9 this information. They gave me these rules and so I asked was
10 that what that says, then I asked in general is that what you
11 do. The questions are in general, so it's a way to understand
12 what I'm asking, then I'd follow up the questions in general.
13 And so this is supposed to apply at the time of this incident
14 so that it was understood throughout these depositions.

15 THE COURT: Well, why don't you just ask her what
16 the policy was in 2011?

17 MR. ALLEN: Because it's much clearer if the witness
18 is reading the document to understand what I'm saying.

19 THE COURT: The document is not from 2011. I mean,
20 because obviously they're going to be required to follow their
21 policies and procedures in place at the time of the incident,
22 right; is that where you're going?

23 MR. ALLEN: No, Your Honor, what I'm going to is I'm
24 trying to have the witness understand what I'm saying, and
25 then I ask them in general does that apply. And when I'm

1 asking in general does it apply at the time of the incident,
2 because that's why they're there, to testify to what happens
3 at the time of the incident.

4 THE COURT: Okay. I think you need to ask her what
5 the policy was at the time of the incident.

6 MR. ALLEN: Okay. That's -- okay. I just --
7 because there's going to be maybe several of these objections
8 and I just want to make sure that I understand and Mr. Cloward
9 understands.

10 MR. CLOWARD: I mean, Judge, here's what it really
11 boils down to. We sent the notice out and say we want to talk
12 to you about this incident, the policies and the procedures,
13 you're being produced as the witness to talk about this stuff.
14 If they want to say this policy doesn't apply to the incident,
15 then they need to do that in the deposition so that we don't
16 rely on what she testifies to in her deposition.

17 THE COURT: Why don't you just ask her the question,
18 what the policy was in 2011? I guess I don't understand.
19 Isn't that what you want anyways, that they didn't follow
20 policies and procedures in 2011?

21 MR. ALLEN: To show Your Honor the notice of
22 deposition.

23 MS. SANDERS: But if I can say, this document is
24 something that RTC produced. It wasn't produced by First
25 Transit. And he went ahead and asked her questions about

1 those documents that were produced by RTC.

2 Now, you know, I did allow them some latitude in the
3 deposition to ask some additional questions, but that doesn't
4 mean that it's relevant here. And now there is a specific
5 motion and granting of that motion that excludes everything
6 that is post 2011. So to try and use something through a
7 deposition that wasn't our document to begin with, it was part
8 of our --

9 MR. CLOWARD: It was your document, LeAnn.

10 MS. SANDERS: It was an RTC document.

11 MR. CLOWARD: No, no. RTC produced it, but it's a
12 First Transit document.

13 THE COURT: Okay. Counsel, I think what is relevant
14 is what was in 2011. I mean, that's the issue for them to
15 decide.

16 MR. CLOWARD: Yeah, I understand that. And the
17 point that Mr. Charles is saying is when we sent out our
18 notice we say we [inaudible] want to talk to you about the
19 incident. The incident is defined as the event that happened
20 right here and right now. We depose them. She gives this
21 testimony. He asks her the question and says, do you follow
22 this and do you do that now, and she says yes.

23 And now they're trying to come and sandbag us and
24 say, oh, well, you know what, the document that you were
25 referring her to was a 2000 -- it was a later policy so it

1 didn't apply. You can't do that. You've either got to in the
2 deposition say this is not a policy that applied to this
3 incident --

4 THE COURT: Or did you not ask the question? I
5 mean, they give you all sorts of stuff during discovery. The
6 question is what's relevant.

7 MR. CLOWARD: But if the stuff that they give us is
8 pursuant to what applies at the time of the incident, we
9 should be able to rely on that and not have --

10 THE COURT: Well, why don't you just ask her the
11 question is what I keep telling you. Ask her.

12 MR. CLOWARD: Okay. I will. Okay. Because I'm
13 afraid that she's going to change her answer, that's why.

14 THE COURT: Well, then you have the deposition to
15 impeach her if necessary.

16 MR. CLOWARD: Okay.

17 (End bench conference.)

18 BY MR. CLOWARD:

19 Q Ms. McKibbins, do you agree that the policy in 2011
20 was to look in your exterior and interior minutes [sic] every
21 five seconds?

22 A Yes, that's correct. Exterior and interior.

23 Q And that policy was in place at the time that
24 Mr. Chernikoff passed away on a First Transit bus, true?

25 A Correct.

1 MR. CLOWARD: Your Honor, at this time we would ask
2 to publish the video to the jurors, and we'd like to show that
3 and walk through that with Ms. McKibbins as the corporate
4 representative.

5 THE COURT: All right. Any objections?

6 MS. SANDERS: Well, there hasn't been any foundation
7 laid for it. It is an exhibit that we also have on our list,
8 but...

9 THE COURT: Are you going to do just portions of her
10 video deposition?

11 MR. CLOWARD: No.

12 MS. SANDERS: Is it the video deposition or the
13 video that you're talking about?

14 MR. CLOWARD: The video of the incident. When she
15 was at the Rule 30(b)(6) deposition, she was identified as the
16 individual who would authenticate, lay foundation for all
17 documents that were produced by First Transit in this case.
18 We'll get the deposition --

19 THE COURT: Is there an objection?

20 MS. SANDERS: I don't have an objection at all to
21 the video coming in.

22 THE COURT: Okay. Maybe you should lay some -- a
23 little foundation though, about the video and her knowledge of
24 the video.

25 MR. CLOWARD: Okay.

1 BY MR. CLOWARD:

2 Q Ms. McKibbins, you're aware that there's a video of
3 this incident, true?

4 A Yes.

5 Q Okay. As the safety manager, when an incident
6 happens, First Transit takes the video and saves that and
7 sends that to whoever, true?

8 A We do save the video, yes. We don't send it to
9 whomever. But yes, we do save it.

10 Q And the video in this case has in fact been
11 preserved, true?

12 A Correct.

13 MR. CLOWARD: So Your Honor, with that foundation
14 I'd like to show the jurors that --

15 THE COURT: And I don't believe there's an
16 objection.

17 MS. SANDERS: No. No objection.

18 MR. CLOWARD: So we're formally moving to have
19 Exhibit -- the video, I believe it's A2, moved into evidence.

20 THE COURT: Okay. And it'll be admitted because
21 there's no objection.

22 (Plaintiff's Exhibit Video admitted.)

23 THE COURT: And are you requesting to publish?

24 MR. CLOWARD: Yes.

25 THE COURT: Okay. That will be granted.

1 BY MR. CLOWARD:

2 Q Have you had a chance to watch this video?

3 A Yes.

4 (Video plays for the jury.)

5 BY MR. CLOWARD:

6 Q Ms. McKibbins, you agree that a First Transit driver
7 should not assist a passenger in drinking on the bus, true?

8 A Yes.

9 Q You agree that Mr. Farrales violated the First
10 Transit rule by actually volunteering to open Harvey's water
11 bottle, true?

12 A I don't.

13 Q You don't agree with that?

14 A I don't.

15 Q Okay. Would you turn to your deposition, page 55.

16 A [Complies.]

17 Q I'm going to read line 19 through 25, or actually,
18 line 11 through 25. Assuming that the video --

19 MS. SANDERS: May I just renew the objection I made
20 last time when we went over this?

21 THE COURT: Is there another objection on this?

22 MR. CLOWARD: It's the exact same that she was
23 already read, or that was already read.

24 THE COURT: Okay.

25

1 BY MR. CLOWARD:

2 Q Line 11. "Assuming that Mr. -- that the video shows
3 Mr. Farrales, the bus driver, assisting Mr. Chernikoff with
4 drinking on the bus, in your opinion is that a violation of
5 First Transit rules?

6 "A Yes."

7 Did I read that correctly?

8 A You did.

9 Q You agree that Harvey may have thought that if the
10 driver was helping him to drink it was okay to eat on the bus,
11 true?

12 MS. SANDERS: Objection. Calls for speculation.

13 THE COURT: Sustained.

14 BY MR. CLOWARD:

15 Q You were able to answer that question during your
16 deposition, were you not?

17 MS. SANDERS: Objection. That's irrelevant. And it
18 also calls for speculation.

19 THE COURT: Sustained. It calls for speculation.

20 BY MR. CLOWARD:

21 Q Okay. You've just seen the video. Do you think
22 that there might be any problems with having the driver
23 actually assist a passenger in drinking?

24 MS. SANDERS: Objection. States facts not in
25 evidence. Calls for speculation.

1 MR. CLOWARD: Your Honor, she's the corporate safety
2 individual. She can talk about --

3 MS. SANDERS: That --

4 MR. CLOWARD: Let me finish, please. Let me finish.
5 I'll give you the same respect.

6 She is authorized to talk about potential
7 foreseeable issues with a rule violation.

8 MS. SANDERS: Well, Your Honor, that's not what the
9 question was all about. He was asking her to get inside the
10 head of somebody else --

11 MR. CLOWARD: No, no.

12 MS. SANDERS: -- and say what they would do.

13 MR. CLOWARD: I'm sorry.

14 THE COURT: Let me hear the question again, please.

15 MR. CLOWARD: It was, what are potential problems by
16 having a driver actually assist a passenger in violating a
17 rule such as drinking on the bus.

18 THE COURT: I'll allow it because she previously
19 testified the reason they have the rules that they do, or some
20 of the reasons they have the rules they do.

21 THE WITNESS: Okay. I'm sorry. Could you repeat
22 the question though.

23 MR. CLOWARD: Certainly.

24 BY MR. CLOWARD:

25 Q You just saw the video.

1 A Yes.

2 Q At the deposition you hadn't seen the video, but you
3 speculated that a passenger may have thought that it was okay
4 if he --

5 MS. SANDERS: Objection. Again, Your Honor,
6 speculation at the time of the deposition is not appropriate
7 here.

8 MR. CLOWARD: Your Honor, I'm asking her a question
9 about what she said at the deposition and --

10 MR. ALVERSON: May we approach?

11 THE COURT: Mm-hmm.

12 (Bench conference transcribed as follows.)

13 THE COURT: I haven't heard the whole question
14 though. I don't know if he's just -- if you're just laying a
15 foundation question. I don't know what the question is
16 though.

17 MR. CLOWARD: Here's --

18 MS. SANDERS: The deposition, she was speculating
19 the entire time through this entire line of questioning. She
20 had not seen the entire video yet. She answered a
21 hypothetical question that wasn't even correct and then very
22 clearly said that she was speculating about the entire line of
23 questioning that you're talking about.

24 MR. CLOWARD: Your Honor --

25 MS. SANDERS: And now he's trying to get into the

1 same thing.

2 MR. CLOWARD: Your Honor, I think it's helpful for
3 the Court to see the question and answer, because Ms. Sanders
4 said, objection, calls for speculation at the deposition. The
5 witness went ahead and gave the answer. She said, yeah, I
6 guess I could see how a passenger could think it would be
7 okay.

8 THE COURT: But that is speculation. Ultimately
9 it's up to the jury to decide the disputed question of fact,
10 whether or not it's reasonable for him to believe he could eat
11 after the bus driver opened the water for him.

12 MR. CLOWARD: But Your Honor --

13 THE COURT: But see, what I don't understand, they
14 objected twice on speculation and it was sustained. Were you
15 going to ask something different, because I didn't get your
16 whole question.

17 MR. CLOWARD: Yeah, I know. That's what I was
18 trying to do. Your Honor, it's allowed for me to talk to this
19 corporate witness who is the person over safety who designs
20 the safety rules, who sets up the safety rules, who discusses
21 the training, why safety rules are put into evidence.

22 THE COURT: And you did ask her that previously.

23 MR. CLOWARD: I understand. But what I'm trying to
24 get to, if counsel would allow me to do that, is that it's
25 foreseeable for a passenger that is allowed to drink, it's

1 foreseeable that they may think that it's okay to eat. And as
2 the corporate person over safety, that is not speculation.
3 She's required to know that. That is her job, her sole job,
4 to find out what the rules are for, why we enforce them.

5 MR. ALVERSON: I think the jury can hear, you're
6 talking so loudly at this point.

7 THE COURT: They can. Okay. I think it is
8 speculation, and you did, if you want to address it more, but
9 you did address the question of why they have the rules in
10 place, one of which was there's the possibility of choking,
11 that she already indicated that's one of the reasons why they
12 don't allow the food or drink on the bus.

13 MR. CLOWARD: Your Honor, I think I should be
14 allowed to also talk about what's foreseeable by allowing
15 someone to, by actually assisting somebody to violate the
16 rules.

17 MS. SANDERS: And that's all speculation in the
18 deposition and then speculation here.

19 MR. CLOWARD: Your Honor, it's the reason for the
20 rules. She's the one --

21 THE COURT: I think they already got this
22 information in frankly.

23 MR. CLOWARD: Well, it's an important issue for us
24 and I think that it's highly appropriate. Ms. Sanders
25 objected at the depo and she went ahead and answered anyway.

1 THE COURT: Is it foreseeable what, that someone
2 would choke if they -- that if someone drank water they'd also
3 eat on the bus?

4 MR. CLOWARD: Is it foreseeable that if the driver
5 is assisting somebody to drink --

6 THE COURT: I think that's speculation.

7 MS. SANDERS: Yeah.

8 THE COURT: I think we've beat this horse a few
9 times. All right. Thank you.

10 MR. CLOWARD: Your Honor, we'd like to --

11 MR. ALLEN: [Inaudible.]

12 MR. CLOWARD: Okay.

13 THE COURT: Thank you.

14 (End bench conference.)

15 MR. CLOWARD: Okay. Your Honor, I'd like to have
16 the witness turn to page 57 of the deposition.

17 THE WITNESS: [Complies.]

18 BY MR. CLOWARD:

19 Q I'm going to just read lines 17 through 25.

20 "Q Is it in -- is it in your safety
21 training manual or material to encourage the
22 driver to assist passengers in not following
23 the posted signs inside the bus?

24 "A No."

25 Did I read that correctly?

1 A Yes.

2 Q Next question.

3 "Q "Why not?

4 "A Because we don't want people to break
5 the rules."

6 Did I read that correctly?

7 A Yes.

8 Q Next question.

9 "Q You don't want them to break the
10 rules because they could endanger their safety,
11 true?"

12 MS. SANDERS: Objection. There was an objection in
13 the deposition and there's an objection now.

14 THE COURT: What's the objection?

15 MS. SANDERS: It's overbroad. It's beyond the scope
16 here.

17 THE COURT: Overruled.

18 BY MR. CLOWARD:

19 Q "Answer. It could."

20 Did I read that correctly?

21 A Yes.

22 MR. CLOWARD: Can you pull up the video of Harvey
23 starting to eat.

24 (Video plays for the jury.)

25

1 BY MR. CLOWARD:

2 Q Okay. Up to that point you agree that Mr. Farrales
3 would have been required to scan his mirrors, including the
4 interior of the bus every five seconds, true?

5 A True.

6 Q You agree that during that period when Mr. Farrales
7 is driving the bus, Mr. Chernikoff is eating his sandwich, at
8 no point did Mr. Farrales tell Harvey that he should not eat
9 his sandwich during that period?

10 A No. That's true.

11 Q You agree that when Mr. Farrales gets off the bus he
12 does not check on Harvey, true?

13 A I did not see him check on him.

14 Q The video doesn't show that, does it?

15 A No, I did not see that.

16 MR. CLOWARD: Brian, let's go back to the next clip
17 in the segment.

18 (Video plays for the jury.)

19 BY MR. CLOWARD:

20 Q You agree that prior to driving off Mr. Farrales
21 does not check on Harvey, true?

22 A In this segment of the video he does not check on
23 him that I can see.

24 Q You agree that First Transit drivers are trained
25 before they drive off they should make sure that their

1 passengers are safe, safely sitting there, true?

2 A Yes.

3 MR. CLOWARD: Next clip.

4 (Video plays for the jury.)

5 MR. CLOWARD: You're fine. Keep playing. I just
6 wanted to point out a specific area. Go ahead and play.

7 (Video plays for the jury.)

8 BY MR. CLOWARD:

9 Q You agree that at no point until right now has
10 Mr. Farrales said anything or done anything, checked on
11 Mr. Chernikoff, true?

12 A I don't hear anything that he's checked on him
13 though, and I can't see him to see if he's checked, no.

14 MR. CLOWARD: Let's play.

15 (Video plays for the jury.)

16 BY MR. CLOWARD:

17 Q Ms. McKibbins, you agree it wasn't until 8:03:42
18 that Mr. Farrales, that was the first time he either looked up
19 into the mirror or called out Mr. Chernikoff's name?

20 MS. SANDERS: It's speculation about what he would
21 have seen.

22 THE COURT: I don't think -- you're just asking
23 the -- I think the way you asked it's fine. Overruled.

24 THE WITNESS: That's the first time that I can
25 actually see him checking, yes, on the video, or hear him.

1 MR. CLOWARD: Now what I'm going to do is why don't
2 we play through the next maybe couple minutes.

3 (Video plays for the jury.)

4 MR. CLOWARD: Actually, it's okay, Brian.

5 BY MR. CLOWARD:

6 Q You've seen the whole video to the end?

7 A Yes.

8 Q You agree that at no point did Mr. Farrales attempt
9 the Heimlich maneuver, true?

10 A True.

11 Q You agree that at no point did Mr. Farrales initiate
12 CPR, true?

13 A True.

14 Q You agree that at no point did Mr. Farrales call 911
15 himself, true?

16 A True.

17 Q Do you know how long it was until the paramedics
18 actually arrived?

19 A Off the top of my head, no.

20 Q Now if you would, I would like you to turn to an
21 exhibit, specifically plaintiff's binder. Exhibit 2, the
22 employee handbook.

23 THE COURT: It's Exhibit 2, so it's going to be book
24 one. So right there, the green one on the left, Jason.

25 MR. CLOWARD: May I approach, Your Honor?

1 THE COURT: You may.

2 BY MR. CLOWARD:

3 Q Ms. McKibbins, can you tell the jurors what Exhibit
4 2 is in the binder there in front of you?

5 A Sure. It's the First Transit employee handbook.

6 Q And that was the handbook that applied at the time
7 of this incident back in 2010, correct?

8 A It is dated 2010, correct.

9 MR. CLOWARD: Your Honor, at this time we'd move to
10 have that into evidence, move that into evidence.

11 THE COURT: Is this the same handbook that was also
12 in place in 2011, at the time of this event?

13 THE WITNESS: I believe so, yes.

14 THE COURT: The January 2010?

15 THE WITNESS: I believe so, yes.

16 THE COURT: Any objections?

17 MS. SANDERS: No objection.

18 THE COURT: Admitted.

19 (Plaintiff's Exhibit 2 admitted.)

20 MR. CLOWARD: Ms. McKibbins, what I would like you
21 to do is turn to page 70 of the employee handbook.

22 May I publish, Your Honor?

23 THE COURT: Any objections?

24 MS. SANDERS: No.

25 THE COURT: Fine.

1 MR. CLOWARD: Page 70. Okay. Thank you. Your
2 Honor, may I approach the TV screen?

3 THE COURT: Yes. You don't have to ask again.

4 BY MR. CLOWARD:

5 Q Ms. McKibbins, you agree that the policy indicates
6 that if you don't act quickly, choking can become serious,
7 true?

8 MS. SANDERS: I think the page number is wrong.
9 That's not the page 70.

10 MR. CLOWARD: I think it's --

11 THE WITNESS: It's page 70, but it's stamped as
12 exhibit page 72.

13 MS. SANDERS: Oh, okay. Sorry.

14 BY MR. CLOWARD:

15 Q Ms. McKibbins, you agree that the policy indicates
16 that choking can become serious if you don't act quickly and
17 knowing what to do [inaudible], true?

18 MS. SANDERS: Objection to the characterization of
19 the policy. It's vague and ambiguous.

20 THE COURT: Overruled.

21 THE WITNESS: The information in here, it does
22 explain what choking is, but it's independent of what the
23 policies are as it's not numbered as a policy in the handbook.
24 This is informational purposes only, this part of the
25 handbook.

1 BY MR. CLOWARD:

2 Q Okay. Let me try again. I'm going to just read
3 this. See if I read this correctly. "Choking can become
4 serious if you don't act quickly and knowing what to do is
5 vital." Did I read that correctly?

6 A Yes.

7 MR. CLOWARD: Brian, if you can highlight the -- the
8 airway.

9 BY MR. CLOWARD:

10 Q I'm going to read the next part. "If the airway
11 becomes blocked by a large piece of food or some other object,
12 the person will find it difficult to speak or breathe." Did I
13 read that correctly?

14 A Yes.

15 Q "How to treat choking," you agree that's a section
16 on the policy, true?

17 MS. SANDERS: Objection. Again, to the
18 characterization as a policy.

19 THE COURT: Overruled.

20 BY MR. CLOWARD:

21 Q Did I read that correctly, Ms. McKibbins?

22 A Yes.

23 Q "The first thing is to start by encouraging the
24 person to cough." Did I read that correctly?

25 A Yes.

1 Q "Do this in a reassuring manner and try not to
2 panic." Did I read that correctly?

3 A Yes.

4 Q "If this doesn't work, get the person to lean
5 forward, support their chest with one hand and with the other
6 give them up to five blows on the back between the shoulder
7 blades." Did I read that correctly?

8 A Yes.

9 Q "It's important that these blows are quite firm,
10 because you're attempting to create a vibration in the chest
11 which will hopefully move the object." Did I read that
12 correctly?

13 A Yes.

14 Q "Some people are concerned about hurting the person
15 because the risk if doing this is very -- but the risk of
16 doing this is very slim." Did I read that correctly?

17 A Yes.

18 Q "Back blows sometimes don't work is because they
19 have not been delivered with enough force." Did I read that
20 correctly?

21 A Yes.

22 Q "After you have given up to five back blows, check
23 inside the mouth in case the object has come up into the mouth
24 and you haven't noticed or the person has not been able to
25 tell you." Did I read that correctly?

1 A Yes.

2 Q "If the five back blows don't work, try a procedure
3 known as the abdominal thrust or Heimlich maneuver." Did I
4 read that correctly?

5 A Yes.

6 Q "How to do abdominal thrusts, Heimlich maneuver.
7 Stand behind the person who is choking." Did I read that
8 correctly?

9 A Yes.

10 Q "Put your arms around their stomach," how about
11 that?

12 A Yes.

13 Q "Make a fist and grab your fist with your other
14 hand." Did I read that correctly?

15 A Yes.

16 Q "Position the fist on the abdomen just above the
17 navel." Did I read that correctly?

18 A Yes.

19 Q "Pull inward and upward up to five times." Did I
20 read that correctly?

21 A Yes.

22 Q "Again checking inside the mouth -- check in the
23 mouth to see if the object has become dislodged." Did I read
24 that correctly?

25 A Yes.

1 Q Go down just a little bit more, Brian, and finish it
2 off. Thank you.

3 "If the object obstruction does not clear after
4 three cycles of back blows and abdominal thrusts [indicating],
5 call 911." Did I read that correctly?

6 A Yes.

7 Q "If at any stage the person becomes unconscious, you
8 must start CPR." Did I read that correctly?

9 A Yes.

10 Q Ms. McKibbins, page 70 was part of the employee
11 handbook that's been marked as Plaintiff's Exhibit 2 in front
12 of you, true?

13 A Yes.

14 Q You agree that after the 2010 handbook was given to
15 the RTC, the RTC never said to First Transit don't do what's
16 on page 70, true?

17 MS. SANDERS: Objection to extent it calls for
18 speculation.

19 THE COURT: You can lay a foundation.

20 Counsel, for whether or not she knows, she deals
21 with the RTC, a foundation for the question.

22 MR. CLOWARD: Yeah, I understand. I was just going
23 to actually use it to impeach her, but okay.

24 (Pause in proceedings)

25

1 BY MR. CLOWARD:

2 Q Ms. McKibbins, you agree that at the time of your
3 deposition you were the corporate spokesperson for First
4 Transit, correct?

5 A Yes.

6 (Pause in proceedings)

7 BY MR. CLOWARD:

8 Q Okay. At the time that you were deposed, do you
9 recall there was a notice that was sent out by our office to
10 your attorneys indicating specific topics that we wanted you
11 to discuss?

12 A Yes.

13 Q And in that notice it was discussed that you would
14 be the individual talking about safety and talking about what
15 is required of the policies and procedures, true?

16 A Yes.

17 Q All right. Now what I'd like you to do is to in the
18 big deposition binder, I'd like you to turn to page 146.
19 We're going to go with line 22, and I'm going to read.

20 "Q So after the 2010 handbook was given
21 to RTC, was there an amendment to the contract?

22 "A No.

23 "Q Did RTC say don't do what's on page
24 70, the first aid choking?

25 "A No."

1 Did I read that correctly?

2 A Yes.

3 Q "Q. Okay. Did First Transit ever say to RTC, here
4 it is, the 2010 handbook, but disregard page 70, choking?

5 "A No."

6 Did I read that correctly?

7 A Yes.

8 Q You agree that this policy, at the first of the
9 policy there is a -- at the employee handbook there is a
10 notices and limitations section where it says that there shall
11 be no oral exceptions to the policy and written exceptions
12 only in writing when signed by the president of First Transit,
13 true?

14 A That's correct.

15 Q You agree you're aware of no document from Brad
16 Johnson [sic] saying that it's okay for First Transit in Las
17 Vegas to disregard page 70 of the employee handbook, true?

18 A Brad Thomas.

19 Q Brad Thomas. I'm sorry.

20 A That's true.

21 Q You agree there's no memorandum signed by Brad -- is
22 it Brad Johnson or Thomas?

23 A Thomas.

24 Q I'm sorry. I have it Brad Johnson here. Thomas.

25 Thank you.

1 A You're welcome.

2 Q You agree there's no memorandum signed by Brad
3 Thomas, the president of First Transit, saying that it's okay
4 to disregard page 70, true?

5 A True.

6 Q There's no email, true?

7 A True.

8 Q There's nothing signed by Brad Thomas saying that
9 it's okay for folks in Las Vegas to disregard page 70 of the
10 First Transit employee handbook, true?

11 A That's correct.

12 Q But your testimony at the time of your deposition is
13 that page 70 did not apply in Las Vegas, true?

14 A That's correct.

15 Q Can you explain to these jurors why First Transit
16 doesn't believe that members of our community are entitled to
17 the same protections as members of other communities
18 throughout the nation regarding choking --

19 MS. SANDERS: Objection.

20 THE COURT: Hold on. What's the objection?

21 MR. CLOWARD: Well, I'm not done with my question.

22 MS. SANDERS: Let him finish his question. I jumped
23 up too soon.

24 THE COURT: Okay.

25 MS. SANDERS: My apology, Counsel.

1 MR. CLOWARD: It's okay. Now I lost my train of
2 thought here.

3 MS. SANDERS: Yeah. I threw you off now, didn't I.
4 I'll sit down.

5 MR. CLOWARD: Okay. Why doesn't -- well, yeah, can
6 the court reporter just read me the question?

7 MS. SANDERS: I'm not sure it was done, because I --

8 MR. CLOWARD: I'll reread the question.

9 BY MR. CLOWARD:

10 Q Why doesn't First Transit believe that members of
11 the Las Vegas community are entitled to have drivers with the
12 same level of experience, training and education as in other
13 communities throughout the United States?

14 MS. SANDERS: Now, objection. It's overbroad. It's
15 argumentative. It states facts not in evidence.

16 THE COURT: Counsel, I'm not sure there's a
17 foundation for this question yet.

18 MR. CLOWARD: She's the director of corporate safety
19 for the entire corporation.

20 THE COURT: I think that there's a question missing
21 though.

22 (Pause in proceedings)

23 THE COURT: Come here, please, just real quick.

24 MR. CLOWARD: Your Honor, may I approach?

25 THE COURT: Yeah, real quick.

1 (Bench conference transcribed as follows.)

2 THE COURT: Unless I didn't hear it [inaudible], the
3 question missing is are there different standards in parts of
4 the United States. Because you kind of jump over that. Did I
5 not hear her testify? I didn't hear her testify anything that
6 there's one set of standards for Las Vegas that are different
7 from the United States.

8 MR. CLOWARD: That's what Ms. Sanders testified --
9 or said in her opening statement. But my point is that here's
10 the deposition notice, these are all the things that we're
11 allowed to ask her.

12 THE COURT: No, no. I'm just thinking you're maybe
13 missing some questions before you get to this question. Like
14 I mean, you're asking her why is Las Vegas any different. I
15 don't know that she said it is.

16 MR. ALLEN: Does it apply to other jurisdictions.
17 Yes. Why doesn't it apply here.

18 MS. SANDERS: Just because he asked a question a
19 certain way in a deposition doesn't mean that it's not
20 objectionable in trial. I think he's just trying to just ask
21 the same question in the same way.

22 THE COURT: I just think there's maybe a few
23 questions missing to get to the question you're at.

24 MR. CLOWARD: This question was not asked in her
25 deposition.

1 THE COURT: You got to remember the jury is like me,
2 they're listening to all this for the first time, so you've
3 got to step them through to this question.

4 MR. CLOWARD: Yeah.

5 THE COURT: So it seems like a few questions may be
6 missing. I think I know where you're going. I don't know if
7 you're trying to imply that there's different policies and
8 procedures in another part of the United States.

9 MR. CLOWARD: No. What I'm trying to imply is that
10 in Las Vegas we didn't get the same --

11 (Plaintiff attorneys confer inaudibly.)

12 MR. CLOWARD: I think I'm going to ask one more and
13 then I'll sit down.

14 THE COURT: Yeah. I think you just need to get to
15 that question.

16 (End bench conference.)

17 BY MR. CLOWARD:

18 Q Do you agree that members of the Las Vegas community
19 are entitled to the same protections as folks in other
20 communities?

21 MS. SANDERS: Objection. It's overbroad. It calls
22 for speculation.

23 THE COURT: I think it is overbroad, Counsel. If
24 you can re-ask that. Are you trying to ask whether -- I'm not
25 sure what you're trying to ask.

1 MR. CLOWARD: I'm just trying to ask if folks in our
2 community are entitled to the same level of training from
3 First Transit drivers.

4 THE COURT: Okay. I think that's -- is there any
5 objection to that question?

6 MS. SANDERS: Let me hear the whole question. Let
7 him finish.

8 BY MR. CLOWARD:

9 Q Are members of the Las Vegas community entitled to
10 the same level of training of First Transit drivers as in
11 folks in other communities throughout the United States?

12 MS. SANDERS: I'm still going to object that it's
13 overbroad and calls for speculation.

14 MR. CLOWARD: She's the corporate over the whole
15 company.

16 THE COURT: Why don't you ask her if the training is
17 the same across the United States.

18 (Pause in proceedings)

19 MR. CLOWARD: I don't have any other questions,
20 Judge.

21 THE COURT: All right. Thank you. Cross.

22 MS. SANDERS: Your Honor, I have a few clarifying
23 questions, but we will reserve the right to recall
24 Ms. McKibbins in our case in chief.

25 THE COURT: My assumption is that you're only

1 covering what was covered in direct?

2 MR. ALVERSON: Yes.

3 MS. SANDERS: That's right.

4 THE COURT: Okay.

5 CROSS-EXAMINATION

6 BY MS. SANDERS:

7 Q Ms. McKibbins, going back to that --

8 MR. ALVERSON: Brian, could you pull that back up
9 again, page 70.

10 BY MS. SANDERS:

11 Q -- page 70, the employee handbook.

12 A Yes.

13 Q With regard to --

14 MR. ALVERSON: The very last sentence.

15 Q With regard to the sections -- first of all, based
16 on what you saw in the video, did it indicate to you that
17 there were any signs or symptoms that Harvey Chernikoff was
18 choking?

19 A No.

20 MR. CLOWARD: Your Honor, I'm going to -- I'm going
21 to -- it's for the same reason. It calls for speculation.
22 Same as she objected to --

23 MS. SANDERS: It's not speculation. She saw it on
24 the video.

25 MR. ALVERSON: What her observation was.

1 THE COURT: I can't hear you, Mr. Alverson.

2 MR. CLOWARD: I'll withdraw. I'll withdraw the
3 objection.

4 THE COURT: I'm sorry, Mr. Alverson. I'm trying to
5 listen, but my ears are still so stopped up.

6 MR. ALVERSON: That's fine. He withdrew it, so
7 we're fine.

8 THE COURT: All right. Thank you.

9 MS. SANDERS: Let me restate it.

10 BY MS. SANDERS:

11 Q Based upon -- you've seen the video?

12 A Yes.

13 Q Based on what you saw in the video, did you see
14 anything indicating to you that Harvey Chernikoff was
15 experiencing any of the typical signs that we see with
16 choking?

17 A No.

18 Q With regard to this information that's in the
19 employee handbook, would Jay have been able to ask Harvey
20 Chernikoff to cough, to stand up to help him with any of the
21 things that would be included in the Heimlich maneuver?

22 A No.

23 Q Did it appear to you that Harvey Chernikoff was at
24 least already unconscious by the time that Jay Farrales
25 identified any kind of a problem with him?

1 A Yes.

2 Q So would the Heimlich maneuver and the information
3 that's included on this sheet, in your view, have been of any
4 assistance whatsoever?

5 A No.

6 Q I want to --

7 (Pause in proceedings)

8 BY MS. SANDERS:

9 Q Okay. The last line there says if at any stage the
10 person becomes unconscious you must start CPR. Would that
11 indicate to you that if somebody's already unconscious you
12 wouldn't do the Heimlich at all, even if you knew that there
13 was choking?

14 A Correct.

15 Q I want to go back to the testimony that counsel
16 pointed out on page 55 of your deposition, where you were
17 asked, Assuming that Mr. -- that the video shows Mr. Farrales,
18 the bus driver, assisting Mr. Chernikoff with drinking on the
19 bus, in your opinion is that a violation of the First Transit
20 rules. At the time of the deposition, had you reviewed that
21 particular part of the video?

22 A I had not.

23 Q What was your understanding of what Mr. Allen was
24 asking you with that question?

25 A When he said assist, I thought he meant actually

1 assist him with drinking, handing him something, holding it to
2 his mouth, helping him drink. To me that's assisting.

3 Q When you actually went back and looked at the video,
4 what did you see during that segment where there's an exchange
5 with a water bottle?

6 A Jay twisted the cap, loosened it up for him so that
7 he could open it himself.

8 Q In your view now, having seen the video, was that a
9 violation?

10 A No.

11 Q I understand and there's going to be testimony here,
12 there is a rule for First Transit about drinking on the bus as
13 well as eating on the bus; is that right?

14 A That's true.

15 Q What is the First Transit rule about drinking on the
16 bus?

17 A That they're not supposed to.

18 Q And what is the RTC rule about drinking on the bus?

19 A It needs to be in a covered container.

20 Q Okay. But do you consider this to be a covered
21 container, the bottle with the lid on it?

22 A It has a top, yes.

23 Q Would that then, Jay assisting Harvey for -- of his
24 assisting Harvey to untwist that bottle, would that be a
25 violation of the RTC policy?

1 A No.

2 MS. SANDERS: Thank you. No further questions at
3 this time, but we reserve the right to recall her in our case
4 in chief.

5 THE COURT: Okay.

6 REDIRECT EXAMINATION

7 BY MR. CLOWARD:

8 Q I'm not real good at questions. But your testimony
9 is that you agree that at the time of your deposition, when
10 Mr. Allen asked you about whether Mr. Farrales taking the
11 water bottle, opening that up, giving it back to Mr.
12 Chernikoff, you testified that that was assisting and that
13 would have been a violation of the policy, true?

14 MS. SANDERS: Objection. It misstates the testimony
15 and was based on an incomplete hypothetical at the time.

16 BY MR. CLOWARD:

17 Q True?

18 THE COURT: I don't have the deposition. Counsel,
19 there was an objection. I think there was an objection to the
20 deposition is what Ms. Sanders indicates; is that correct?

21 MR. CLOWARD: Your Honor, I'd like to turn to
22 page 55. This is the third time this will be asked. It's
23 line 11.

24 THE COURT: Well, hold on. I have her deposition
25 book. I'm going to allow it. I don't think it's speculation.

1 I think she's -- there's been a foundation laid that she is
2 familiar with the rules and the reasons behind those rules of
3 First Transit.

4 BY MR. CLOWARD:

5 Q Okay. You agree at the time of your deposition you
6 testified that assuming the video showed Mr. Farrales the bus
7 driver assisting Mr. Chernikoff with drinking on the bus, that
8 would be a violation of First Transit rules, true?

9 A Correct, if he assisted him with drinking.

10 Q And that's only if he's holding the bottle up to his
11 mouth; that's not if he actually opens the bottle so that he
12 can take a drink by himself?

13 A That's how I understood assisting to be.

14 Q Okay. Will you pull up when Mr. Farrales comes back
15 on the bus.

16 You also were asked whether or not Mr. Chernikoff
17 was struggling, whether you saw any struggling.

18 A Yes.

19 Q Before we show the video, because words are
20 important apparently, what is your definition of what
21 struggling would be?

22 A Well, I was asked about the normal struggles for
23 signs of choking, and based on my knowledge of what a person
24 would be showing for signs of choking would be visible
25 distress near their -- the universal signs of choking,

1 grabbing your neck [indicating] or something to get somebody's
2 attention that you are choking and that you need help.

3 MR. CLOWARD: Okay. Play that, Brian.

4 (Video plays for the jury.)

5 BY MR. CLOWARD:

6 Q Do you think that the video looks like Mr.
7 Chernikoff is struggling right there?

8 A It doesn't look like a choking struggling to me, no.

9 Q And more specifically, does it look like he's
10 struggling at all?

11 A I've watched the entire video and he does move
12 around a lot through the video, so just watching it and
13 watching him down like that, I can't say whether it's a
14 struggle or not.

15 Q Okay. You talked a little bit on Ms. Sanders'
16 questioning about the Heimlich maneuver and how to identify
17 the signs of choking and things like that. Do you recall that
18 testimony?

19 A Yes.

20 Q When did you learn first aid and the Heimlich
21 maneuver?

22 A I don't know it.

23 Q Oh. But your --

24 MR. CLOWARD: Okay. No further questions.

25 THE COURT: Anything else?

1 MS. SANDERS: No further questions at this time,
2 Your Honor.

3 THE COURT: All right. Thank you, ma'am, for your
4 time. Please step down.

5 THE WITNESS: Thank you.

6 THE COURT: You know, it's 12:15. Plaintiff, what
7 time is your next witness?

8 MR. CLOWARD: As soon as Your Honor wants. I think
9 we're ready whenever.

10 THE COURT: Okay. Which is your next -- who is your
11 next witness?

12 MR. ALLEN: Supposed to be here at 12:30.

13 MR. CLOWARD: 12:30.

14 THE COURT: Jason, is it very crowded in the
15 building?

16 THE MARSHAL: We have like eight to ten trials
17 going, Judge.

18 THE COURT: So probably 1:30.

19 THE MARSHAL: At least.

20 THE COURT: Let's do 1:30. Ladies and gentlemen of
21 the jury, please come back from lunch at 1:30. Again, don't
22 talk about the case, don't research the case, don't form or
23 express an opinion on this case.

24 (Jurors recessed at 12:13 p.m.)

25 THE COURT: Is there anything we need to address

1 before lunch?

2 MS. SANDERS: None for us.

3 MR. CLOWARD: No.

4 THE COURT: Okay. See you at 1:30.

5 (Court recessed at 12:13 p.m. until 1:38 p.m.)

6 (Outside the presence of the jury.)

7 THE COURT: Let's get the jury in here. Looks like
8 we have --

9 MR. ALLEN: Please the Court, a real quick
10 question --

11 THE COURT: Yes, sir.

12 MR. ALLEN: -- from the Georgia lawyer.

13 I understand in Nevada there's a procedure where the
14 jury can ask questions.

15 THE COURT: Mm-hmm.

16 MR. ALLEN: And how does that work?

17 THE COURT: Well, I don't know if you were in here
18 when I was going over the instructions yesterday. We have
19 them write it on a sheet of paper with their name and their
20 badge number, and then it comes up to me first, and I'll show
21 you guys to make sure it is an appropriate question. But I
22 did tell them yesterday specifically they could ask questions.

23 MR. ALLEN: Should we remind them before I -- should
24 we remind them before I put the medical witness up?

25 THE COURT: I can remind them, that's fine, because

1 this is usually when they have questions.

2 MR. ALLEN: Okay. I just wanted to know what was
3 proper. Thank you, Judge.

4 THE COURT: Yeah. It's not like Phoenix. Phoenix,
5 isn't Arizona the one where they can raise their hand and ask
6 during the course of trial? I only know that from the Jodi
7 Arias trial. And I didn't watch it all. I just watched the
8 clips on the news, by the way.

9 MR. ALLEN: That would be my preference if there's
10 no objection, if you could just remind the jury of that.

11 THE COURT: Yeah. I sure will.

12 MR. CLOWARD: Thanks, Judge.

13 (Jurors reconvene at 1:39 p.m.)

14 THE COURT: The jury's back. Hope you guys had a
15 great lunch. Please call your next witness.

16 MR. ALLEN: Please the Court. Your Honor, we would
17 like to call -- the Chernikoffs would like to call their
18 expert in emergency medicine and critical care at this time,
19 Dr. Stein.

20 THE COURT: All right. And ladies and gentlemen of
21 the jury, again, as I indicated yesterday, if you have a
22 question, please jot it down. Put your name and badge number
23 and give it to the marshal.

24 KENNETH STEIN, PLAINTIFF'S WITNESS, SWORN

25 THE CLERK: Please state and spell your full name

1 for the record.

2 THE WITNESS: My name is Dr. Kenneth A. Stein,
3 S-t-e-i-n.

4 THE COURT: Whenever you're ready.

5 MR. ALLEN: Please the court, Your Honor?

6 THE COURT: Yes.

7 DIRECT EXAMINATION

8 BY MR. ALLEN:

9 Q Dr. Stein, I introduced you as an expert in
10 emergency medicine and critical care. Before we get into all
11 your specific opinions, are you the type of doctor that's
12 going to tell this jury as to within a reasonable degree of
13 medical probability when Harvey would have been able to say
14 had his life saved had a person trained on page 70 of the
15 employee handbook had initiated that, those actions?

16 A Yes, sir.

17 Q And would you as well be the one to tell them when,
18 within a reasonable degree of medical probability, not only
19 would his life been saved, but his brain?

20 A Yes, sir.

21 Q Now, let's tell the jury a little bit about
22 yourself. Tell them what kind of training you did to
23 become -- first, what is an emergency medicine doctor?

24 A Okay. So emergency medicine is the field where we
25 deal with people that come into the emergency department,

1 whether it be from a gunshot wound or a car accident or a
2 splinter or bad pneumonia or heart disease or a stroke,
3 symptoms that are very mild, as well as people who are in
4 cardiac arrest.

5 Q And how is emergency medicine different than
6 critical care medicine?

7 A So in critical care medicine, and I do both, that's
8 working in the critical care department or the intensive care
9 unit of the hospital, where we take care of the sickest of the
10 sick people, people who have just come out of major surgery,
11 people who are -- have had a heart attack, have had a stroke,
12 have severe pneumonia, people who are on ventilators, life
13 support machines if you will, who have various severe
14 illnesses that are of a severity enough that they need very
15 close monitoring by nursing staff and physicians.

16 Q Are you the kind of doctor that when somebody does
17 choke or has choked, they come in and see you?

18 A If they're healthy and they've choked and they've --
19 in a restaurant and they've had the Heimlich maneuver and
20 they're healthy otherwise, they may not even come to the
21 hospital. If they've choked and they're still ill where
22 there's concern they may choke again, they'll come to the
23 hospital and I would see them if I was in the emergency
24 department at that time.

25 Q Are you the kind of doctor that's trained in these,

1 Heimlich maneuver, CPR, first aid?

2 A Yes, sir.

3 Q And have you taught others how to do that?

4 A So a lot of the training that goes on for what we
5 call first aid is aid the people provide to people before
6 healthcare providers arrive. So someone who's at a baseball
7 game and someone gets injured, or someone collapses in a
8 supermarket and someone rushes to help them, that would be
9 what's called basic first aid or basic life support. I'm
10 generally involved with teaching people once those people have
11 reached the hospital.

12 Of course we also have people in the hospital who
13 have cardiac arrests and get food stuck. But I'm involved
14 with teaching doctors in training, nurses in training in the
15 medical setting, so not much in what we call the pre-hospital
16 setting.

17 Q So are you perfectly capable of explaining to the
18 jury page 70 of the employee handbook?

19 A Yes, sir.

20 Q And please just tell the jury what kind of training
21 and education you had to go through to be, is it double board
22 certified or is it triple?

23 A Well, actually triple certification.

24 Q First, what is board certification?

25 A So in medicine there are various what are called

1 boards. Those are a group of doctors in a certain field that
2 have certain criteria as to what someone should know, how
3 knowledgeable they should be, what training they should have
4 to be certified in that field. So I have board certification
5 in internal medicine by what's called the American Board of
6 Internal Medicine.

7 I have board certification in emergency medicine by
8 the American Board of Physician Specialists. And then there's
9 what we call a subspecialty, which is for me it's neuro
10 critical care. That's caring for people that have severe
11 critical illnesses and concentrating on people that have
12 illnesses of the brain and nervous system. And that's
13 certified by a body called the United Council of Neurologic
14 Subspecialists.

15 Q When you use the word "neuro," neurological, what
16 kind of brain injuries are you talking about?

17 A That will be everything from someone who's had a
18 stroke to someone who's had bleeding in their brain or brain
19 trauma, someone who has seizures, someone who has severe
20 psychiatric illness who's in the hospital who's not acting
21 quite normally, people who have had injury to their spinal
22 cord or their nerves in their hands.

23 Often people have had significant what we call
24 anoxic brain injury. That means -- anoxic means without
25 oxygen. So people who have had injuries to their brain from

1 not having enough oxygen, whether that's a mild amount of
2 injury or people who we eventually declare as being brain
3 dead.

4 Q You told us about the brain training that you talked
5 about. Did you also have -- tell the jury how your specialty
6 knows about the heart and issues with the heart.

7 A So both in -- so critical care medicine is what we
8 call a subspecialty after internal medicine. So internal
9 medicine, people kind of think, well, what does that mean.
10 And if you think of pediatrics as being a doctor for kids,
11 internal medicine is doctors for adults.

12 So whether it's headaches and brain problems or
13 heart problems, lung problems, stomach problems, basically
14 everything that would be involved in caring for an adult other
15 than pregnancy would be internal medicine. So we have
16 training in the heart, the lungs, the digestive system and all
17 illnesses in that area. Likewise in emergency medicine,
18 that's a very large part of emergency medicine and of critical
19 care medicine, is heart and lung related problems.

20 Q And people with heart attacks.

21 A Yes, sir.

22 Q Have you dealt with that?

23 A Very often, yes, sir.

24 Q Now, how long have you been a doctor?

25 A Since graduated medical school in 1991, so coming up

1 on 25 years.

2 Q And then after you finished medical school, did you
3 do some additional training before you -- after medical
4 school?

5 A Yes, sir. So it was four years of college, then
6 four years of medical school, and then after that was three
7 years of what we call residency training. I tell my kids when
8 I was all done with it I finished 23rd grade.

9 Q Okay. And how old were you at the 23rd grade? How
10 many years ago was the 23rd grade?

11 A I believe I was 31 when I finished.

12 Q How old are you now?

13 A I am now 54.

14 Q Now, Doctor, we're going to talk about, we're going
15 to educate the jury as to some of the terms that they've
16 heard. And before we educate the jury as to some of those
17 terms, I would first like to talk to the jury about you were
18 asked to do those things that I had spoke about earlier, form
19 medical opinions within a reasonable degree of medical
20 probability. Did you review some information to formulate
21 your opinions?

22 A Yes, sir.

23 Q Did you review deposition testimony?

24 A Yes, sir.

25 Q Did you get a list for me?

1 A Yeah. It was hard to remember everything, so I
2 wrote it down. And I'd like to clarify. I finished medical
3 school in '88, so I've been a doctor since '88. I finished
4 residency in '91, so I've been a doctor for 28 years.

5 Q And been practicing emergency medicine, critical
6 care?

7 A For 25 years.

8 Q Okay. And I may get ahead of myself. And you do
9 that, where do you do that? Do you do that in an emergency
10 room or do you do that in a hospital? How do you do that?

11 A So I used to practice full time or most of my time
12 in emergency medicine, part time in critical care. Over the
13 years it's transitioned where I now do most of my time in the
14 critical care. Critical care and intensive care are the same
15 thing. I might bounce those terms back and forth. But I'm
16 still working in the emergency department.

17 I'm in the emergency department of two different
18 hospitals. One is in a nice suburb of St. Louis, a nice
19 private hospital called St. Luke's Hospital. There's also an
20 inner city hospital which is called Saint Louis University,
21 and at Saint Louis University I'm there on faculty and we'll
22 have residents. Those are people who have finished medical
23 school, they're doctors, they're training in emergency
24 medicine, and I'm helping train them how to be emergency
25 medicine doctors. We'll be seeing patients together side by

1 side in the emergency department.

2 And the critical care department that's there in the
3 hospital in the intensive care unit, when patients come up
4 from the ER, sometimes if they're having a lot of problems
5 with a very ill patient, I'll go down to the ER to help them.
6 Sometimes if there's a patient on what we call the floor,
7 meaning a part of the hospital outside of the intensive care
8 unit and they're having a lot of problems, I'll be called to
9 go to their bedside to help them, and then bring them to the
10 intensive care unit if need be.

11 Q Doctor, I understand there are doctors like you that
12 are patient doctors, and there are doctors who spend a lot of
13 time teaching other doctors in a medical school setting, and
14 there's those doctors who spend a lot of time researching.

15 A Yes, sir.

16 Q And do you spend all your time doing patient care?

17 A So all of the time that I'm working as a doctor it's
18 taking care of patients. While I'm in the emergency — well,
19 let's say 98 percent, 99 percent, while I'm in the emergency
20 department at Saint Louis University, while we're taking care
21 of patients, I'll also teach residents.

22 So if someone comes in and they're having chest
23 pain, and after we see the patient I'll talk to them, I'll go
24 okay, so what do you think's going on, and we'll talk about
25 what's going on with this patient, how do you evaluate chest

1 pain, how do we treat the patient, but it's all focused on
2 caring for a specific patient. Once in a while I give
3 lectures, but the vast majority of the time it's there what we
4 call in the trenches caring for patients.

5 Q Thank you, Doctor. Now, back to your list. Let the
6 jury know what you reviewed that helps formulate your opinions
7 based upon your education, training and your background. What
8 information did you review?

9 A Okay. So there were numerous things that were
10 involved in this case, and these include the report from the
11 Clark County Fire Department. There was depositions that were
12 taken in this case. Those were the depositions of -- and I
13 say patient just because in medicine you usually say patient.
14 I should say Mr. Chernikoff. Please forgive me if I say
15 patient.

16 There was the deposition of the mother of
17 Mr. Chernikoff, the deposition of the father of Mr.
18 Chernikoff, the deposition of the bus driver, the deposition
19 of the medical examiner, various medical records for Mr.
20 Chernikoff from prior to his death. There was an incident
21 report, I believe, from First Transit on this case. There was
22 an employee manual that was used that the employees of First
23 Transit were provided.

24 There was a paratransit interview form. There was a
25 death certificate. There was the coroner's report. There was

1 the autopsy report. There was a video of what occurred on the
2 bus. There were also reports from defense experts, a
3 Mr. Daecher, if I'm pronouncing the name correctly, and a
4 Dr. MacQuarrie, if I'm pronouncing the name correctly. He was
5 a defense medical expert.

6 Q Based upon all that, we're going to get to your
7 opinions in detail in a minute, but let's first educate the
8 jury as to some basic parts of the anatomy, and then we'll
9 talk a little bit about the event of choking; is that okay?

10 A Yes, sir.

11 Q And before you took the witness stand you helped me,
12 helped us put together or pick out a chart that was easy for
13 the jury to see the anatomy. Do you remember doing that?

14 A Yes, sir.

15 Q Would that be helpful for the jury to understand the
16 events that occur when people swallow and the airway gets
17 blocked and clearing the airway?

18 A I think that would be helpful.

19 MR. ALLEN: At this time, Your Honor, I'd like to
20 publish that.

21 MS. SANDERS: I haven't seen it. It's used
22 demonstratively, is it --

23 MR. ALLEN: It was one that was used in the opening.

24 MS. SANDERS: Demonstratively only, correct?

25 MR. ALVERSON: Is that it right there?

1 MR. ALLEN: For demonstrative purposes only.

2 MR. CLOWARD: Yes.

3 MS. SANDERS: Oh, sure.

4 MR. ALLEN: And if it pleases the Court, is it okay
5 if he comes down to the monitor to help educate the jury?

6 THE COURT: That's fine.

7 THE WITNESS: I apologize about my coughing.

8 MR. ALLEN: And here, I'm going to give you a pen if
9 it's easier for you to point to.

10 THE WITNESS: I'll try not to mark up their screen.

11 MR. ALLEN: If you need something marked, we got a
12 guy back here who's pretty good. Can you mark things and
13 circle things?

14 THE COURT: Well, you can actually touch the screen
15 and circle things too. That screen you can't, but if you do
16 it -- here. If you circle, see, it'll show up on the screen
17 over there. It should.

18 MR. ALLEN: But I don't want to allow him to do
19 that, so.

20 THE WITNESS: His circles are better than my
21 circles.

22 THE COURT: Okay. Let me clear it. There you go.
23 So yeah, in the future you can also mark on the screen.

24 BY MR. ALLEN:

25 Q Now, so what do we have here, Doctor?

1 A So this is a view from the side of a person
2 obviously facing this way [inaudible] back of the head. And
3 this is kind of showing in semi x-ray vision what's going on
4 inside of the person's body. So when we swallow, food goes in
5 our mouth. It doesn't really show the mouth, what we call the
6 oral pharynx.

7 The pharynx means the part of the mouth, if you
8 will, you know, the front part of the mouth and the back part.
9 Food would come down here, or air when you breathe in. This
10 area up here is what we call the nasopharynx, and that's when
11 we breathe, air goes through here.

12 If we could take this whole area here and enlarge
13 it, please. And if it's possible to leave the writing, that
14 might be helpful. There we go. All right.

15 So this is the back part of the pharynx. So your
16 tongue would be over here. When we breathe, air would come
17 down this way and air would come down the back here. And when
18 we swallow, this is called the epiglottis, that's closed.
19 When we breathe, that opens up and air goes in this way. When
20 we have food in our mouth, we eat the food, those are the
21 little green things up there, and the food goes down. The
22 epiglottis closes and the food goes down the back here into
23 what we call the esophagus.

24 When we talk about the airway, that's wherever air
25 moves. So normally the air would come in through your nose,

1 if you're breathing through your nose, will come in through
2 your mouth if you're breathing through your mouth, and then it
3 goes down here into the trachea.

4 Q And below the trachea, this would be the --

5 A And then down here, just because -- the trachea's
6 also called the windpipe. If you feel the front of your neck,
7 you feel that hard part right there. That's your trachea, and
8 that goes down into your lungs and that's how we breathe. And
9 the air comes in and out from the lungs.

10 Q So we're looking at this if it were sideways?

11 A Yes, sir.

12 Q Okay.

13 A Sideways with a person facing this way.

14 Q And you talked to us about how we normally breathe;
15 is that right?

16 A Yes, sir.

17 Q Anything else that you think would be helpful for
18 the jury to understand?

19 A Well, the other question is what happens when
20 someone is choking, and choking meaning that your airway is
21 cut off. In this case it's being cut off because there's a
22 big piece of food that's in there. You can also talk about
23 someone grabbing someone's neck and squeezing, but that's not
24 what we're talking about here.

25 So if someone has a large piece of food or a piece

1 of food of whatever size, and instead of it going down into
2 the esophagus which goes down to the stomach where it's
3 supposed to, that food comes and gets caught over here, either
4 in the trachea or right above the trachea, that will block the
5 airway and someone will choke.

6 So inside of your throat you have the vocal cords
7 and the vocal cords go like this. So when we breathe, they go
8 [indicating] and they open, and you breathe out and they
9 [indicating], and they close. And when we're putting people
10 on ventilators, we actually look at that and we can see the
11 vocal cords open and we can put a tube down into someone's
12 lung to put them on a breathing machine.

13 If someone has food that's in their mouth and if
14 it's big enough that it blocks this area up here, that air
15 cannot get into the trachea, they'll choke, they'll run out of
16 air and they'll pass out and die. If that piece of food gets
17 caught in the vocal cords, it can block the airway and they
18 can die.

19 You also get people who, you know, like little kids
20 that they say don't give little kids peanuts or hot dogs,
21 because those can actually go down between the vocal cords and
22 down into the airway, into the trachea or the windpipe, and
23 that can choke you. So depending on the size of where the
24 food is, depending on how large the piece of food is and where
25 it is, it can cause you to choke.

1 Q Anything else as far as explaining to the jury that
2 would be helpful as far as how we breathe or how an airway may
3 be blocked before we talk about how to help somebody whose
4 airway's blocked?

5 A Sure. Well, normally we breathe on what's called
6 negative pressure. What the heck does that mean? That means
7 we suck air into our lungs. We go [indicating]. We take a
8 breath and our ribs expand and that pulls air in, so
9 [indicating], and the air comes in and then [indicating], our
10 ribs come together and the air comes out.

11 If someone gets air that -- or if someone has food
12 or some other object that's caught somewhere in the airway and
13 they try and breathe in and they can't get in [indicating],
14 and it's stuck, they can't get anymore air in, and they'll run
15 out of oxygen in their blood and they'll pass out and die.

16 There are ways, techniques that people have
17 developed to try and help people get things out of their
18 airway. One is people can go up, if someone's really choking,
19 they can go to their back [indicating] and give real hard
20 blows on their back, what we call back blows, then the person
21 bends forward trying to help them get that out.

22 You can also do what's called the Heimlich maneuver,
23 where you go around the person and grab them with their fists
24 down below the rib cage, and you pull up real hard, kind of
25 helping the person bend over, trying to force some air that's

1 in the lungs to come out. You can also do that same sort of
2 thing but instead of going below the rib cage, you can go
3 around the chest and pull in real tight, especially if it's a
4 really, really large person, if you can't get your hands about
5 the belly.

6 If someone's doing fine and they just have a little
7 bit of a cough you don't do this. But if they're severely
8 choking and they have that look of panic on their face,
9 they're not able to breathe, these are things that can be done
10 to try and help save a person.

11 Q And you told us about the negative air pressure.
12 What happens with the negative air pressure when you're
13 pushing?

14 A Well, this is what we call -- this is the opposite
15 of sucking the air in. This is building up positive pressure,
16 so building up pressure in the chest to try and push the air
17 out. Kind of like if you have a bottle of champagne and you
18 have a cork in there and you loosen it up a little, and
19 eventually that pressure's going to [indicating] pop the cork
20 out of the champagne bottle.

21 As you're pushing in on the chest or pushing in on
22 the belly, you're trying to build up enough pressure inside
23 the chest to [indicating] pop out that piece of food.

24 Q Anything else about this exhibit before we go to
25 page 70?

1 A I think that's the main part. There might be some
2 other parts that come up while we're talking, but I think
3 that's the main part.

4 Q If there is, I tell you what we'll do. We'll put up
5 page 70. If there are some other parts you want to go back
6 to, Doctor, I've got a hard copy of page 70. I'm going to put
7 that up here.

8 A Yes, sir.

9 Q And I'd like you to use either the screen or this to
10 explain to the jury; is that fair?

11 A Yes, sir.

12 MR. ALLEN: Any objection to using page 70 at this
13 point?

14 MS. SANDERS: None from me.

15 THE COURT: All right.

16 BY MR. ALLEN:

17 Q Put the full page 70 up there. Doctor, why don't
18 you come down from the stand, if you don't mind, and let's
19 talk about page 70.

20 THE WITNESS: Your Honor.

21 THE COURT: I'm sorry, Doctor. My ears are so
22 stopped up I can barely hear.

23 THE WITNESS: No problem.

24 THE COURT: I think it's allergies.

25

1 BY MR. ALLEN:

2 Q If you'd come down here. Here is page 70, and we
3 have another copy up here. So what I'd like to do is we're
4 going to walk through this and blow up paragraph by paragraph
5 up here, fair?

6 A Yes, sir.

7 Q And this is part of the employee handbook that you
8 reviewed?

9 A Yes, sir.

10 Q Okay. Let's first, the top of the handbook, it
11 reads, First Aid and Choking; is that correct?

12 A Yes, sir.

13 Q Now let's talk about the very first paragraph, if we
14 can enlarge it. Stop right there. There you go. It says,
15 Choking can become serious if you don't act quickly and
16 knowing what to do is vital. Tell the jury about that.

17 A All right. So there is some things, like if someone
18 has, you know, a cold or pneumonia, where you may have a
19 couple days or a couple of hours in order to do things and get
20 them to the hospital and get them antibiotics in trying to
21 save them. Certain things that relate to the heart or the
22 brain or breathing, you don't have a lot of time.

23 So if someone's drowning, you don't have a couple
24 hours or days to wait. If someone's choking on a piece of
25 food, you don't have a couple hours or days. You have, you

1 know, seconds and minutes count. When we talk about the brain
2 we say time is brain. If you lose oxygen, the more time you
3 waste the more brain is going to get damaged.

4 So it's important to know what to do then and there,
5 kind of have the education ahead of time. It's not really a
6 time to say, oh, gee, let me find the manual, look it up and
7 read what to do. And vital means very important.

8 Q Okay. The next sentence. "Most choking involves
9 food that falls to the back of throat resulting in a muscle --
10 a muscular spasm, gagging, and results in a person trying to
11 cough and breathe." Explain that to the jury, Doctor.

12 A So inside of your airway, as things get in your
13 airway, it makes you cough. So if you've ever had like
14 something to drink and you kind of like breathed in at the
15 wrong time while you're drinking and you get something in, you
16 probably go [indicating] and you cough right away. It's what
17 we call the cough reflex. And if something -- and when I say
18 the airway, I mean down into the actual trachea, the windpipe.
19 People will try to do that.

20 If there's something small enough and it's not
21 totally blocking off the airway, you might hear them coughing,
22 gagging, trying to get that out. If there's something that's
23 big enough that it totally blocks the airway, they're not
24 going to be able to breathe.

25 Q Let me interrupt you, Doctor. Can we put back the

1 illustration and make that a little bit bigger. And we were
2 talking about the different areas being blocked. Can you
3 remind us where you're talking about?

4 A So blockage can occur up here in the back of the
5 throat, what we call the back of the pharynx. We can block up
6 that whole area up there. It can also be right above the
7 vocal cords. It can be between the vocal cords or it can be
8 down here in the windpipe. And there's some terms, like
9 people hear the term "wheezing," and I'm not real good at
10 imitating things.

11 But wheezing would be a sound like people have
12 asthma and they go [indicating], like when you're breathing
13 in. Sometimes if people have something that's caught in their
14 throat or there's a narrowing in the airway, as they're trying
15 to breathe out they have a sound that's called "stridor,"
16 which is [indicating], like that. But if the airway's totally
17 blocked you can't make any sound, because you need air moving
18 in order to make sound.

19 Once again, if something's caught up here and it's
20 big enough and it totally blocks the whole part of the airway
21 up above the vocal cords, that can cause choking. If it's
22 over here, the vocal cords would go right across there, and
23 it's either right above the vocal cords or right inside the
24 vocal cords, that will cause choking, or if it's down here
25 below the vocal cords it will cause choking.

1 Q And when you mean choking --

2 A I mean unable to breathe, difficulty getting air in
3 and out.

4 Q And back to page 70, anything else there? Is it
5 good to go in the next paragraph?

6 A Good to go.

7 Q So if the airway becomes blocked by a large piece of
8 food or some object, the person would have found it difficult
9 to speak or breathe. Talk to us about the difficulty speaking
10 and breathing.

11 A So in order to speak, we call it phonate, you need
12 your vocal cords to kind of move, and you need air to come
13 through the vocal cords. If there's no air going through, it
14 doesn't make any sound. It's kind of like listening to
15 someone playing the flute. You know, if they're blowing air
16 there's going to be sound. If they're just holding it,
17 there's no air going through it, there's no sound.

18 So if you're not able to get air in and out of your
19 lungs, in and out of your vocal cords, you're not going to be
20 able to speak, you're not going to be able to make any noise.

21 Q And now we move over to the next paragraph. It
22 says, "How to treat choking," if we can enlarge that. Let's
23 go ahead and enlarge that whole section, how to -- that
24 paragraph. And if you could, Doctor, let's start off by how
25 to treat choking. Explain to the jury, is there a way to

1 treat somebody if somebody is conscious or can talk to you
2 versus somebody that's unconscious?

3 A [Inaudible.]

4 Q Okay. So would you explain the difference, what
5 those two things mean and how that applies to the choking?

6 A So conscious basically means people are awake and
7 able to respond to you. Unconscious means they're passed out
8 and unable to respond.

9 If someone, you know, like someone who got the
10 little bit of water in their lungs when they drank something,
11 it may have happened I had some lemonade that I expected to be
12 cold and it was real warm, it kind of sucked up in the straw
13 faster than I thought and it went down my lungs. And lemonade
14 really makes you cough, by the way. And you start coughing
15 and I was okay, you know, I was awake. I was not very
16 comfortable but I was able to breathe, so that would not be a
17 time for someone to come and try and pat on my back and do a
18 Heimlich.

19 If they're able to control their airway, they're
20 able to still breathe, you let them do it on their own. You
21 just kind of say, okay, you know, just breathe deeply,
22 breathe, you know, try and relax. Because if people really
23 panic [indicating] it makes things worse. So that's what
24 number one is. If they're able to cough on their own, let
25 them.

1 Q So start by encouraging the person to cough in the
2 reassuring manner and try not to panic.

3 A Mm-hmm. [Inaudible] who is a caregiver don't panic
4 and tell the patient not to panic.

5 Q Why is it important for the caregiver not to panic?

6 A If panic takes over your brain, you're too nervous
7 to think clearly. So you have to kind of, you know, be able
8 to think and know what to do. It's kind of like people who
9 take training in self-defense, you know, if someone attacks
10 you and you just panic, you forget what to do.

11 If you learn the moves and, you know, body memory of
12 what to do when someone attacks you, you know, blocking and
13 such, you're calm, you're relaxed, you're able to let your
14 body and mind work the way they're supposed to.

15 Q And how does training or educating somebody to
16 page 70 help prevent people from panicking?

17 A If they have some knowledge and they remember the
18 knowledge, hopefully they'll be able to bring that up at the
19 time of an emergency when they need it.

20 Q And the remembering the knowledge is training?

21 A Yes, sir.

22 Q Next bullet. It says, If this doesn't work, get the
23 person to lean forward, support their chest with one hand,
24 with the other give them up to five blows on the back between
25 the shoulder blades. Can you demonstrate that on me or do you

Case No. 70164

In the Supreme Court of Nevada

FIRST TRANSIT, INC.; and JAY
FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; and ELAINE
CHERNIKOFF,

Respondents.

Electronically Filed
Oct 20 2017 02:57 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable STEFANY A. MILEY, District Judge
District Court Case No. A-13-682726-C

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1 MR. CLOWARD: Do you agree with me that if
2 somebody's seated, buckled in, it might be a little bit more
3 difficult to identify.

4 PROSPECTIVE JUROR NO. 223: Yes.

5 MR. CLOWARD: Might take some special training to
6 help the person identify --

7 PROSPECTIVE JUROR NO. 223: And you have to see the
8 size of the person because, you know, there are certain ways
9 that -- let them go back, brace yourself if they're going to
10 pass out while they're choking. Certain ways to do that.

11 MR. CLOWARD: [indiscernible] questions. You're
12 singled out so I appreciate it. Normally we get to move
13 around but you're really on the hot seat this time.

14 PROSPECTIVE JUROR NO. 223: Do a lot of that. Part
15 of my job is patient education. So since we are, we are
16 patients so many hours and they'll ask us a lot of questions.
17 We automatically go into patient education mode.

18 MR. CLOWARD: Thank you.

19 PROSPECTIVE JUROR NO. 223: You're welcome.

20 MR. CLOWARD: How do you -- I talked about getting
21 off the exit and coming up to that stop sign and that
22 stoplight, three a.m. I can see nobody's coming, but I really
23 just want to get home. How do you feel about following rules?
24 Are they important, not important?

25 PROSPECTIVE JUROR NO. 223: It's very important,

1 yeah, because you can cause an accident. And I kind of get
2 aggravated when I hear people not following that.

3 MR. CLOWARD: Okay. Last question. Public figure,
4 favorite job, something you're passionate about.

5 PROSPECTIVE JUROR NO. 223: I would say the Armed
6 Forces because they're out there defending this country,
7 they're dying for this country. What's the second one?

8 MR. CLOWARD: Your very favorite job.

9 PROSPECTIVE JUROR NO. 223: What I'm doing now.
10 It's gratifying when you get patient feedback, especially when
11 they said oh, can you do my dialysis next time. Because since
12 I work in an acute setting and my company has the contract for
13 14 hospitals, we don't know if we're going to be going back to
14 that hospital. I could be working. So it's very gratifying
15 when they say can you do my dialysis, you're very good. I
16 felt good [indiscernible] that part is very gratifying.

17 MR. CLOWARD: Makes you feel good when people
18 recognize you.

19 PROSPECTIVE JUROR NO. 223: Oh, yeah.

20 MR. CLOWARD: And then something you're passionate
21 about.

22 PROSPECTIVE JUROR NO. 223: Sports and cooking.

23 MR. CLOWARD: [indiscernible] cook?

24 PROSPECTIVE JUROR NO. 223: Spanish food, Chinese
25 food, Korean food, I go through it all. I have two books of

1 recipes and I cook and I try them out on my family, see what
2 they like.

3 MR. CLOWARD: What's your very favorite thing to
4 cook?

5 PROSPECTIVE JUROR NO. 223: I'd say Spanish food.
6 Yeah, Spanish food is my favorite. Some original from
7 Ecuador, so it's very hard kind of food to cook because it's
8 very intricate. There's a lot of -- some Filipino food, my
9 wife is Filipino. Those are my two favorites. Sports, I like
10 football. I'm passionate about football, yeah.

11 MR. CLOWARD: NFL, [indiscernible], soccer?

12 PROSPECTIVE JUROR NO. 223: NFL, I like the Broncos
13 and the Giants because I grew up in New Jersey. And then
14 college is Alabama.

15 MR. CLOWARD: Some good teams that win a lot.

16 PROSPECTIVE JUROR NO. 223: Oh, yeah, because
17 they're defense.

18 MR. CLOWARD: You're not going to hold it against
19 [indiscernible]

20 PROSPECTIVE JUROR NO. 223: [indiscernible] two
21 games.

22 MR. CLOWARD: I'll tell you something, though, he's
23 from Georgia but he's actually a Tennessee volunteer
24 [indiscernible]. Oklahoma game he's the only guy in the whole
25 stand. He's wearing a bright orange at Oklahoma's home game.

1 I just think you're [indiscernible], I would never do that.

2 Okay, last question. I told you that was the last
3 set of questions, but I've got another one. I want to know
4 about your decision making process and whether -- you know,
5 some folks, like my dad, for instance, when he makes a
6 decision, it doesn't matter what decision, if it's an
7 important decision he's going to list pros and he's going to
8 list all the cons. He's going to go through and make that big
9 old list and unless the pros far outweigh the cons, unless
10 he's like 90 percent sure, he just will not make the decision.
11 And somebody else like my mom, she's spontaneous and that's
12 probably why they get [indiscernible]. She makes a decision
13 and it's kind of like well, this sounds good, you know, it's
14 okay.

15 So what I want to know is assuming that you're
16 instructed that in a case like this all of your decisions are
17 just more likely than not. So you put all the evidence on one
18 side and you put all the evidence on the other, decide that
19 it's just barely tilting, is the side that that's the decision
20 you make for them. Some folks think that's too easy for the
21 plaintiffs. Is that --

22 PROSPECTIVE JUROR NO. 223: It's kind of hard to
23 decide on that. If it's just barely I would have to rethink
24 that over and over. If I have to make a decision then I would
25 have to go with more or higher. But again, it's hard if it's

1 just barely, you know. But if I have to make a decision and
2 that's what we're instructed to do, I would have to go with
3 whichever one is higher than the other.

4 MR. CLOWARD: Okay. So you would be able to --
5 you'd be able to do it if you were instructed on that?

6 PROSPECTIVE JUROR NO. 223: Yes.

7 MR. CLOWARD: Mr. Farrales, I think Mr. Alverson
8 pointed out Mr. Farrales is Filipino, your wife is Filipino.

9 PROSPECTIVE JUROR NO. 223: Yes.

10 MR. CLOWARD: Anything you'd feel more sympathetic
11 or anything like that?

12 PROSPECTIVE JUROR NO. 223: No. Actually, a lot of
13 my teammates are Filipino in dialysis. I'd say like 70
14 percent of my teammates are Filipino. So we're very friendly,
15 very good people, but this is a case.

16 MR. CLOWARD: [indiscernible] influence?

17 PROSPECTIVE JUROR NO. 223: No.

18 MR. CLOWARD: So my client Elaine here and her
19 husband Jack over here, they shouldn't be worried, they
20 shouldn't be worried about that.

21 PROSPECTIVE JUROR NO. 223: No, I'm impartial. I
22 believe in the law, facts.

23 MR. CLOWARD: Thank you.

24 THE COURT: Counsel, could you just come here for a
25 scheduling matter real quick, please?

1 (Bench conference transcribed as follows.)

2 THE COURT: Do you just want to try to get a jury
3 before we go to lunch? I need to take a break. I think some
4 of the jurors need to go as well. Do you mind if we take a
5 quick break?

6 MR. CLOWARD: [inaudible]

7 THE COURT: On the challenges for cause? I'll give
8 you a chance to do this. You passed the panel but for the
9 challenges you made for cause. And I do need to make a basis
10 once we go on break as to why I granted the ones I did and I
11 did not grant the ones I did.

12 MR. CLOWARD: [inaudible]

13 THE COURT: Okay. Keep going, please.

14 MR. CLOWARD: I think that the Court should spend
15 some time to make sure that these folks [inaudible] impartial
16 jurors. That's what [indiscernible] says. He says it's the
17 Court's responsibility is to make sure [indiscernible] --

18 THE COURT: Why don't we just take a break and
19 discuss this real quick? Okay?

20 (End of bench conference.)

21 THE COURT: Ladies and gentlemen of the jury, I'm
22 going to give you guys -- please come back at 1:20. I know
23 that you guys are getting hungry, but we should have a jury
24 soon. We're not going to -- are you guys starving to death or
25 can you make it a little bit? You're starving? I know we get

1 on a roll. I keep thinking we'll be done soon so we can get
2 this wrapped up. Why don't we just go ahead and give you guys
3 a lunch break then. It's not getting any earlier in the day.
4 It's 1:10 currently. Can you guys come back at 2:30, please?

5 All right. Again, remember this. If you see the --
6 hold on, hold on, I've got to tell you this every time. You
7 can't talk about the case, you can't research the case, you
8 cannot form or express an opinion on the case. If you see any
9 of the lawyers or parties that are in this case outside,
10 please ignore them because they will ignore you because they
11 cannot speak to you. Okay? So we'll see you back at 2:30.

12 (Prospective jury panel recessed at 1:08 p.m.)

13 THE COURT: Counsel, I will let you guys make the
14 record, I just need a quick break. If you guys need to use
15 the restroom, please do so. I'll be right back.

16 (Court recessed at 1:09 p.m. until 1:11 p.m.)

17 (Outside the presence of the prospective jury panel.)

18 THE COURT: Okay. So yesterday the plaintiff
19 requested several challenges for cause. The first one was Mr.
20 Strobeck, which is badge number 138. Then there was Tobin,
21 183. That was stipulated to by the parties. So that was
22 granted. Caleb Morgan, badge number 216. Burr, Dale Burr,
23 number 214. Badge number 172, Jesse Colyar. And badge 137,
24 Deanna Smith.

25 The Court did allow after additional questioning by

1 the defense, I did allow -- I did dismiss Caleb Morgan for
2 cause. And the reason I did that was this. Upon questioning
3 by the defense, I mean, Mr. Morgan originally indicated that
4 he thinks lawsuits are usually frivolous and he never agrees
5 with the money the plaintiffs are asking for. On voir dire
6 the defense asked some further questions and to the Court's --
7 in the Court's opinion Mr. Morgan never gave an unequivocal
8 response that he could put aside his general feeling that
9 lawsuits are frivolous and could listen to the evidence and
10 testimony and render a fair and impartial verdict based upon
11 what the evidence presented. So that is why I let him go. I
12 didn't think he was unequivocal in being able to listen to
13 both sides of the case.

14 Now Strobeck, I did not allow and that's badge
15 number 138. I do recognize on plaintiff's questioning Mr.
16 Strobeck indicated that 95 percent of the cases are just for
17 money, he didn't think he could be fair to the cases -- fair
18 to the plaintiff. But just because he thinks that 95 percent
19 of the cases are for money, that does not mean -- and he even
20 articulated that he could listen to the law as given to by the
21 Court. He could follow the law, he could put aside any
22 perceived -- preconceived notions or ideas and render a
23 verdict that was fair to both the plaintiff and the defendant.

24 He never indicated that he would refuse under any
25 circumstances to award money to the plaintiff. In fact, he

1 just indicated that most cases are frivolous and I know you
2 guys gave the example of McDonald's. Even plaintiff's counsel
3 agreed that perhaps the McDonald's settlement was frivolous.
4 But he never indicated he could not be fair and impartial to
5 both the plaintiff and the defense in this case.

6 With respect to Mr. Burr, badge number 214. There
7 was some discussion by him under plaintiff's voir dire that he
8 couldn't consider a large amount of money but really,
9 plaintiff never really went into that anymore. I mean, he
10 said there's a lot of PI, personal injury ads, which was a
11 sentiment that was expressed by many of the jurors upon
12 questioning by counsel. However, he indicated that he would
13 -- without hesitation he could listen to the law and putting
14 preconceived notions or ideas aside about personal injury ads
15 or personal injury settlements he may have heard on the news
16 or on some other media source and could render a verdict fair
17 to both the plaintiff and the defense based upon the evidence
18 presented in this case.

19 Same with Mr. Colyar, badge number 172. I do
20 recognize that during plaintiff voir dire Mr. Colyar indicated
21 that there was a lot of greed out there and he didn't know if
22 he could be fair to the plaintiff. However, on further voir
23 dire by the defense he did indicate that he could put his
24 personal sentiments aside regarding personal injury and
25 litigation and could be -- listen to the facts and the

1 evidence presented and be fair and impartial to both the
2 plaintiff and the defense.

3 Lastly -- so I did not allow that one. On to Deanna
4 Smith, badge 137. I think that some of the problem with Ms.
5 Smith was the way the questions were presented to her because
6 she kept basically saying I don't know. The way, frankly, I
7 took that to be was that she didn't know what she would do
8 because there was nothing before her at that time to make a
9 decision on. When she was voir dired by defense counsel she
10 did indicate that -- at first she indicated that she would try
11 to put preconceived notions aside but on further discussion
12 she did indicate that she would listen to the instructions of
13 the Court and could put any preconceived notions aside and
14 render a verdict that would be fair to the plaintiff and the
15 defense based upon the evidence.

16 So that is the reason I did not allow the other
17 challenges for cause. If you guys would like to make a record
18 further, that is fine, but the Court's decision will stand at
19 this point.

20 MR. CLOWARD: I would like to make a record, Judge.
21 First and foremost, as we learn in Whitlock v. Salmon, when
22 the Supreme Court reviews this issue, the very most important
23 thing is to look at the entire body of the jurors' statements,
24 not to look at detached statements alone. That's important.
25 The second thing that's very important is that I'm not aware

1 of a single case in the history of either this state or any
2 other case where a judge has been reversed for granting a
3 cause challenge. Courts are reversed routinely for not
4 granting cause challenges because the parties are guaranteed a
5 fundamental right to have a jury of their peers who can be
6 fair and impartial.

7 And in this case, these jurors, yeah, while they're
8 asked, if you look at the very detached questioning, if you
9 look at the very leading lawyerly, and they're great questions
10 by Bruce, Mr. Alverson, the questions are designed to get them
11 -- well, you agree that you could, you know, follow the rules
12 of the law and you agree that if the Judge told you to do this
13 you're going to do that. The studies have shown that that
14 type of a question is inappropriate because the jurors -- what
15 juror's going to say no, I can't follow the law, I'm not going
16 to follow the law, I'm not going to do that.

17 When you look at the body of what these individuals
18 have said, plain and simple, Mr. Strobeck, I mean, this guy,
19 it's impossible for him to be fair. It is absolutely
20 impossible for him to be fair. He said flat out it would not
21 be fair, in his own words. Keep in mind, the questioning by
22 Mr. Alverson, these are very leading questions. My questions
23 were open ended, like what do you -- how do you feel about
24 this? Tell me how you really feel, be brutally honest with
25 me, tell me how you feel. Well, I don't like these lawsuits,

1 I think that they're this and I think they're that. Well, can
2 you be fair? No, I can't be fair. Would it be fair to have
3 you on this jury? No, it wouldn't be fair to have you on this
4 jury.

5 Mr. Alverson comes along the next day, well, do you
6 think that you could follow the law. Of course he's going to
7 say yeah, I can follow the law. So the Court really needs to
8 look at the totality of the circumstances. And the very most
9 recent Supreme Court case, the case -- it's an appellate
10 decision by Judge Tao Gibbons and Silver. I think it's Wills
11 or Willis v. State. I had to know that for the en banc
12 argument that I just had a week and a half or two weeks ago on
13 this issue, voir dire.

14 But they talked about in that case it's the Judge's
15 responsibility to make sure. So I'm encouraging the Judge to
16 ask these folks in very vanilla, very neutral. You know, Mr.
17 Strobeck, yesterday under Mr. Cloward's questioning you said,
18 you know, you wouldn't be fair on this jury. I wanted to --
19 but then when Mr. Alverson asked you these questions you said
20 you would be. You know, I want you to really look inside and,
21 you know, can you be fair to both parties. I think that's
22 what the Court needs to do. If the Court is going to deny my
23 cause challenge, I think the Court needs to voir dire these
24 individuals to make sure that they can actually be fair to my
25 clients.

1 Because the things that they've said, specifically
2 Strobeck -- I mean, Strobeck is as toxic of a juror as I've
3 ever seen for the plaintiff. He flat out said he could not be
4 fair to my clients. And then Mrs. Smith, Your Honor, Ms.
5 Smith said the exact same thing that Mr. Morgan said. Mr.
6 Morgan said well, look, you know, I'm human, I mean, yeah, you
7 know, I can try, but, I mean, I'm human. It's going to be
8 hard for me. It's not fair to my clients to have jurors that
9 it's going to be hard for them to follow the law. It's just
10 not fair.

11 THE COURT: Mr. Morgan's been excused, so let's not
12 focus on him.

13 MR. CLOWARD: I understand and that's a fair point.
14 But I guess the reason why I brought him up is that Ms. Smith
15 had the same reservations. She said well, I'm -- she actually
16 pointed to Mr. Morgan and said well, I'm kind of like Mr.
17 Morgan, you know, I'll try, but I don't know if I can. Then
18 Mr. Alverson says well, look, how can I get a more definitive
19 answer out of you. Can you follow the law? Do you agree that
20 everyone -- I mean, the questions were do you agree that
21 everyone wants to have somebody that is fair and impartial and
22 will follow the law. Well, everyone's going to agree with
23 that. That's not the question. The question is is look,
24 yesterday you told Mr. Cloward plain and simple that you would
25 be unfair and that it would be unfair to have you on this jury

1 because of your views.

2 Are you able to set that aside and truly be fair and
3 impartial in this case or are you going to be maybe deciding
4 this with your heart? That's the question, not hey, let me
5 ask you a very direct point will you follow the law. The
6 studies, the literature, the case law that I've analyzed,
7 that's not appropriate. It's not appropriate to just come in
8 here and rehab them well, you can follow the law, can't you.
9 That doesn't tell anybody anything and it certainly doesn't
10 tell the Supreme Court whether or not these folks are really
11 fair and impartial.

12 And that's what we want. We want a full record so
13 that if we have to come down here and do this again or if
14 there's an appeal, the Supreme Court can have an intelligent,
15 meaningful review pursuant to *Jitnan v. Oliver* of whether
16 these folks can be fair, not only to my clients, but to them
17 as well. It's important for them as well to have a fair
18 fight. Both parties are entitled to that, Judge. So I will
19 rest on that but I renew my cause challenges.

20 I think that it's only fair to have the Court voir
21 dire these individuals and not in like hey, if I tell you to
22 follow the law will you follow what I tell you to do, like to
23 actually ask them, you know, hey, I'm concerned. You told Mr.
24 Cloward yesterday you'd be unfair to sit on this jury, but you
25 just told Mr. Alverson that -- you know, so which one is it,

1 you know. So anyway, with that, Judge, thank you.

2 THE COURT: Mr. Alverson?

3 MR. ALVERSON: I agree with the Court's ruling which
4 includes the dismissal of Mr. Morgan. I think that was a
5 correct ruling.

6 THE COURT: All right. Actually, I will go back
7 because the jurors have to come back anyway. I will revisit
8 Strobeck and Smith. With respect to the other ones, I've
9 already made a record on those.

10 MR. CLOWARD: Thank you, Judge.

11 THE COURT: So we'll see you guys back at 2:30. And
12 my question is going to be just very brief.

13 MR. CLOWARD: I think that's --

14 THE COURT: I think there's some questions that may
15 have confused them, but I think those questions are questions
16 counsel should ask. All right. Thank you.

17 (Court recessed at 1:23 p.m. until 2:34 p.m.)

18 (In the presence of the prospective jury panel.)

19 THE COURT: Chernikoff versus First Transit,
20 A682726. All right. Counsel, please make yourselves
21 comfortable.

22 Okay, ladies and gentlemen of the jury, obviously,
23 we've been here now for two days and over the last two days
24 I've been listening to -- I've been making notes about your
25 responses to both my questions and plaintiff's questions and

1 defense questions. I just have some follow-up questions
2 because what I'm looking for in a juror is a person that
3 listen to the evidence presented by the plaintiff and evidence
4 presented by the defense and be fair and impartial. Which
5 means, as we sit here today, because you guys have heard no
6 evidence whatsoever, both the plaintiff and defense should be
7 on relatively equal footing.

8 So I need to find out a little bit more information
9 from some of you. Mr. Strobeck, so you had a lot of questions
10 yesterday and I know you had a lot of questions today. But I
11 have a little bit of a conflict in the notes I have, what I
12 took down when you were talking. My notes from yesterday
13 indicate that when plaintiff was asking you questions you
14 indicated that you think 95 percent of cases are just for
15 money and you could not be fair to the plaintiff.

16 And then I think you said today or yesterday maybe
17 lines crossed when you asked for certain types of -- amounts
18 of money. And then when the defense counsel got up and asked
19 you questions he asked you if you could follow the law, which
20 you said you could, correct?

21 PROSPECTIVE JUROR NO. 138: Uh-huh.

22 THE COURT: But I just need a little bit more
23 information today. As we sit here today, is the plaintiff
24 already behind the eight ball without you having heard any
25 evidence or anything whatsoever?

1 PROSPECTIVE JUROR NO. 138: I should have clarified
2 more.

3 THE COURT: Yeah.

4 PROSPECTIVE JUROR NO. 138: I do believe that a lot
5 of the cases are for money. But in saying that, that's -- if
6 he asked me in a situation if this person sued this person for
7 a billion dollars, do you think that person is suing them just
8 for money. And just off the top of my head I would say yes.
9 But in a court case I'm absolutely going to be honest and stay
10 open minded. I was always told that the truth, even if it
11 hurts someone, is better in the end in the long run of their
12 life than it is to lie to them and tell them something
13 different.

14 THE COURT: Okay. So as we sit here today, is the
15 plaintiff and the defendant, are they in the same position in
16 your mind since you haven't heard any evidence whatsoever?

17 PROSPECTIVE JUROR NO. 138: Yes, ma'am.

18 THE COURT: Okay. So if you become a juror, the
19 jurors get to decide the facts. You'll be told that in jury
20 instructions in fact. And you do get to bring into jury
21 deliberation your everyday experiences as men and women. But
22 again, we just need them to be sitting here on equal footing
23 since you've heard no evidence. So let me ask this question.
24 If the plaintiff presented evidence and you believe they
25 proved their case, would you be able to find for the

1 plaintiff?

2 PROSPECTIVE JUROR NO. 138: Yeah, absolutely.

3 THE COURT: All right. And if you listen to all the
4 evidence and testimony and you believe the plaintiff did not
5 prove their case, would you be able to find for the defendant?

6 PROSPECTIVE JUROR NO. 138: Absolutely.

7 THE COURT: All right. Let me hear it one more
8 time. You believe you could be fair and impartial to both.

9 PROSPECTIVE JUROR NO. 138: I could be fair to both.

10 THE COURT: All right. Thank you very much. All
11 right. Let's see. Mr. Burr, where are you? There you are.
12 Mr. Burr, you're badge number 214. Same thing with Mr.
13 Strobeck. I had some conflicts in my notes and I want to make
14 sure that my notes accurately reflect your position. So my
15 notes yesterday indicated that -- and there was some
16 discussion today that you couldn't consider large amounts of
17 money. They really didn't elaborate on that much and you
18 think there's lots of personal injury ads on TV, which I don't
19 think anyone would disagree with you there. There are
20 personal injury ads on TV.

21 But the question becomes as we sit here today,
22 because you've heard no evidence, no testimony whatsoever, are
23 the plaintiff and the defendant on equal footing?

24 PROSPECTIVE JUROR NO. 214: Yes.

25 THE COURT: Okay. And if you believe after

1 listening to all the evidence and testimony that the plaintiff
2 proved their case, could you find in favor of the plaintiff?

3 PROSPECTIVE JUROR NO. 214: Yes.

4 THE COURT: And if you believe after listening to
5 all the evidence that the plaintiff did not prove their case,
6 could you find in favor of the defendant?

7 PROSPECTIVE JUROR NO. 214: Yes.

8 THE COURT: And again, you believe you could be fair
9 to both?

10 PROSPECTIVE JUROR NO. 214: Of course.

11 THE COURT: All right. Thank you very much. Let's
12 see. Colyar, Jesse. Mr. Colyar, you're badge number 172.
13 Yesterday I put down in my notes that you kind of -- there was
14 a discussion about how people feel about personal injury cases
15 and they brought up the McDonald's case and everything else.
16 My notes say that you believe that there is a lot of greed and
17 you could not be fair to the plaintiff. But when Mr. Alverson
18 asked you some questions today, he asked you whether you could
19 follow the law and you said yes, right?

20 PROSPECTIVE JUROR NO. 172: Yes.

21 THE COURT: Okay. But I need a little bit more
22 information. As we sit here today, you've heard no evidence,
23 no testimony whatsoever. Are the plaintiff and the defendant
24 on equal footing in your eyes?

25 PROSPECTIVE JUROR NO. 172: Yes.

1 THE COURT: Okay. So if the plaintiff presents
2 their evidence and testimony and you believe at the end of the
3 case that they have proven their case, could you find in favor
4 of the plaintiff?

5 PROSPECTIVE JUROR NO. 172: Of course.

6 THE COURT: All right. And the reverse. If you
7 listen to all the evidence and testimony presented by both
8 sides and you believe the plaintiff has not proven their case,
9 could you find in favor of the defense?

10 PROSPECTIVE JUROR NO. 172: Yes.

11 THE COURT: So you think you could be fair to both?

12 PROSPECTIVE JUROR NO. 172: Yes.

13 THE COURT: And you have no hesitation to tell me
14 that.

15 PROSPECTIVE JUROR NO. 172: Yes.

16 THE COURT: All right. Thank you. And lastly, Ms.
17 Deanna Smith, badge number 137. So again, I got kind of
18 conflicting notes between yesterday and today. Yesterday when
19 the plaintiff was asking you questions you indicated you would
20 not want someone like yourself on the jury but you did also
21 say a lot of I don't know, I don't know. I wasn't really sure
22 how to interpret the I don't knows. And then today when Mr.
23 Alverson asked you some questions you said you could utilize
24 the law that was given to you by the Court; is that correct?

25 PROSPECTIVE JUROR NO. 137: That is correct.

1 THE COURT: What I need to make sure of, though, is
2 I -- when you were having all the I don't know yesterday, the
3 way I kind of took it was you didn't know what you would do
4 because you had not heard the evidence and testimony yet in
5 this case. Is this correct or were you trying to convey
6 something else?

7 PROSPECTIVE JUROR NO. 137: That's correct.

8 THE COURT: Okay. So since you haven't heard any
9 evidence and testimony in this case whatsoever, are the
10 plaintiff and the defendant on equal footing at this stage?

11 PROSPECTIVE JUROR NO. 137: Yes.

12 THE COURT: And if you listen to all the evidence
13 and testimony presented by both the plaintiff and the defense
14 and you feel the plaintiff has proven their case, could you
15 find for the plaintiff?

16 PROSPECTIVE JUROR NO. 137: Yes.

17 THE COURT: And the reverse. If you listen to all
18 the evidence and testimony and you believe the plaintiff has
19 not proven their case, could you find for the defense?

20 PROSPECTIVE JUROR NO. 137: Yes.

21 THE COURT: All right. And you're comfortable and
22 you're unequivocal about this.

23 PROSPECTIVE JUROR NO. 137: Yes.

24 THE COURT: All right. The prior ruling will stand.
25 All right. Ladies and gentlemen of the jury, at this point

1 we're going to begin -- actually, hold on.

2 MR. ALVERSON: I have a couple --

3 MR. CLOWARD: Yeah.

4 THE COURT: I'm sorry. Let me review my notes. I
5 have lots of notes. I'm sorry, Mr. Alverson. You started to
6 say something.

7 MR. ALVERSON: Yes. It's my turn to ask Mr. Acuna
8 a couple questions.

9 THE COURT: Did I cut you off? I'm sorry.

10 MR. ALVERSON: That's fine. That's fine.

11 THE COURT: I totally forgot. I'm sorry. We had a
12 new member joining us before lunch, but please continue, Mr.
13 Alverson. Just with respect to this one juror.

14 MR. ALVERSON: Did the counsel waive for cause?

15 MR. CLOWARD: I'll make the record off -- yeah.

16 MR. ALVERSON: As to Mr. Acuna.

17 MR. CLOWARD: Oh, yeah, absolutely, yeah.

18 MR. ALVERSON: Just a couple of questions. When you
19 first got into the box and you were asked to describe the
20 choking and you went like that.

21 PROSPECTIVE JUROR NO. 223: Yes.

22 MR. ALVERSON: That's kind of a standard description
23 for choking, isn't it? We see it on patients and that kind of
24 a universal sign for choking.

25 PROSPECTIVE JUROR NO. 223: Yes.

1 MR. ALVERSON: When counsel said in a chair and
2 represented that he was in a seatbelt, unless his arms are in
3 there too, would that same thing occur?

4 PROSPECTIVE JUROR NO. 223: Yes, more flailing of
5 the arms, yes.

6 MR. ALVERSON: Would he still be doing that? He
7 wouldn't be able to stand up.

8 PROSPECTIVE JUROR NO. 223: No, because he had his
9 seatbelt on.

10 MR. ALVERSON: But every other frantic movement
11 would still be [indiscernible].

12 PROSPECTIVE JUROR NO. 223: Yes.

13 MR. ALVERSON: Thank you. Pass for cause. Thank
14 you, sir.

15 PROSPECTIVE JUROR NO. 223: You're welcome.

16 THE COURT: All right. What we're going to do at
17 this point is we're actually going to begin jury selection.
18 Over the next several minutes you'll see both the plaintiff --
19 counsel for the plaintiff, counsel for the defense passing a
20 sheet of paper back and forth. On that paper they are putting
21 the names of individuals who they are going to excuse as a
22 juror in this case. If you're excused, please don't take any
23 offense to it. The attorneys are just trying to find a juror
24 who would be suitable for this particular case. Make yourself
25 comfortable over the next several minutes. If you want to

1 stand, please stand by your chair, talk to your neighbor,
2 whatever you need to do. We should be finished within a
3 relatively short period of time.

4 (Court recessed at 2:44 p.m. until 2:54 p.m.)

5 (In the presence of the prospective jury panel.)

6 THE COURT: We're on the record. All right, ladies
7 and gentlemen. If your name is called please stand and move
8 to the back of the room. Do not leave yet.

9 THE CLERK: Badge number 138, Reed Strobeck. Badge
10 number 137, Deanna Smith. 133, Gayle Scheeler. 214, Dale
11 Burr. 198, Darrell Rivera. 146, Beckum. 181, Tindall. 177,
12 King. 194, Chaisuriya. 221, Simms.

13 THE COURT: All right. Counsel for the plaintiff,
14 counsel for the defense, is this the jury you selected?

15 MR. ALVERSON: It is, Your Honor.

16 MR. CLOWARD: Yes, Your Honor.

17 THE COURT: All right. Thank you. Everyone else,
18 you are going to be dismissed as jurors at this point. Please
19 go downstairs to jury services and check out, and that's on
20 the third floor, before leaving the building. Thank you for
21 your time the last two days.

22 All right. Counsel, if you'd like to make
23 yourselves comfortable. Ladies and gentlemen of the jury,
24 looks like you're already getting to know each other. You've
25 all been selected as jurors, so you'll get to know each other

1 even better over the next week. I need for you to please
2 stand and raise your right hand to be sworn in as jurors.

3 (Jury panel sworn.)

4 THE COURT: All right. Sit down. All right, ladies
5 and gentlemen. The first question everyone has when they get
6 selected for jury duty is questions about their employer and
7 everything else. Jason will give you information on that.
8 Usually, they just require to see that badge showing that you
9 are in fact a juror. If your employer requires something
10 additional, talk to Jason about it. He'll also give you all
11 the instructions for parking, getting in the building every
12 day.

13 So this is what we're going to do. You've now been
14 sworn in as jurors on this case. I'm going to take the next
15 several minutes to give you, kind of read you some
16 instructions. The instructions are basically an overview to
17 what the trial is and to hopefully kind of guide you in
18 listening to the evidence and testimony during the course of
19 the case. When I'm finished, if we have time, the plaintiff
20 will present their opening and the defense will also have an
21 opportunity to present their opening. Thereafter, we will
22 start with the plaintiff's witnesses.

23 Ladies and gentlemen of the jury, you are admonished
24 that no juror may declare to a fellow juror any fact relating
25 to this case of his own knowledge. And if any juror discovers

1 during the trial or after the jury has retired that he or any
2 other juror has personal knowledge of any fact or controversy
3 in the case, he shall disclose the situation to me in the
4 absence of the other jurors. This means if you learn during
5 the course of the trial that you're acquainted with the facts
6 of the case or the witnesses and you have not previously told
7 us of that relationship, then you must declare that fact to
8 me.

9 Sometimes what happens to people is, you know, we
10 ask you whether you recognize the names of people who may be
11 called as witnesses. But I know I'm terrible at names and
12 sometimes you see someone and it clicks. You put the name and
13 the face together. If that happens to you, it's not a big
14 deal, but it is important that you let the Court know as soon
15 as possible.

16 The way you communicate to the Court is going to be
17 through Jason, the Marshal. Jason should be in here through
18 most of the trial, but if he's not, there will always be a
19 Marshal in the department that can help convey a message to
20 the Court.

21 During the course of the trial the attorneys for
22 both sides, court personnel, other than the Marshal, are not
23 permitted to talk to you. It's not that they're being
24 antisocial, it's simply that they're all bound by ethics in
25 the law not to speak with you because doing so could

1 contaminate your verdict. We're not even allowed to say hello
2 to you if we should pass you in the hallway or be in the same
3 elevator with you. If you should recognize a witness or be
4 familiar with the facts of the case when the witness is
5 testifying, please make a note on your jury pad that you
6 recognize such and such witness and how you recognize that
7 witness. At the next break in trial please hand that note to
8 the Marshal and he will present it to the Court.

9 The same thing goes if you want to ask questions
10 during the course of the trial. Please write the question
11 down on your notepads that you'll receive and put your name
12 and badge number on there and then give that question to the
13 Marshal and he'll get it to the Court.

14 Frequently, people do not recognize witnesses by
15 names, but may recognize them when they come into the
16 courtroom to testify. The person could be your child's soccer
17 coach or you only know him by a first name or someone who
18 lives a few houses down that you just recognize when you're
19 out in the neighborhood. Again, if that happens in the case,
20 not a big deal, but it's important that you let the Court know
21 by notifying the Marshal.

22 You're admonished additionally that you are not
23 visit the scene of any of the acts or occurrences made mention
24 of during the trial unless specifically directed to do so by
25 the Court. The reason that we do not want you going out to

1 any particular scene or location referenced during the trial
2 is not because we don't want you to know everything there is
3 to know about the location. However, it's simply because
4 there's no guarantee that the intersection, the street, the
5 apartment complex, the restaurant or whatever it is looks the
6 same today as it did on the day of the incident. Usually,
7 photos are taken at the time of the incident or shortly
8 thereafter and we will use those photographs during the trial
9 rather than going to the site to look at it firsthand.

10 The parties may sometimes present objections to some
11 of the testimony or other evidence. At times I may sustain
12 those objections or direct that you disregard certain
13 testimony or exhibits. You must not consider any evidence to
14 which an objection has been sustained or which I have
15 instructed you to disregard.

16 It is the duty of a lawyer to object to evidence
17 which he believes may not be properly offered and you should
18 not be prejudiced in any way against the lawyer who makes
19 objections on behalf of the party the lawyer represents. I
20 may also find it necessary to admonish the lawyers. If I do
21 you should not show prejudice to the lawyer or his clients
22 because I found it necessary to admonish that lawyer.

23 Throughout the trial if you cannot hear a question
24 asked by the attorney or the answer given by a witness, please
25 raise your hand as an indication. If I don't see your hand

1 up, please, you know, you can make -- say excuse me or
2 something else to get my attention. It's very important that
3 if you don't hear a question that you ask the attorney to
4 reask the question so that you can hear the question and the
5 response thereto.

6 If you wish, you may take notes to help you remember
7 what any witness has said. If you do take notes, please keep
8 them to yourself until you and your fellow jurors go to the
9 jury room to decide the case. Do not let note taking distract
10 you so that while you're writing down the answer to question
11 one, two or three more questions are asked and you don't get
12 to hear the responses to those questions. You need to rely
13 upon your own memory of what was said and not be overly
14 influenced by the notes of other jurors when you go back to
15 deliberate.

16 The case is going to proceed in the following order.
17 First, the plaintiff has the opportunity to make an opening
18 statement outlining the case and suggesting to you what it
19 believes the evidence is going to be. The defendant may also
20 make an opening statement or may reserve their right to make
21 an opening statement until after the plaintiff has put on all
22 their evidence.

23 Opening statements are a synopsis, an overview of
24 what the attorney believes the testimony will be. Opening
25 statements of the attorneys are not evidence. After all, the

1 attorneys are not witnesses to any of the facts in controversy
2 in this case.

3 The plaintiff will then introduce evidence and call
4 witnesses. At the conclusion of plaintiff's case the defense
5 may then call any additional witnesses and submit additional
6 evidence if it wishes to do so. After the defense rests, the
7 plaintiff has a right to call rebuttal witnesses.

8 After all of the evidence is in, I will instruct you
9 on the law that applies to this case. You must not be
10 concerned with the wisdom of any rule of law stated in these
11 pretrial instructions or in the instructions given to you at
12 the end of the trial, regardless of any opinion you may have
13 as to what the law ought to be. It would be a violation of
14 your oath to base a verdict upon any other view of the law
15 than that given to you in instructions of the Court.

16 After the instructions and the law are read to you,
17 each party has the opportunity to argue orally in support of
18 their case. This is called closing argument or summation.
19 What the attorneys say in closing argument is not evidence.
20 Their arguments are designed to summarize and interpret the
21 evidence for you and show how the evidence and the law relate
22 to one another.

23 Since the plaintiff has the burden of proof, the
24 plaintiff gets to argue to you twice at the end of the trial.
25 Plaintiff will argue, the defense will argue and then the

1 plaintiff will have the opportunity to rebut the defendant's
2 argument. After the attorneys have presented their arguments,
3 you will retire to select a foreperson to deliberate and
4 arrive upon your verdict.

5 Faithful performance by you of your duties is vital
6 to the administration of justice. It is your duty to
7 determine the facts and determine them from the evidence and
8 the reasonable inferences arising from such evidence. And in
9 so doing, you must not indulge in guesswork or speculation.

10 The evidence which you are to consider consists of
11 the testimony of witnesses and exhibits admitted into
12 evidence. The term witness means anyone who testifies in
13 person or by way of deposition and it may include the parties
14 to the lawsuit. A deposition is simply an examination of the
15 witness at a prior date under oath with the attorneys present
16 where the testimony is taken down in written format. Those
17 written questions and answers will be read to you during the
18 trial.

19 Admission of the evidence in court is governed by
20 rules of law. From time to time it may be the duty of the
21 attorneys to make objections and my duty as the Judge to rule
22 on those objections and decide whether a certain question may
23 be answered or whether certain evidence may be admitted. You
24 must not consume yourself with the objections made by the
25 attorneys or with the Court's reasons for its rulings.

1 You must not consider testimony or exhibits to which
2 an objection has been sustained or which has been ordered
3 stricken. Further, you must not consider anything which you
4 may have seen or heard when the Court is not in session, even
5 if what you see or hear is said or done by one of the parties
6 or by one of the witnesses.

7 While you're here in the courthouse please always
8 wear the badge the Marshal gave you, which will identify you
9 as a juror. When you come into court, please only make
10 conversation with other individuals who are designated as
11 jurors.

12 In every case there's two types of evidence, direct
13 evidence and circumstantial evidence. Direct evidence is
14 testimony by a witness about what that person saw, heard or
15 did. So, for example, if you wake up and you see the rain
16 falling -- well, if you wake up and you see the rain falling,
17 I mean, that's direct evidence because it's something that you
18 actually saw. In contrast, circumstantial evidence is
19 testimony or exhibits which are proof of a particular fact
20 from which if that fact is proven you can infer the existence
21 of a second fact. So in contrast, if you wake up in the
22 morning and your car's covered with water and the streets are
23 all wet, you can infer that it rained during the course of the
24 night. That would be circumstantial evidence.

25 You can consider both direct and circumstantial

1 evidence in deciding the case. The law permits you to give
2 equal weight or value to both types of evidence, but it's up
3 to you to decide how much weight to give to any particular
4 piece of evidence. Opening statements and closing arguments
5 are intended to help you understand the evidence and in
6 applying the law. But please understand, what the attorneys
7 tell you is not evidence, they're not witnesses, they have no
8 first-hand information and therefore, what they tell you is
9 not evidence.

10 I may take notes during the trial. Do not make any
11 inference from this action on my part because I'm required to
12 be prepared for legal arguments of the attorney during the
13 course of the trial. Again, let me remind you. Until this
14 case is submitted to you, do not talk to each other about it
15 or about anyone who has anything to do with it until the end
16 of the case when you go to the jury room to decide upon your
17 verdict. This includes social media. If you utilize social
18 media, you can say that I have been selected as a juror in a
19 civil case; however, you cannot give any additional
20 information regarding the case.

21 Do not talk with anyone else about this case or
22 about anyone who has anything to do with it until the trial is
23 ended and you've been discharged as jurors. Anyone else
24 includes members of your family and your friends. Those of
25 you who are employed, you'll need to let your boss know that

1 you've been selected as a juror in this case. Do not let
2 anyone talk to you about the case or about anyone who has
3 anything to do with it. If someone should try to talk to you
4 about the case while you're serving as a juror, please report
5 that to me immediately by contacting the Marshal.

6 Do not read any news stories or articles or listen
7 to any radio or television or Internet reports about the case
8 or about anyone who has anything to do with it. Do not do any
9 research or make any investigation about the case on your own.
10 Now in age of Google and all the other search engines, people
11 sometimes don't realize that they can't go ahead and Google
12 terms, people or anything that may come up during the course
13 of the trial. You cannot Google, do any type of search by way
14 of Internet or any other source during the course of the
15 trial.

16 Do not make up your mind about what the verdict
17 should be until after you've gone to the jury room to decide
18 the case and you and your fellow jurors have discussed the
19 evidence. It is important throughout the trial to keep an
20 open mind. At the end of the trial you'll have to make your
21 decision based on what you recall of the evidence. You will
22 not have a written transcript to consult, even though we have
23 a court recorder who takes down the testimony, it is not typed
24 up in a readable format and is difficult and time consuming
25 for the recorder to read back lengthy testimony. Therefore, I

1 urge you to pay close attention to the testimony as it is
2 given.

3 Counsel, I don't know that we'll get through -- I
4 don't know how long plaintiff's openings are going to be. Do
5 we have time for plaintiff's?

6 MR. CLOWARD: I've timed it, it's about 45 minutes.

7 MS. SANDERS: We do have an issue, though, that we
8 brought up this morning and I think needs to be resolved
9 before --

10 THE COURT: Okay. Can you come up for a second?
11 (Bench conference transcribed as follows.)

12 MS. SANDERS: [inaudible]

13 THE COURT: I don't know if I'll have a chance to do
14 -- I have to leave at 4:30 today.

15 MS. SANDERS: I'd rather do it tomorrow.

16 THE COURT: Okay.

17 MR. CLOWARD: [inaudible] split them up. It's not
18 fair to give them [inaudible] so either both of them have to
19 go tomorrow or both of us tonight.

20 THE COURT: What time is your expert going to be
21 here?

22 MR. CLOWARD: [inaudible]

23 THE COURT: Are they here through tomorrow? Okay.

24 MS. SANDERS: [inaudible]

25 THE COURT: We can start addressing some other

1 issues if there's anything else we need to address.

2 (End of bench conference.)

3 THE COURT: Ladies and gentlemen, it looks like
4 we're going to have an early day today. So again, tomorrow
5 morning we're going to start at 9:30, tomorrow's Friday. So
6 it's anticipated we'll go from 9:30 to 5. So you guys can let
7 your employer know. Next week we will not be full days
8 Monday, Tuesday or Wednesday. Jason will give you a schedule
9 so you can let your employers know. So some of you may be
10 able to go to work in the morning and then come into court in
11 the afternoon. Tomorrow I'll see you at 9:30.

12 Again, you'll hear this every time you leave the
13 courtroom. You cannot talk about the case, you cannot form or
14 express an opinion on this case. You cannot research the
15 case. And when you come back tomorrow, please sit in the
16 exact same seats. Those will be your chairs until the end of
17 the trial. Thank you.

18 (Jury panel recessed at 3:11 p.m.)

19 THE COURT: Counsel, make yourselves comfortable.
20 Since we have some time, is there anything we can work on?

21 MR. CLOWARD: I think we could work on jury
22 instructions.

23 THE COURT: All right.

24 MR. ALLEN: And LeAnn, did you look at that
25 transcript? We have a witness that we're going to call by

1 transcript.

2 THE COURT: So on the jury instructions, my opinion
3 is if you guys stipulate to them, then that's fine with me.
4 The only ones I really need to go through with you guys are
5 the ones that you haven't stipulated to. Do you think you can
6 do jury instructions so early in the case?

7 MR. CLOWARD: Yeah.

8 MR. ALVERSON: Do we even have them down here?

9 MS. SANDERS: We have some down here. I'm not sure.

10 MR. ALVERSON: Sounds pretty early.

11 MS. SANDERS: I mean, if there's stuff that we can
12 stipulate to maybe, but we probably don't have a complete set.

13 THE COURT: It's really up to you. I mean, if you
14 guys want to use the time in the courtroom to start
15 stipulating to ones, that's fine with me. I don't know that I
16 could rule on contested issues at this particular stage.

17 MR. CLOWARD: Okay. Maybe what would -- I'm sorry.
18 Go ahead.

19 MS. SANDERS: Well, maybe stay on that, Ben, and
20 then I think I'll have another issue.

21 THE COURT: What about objections in the
22 depositions? Are you going to use the depositions in lieu of
23 testimony?

24 MS. SANDERS: I guess that they aren't now going to
25 use it in opening, so it's --

1 MR. CLOWARD: I thought that I was -- I thought the
2 ruling from this morning was to not show them anything. So I
3 modified everything to take everything out.

4 THE COURT: Okay.

5 MR. CLOWARD: I mean, if the Court is willing to
6 allow me to do that, I mean, I'd prefer to show them what I
7 wanted but, you know. I thought the Court was saying don't
8 show them anything so I was willing to live with the Court's
9 ruling.

10 MS. SANDERS: We did have a discussion this morning
11 about restipulating to the joint exhibits after opening and I
12 don't know if that's -- I think Charles and I talked about it.

13 MR. CLOWARD: I think we'd probably want to talk
14 about that and then we could --

15 MS. SANDERS: All right. Well then, I guess there's
16 really nothing to --

17 MR. ALVERSON: Let's go home.

18 THE COURT: If you guys stipulate something the
19 clerk is here for another hour plus, till five.

20 MR. CLOWARD: Judge, the one issue that I wanted to
21 I guess ask is when we do argue the jury instructions, because
22 I've already one the research, what is the best -- how do you
23 prefer that to happen on potentially contested issues? What's
24 the best way that you want to be educated?

25 THE COURT: If you have jury instructions you know

1 are contested before you come into court, if you give me
2 whatever case law you have, I will read it.

3 MR. CLOWARD: Okay.

4 THE COURT: But for the contested ones on both
5 sides, please just bring me the authority.

6 MR. CLOWARD: Would you like it in brief format or
7 just the cases or both?

8 THE COURT: I can usually just use the cases. I
9 usually need to hear your position first, but if I have the
10 case law I'll read that too.

11 MR. CLOWARD: Okay. Fair enough.

12 THE COURT: Yeah. You guys are going to be busy
13 during trial. I don't know that you need to write anymore
14 briefs than necessary.

15 MR. CLOWARD: It's an important issue.

16 THE COURT: Okay. Well, if you feel that it's
17 something that really needs to be flushed out in a brief,
18 that's up to you. I'm not going to keep you from filing one.
19 But usually, please just bring me all the case law.

20 MR. CLOWARD: Certainly will do that.

21 THE COURT: Okay. Thank you.

22 MR. CLOWARD: Thank you, Judge. Appreciate it.

23 MS. SANDERS: Thank you.

24 (Court recessed for the evening at 3:15 p.m.)
25

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF,)
ELAINE CHERNIKOFF,)
)
Plaintiff,)
vs.)
)
FIRST TRANSIT INC.,)
)
Defendant.)

CASE NO A-13-682726
DEPT NO. XXIII

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

FRIDAY, FEBRUARY 19, 2016

APPEARANCES:

For the Plaintiff: BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants: LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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1 LAS VEGAS, NEVADA, FRIDAY, FEBRUARY 19, 2016, 9:36 A.M.

2 * * * * *

3 THE COURT: So we're on the case of Chernikoff vs.
4 First Transit, Case A682726. We have the jurors here.
5 Anything we need to address before we bring the jurors in?

6 MR. CLOWARD: Just one really brief housekeeping
7 matter.

8 THE COURT: Of course.

9 MR. CLOWARD: The plaintiffs filed a bench brief
10 yesterday. We're not going to be calling one of our expert
11 witnesses. Nobody discussed him as being a potential, so none
12 of the venire men or women were asked about whether they knew
13 him or not. So we just feel like it would be inappropriate to
14 discuss him at any point during the trial, and we've provided
15 the case authority that supports that position. I just wanted
16 to make sure that, you know, that was not going to be an
17 issue.

18 MS. SANDERS: Your Honor, we did receive yesterday
19 afternoon a copy of the brief. We are preparing a written
20 opposition and we'd be -- we'd like to be allowed the
21 opportunity to respond in writing to that motion.

22 THE COURT: Okay. I haven't looked at it yet. It
23 just got put on my bench this morning. So let me look at it
24 and then we'll discuss it later. Is there anything else we
25 need to address?

1 MR. CLOWARD: No, Your Honor.

2 MS. SANDERS: Nothing from us, Your Honor.

3 THE COURT: Okay. Let's bring the jury in.

4 (Jurors enter at 9:37 a.m.)

5 THE COURT: Welcome back, ladies and gentlemen of
6 the jury. When we left off yesterday I gave you guys some
7 instructions to use during the course of the trial. It is now
8 plaintiff's turn to present their openings.

9 MR. CLOWARD: Thank you, Your Honor.

10 PLAINTIFF'S OPENING STATEMENT

11 MR. CLOWARD: So now is the opportunity for us to
12 talk to you about the evidence. I just want to make sure, can
13 everyone see that okay? Okay. This is the opportunity, this
14 is opening statement, this is kind of like a forecast of what
15 the evidence is going to be. We're not going to be able to
16 actually show you the specific evidence. We're just going to
17 tell you what the evidence is going to show.

18 This is a case again, my clients, Jack and Elaine
19 Chernikoff vs. First Transit and Mr. Farrales. Paratransit
20 companies like First Transit must have a well-trained
21 workforce to prevent harm. You're going to hear about a
22 couple of entities.

23 Your Honor, may I move this over just a little bit?

24 THE COURT: You can make yourself comfortable.

25 MR. CLOWARD: Thank you, Your Honor.

1 THE COURT: Just be careful not to unplug it.

2 MR. CLOWARD: Okay. So you're going to hear about
3 three entities in this case. Number one, you'll hear about
4 RTC. RTC is a governmental body. It's basically the regional
5 transportation commission. It's partially funded by our tax,
6 our tax dollars, sales tax and things like that. So the RTC
7 offers certain services to individuals in our community.
8 Specifically they offer things like transportation.

9 And so what RTC does is they -- they say, look, we
10 want folks to come to us and bid on the opportunity to work
11 for us, to basically have this contract where you will provide
12 the workforce, you will provide the employees, and you will
13 take folks throughout the community. So you'll hear that RTC
14 initially contracted with Laidlaw, and then Laidlaw was
15 purchased by First Transit.

16 So the way that this works is RTC pays Laidlaw and
17 Laidlaw in return performs this service of taking individuals
18 throughout the community. You'll hear that when RTC enters
19 into the contract, RTC basically washed their hands of the
20 duties and responsibilities of training.

21 They say, look, if you're going to come to us, we're
22 going to pay you millions of dollars -- and you'll hear what
23 the contract was. It was in the 20 to \$30 million per year.
24 You'll hear that part of that was that the contract provider
25 agreed to do training, to have manuals, to hire the employees,

1 to fire the employees, to discipline and so forth.

2 After the contract was entered into with RTC and
3 Laidlaw, First Transit purchases Laidlaw. Okay. First
4 Transit purchased Laidlaw a couple years before this incident.
5 So essentially the party that we're really dealing with is
6 First Transit, because First Transit was the contract provider
7 that was in place at the time Mr. Chernikoff, Harvey was using
8 the service. And you'll hear about some -- potentially some
9 amendments to the contract. Those amendments to the contract
10 were actually with First Transit, not with Laidlaw after the
11 purchase.

12 So this starts back in 2006. That's when this story
13 really begins. The story starts in 2006, when Mr. Farrales
14 was hired. The evidence will be that Mr. Farrales, he didn't
15 have any experience driving paratransit buses. He didn't have
16 any experience working with folks that have disabilities.

17 And the minimum hiring standards you'll hear about
18 from RTC are that they're really low. There's -- you know,
19 you're going to hear that even murder, kidnapping or crimes
20 against children may only potentially disqualify someone from
21 employment at First Transit. And that's a driver. Those are
22 the standards for the driver.

23 So you'll hear the evidence that when somebody is
24 hired for this position, they go through some very kind of
25 cramming training for the first five days. So day one, you

1 know, you got 7 1/2 hours of training. All these policies are
2 thrown at the drivers. Day two, the same thing, 7 1/2 hours.
3 Day three, the same thing, 7 1/2 hours. Day four, 7 1/2
4 hours. Day five, 7 1/2 hours. And then the drivers have
5 three days of behind the wheel training. And then they're
6 turned loose and they're allowed to take the members of our
7 community, transport the members of our community.

8 And importantly, specifically with First Transit and
9 the paratransit system, keep in mind we're dealing with folks
10 that have disabilities. So First Transit, it was Laidlaw
11 first and then First Transit, when they approached RTC they
12 said, hey, look, we specialize in this, we're professionals in
13 transportation of individuals, specifically folks with
14 disabilities. We're holding ourselves out, we're the
15 professionals, we want your 20 to \$30 million a year contract,
16 we can do this and we can do this safely.

17 So let's talk about some of the training topics and
18 important safety rules that you're going to hear about in this
19 case. And you'll find out, like Mr. Alverson pointed out,
20 witnesses will take the stand. Well, you'll find out that
21 witnesses have actually already taken the stand. Ms.
22 McKibbins for instance was already deposed. And importantly,
23 when she was deposed, just like she's sitting here today, it's
24 in the capacity of a corporate representative.

25 So she speaks for First Transit. She was deposed,

1 swore to tell the truth, the whole truth and nothing but the
2 truth. And she testified that the way that they train their
3 employees, one way that they train their employees is by
4 giving a handbook. They give a handbook out. The handbook
5 has the policies, it has the procedures, it has all of the
6 information in the handbook that is expected of the employees.

7 And importantly, because safety is an ongoing issue,
8 you know, ten years ago cellphones weren't as prominent as
9 they are today. Even five years ago texting wasn't as
10 prominent as it is today. So the way that safety training and
11 safety works is that as things progress, new risks are
12 identified and new training happens.

13 And so what the testimony was is that the employee
14 handbook is updated, and each time it's updated, because it's
15 so important, you'll hear the employees were required to sign
16 off on the handbook, sign off, hey, I received this, I know
17 that I need to follow these rules, I'm going to sign off
18 acknowledging the day that I received this. You'll also hear
19 that the handbook was sent to RTC so that RTC knew what First
20 Transit was going to be doing.

21 So let's talk about the rules that Ms. McKibbins,
22 the corporate representative, talked to us about.
23 Specifically drivers must make sure the passengers are safe
24 before driving off. Second, drivers must scan the interior of
25 the bus every five seconds. Number three, drivers must not

1 allow passengers to eat or drink on the bus. So these are the
2 rules of First Transit. And there are a whole bunch of rules
3 that we're going to talk about during the course of this, but
4 to make sure that my opening doesn't go for a day, we're just
5 going to talk about these three.

6 The rules were so important to First Transit that
7 you'll hear not only did First Transit point out the rules
8 like, hey, driver so and so, this is the rule, you know, you
9 can't let passengers do this on the bus. But they sat them
10 down and they explained in the training like this is why we
11 have the rule.

12 So specifically regarding drivers must make sure the
13 passengers are safe before driving off, this is explained this
14 is important. We are transporting individuals with
15 disabilities. Say we have a -- and it's not just mental
16 disabilities. It's also vision. It's also hearing impaired.

17 And so if you have an individual who maybe has a
18 vision disability, they're getting on the bus, they don't know
19 that the driver is seated and is ready to go, so they are not
20 seated yet and the driver takes off. Well, that person's
21 going to tumble and hit their head or something bad can
22 happen. So the drivers were taught before you drive off, make
23 sure that your passengers are safe.

24 Second, drivers must scan the interior of the bus
25 every five seconds. Now, again, this is the same principle.

1 You might have an individual on the bus with a mental
2 disability who takes their seatbelt off and walks to the back
3 of the bus or does something like that. Mr. Farrales actually
4 said, these are his words, not mine, that because passengers
5 with disabilities sometimes fight or they do things that they
6 are not supposed to do, that's why we're trained to scan the
7 interior of the bus every five seconds.

8 Second -- or I mean, the third rule, drivers must
9 not allow passengers to eat or drink on the bus. And again,
10 the reason why, we go back to not only did they tell the
11 rules, but they also explained. Both Ms. McKibbins and Mr.
12 Farrales agreed that the reason they're trained to not allow
13 eating on the bus is that people could choke, and if they
14 choke they could choke to death.

15 So that rule was explained, this is why we have this
16 rule, this is why we do this. We don't allow passengers to
17 eat, this is why it's important, this is why we need to
18 enforce this rule. So were they important to First Transit?
19 Well, Ms. McKibbins testified, she explained absolutely
20 drivers must observe all rules, safety rules and regulations,
21 and drivers must know and enforce all safety rules. So her
22 words when she's deposed, drivers must know these rules, they
23 must enforce them, it's important.

24 So why are we here? We're here because First
25 Transit violated several of their own policies. So let's talk

1 about the rules that were violated, specifically checking on
2 the passengers, making sure they're safe before driving off.
3 That was violated. Rule No. 2, scan the interior of the bus
4 every five seconds, that rule was violated. Rule No. 3, no
5 food or drink on the bus, that rule was violated.

6 What happened when the rules were violated? Well,
7 what happened is Harvey Chernikoff was allowed to choke to
8 death on a First Transit bus 4 feet away from Mr. Farrales,
9 and that's why we're here today. And so the question that you
10 folks will have to determine is were these rules important, if
11 they had been followed would the outcome have been different.
12 Let's go through those.

13 And I -- we're going to show you these clips not
14 right now. We're going to show you -- there's actually a
15 video of this incident. I'm asking on behalf of my clients,
16 they don't want to see this, so they're going to go outside.
17 That's one of the reasons that we're not showing it right now.
18 And so when we get ready to show it, they're going to walk out
19 of the courtroom. So that's what that's going to be about. I
20 want to be up front about that.

21 The video will show that about an hour before Harvey
22 chokes, okay, and keep in mind --

23 Your Honor, may I move these?

24 THE COURT: You can make yourself comfortable.

25 MR. CLOWARD: Okay. Thank you, Judge. Appreciate

1 it. Thank you.

2 So the evidence is going to show that about an hour
3 before this event happens, and then keep in mind Harvey is
4 sitting on the front row. Harvey loved to sit on the front
5 row. The evidence will show that that's where he wanted to
6 sit every single time if he could. So he's sitting in the
7 front row. He's sitting here like this and he calls out.

8 And he calls Mr. Farrales, he calls him Jerry. He
9 says, Jerry, I'm thirsty, I'm thirsty, Jerry. And Mr.
10 Farrales says, Well, let me help you, hand me up your water,
11 you know, let me help you. And Mr. Farrales actually grabs
12 the water bottle from Harvey and opens it up and hands it back
13 to him, and Harvey drinks from the water.

14 So you have to ask, you'll be asked to ask would
15 this -- would have following this have made a difference, if
16 Mr. Farrales had simply said, Harvey, you remember the rules,
17 no eating or drinking, you can't eat or drink on the bus, I'm
18 sorry, it will have to wait. That's the first thing you think
19 about. This rule was violated. If Harvey is simply told no
20 food or drink on the bus, if Mr. Farrales had done what he was
21 trained to do to enforce the rules and enforce them because of
22 the reasons, Harvey is still here with us today.

23 Rule No. 2, drivers must scan the interior of the
24 bus. This rule, okay, so here's Mr. Farrales. Mr. Farrales
25 is sitting in his driver's seat. He's driving down the road.

1 Harvey is sitting here. Harvey reaches into his food -- his
2 lunch pail, pulls out his sandwich, and for two minutes and 45
3 seconds he eats his sandwich.

4 MS. SANDERS: Your Honor, I'm going to object. He's
5 showing now something that has not been admitted into
6 evidence.

7 MR. CLOWARD: Your Honor, this is a demonstrative
8 photograph. It's not the video.

9 MS. SANDERS: It is -- it is from the actual video
10 that is not yet in evidence.

11 MR. CLOWARD: I'll move this slide.

12 THE COURT: Let's move on.

13 MR. CLOWARD: I just moved the slide. Is that --

14 THE COURT: I see it. That's fine.

15 MR. CLOWARD: So the evidence will show that for
16 those two minutes Harvey eats the sandwich this far away from
17 Mr. Farrales. He is the first passenger behind Mr. Farrales.
18 So when you look at the five second rule, when you look at the
19 video, and we're going to have a counter when we show this,
20 every five seconds, keep in mind the twos and the sevens,
21 every five seconds the rule is violated.

22 All Mr. Farrales has to do is simply look into the
23 rear-view mirror and say, Harvey, put your food away, no
24 eating and drinking on the bus, Harvey. This rule is violated
25 because Mr. Farrales does not look for two minutes and however

1 long I said. Thirty-four times this rule is violated. The
2 next rule -- so this rule is violated 34 times. Again, if
3 Harvey's simply told, Harvey, put your food away, you can't
4 eat on the bus, if he's reminded of this.

5 Number one, drivers must make sure -- so we're
6 moving back to the first rule. Drivers must make sure that
7 passengers are safe before driving off. And this is at
8 8:30:42. So as Harvey -- the video will show us Harvey is
9 eating this sandwich. The bus starts to come to a stop. As
10 the bus is starting to come to a stop, there is another
11 passenger on the bus.

12 So at the time Harvey is allowed to choke to death
13 on the First Transit paratransit bus, there are two
14 passengers, Harvey and another passenger sitting over here
15 named Ms. Kincaid [phonetic]. She's actually a couple seats
16 back. She'd be sitting about right here. So as the bus pulls
17 up, Ms. Kincaid starts to get off the bus. You see her put
18 her bag on the front seat, then she gets up. She moves to the
19 front of the bus.

20 You can see Harvey, now he's starting to struggle.
21 You can see he kind of reaches out like this. He starts to go
22 like this. He is dry heaving. He's in obvious distress.
23 Mr. Farrales has an opportunity to simply check on the
24 passenger, the other passenger he has. That did not happen.

25 Mr. Farrales gets back on the bus, and at this point

1 the video is going to show Harvey now is slumped into the
2 aisle. So it's past the stage. I mean, he is slumped into
3 the aisle, leaning into the aisle. It is crystal clear that
4 he is in distress. He's leaning all the way over into the
5 aisle in distress.

6 Mr. Farrales gets onto the bus, gets into his
7 driver's seat. Keep in mind my client is dying right now in
8 that seat behind him. He gets into his seat, checks on some
9 paperwork, puts it in drive and drives off. The question you
10 will be asked is had he simply looked left to his only
11 remaining passenger on the bus, would Harvey be here today.
12 But instead, the five second rule is violated another 40
13 times.

14 He puts it in drive, he drives off. And it's not
15 until three minutes later, three minutes later that he
16 actually sees Harvey, checking on him for the first time. So
17 the question you have to ask is if during this three minutes
18 had the driver simply done what he was trained to do, scan the
19 interior of his bus every five seconds, he would have stopped,
20 pulled over and done something. Forty more opportunities.
21 We'll play that through, and it's an eternity.

22 Was this death preventable? Well, let's talk about
23 that for a minute. The Heimlich maneuver -- or excuse me.
24 How choking occurs. Choking. We have this piece of -- this
25 flap of skin in the back of our throat. It's called the

1 epiglottis. And think of the epiglottis, it's like a
2 drawbridge. Okay. In the normal relaxed position the
3 drawbridge is up and the air is allowed to come in through the
4 nose and come in through the mouth, and it goes down through
5 the airway into the lungs.

6 So this is in the relaxed position, it's up. What
7 happens is when you swallow, that epiglottis, it's like a
8 drawbridge, it goes down and it covers the airway and allows
9 the food to go down the esophagus into the stomach. What
10 happens is when you -- when the epiglottis is down and food
11 gets clogged into this area, it closes the airway and that's
12 why people aren't allowed -- or aren't able to breathe.

13 So let's talk about the employee handbook you'll
14 hear about. This is going to be page 70 of the First Transit
15 handbook. This is right out of their employee handbook. The
16 employee handbook, page 70 talks about first aid, talks about
17 choking, how to treat choking, and it actually teaches how to
18 do the Heimlich maneuver.

19 In the handbook it is described, all of these
20 things. Choking can become serious if you don't act quickly,
21 here's how to treat choking, here's how to do the Heimlich
22 maneuver, if the obstruction does not clear after three cycles
23 of back blows and abdominal thrusts, then call 911, if at any
24 stage the person becomes unresponsive, start CPR.

25 Okay. So the Heimlich maneuver, if you have

1 somebody standing in front of you, you put your arms around
2 them, you make a fist, you put it above the belly button, you
3 grab the other hand and you do upward and in, upward and in,
4 that's it. That's the Heimlich maneuver. That right there is
5 the Heimlich maneuver and that actually comes out of First
6 Transit's page 70 employee handbook.

7 So what are the defense excuses that you're going to
8 hear? Well, let's talk about the defenses in the case.

9 Number one defense, page 70, the choking training of the
10 employee handbook does not apply here in Las Vegas. Defense
11 No. 2, the driver could not see Harvey choking. Excuse No. 3,
12 Harvey didn't actually choke, he had a heart attack.

13 Excuse No. 4, it was Harvey's fault for eating on
14 the bus. Excuse No. 5, it is Jack and Elaine's fault for not
15 having a PCA with Harvey on the bus that day. Number 6, it
16 was his parents' fault for letting him eat on the bus. So
17 let's talk about each of these and what the evidence will
18 show.

19 Number 1, the evidence will show about page 70, this
20 page 70 that does not apply here in Las Vegas. Ms. McKibbins
21 testified that this policy does not apply here, that this page
22 of the manual does not apply. Ms. McKibbins claimed that
23 page 70 doesn't apply and that the employees are told that
24 page 70 does not apply in Las Vegas.

25 So you're going to have to, like Mr. Alverson said,

1 use your common sense. Use your common sense. The board is
2 right over there. Use your common sense in this case. You're
3 going to have to evaluate the evidence. You're also going to
4 have to evaluate that at the first of the employee handbook is
5 a letter and some things, some notices and limitations from
6 Brad Thomas, the president of the company of First Transit.

7 And one of the things that Brad Thomas says in the
8 notices and limitations section of the policy is, No person,
9 no person is authorized to make oral exceptions to this
10 handbook, and written exceptions are permitted only when
11 signed by the president of First Transit. No person can
12 orally change that, only written exceptions made by the
13 signature of Brad Thomas.

14 Brad Thomas never said, there's no memo, there's no
15 letter, there's no email, there's nothing saying page 70 does
16 not apply to Las Vegas. Hey, in Las Vegas we know it's the
17 wild, wild West, so you can do whatever you want, there's
18 nothing of that. Brad Thomas never says page 70 does not
19 apply. Ms. McKibbins admitted there's no letter, memo, email,
20 facts or anything saying that page 70 can be disregarded.

21 Mr. Farrales admitted he was never told that page 70
22 did not apply to him, that he was given the policy, asked to
23 sign off on it, was never told you can ignore page 70. So
24 again, you're going to have to determine whether this handbook
25 page 70 applied to Las Vegas or not. You're going to have to

1 determine whether this is a valid defense.

2 Let's talk about the driver could not see Harvey
3 choking. I'll move through this fast. But the proof is in
4 the pudding, and I want to -- I got to try to be respectful
5 here. The proof is in the pudding. You're going to see the
6 video. Okay. You're going to see Mr. Farrales for the first
7 time during that five to six minute span. You're going to see
8 clearly on the video the proof is in the pudding.

9 You will literally see when he first sees Harvey
10 choking, slumped over into the aisle. His sunglasses pop up
11 into the display and you can see his sunglasses. For the
12 first time seconds after that he says, Harvey. Seconds after
13 that you see his hand reach around and grab Harvey's arm and
14 shake it and he starts saying, Harvey, Harvey. So you'll have
15 to determine whether the driver had he wanted to have been
16 able to see Harvey.

17 Excuse No. 3, Harvey didn't actually choke, he had a
18 heart attack. The defense is going to hire -- they've brought
19 in an expert and they will bring in an expert, Dr. MacQuarrie.
20 And Dr. MacQuarrie says, you know what, I think that Harvey
21 had a heart attack, he didn't really choke to death, he had a
22 heart attack. But in reaching this opinion, again you're
23 going to have to use your common sense, your common sense
24 here, if this is really a valid excuse here.

25 Because in reaching the opinion that he did,

1 Dr. MacQuarrie ignored that there's a lunch box sitting right
2 next to Harvey, he ignored that he has food emanating from his
3 mouth, he ignored that there's a piece of sandwich removed
4 from his mouth by the coroner, ignored that the coroner for
5 Las Vegas for our community, our community coroner ruled this
6 death by choking, and the death certificate says choking and
7 says nothing about anything related to the heart. So you'll
8 have to determine again, using your common sense, whether this
9 is a valid excuse.

10 Number 4, it's Harvey's fault for being on the bus.
11 Going back to the video, we will see the video where Harvey
12 asks Jay, he says, I'm thirsty, and Jay says, Let me help you,
13 he reaches and grabs the water. Ms. McKibbins admitted that
14 by having the driver open up his water bottle Harvey may have
15 thought it was okay to eat. Mr. Farrales is handing him the
16 water bottle, is assisting him in violating the rule that
17 Mr. Farrales was paid and hired to enforce, yet he's assisting
18 Harvey. So is it reasonable for Harvey to believe that it's
19 okay to eat on the bus? Again, using common sense.

20 Number 5, it was his parents' fault for not having a
21 PCA. Well, let's talk about what the PCA is. That's what we
22 call a personal care attendant. That's basically somebody
23 that goes around with the individual that has the need for --
24 the disability. So Jack and Elaine had a personal care
25 attendant named Joseph. Joseph lived with Harvey.

1 Joseph took care of Harvey. Joseph took Harvey to
2 dances when Harvey would take Rosemarie out, Harvey's
3 girlfriend. They would go to dances at the Opportunity
4 Village. Harvey would be taken to the doctor by Joseph.
5 Harvey would be taken places by Joseph. Joseph would take
6 Harvey to things that were non-routine.

7 Okay. But remember, you're going to hear evidence
8 that when an individual goes to find out whether they can use
9 this service or not, they go through a screening process. In
10 this case Harvey was evaluated by somebody named Czarina
11 Mendez. You'll hear from her. Czarina Mendez said, Look,
12 Harvey was -- when I evaluated him he was not required to have
13 a PCA. I allowed him to have a PCA when he wanted to travel
14 somewhere besides work to home.

15 So something that's non-routine like going to the
16 doctor, something that Harvey doesn't do every single day,
17 like get on the bus, they take him straight to work, he works,
18 they put him back on the bus, they take him straight home.
19 Something that's non-routine she allowed a PCA. But very
20 important, you'll have -- you'll hear the evidence, Harvey was
21 not required to have a PCA. So you'll have to determine
22 whether this is a valid excuse.

23 And then Excuse No. 6, it was his parents' fault for
24 letting him get on the bus. Well, let's talk about the
25 choices that were made by the Chernikoffs in this case. Jack

1 and Elaine, you'll hear, loved Harvey. They loved their son.
2 They did not allow him to ride on the regular buses in town
3 because they didn't want him to get off the bus and get lost.

4 They did not allow Harvey to even ride taxis or car
5 services because they didn't trust that the taxi drivers would
6 take him to where he was supposed to be, and they were afraid
7 that a taxi driver may drop him off prematurely or somewhere
8 and he would be lost.

9 Instead, when they took Harvey to where he worked
10 at, Transition Services, which we'll hear about in a minute.
11 Transition Services is like Opportunity Village. When they
12 first took him there, they heard about the paratransit service
13 here. That's where it was first recommended to them. So they
14 took Harvey down to the RTC to have him evaluated to make sure
15 that it was safe for him to ride on a First Transit bus.

16 And I -- you know, the biggest -- the biggest
17 weakness in the case for the plaintiffs is that Jack and
18 Elaine trusted First Transit to simply do their job. And
19 you're going to have to determine whether they are wrong to
20 trust that the people that are holding themselves out as the
21 specialists in the community, the people that are getting paid
22 20 to \$30 million from RTC to perform this can be expected to
23 do their job.

24 You'll hear about Harvey's life. This is Jack.
25 This is Neil, his brother. This is Elaine.

1 MS. SANDERS: Your Honor, I'm going to object again.
2 Again he's using photographs that are not in evidence.

3 MR. CLOWARD: Your Honor, they're demonstrative. I
4 skipped through them. They're demonstrative photographs.

5 THE COURT: I'll allow them for demonstrative
6 purposes only.

7 MR. CLOWARD: You will?

8 THE COURT: For demonstrative purposes only.

9 MR. CLOWARD: Thank you, Judge.

10 You're going to hear that Harvey, he loved to dress
11 like a cowboy. You're going to hear from Elaine that after he
12 passed away, a family friend actually made Neil and Elaine a
13 blanket, and the blanket is made of Harvey's shirts. And
14 there are a lot of these western shirts.

15 Harvey loved to wear cowboy clothes. You can see
16 he's got the cowboy hat and cowboy belt. That's something
17 that he really enjoyed and that he loved that. And you're
18 going to hear about that. You're going to hear about how he
19 loved Elvis. He thought Elvis was the best. He had kind of a
20 shrine in his house of Elvis.

21 You're going to hear that he had a job at Transition
22 Services. And keep in mind Transition Services, when I say
23 job, the evidence will be that, you know, this is -- they're
24 not paying Harvey like \$10 an hour. Like Harvey got paid like
25 180-some odd dollars over 14, 15 months. So I mean, this is

1 an opportunity for Harvey to go daily basis to have meaningful
2 work and work with other folks, work with disabilities
3 throughout the community, and you'll hear about that.

4 I'm about ready to sit down. The last thing that I
5 want to impress upon you is that you're going to hear another
6 side to this event in a minute. All I'm asking is that you
7 keep an open mind until the very end. Because I will prove
8 that all of the defenses the First Transit attorneys are going
9 to talk to you about in a minute are not -- either not true or
10 they're not valid. And I'm just asking you to keep an open
11 mind until the closing arguments. Thank you.

12 THE COURT: Thank you. Counsel.

13 MS. SANDERS: May we have a moment just to set up?

14 THE COURT: Yeah, to set up. Why don't we just take
15 a ten minute break to stretch and you guys can be fresh for
16 both openings. So come back at 20 after the hour and we'll
17 get started on the defense's opening. Again, don't talk about
18 the case, don't research the case, don't form or express an
19 opinion on the case.

20 (Jurors recessed at 10:13 a.m.)

21 THE COURT: All right. Get set up, please.
22 Counsel, can I have a copy of your PowerPoint for a court
23 exhibit, please.

24 MR. CLOWARD: Yes, Your Honor.

25 THE COURT: Okay. Thank you.

1 (Court recessed at 10:14 a.m. until 10:22 a.m.)

2 (Jurors reconvene at 10:23 a.m.)

3 THE COURT: Welcome back, ladies and gentlemen.

4 Counsel for the defense is going to present their openings.

5 Thank you.

6 MS. SANDERS: Thank you, Your Honor.

7 DEFENDANTS' OPENING STATEMENT

8 MS. SANDERS: Good morning. Harvey Chernikoff died
9 on a bus that was being driven by Jay Farrales of a medical
10 event, and Jay could do nothing to stop it. I call it a
11 medical event because we're not absolutely clear on exactly
12 what caused Harvey to die.

13 We do know that the coroner found a large chunk of
14 what he thought was partially chewed food that smelled of
15 peanut butter. It was so tightly impacted in his airway that
16 it took the coroner ten minutes to remove it, and he had to
17 use a special tool to do it. Now, based on those findings,
18 the coroner concluded that Harvey died as a result of choking.
19 And maybe he did.

20 But on the other hand, and as you will see as the
21 case progresses, the reactions that Harvey had at the time,
22 the way he reacted were not consistent with what one might
23 expect to see with choking, the things we all consider to be
24 universal signs of choking. There wasn't any panicked
25 movements. There wasn't any clutching of the throat. There

1 wasn't any noises.

2 Instead, and as you'll hear from the expert
3 testimony, what happened with Harvey was much more consistent
4 with a sudden fatal event much like a heart attack or a
5 stroke. Now, we'll never know for sure what actually caused
6 Harvey's death, because his parents didn't allow an autopsy.
7 And they have a perfect right not to, not to allow an autopsy.
8 As we understand it, that was done for religious reasons. But
9 in this case, because there was no autopsy done, we'll never
10 know for sure exactly what caused Harvey's death.

11 There's one thing that Mr. Cloward mentioned in his
12 opening that everybody on the defense side of this case agrees
13 with. Harvey Chernikoff's death was a tragedy. There is
14 nobody that's going to dispute that. Now, I didn't know
15 Harvey Chernikoff of course, because we didn't come into this
16 case until much later.

17 But we have had an opportunity over the course of
18 working on the case to learn a little bit about him. And what
19 we've learned is that he was a very friendly person, very
20 fun-loving, very talkative, and that he had a lot of friends.
21 I have no question that he is greatly missed by his family,
22 and they certainly deserve our condolences.

23 But this case is also about another man, my client,
24 Jay Farrales. He is here today because he's been accused of
25 causing Harvey Chernikoff's death. Jay will tell you himself

1 about his interactions with Harvey Chernikoff. He really
2 liked him. They had many conversations and Jay really enjoyed
3 those conversations. But you'll also hear about his own
4 turmoil. He's had to live with the weight of these
5 allegations for 4 1/2 years now.

6 Jay will tell you all of his conduct, what was going
7 through his head on that terrible day. But he'll also tell
8 you of his conviction that the plaintiff's claims in this case
9 against him are untrue, unfounded and unfair. By the
10 conclusion of this case you will also agree that there was
11 nothing that Jay could have done or not done that would have
12 changed the tragic outcome for Harvey Chernikoff.

13 Now, you'll be asked to judge Jay's conduct at the
14 end of this case, so it's important that you know a little bit
15 about him. Jay was born and raised in the Philippines. He
16 came to the United States in 2000. But when he was still in
17 the Philippines he originally was trained as a dental
18 technician. He completed that program and he actually worked
19 for a while making dentures at a facility there.

20 He was eventually persuaded to join his family's
21 business, making and selling construction materials, and he
22 worked in that position and managed several employees for a
23 period of time before he wanted to look for better job
24 opportunities. Jay decided to come to the United States
25 because he wanted a better life for himself and his family.

1 He was engaged at the time to a woman, Karen, his now wife, in
2 the Philippines, and he wanted to come to the United States in
3 order to try and find a better life, better job opportunities
4 for himself and his family.

5 Now, it wasn't easy for Jay, because he did get
6 married to Karen, but she was not able to immediately come to
7 the United States because she needed to go through the
8 immigration process. So they actually had a long distance
9 marriage for a couple of years while she was completing that
10 process.

11 They did manage to get together and they have three
12 children, twin 13-year-old daughters and a nine-year-old
13 daughter. The family wasn't all able to come together and
14 live together in the United States until 2008, so they've only
15 all been together in the same home here in Henderson since
16 2008. And during the time that they were going back and
17 forth, they had many struggles and issues being separated like
18 that.

19 But when Jay came to Las Vegas he worked a few
20 different jobs, but then decided to study for and he actually
21 obtained his commercial driver's license. He worked for about
22 four years as a cab driver, and then he found out about a job
23 opportunity with Laidlaw Transit. And Mr. Cloward mentioned a
24 little bit about Laidlaw. They were looking for somebody to
25 enter their program as a paratransit driver.

1 Now, you did hear a little bit about Laidlaw. It's
2 the predecessor company to First Transit. Now, Jay applied
3 for and got the job, and started working as a paratransit
4 driver going through the training with Laidlaw in 2006. It's
5 a job he'll tell you he immediately loved. He will share with
6 you how much he enjoyed and still enjoys working with,
7 transporting and interacting with disabled passengers.

8 Jay started working for First Transit in 2007, when
9 First Transit took over and bought out Laidlaw. And he stayed
10 with First Transit through the time that First Transit's
11 contract with the RTC expired in 2014. But then Jay was hired
12 by Transdev [phonetic], which is the new contractor that
13 picked up the contract for RTC, and he continues to drive
14 paratransit to this day.

15 Now, in Jay's 10 year career as a paratransit driver
16 he'll tell you, and he's always taken his responsibilities as
17 a driver very seriously, and he has a very excellent work
18 record to show for it. In fact, Jennifer McKibbins, who is
19 his former safety manager, will tell you that during the time
20 that Jay worked for First Transit, he was one of the best and
21 safest drivers that they had in the fleet. You'll find that
22 Jay is a man of great personal and professional integrity.
23 He's very proud of his job, he's very proud of the training
24 he's received, and he's very committed to the passengers that
25 he transports.

1 Harvey Chernikoff's death continues to haunt him,
2 and it probably always will. And that's not because he feels
3 guilty. It's not because he feels like he did anything wrong.
4 It's because he witnessed another person's death, somebody he
5 really cared about, and that's not an easy thing to put behind
6 you. But the evidence in this case will clearly show that Jay
7 does not deserve to be accused of killing Harvey Chernikoff.

8 Let me tell you a little bit about my other client,
9 First Transit. First Transit is an international
10 transportation corporation, and it has operations in 43 states
11 and six countries. Here in Las Vegas, First Transit had taken
12 over the contract with RTC to provide paratransit services
13 when it bought out Laidlaw, and you heard a little bit about
14 that.

15 Let me tell you a little bit though, about the
16 paratransit and how that works. Paratransit is actually a
17 part of the public transportation system that is geared
18 towards providing accommodated travel for persons with
19 disabilities. It's set out in the Americans with Disabilities
20 Act, or what we'll refer to as the ADA. And the purpose of
21 that is to provide accommodated travel for people who may have
22 some kind of difficulty using the regular transportation
23 services.

24 Now, under the ADA, the transport companies can't
25 discriminate against people. They can't restrict them by

1 saying that there are certain things that they can't do that
2 they otherwise would be able to do on the public transport
3 system. But it's intended to give an easier way for disabled
4 people to effectively be able to move around.

5 Now, as I said, RTC had contracted with First
6 Transit. RTC could have provided themselves the
7 transportation services, drivers, buses, that kind of thing.
8 But in this case they contracted out with First Transit to
9 provide part of the services that would be available to
10 passengers with disabilities. And that contract went into
11 effect in 2007 and just ended in 2014.

12 Now, according to the responsibilities here, RTC is
13 the entity that was responsible for making sure the passengers
14 were eligible to actually ride the paratransit, and they did
15 that through an interviewing process. If somebody wanted to
16 be considered for riding paratransit, taking advantage of
17 those services, they would call RTC, not First Transit, and
18 they would go through and set up an interviewing process.

19 You'll hear from the interviewer, Ms. Mendez, who
20 actually conducted the interview of Harvey Chernikoff and
21 determined that he was eligible for riding the paratransit.
22 Now, once they completed that interview process and been
23 determined to -- as eligible to ride paratransit, the
24 passenger is sent an information card, an identification card
25 that indicates that he or she is eligible to ride the

1 paratransit and for how long.

2 And you heard Mr. Cloward mention about the personal
3 care attendant. During the interview process, one of the
4 things that the interviewer can and does do is try to make an
5 assessment about whether or not that passenger should be
6 allowed to have a personal care attendant ride on the bus with
7 them.

8 Now, as he said, it's not something that they can
9 require. The passengers are allowed to, if they are
10 determined to be eligible, ride on the bus without a PCA is
11 what they call it. But if they are determined to be approved
12 for a PCA, what that means is that personal care attendant, if
13 the ride is scheduled that way, can ride for free with that
14 person and provide whatever additional monitoring needs they
15 might have while they're on the bus.

16 In this particular case the interviewer did
17 determine that Harvey Chernikoff was both eligible to ride the
18 paratransit and that he should be allowed to ride with a
19 personal care attendant if he'd so choose. It was a decision
20 that was up to the passenger him or herself or whoever is
21 responsible for that person.

22 Now, the only information that First Transit got,
23 once somebody had been determined to be eligible, is a one
24 letter code they would get. If a passenger called RTC to say
25 I want to ride the bus tomorrow, that would be entered into a

1 computer system, and First Transit in turn would get a
2 manifest readout showing for example Harvey Chernikoff to be
3 picked up at a particular address, an estimated time of
4 pickup, where he's going, and they would give a one letter
5 code identifying what type of disability that person had.

6 In Harvey Chernikoff's case there was a C on the
7 manifest, meaning only that he had a cognitive issue of some
8 sort. That's the only information that Jay Farrales had about
9 Harvey Chernikoff. And the reason for that is because
10 information about a person's disability is confidential. None
11 of us are allowed to know what each other's medical conditions
12 are, and that applies to paratransit drivers as well as
13 anybody else. So the information they got was very short and
14 very limited, but enough to tell them, you know, something
15 about what type of disability that person had.

16 Now, passengers scheduled their trips through the
17 RTC, and what First Transit's role was is to provide the
18 personnel. The RTC owned all the buses. It's all their
19 things that were on the interior. First Transit's part of the
20 role was to hire and train the drivers and to maintain the
21 buses. And they were kind of overseeing the day to day
22 operations of the paratransit service, but in conjunction with
23 the RTC and subject to their -- the RTC's own rules and
24 regulations for what they needed to do.

25 Now, under the contract with RTC, that set out the

1 general parameters for personnel, for training, for
2 responsibilities as between First Transit and RTC. And you'll
3 hear about more of that when the case progresses.

4 You'll hear testimony from Jay and from Jennifer
5 McKibbins, who's now the director of corporate safety for
6 First Transit. At the time she was the safety -- safety,
7 security and training manager for the First Transit operation
8 here in Las Vegas. And part of her job responsibilities was
9 to train the drivers, and that included Jay.

10 Now, they'll tell you about the extensive training
11 that the drivers went through both in the classroom, behind
12 the wheel, the special lectures that they participated in, the
13 regular safety meetings that they had, special topic training,
14 refreshers, ongoing training all for the purpose of keeping
15 their skills up to date.

16 You'll also hear testimony from Matthew Daecher, who
17 is a transportation safety expert. And Mr. Daecher has
18 reviewed the video. He's reviewed the pertinent materials,
19 documents, rules and regulations, and he'll tell you that he
20 is fully supportive of Jay's conduct, of the policies that
21 were in place with First Transit, the rules, the regulations
22 that applied and the rationale behind them. In every
23 instance, according to Mr. Daecher, both Jay and First Transit
24 fully complied with their obligations.

25 Now, you'll hear plaintiff's counsel talk a lot

1 during the course of this case about safety rules. In fact,
2 you got a hint of it from Mr. Cloward's opening statement.
3 You'll hear about general safety rules, First Transit Rules,
4 RTC rules, passenger rules, driver rules, all thrown at you
5 with the intent of trying to convince you that Jay and First
6 Transit violated some safety rule and that Harvey Chernikoff's
7 death was the result.

8 But the simple truth and what you'll see as this
9 case progresses is that Harvey Chernikoff died of natural
10 causes. Whether that's from a sudden medical event like a
11 heart attack or a stroke, whether it's from choking, or
12 whether it's a combination of those factors we'll never know
13 because there was no autopsy done. But more importantly for
14 this case what the evidence will show is that nothing Jay or
15 First Transit did or did not do could have changed that
16 outcome.

17 You'll have the rather unique opportunity in this
18 case to actually see what happened to Harvey Chernikoff,
19 because there's videotape evidence that captured the entire
20 event. The truth will literally be before your eyes. And
21 while it may be difficult for some of you to watch the moment
22 of another person's death, when you see the video and when you
23 hear the testimony and evidence presented by the defense, and
24 when you use your common sense, you will come to no other
25 conclusion that there can be no finding of either liability or

1 damages against these defendants.

2 What does the video show. Mr. Cloward mentioned to
3 you that there are a couple of different time frames through
4 this video. And by the way, the entire video is about three
5 hours long. So you will have an opportunity to look at the
6 entirety of it when you're in your deliberations and see
7 different parts of it.

8 During the course of the trial, I would anticipate
9 that probably there will be selected shorter portions that
10 will be shown to you so that -- and they will emphasize a
11 particular point. But the part of the video that is most
12 important here is relatively short. At around -- and these
13 are approximate times, because it's a continuous flow. At
14 around 7:57 to 7:42 -- 7:57:42 to 7:59:28, the video shows
15 that Harvey is eating a sandwich.

16 And by the way, let me back up for a minute just to
17 kind of give you some context here. Harvey got on the bus
18 just a little before 7:00 o'clock in the morning. And you'll
19 see there's several interactions between him and Jay. As
20 Mr. Cloward mentioned, he sat directly behind -- there's a
21 petition -- or a partition, excuse me, directly behind the
22 driver, but Harvey sat in that first seat right behind him.

23 And you'll see that there are several interactions
24 between them. Harvey asks Jay a lot of questions. They talk
25 several times during the course of it. You see at one point