owed by a cruise ship company to a disabled passenger who was injured during a fire drill — when the cruise company was aware of the passenger's disabilities. The Ninth Circuit held:

> A passenger carrier has a duty "to exercise extraordinary vigilance and the **highest skill** to secure the safe conveyance of the passengers, and **if it knows that a passenger has physical disabilities it must exercise such higher degree of care — including giving special assistance — as is reasonably necessary to ensure that passenger's safety in view of his disabilities**.[3]

Moreover, the Ninth Circuit instructed that this heighted duty of care is expansive. The heightened duty is not triggered *only if* the *specific* disability the carrier knew about caused the injury — it is triggered by knowledge of any disability.[4] Thus, Nevada Pattern Instruction 4NG.45 appropriately includes the additional language that "the failure of the defendant to fulfill this duty is negligence."

In this case, Harvey had the mental capacity of a 5-year old. Defendants only provide paratransit services to individuals who qualify as mentally or physically disabled. And, Defendants — through their own screening process — classified Harvey as a "C" for cognitively disabled. It is undisputed that Defendants knew that Harvey was mentally disabled — thus, a heightened duty of care was owed to him and Pattern Jury Instruction 4NG.45 is appropriate.

B. Nevada Pattern Jury Instruction 4NG.42 — DUTY OF A COMMON CARRIER TO A PASSENGER — is and Incorrect Statement of the Law and Should NOT be Given.

It is anticipated that Defendants will propose Nevada Pattern Jury Instruction 4NG.42 — Duty of a Common Carrier to a Passenger — an instruction that provides a lower duty of care — as the appropriate standard of care instruction. This instruction reads:

> At the time of the occurrence in question, the defendant was a common carrier. A common carrier has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier. Its failure to fulfill this duty is negligence.

---

[3] Id. at 8185 (quoting Allen v. Matson Navigation Co., 255,F.2d 273, 277 (9th Cir. 1958)) (citing McBride v. Atchison, T. & S.F. Ry., 279 P.2d 966 (Cal. 1955); Croom v. Chicago, M & St.P.Ry., 53 N.W. 1128 (Minn. 1893)) (emphasis added).
[4] See id.

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The pattern instruction cites to Groomes v. Fox[5] in support of this instruction. The problem with using Groomes in support of the proposed language of 4NG.42 is that Groomes is a three paragraph decision that **never** sets forth, discusses, or even mentions the duty of care owed by a common carrier or the proper language for such a jury instruction.[6]

Groomes fails to provide any insight into the appropriate language for a common carrier jury instruction. And, it fails to address the duties common carriers owe when transporting *disabled individuals*, such as Harvey.

Pattern Jury Instruction 4NG.45 deals specifically with the situation at hand in our case — the specialized **transportation of disabled individuals**. And, the language used in that instruction is taken directly from Lundstrom, which was established as precedent by the Ninth Circuit more than 50 years ago.[7] Clearly, 4NG.45 is the appropriate duty of care instruction to provide to the jury in this case.

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CONCLUSION

Based on the foregoing, this Court should allow Plaintiffs' proposed instruction — **4NG.45 — DUTY TO DISABLED, INFIRM, OR INTOXICATED PERSON, OR DUTY TO A CHILD,** which is consistent with over 50 years of Ninth Circuit precedent regarding this issue.

DATED this 23 day of February, 2016.

CLOWARD HICKS & BRASIER, PLLC

#10522 for

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South 6th Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

[5] 96 Nev. 457, 611 P.2d 208 (1980).
[6] See id. (A copy of this case has been attached for the Court's convenience as Exhibit 2.)
[7] 323 F.2d 817.

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 23 day of February, 2016, I caused the foregoing **PLAINTIFFS' BENCH BRIEF REGARDING NEVADA PATTERN JURY INSTRUCTION "4NG.45 — DUTY TO DISABLED, INFIRM, OR INTOXICATED PERSON, OR DUTY TO A CHILD"** to be served as follows:

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

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

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

[ ] by hand delivery

to the attorneys listed below:

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

An employee of CLOWARD HICKS & BRASIER, PLLC

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EXHIBIT 1

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Rindfleisch v. Carnival Cruise Lines, Inc., Fla.App. 3 Dist., November 4, 1986

323 F.2d 817
United States Court of Appeals,
Ninth Circuit.

AMERICAN PRESIDENT LINES, LTD., Appellant,
v.
Mildred LUNDSTROM, Appellee.

No. 18673.
|
Oct. 24, 1963.

Passenger's action against shipowner for injuries sustained. The United States District Court for the District of Oregon, John F. Kilkenny, J., entered a judgment for the passenger and the shipowner appealed. The Court of Appeals, Merrill, circuit Judge, held that evidence sustained shipowner's negligence in failing to take special precautions to assist passenger, known to be under disability, during fire drill in which she fell while ascending steps without assistance.

Affirmed.

West Headnotes (4)

[1] **Carriers**
Care Required and Liability of Carrier in General

Passenger carrier has duty to exercise extraordinary vigilance and highest skill to secure safe conveyance of passengers.

3 Cases that cite this headnote

[2] **Carriers**
Care to persons under disability; children

If passenger carrier knows that passenger has physical disabilities it must exercise such higher degree of care, including giving of special assistance, as is reasonably necessary to insure passenger's safety in view of his disabilities.

2 Cases that cite this headnote

[3] **Shipping**
Pleading and evidence

Evidence was sufficient to show that shipowner should have anticipated that passenger, known to be under disability, would be likely to experience unusual difficulties in climbing steps under fire drill conditions when hampered by life jacket, and should have taken steps to guard against her falling.

1 Cases that cite this headnote

[4] **Shipping**
Pleading and evidence

Evidence sustained finding of shipowner's negligence in failing to take special precautions to assist passenger, known to be under disability, during fire drill in which she fell while ascending steps without assistance.

2 Cases that cite this headnote

Attorneys and Law Firms

*817 Wood, Wood, Tatum, Mosser & Brooke and Erskine Wood, Portland, Or., for appellant.

Green, Richardson, Green & Griswold, Burl Green, Lohman & Robinson and Gerald H. Robinson, Portland, Or., Dick & Dick, and Edgar Dick, The Dalles, Or., for appellee.

Before MERRILL and BROWNING, Circuit Judges, and MURRAY, District judge.

Opinion

MERRILL, Circuit Judge.

In this diversity case the sole question upon appeal is whether there is any evidence to show negligence on the part of the appellant. Appellant asserts that the district court erred in failing to take the case from the jury.

Appellee was injured on appellant's ship when she fell during the course of a fire drill. She testified that the cause of her

fall was her inability to see, over the bulge of the life jacket she was wearing, the steps she was then ascending. Appellant asserts that there is no evidence whatsoever that the ship's officers or any other agent knew or should have known of the fact that she was unable to see over the bulge of her life jacket.

Appellee was physically impaired. She was suffering from an extreme arthritic condition of her hands and feet. She was recovering from a fractured hip. These disabilities affected her use of her hands, her ability to walk, to go up and down stairs, to open dresser drawers and to dress. Prior to the voyage, appellee's son advised the ship's purser, assistant purser and chief steward of these facts, and they assured him that appellee would be taken care of. Appellee also told the ship's nurse that she had difficulty in going up and down stairs. In the days prior to the accident she had been furnished assistance in dressing, opening dresser drawers and arising from her *818 chair after meals. It is true that she had descended and ascended stairs to and from the ship's dining room without assistance; but the circumstances of the ascent for the fire drill differed considerably. On that occasion she had to wear a life jacket, other passengers were rushing by her, some thirty people were milling about at the top of the stairway, and, as she testified, these conditions as well as a clanging bell made her nervous and impelled her to hurry. Although a ship's newspaper had announced that all passengers were required to attend the drills, ship's employees neither told her she could be excused nor gave her assistance in the ascent which led to her accident.

[1] [2] A passenger carrier has a duty 'to exercise extraordinary vigilance and the highest skill to secure the safe conveyance of the passengers', Allen v. Matson Navigation Co. (9 Cir., 1958), 255 F.2d 273, 277, and if it knows that a passenger has physical disabilities it must exercise such higher degree of care— including giving special assistance— as is reasonably necessary to insure that passenger's safety in view of his disabilities. See McBride v. Atchison, T. & S.F. Ry. (1955), 44 Cal.2d 113, 279 P.2d 966; Croom v. Chicago, M. & St. P. Ry. (1893), 52 Minn. 296, 53 N.W. 1128, 18 L.R.A. 602.

These principles, applied to the facts of this case, would require affirmance unless we accept appellant's contention that, since appellee testified precisely as to the cause of her injury— inability to see over the bulge of the life jacket— the notice to the ship's officers of her disabling circumstances and the failure of those officers to excuse her or provide assistance are wholly immaterial to the question of fault.

[3] [4] 3, 4$ In our judgment appellant views the nature of the asserted negligence too narrowly. It can hardly be denied that a life jacket obscures vision to some extent. Moreover, merely because appellee testified that inability to see over the life jacket was the immediate cause of her fall, it does not follow that her known disabilities and the pressing conditions of the drill did not also contribute to the accident. Appellant's care should be judged in view of its duty to anticipate obscured vision not in the abstract but in the light of these other factors.

The question presented is simply whether there is evidence from which it could be found that appellant should have anticipated that appellee, disabled as she was, would be likely to experience unusual difficulties in climbing steps under these fire drill conditions when hampered by a life jacket, and, if so, should have taken steps to guard against injury as a consequence.

The record clearly demonstrates the affirmative.

Judgment affirmed.

All Citations

323 F.2d 817, 8 A.L.R.3d 646, 1963 A.M.C. 2523

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EXHIBIT 2

96 Nev. 457
Supreme Court of Nevada.

Frank GROOMES and Whittlesea Blue Cab Company, a Nevada Corporation, Appellants,
v.
Louis FOX, Respondent.

No. 11587.
|
May 22, 1980.

Taxicab passengers brought action to recover damages for injuries they sustained in automobile collision. The jury found for the defendant, and the Eighth Judicial District Court, Clark County, Howard W. Babcock, J., granted a new trial on the ground that there had occurred manifest disregard by jury of instructions of the court. The Supreme Court held that evidence supported trial court's finding that had jury paid due regard to instructions of the court, particularly instruction concerning duty of care owed by common carrier to its passengers, it was not possible to return a defense verdict in action to recover damages for injuries passengers sustained in automobile accident caused by failure of taxicab's brakes.

Affirmed.

West Headnotes (1)

[1] **Carriers**
As to Negligence with Respect to Means of Transportation

Evidence supported trial court's finding that had jury paid due regard to instructions of the court, particularly instruction concerning duty of care owed by common carrier to its passengers, it was not possible to return defense verdict in action to recover damages for injuries taxicab's passengers sustained in automobile accident caused by failure of taxicab's brakes.

5 Cases that cite this headnote

Attorneys and Law Firms

*458 **208 Rose, Edwards, Hunt & Pearson, Ltd., Las Vegas, for appellants.

Lehman & Nelson, Las Vegas, for respondent.

OPINION

PER CURIAM:

In this action to recover damages for injuries sustained in an automobile collision, the jury found for the defendants, Groomes and Whittlesea Blue Cab. The court granted a new trial since, in its view, there had occurred a manifest disregard by the jury of the instructions of the court. NRCP 59(a)(5).

The plaintiff below, Louis Fox, was a passenger for hire in the Whittlesea cab driven by Groomes. Before picking up Fox, Groomes noticed that his brakes were "mushy," radioed that information to the dispatcher and was told to bring the cab in after his next fare. Mr. Fox and wife were the next passengers. While proceeding south on Las Vegas Boulevard towards the Sands Hotel, Groomes entered the left turn lane to enter the Sands when the car in front of him stopped suddenly. Groomes applied his brakes but could not stop.

Had the jury paid due regard to the instructions of the court, particularly the instruction concerning the duty of care owed by a common carrier to its passengers, it was not possible, in the view of the trial court, to return a defense verdict. Here, as in **209 Price v. Sinnott, 85 Nev. 600, 460 P.2d 837 (1969), we believe it was well within the province of the trial court to so conclude.

Affirmed.

All Citations

96 Nev. 457, 611 P.2d 208

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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 5

TUESDAY, FEBRUARY 23, 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.

RECORDED BY MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

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LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 23, 2016, 1:02 P.M.

* * * * *

(Jurors enter at 1:03 p.m.)

THE COURT: Welcome back, ladies and gentlemen of the jury. I think we have everyone. Counsel, make yourselves comfortable, please. Yesterday, when we left off, we had Ms. Chernikoff on the stand. Have we completed her testimony?

MR. CLOWARD: Yes.

THE COURT: So the plaintiff's next witness, please.

MR. CLOWARD: The plaintiff calls Ms. Czarina Mendez from RTC.

CZARINA MENDEZ, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Would you please state and spell your first and last name for the record.

THE WITNESS: First name is Czarina, spelled C-z-a-r-i-n-a. The last name is Mendez, M-e-n-d-e-z.

THE COURT: Whenever you're ready.

MR. CLOWARD: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. CLOWARD:

Q How are you today, Ms. Mendez?

A Good.

Q You probably could be better not being down here testifying, right?

A Right. Right.

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Q I'm going to be really short, just a few questions.
A Okay.
Q Can you just tell the folks on the jury, who do you work for?
A I work for the Regional Transportation Commission.
Q And you understand, I guess, why you're here today. We took your deposition about a year ago, I think.
A I do.
Q Okay. Can you just tell the jurors, I guess, what your position is with the RTC? Do you still have the same position?
A I do.
Q And can you just tell us what that is?
A Okay. I am an eligibility specialist. Applicants come in to determine if they qualify for the paratransit services. Paratransit is transportation for the disabled that are unable to take the regular bus system.
Q And did you do an eligibility determination for Mr. Harvey Chernikoff?
A I believe so.
MR. CLOWARD: Your Honor, if I may, I'd like to just approach the witness to provide her with a document.
THE COURT: Any objections?
MS. SANDERS: No objection.
THE COURT: That's fine.

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BY MR. CLOWARD:

Q This would be A17. If you want to just take a look at that, then I'll ask you a question.

A Mm-hmm.

Q Is that the interview form for -- that I guess you performed for Mr. Chernikoff?

A Yes.

Q And really the only thing that I would like you to tell the jurors is was Harvey, I guess, was he determined eligible to ride the RTC First Transit buses?

A From the back of the observation, I did give Mr. Harvey eligibility for three years.

Q And I believe at your deposition you were asked a couple questions about that process and the scope of the eligibility that you awarded --

A Mm-hmm.

Q -- or decided.

Did you determine that Mr. Chernikoff had to have a PCA with him at all times on the bus?

A I recommended that if he would like to travel with a personal -- PCA, he was eligible for that at no cost.

Q But that wasn't like something that he had to have; is that fair?

A No.

Q Okay. And I believe in your deposition you

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explained that for things that were non-routine, that was kind of what your determination was for a PCA; is that fair?

A It's up to the passenger or family member if they'd like to send the passenger with a personal care attendant.

Q Okay. Thank you so much for coming down. I appreciate it. Thank you.

MR. CLOWARD: No further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MS. HYSON:

Q Good afternoon, Ms. Mendez.

A Hi.

Q So I think you just explained to the jury as an eligibility specialist, it was your job to conduct eligibility interviews for the paratransit; is that right?

A That's correct.

Q Okay. And in your position as eligibility specialist, you're employed by the Regional Transportation Commission, RTC, correct?

A That's correct.

Q And you're not employed in that position by First Transit; is that right?

A That's correct.

Q So when you determine eligibility for passengers to use the paratransit, that is a determination made by the RTC,

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correct?

A Correct.

Q You were just shown an interview form, Exhibit A17. When you do these assessments, you complete an interview form; is that right?

A That's correct.

Q And you obtain that information that you put in the interview form from the passenger; is that right?

A The passenger or, if they're unable to provide any information, guardian, family member, whoever accompanied them to the actual appointment.

Q So family members are permitted to accompany passengers to the RTC interview?

A Yes.

Q And you'll obtain information from those family members as well?

A Yes, if they're unable to provide any information.

Q Okay. In your function as eligibility specialist, do you ever review medical records prior to making your eligibility determination?

A We -- it's not required to submit medical documentation, and that's explained over the phone to the family member or the applicant themselves. We do review all medical documentation that is forwarded to us or presented to us at the time of the appointment.

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Q But medical documentation is not always provided to you as part of your evaluation?
A That's correct.
Q And you make your determination either at the interview for eligibility or within 21 days following the interview?
A That's correct.
Q Once an applicant is determined to be eligible, you notify them of that via mail; is that right?
A That's correct.
Q And you send them a letter?
A Correct.
Q And that letter includes information about how long the rider is approved for?
A Yes.
Q In this case, I believe you testified that Mr. Chernikoff had eligibility for three years?
A That's correct.
Q You also include in that letter whether the applicant has been approved for a PCA, a personal care attendant; is that right?
A That's correct.
Q An ID also accompanies the eligibility letter?
A That's correct.
Q And that ID would note whether a rider has been

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approved for a personal care attendant, correct?

A That's correct.

Q If a rider's approved to use the paratransit with a PCA, they have the option of bringing the PCA with them free of charge, right?

A That's correct.

Q But RTC cannot require a passenger to ride with a PCA even if determined eligible; is that right?

A That's correct.

Q And a PCA, if a rider is determined to be eligible to use a PCA, they can ride with that PCA on any ride that they book with the paratransit; is that right?

A That's correct.

Q The PCA is not necessarily determined to be just for special occasions?

A No.

Q Similarly, First Transit cannot require a rider to ride with a PCA; is that right?

A That's correct.

Q So even if a rider is approved, it is up to the rider or their family or custodian to determine whether to bring a PCA with them?

A That's correct.

Q You also send approved riders a copy of the RTC rider's guide; is that right?

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A [No audible response.]

Q There is some binders behind you. If you could pick the first joint binder and open it -- I believe so. Open it to Exhibit A6.

MS. HYSON: And Your Honor, may I have permission to approach?

THE COURT: You may.

(Ms. Hyson assists the witness.)

BY MS. HYSON:

Q I'm showing you what's been premarked as Exhibit A6. Is this a copy of the rider's guide that you send to eligible paratransit riders?

A That was a copy at that time.

Q So in 2011, this is the paratransit -- or the RTC paratransit rider's guide that you would send?

A That's correct.

Q And you send this document to every eligible rider as part of your position as eligibility specialist?

A That's correct.

Q And so it's your belief that you sent a copy of this rider's guide to Mr. Chernikoff?

A I did.

MR. CLOWARD: Your Honor, I guess the only concern that I have is that's a 2011 guide. He was approved in 2010. That's the only concern I have.

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THE WITNESS: It was -- they're good for about two to three years depending on the updates that RTC does. If they have any changes, then we'll update them every so often.

BY MS. HYSON:

Q Okay. So it's your understanding that the copy of the paratransit rider's guide you're looking at is the one that was provided to Mr. Chernikoff?

A Most likely, yes.

Q And this is a document that's created by the RTC, correct?

A Yes.

Q Let's talk about the relationship between RTC and First Transit.

MR. CLOWARD: Your Honor, I need to approach on this issue.

THE COURT: Okay.

(Bench conference transcribed as follows.)

MR. CLOWARD: She's not allowed to talk about it. She's not the Rule 30(b)(6). She's not here as the Rule 30(b)(6). When she was deposed, her attorney specifically said she's not the Rule 30(b)(6). She's not an appropriate witness to talk about these things. It's unfair to us. She's never been designated. In their designation they only designate her as the interviewer. So to now go into the relationship with RTC, First Transit and all of that, that's

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inappropriate.

MS. HYSON: I think that's premature, since I haven't asked a question yet. I am going to ask her things that she would know in her position as an eligibility specialist, and she would be qualified to answer questions about that.

MR. CLOWARD: Their specific designation talks about only the interview form. That's their trial designation. That's their list of witnesses. And most importantly, at her deposition, Calder Huntington specifically at the very first of the deposition said she's not the Rule 30(b)(6), she's only here to talk about her personal knowledge. Now she's going to get into corporate relationships, corporate knowledge; that's inappropriate of this witness.

MS. HYSON: If it's within her personal knowledge, then it's in her purview to provide answers to questions.

MR. CLOWARD: No, because she --

THE COURT: How was she designated? How did you guys designate her?

MS. HYSON: As an individual.

THE COURT: An individual who's going to be testifying regarding RTC policies and procedures? What actual --

MS. SANDERS: I don't really remember.

MR. CLOWARD: I looked at it, because I knew this

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would be an issue. It's talking about the interview process only, and the interview of Mr. Harvey Chernikoff.

MS. HYSON: My questions are going to go to the interview process.

THE COURT: Okay. As long as it is the interview process and as long as it stays within the scope of the designation.

MS. HYSON: Okay.

THE COURT: Okay.

MR. CLOWARD: Thank you.

(End bench conference.)

BY MS. HYSON:

Q Ms. Mendez, as an eligibility specialist, you make your determinations of eligibility on behalf of RTC; is that right?

A That's correct.

Q And First Transit doesn't have any involvement in your eligibility determination as an eligibility specialist?

A That's correct.

Q In your position as eligibility specialist, you don't forward any medical documents that you've reviewed for a rider to First Transit, do you?

A That's correct. To my knowledge we don't forward anything to the third party.

Q You also don't forward a copy of the approval letter

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that you send paratransit riders to First Transit, do you?

A That's correct.

Q You don't send First Transit a copy of the ID that you forward to eligible riders?

A That's correct.

Q And that's because that information, to your understanding, is confidential; is that right?

A That's correct.

MR. CLOWARD: Your Honor, it's leading.

THE COURT: It's cross.

MR. ALVERSON: It's cross-examination.

MR. CLOWARD: I'll withdraw.

BY MS. HYSON:

Q To your knowledge, the only information that RTC is provided about an eligible rider is a one letter designation as to their disability; is that right?

A I'm sorry. Repeat that question again.

Q To your knowledge, the only information that RTC provides First Transit with regarding eligible riders is a one letter designation that identifies their disability; is that right?

A I'm unsure on that.

Q And you testified earlier that you conducted Harvey Chernikoff's eligibility interview?

A I'm looking at the application, yes.

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Q Do you have an independent recollection of that interview?

A I do not.

Q I believe you still have Exhibit A17 in front of you.

A Mm-hmm.

Q And that is the paratransit form that you completed during or shortly thereafter the interview of Harvey Chernikoff?

A During the interview, yes.

Q And according to the interview form, Mr. Chernikoff's parents attended the interview with him; is that right?

A From what I -- from what I wrote, yes, he was brought in by his parents.

Q And according to Harvey's parents, he was able to travel on the paratransit without a PCA. You noted that in your report; is that right?

A I believe -- I would have to review this, but if he could travel by himself, there's -- we have nothing regarding that, if he could travel alone or not.

Q But you do ask questions of the people at the interview, whether they believe they can travel without a PCA; is that right?

A We do.

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Q And that question was asked of Mr. Chernikoff and/or his parents at the time of the interview?

A Correct. Yes.

Q And the response to that question was that it was either Mr. Chernikoff or his parents' belief that he didn't require a PCA to travel on the paratransit; is that right?

A That's correct.

MS. HYSON: Okay. Those are all of my questions. Thank you very much.

THE COURT: Redirect.

MR. CLOWARD: Just a couple, Your Honor.

THE COURT: And before we -- actually, why don't you come up now. We have questions of this witness from the jury.

(Bench conference transcribed as follows.)

THE COURT: I don't know if she's the right person to answer these.

MR. CLOWARD: And here's the designation, Your Honor, if you'd like to read that. That's their designation, C. Mendez.

THE COURT: Okay. I think they stayed within that.

MS. HYSON: [Inaudible.]

THE COURT: Is there going to be someone who is going to be [inaudible]?

MR. CLOWARD: I'll just read them out to you. Is there --

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MS. SANDERS: She doesn't know that.

MR. CLOWARD: [Inaudible.]

THE COURT: Is there someone who will be able to testify regarding those questions?

MR. CLOWARD: I think their witnesses.

THE COURT: Your witness?

MS. SANDERS: Probably, yes.

THE COURT: Okay. I'll just let the jury know. All right. Hold on a second.

(End bench conference.)

THE COURT: Ladies and gentlemen of the jury, I did receive three questions, one from Denise, Juror No. 4 -- oh, actually three from Denise, Juror No. 4. Looking at these questions, I don't believe that this witness is going to be qualified to answer those questions. But counsel does anticipate that these questions should be answered later on with different witnesses. Thank you.

MR. CLOWARD: Okay. Just one question.

REDIRECT EXAMINATION

BY MR. CLOWARD:

Q Just one question. Whether a driver -- or I mean, a passenger rides with a PCA or rides without a PCA, can members of the community trust First Transit to do what they've set out to do, which is to drive the RTC buses?

MS. HYSON: Objection, Your Honor. That's

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speculation. [Inaudible] answer that question.

THE COURT: I'm not sure I understand the question. Can the community count on them to drive the RTC buses?

MR. CLOWARD: Yeah. I mean, can passengers trust that the First Transit will operate the buses safely whether a person is with a PCA or without a PCA.

THE COURT: Sustained, speculation.

MR. CLOWARD: Okay. I have no further questions.

THE COURT: Thank you. All right. Any additional questions of this witness?

MS. HYSON: No, Your Honor.

THE COURT: Ma'am, thank you for your time. You're free to go. Oh, I do have one more question. Okay. Counsel, another question.

(Bench conference transcribed as follows.)

MR. CLOWARD: Fair question.

MS. SANDERS: She won't know that either.

MR. CLOWARD: I think it's a fair question.

MS. SANDERS: I think it's speculative.

THE COURT: It is speculation.

MS. BRASIER: It's speculative?

THE COURT: It is. Hold on. Hold on.

I think that the better question is whether or not when people have mental retardations are there -- is there anything they do differently in order to make sure they

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understand the requirements of riding on the bus. That basically asks the same thing. I think that's what they're trying to find out.

MS. BRASIER: I don't have any problem with that.

THE COURT: I mean, the question was how would someone mentally retarded know what's in the manual if --

MR. ALLEN: Well, if I may, Your Honor, when she interviewed him, he stated -- she stated that he didn't seem to know why he was here. And that was specifically the state of mind kind of what she was looking at, if you look at the interview form.

MS. SANDERS: That's why the parents were there.

THE COURT: Well, maybe some clarification then on this issue?

MS. HYSON: I mean --

THE COURT: What do you need to tell me?

MS. HYSON: I don't think that she --

THE COURT: I think it's speculation.

MS. HYSON: Yeah. It's not really [inaudible] to expect that they understand.

MS. SANDERS: And every person has a different level of understanding and they don't put that part into the interview. They don't put that part into their actual disability interview process. And she's not a psychiatric or medical person anyway to know that level.

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THE COURT: So would the answer be that she's just not qualified to answer this question?

MS. HYSON: Yes.

THE COURT: Okay.

MR. CLOWARD: I think, just for the record --

THE COURT: Unless you can ask a series of foundational questions to get this.

MR. CLOWARD: Yeah. I mean, I can certainly try.

THE COURT: Okay.

(End bench conference.)

THE COURT: All right. So I do have a question from Juror 8, Darrell Shakespear. The question is: Would you expect a person having mild retardation to remember any of the rules sent home in your packet?

With respect to this particular question, I don't know that this witness is qualified to answer that question, however I believe the plaintiff counsel has some additional questions which may answer this issue.

MR. CLOWARD: Okay. Thank you. Thank you, Your Honor.

REDIRECT EXAMINATION (continued)

BY MR. CLOWARD:

Q Ms. Mendez, can you just tell the jurors, I guess, based on your interview form, how was -- when you were doing the determination, how was Harvey acting and what are your

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notes?

A From my notes?

Q Yeah. From your notes.

A Oh, from my notes.

Q I believe at the depo you talked about how you took him, interviewed him alone.

A He was friendly and he giggled throughout his interview inappropriately.

Q Did he seem to understand why he was there?

A I am assuming not from what I wrote.

Q Okay. Thank you.

THE COURT: Is there any additional question for this witness?

MS. HYSON: Yes, Your Honor.

THE COURT: All right.

RECROSS-EXAMINATION

BY MS. HYSON:

Q Ms. Mendez, you don't have any medical training, do you?

A I -- I do not.

Q When you evaluate an individual for eligibility on the paratransit, are you rendering a medical determination about their cognitive abilities?

A No. It's based on what we see on the first level, if they're able to answer any of the questions on the

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application.

Q And in the event an eligible, or a paratransit rider that you determine to be eligible has cognitive issues, you still provide them with a copy of the rider's guide; is that right?

A Correct.

Q And if a -- if a rider or their family believed that they were unable to understand or retain those rules, if they're approved with a PCA, then that would be a reason to ride with a PCA; is that right?

A Correct.

MS. HYSON: Thank you.

THE COURT: All right. Anything else?

MR. CLOWARD: No.

THE COURT: Thank you, ma'am, for your time. You're free to go. Have a nice day.

THE WITNESS: Thank you.

THE COURT: Next witness, please.

MR. CLOWARD: Your Honor, we've got another witness that apparently is not here yet, so we're going to -- we'd like to read the deposition of Dr. Lingamfelter.

THE COURT: Okay. And is there any objection?

MS. HYSON: No.

THE COURT: All right.

MR. CLOWARD: Allison, will you ask the questions?

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THE COURT: Hold on. We need to have her sworn in.
MR. CLOWARD: Because he's a male.
THE COURT: All right. Counsel, you have to be sworn in.
MR. CLOWARD: From over here or --
THE COURT: Just you can be right here, but just please raise your right hand to be sworn in.

BEN CLOWARD, READER, SWORN

THE CLERK: Would you please state and spell your first and last name for the record, please.
THE COURT: The name of the individual in the deposition.
THE CLERK: Yeah.
MR. CLOWARD: So this is the doctor's name?
THE COURT: Yes.
THE WITNESS: Daniel Lingamfelter, D-a-n-i-e-l. Lingamfelter, L-i-n-g-a-m-f-e-l-t-e-r.
THE COURT: Please sit down.

(Deposition of DANIEL LINGAMFELTER read as follows)

"Q State your full name, please.
"A Daniel Lingamfelter.
"Q Since we're on the phone, I'm just going to ask myself -- that myself and Mr. Cloward identify ourselves."

MS. BRASIER: Ms. Sanders says, "My name is LeAnn

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Sanders with Alverson Taylor Mortensen and Sanders. I represent First Transit and Jay Farrales in this case."

Mr. Cloward says, "My name is Ben Cloward, and I represent the plaintiffs in this case. I am from the firm Cloward Hicks & Brasier."

Ms. Sanders asks the questions.

"BY MS. SANDERS:

"Q Doctor, have you had your deposition taken before?

"A I have.

"Q On how many occasions?

"A I would say between six to ten times.

"Q And do you feel comfortable with the procedure itself, or would you like me to go through some of the ground rules with you?

"A I feel fairly comfortable.

"Q Okay. Doctor, we're here to talk about an examination report that you -- a coroner's report that you prepared with regard to a gentleman by the name of Harvey Chernikoff. Do you have any independent recollection of doing that examination?

"A Some independent recollection. I have some documents in front of me to help me with my recollection.

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"Q Okay. That was going to be my next question. What do you have in front of you?

"A Essentially all the Clark County Coroner documents that I was able to get my hands on regarding the Harvey Chernikoff case, including my post mortem examination report, the Clark County Coroner Medical Examiner report of investigation, as well as some other supplemental files or reports that were taken from Chernikoff's file from the coroner's office.

"Q What kind of documents are those?

"A Okay. Well, one document is from NMS Labs. That's providing information on electrolyte levels for Harvey Chernikoff. One is called a record of examination from the Clark County Coroner, and it's essentially just my filling out of a death certificate like form. I have a document of my notes taken during the examination.

"I have a document entitled Case Notes for Harvey Chernikoff. There are two notes, one of which talks about a CAT video surveillance is available upon request. The second note mentions the father legal next of

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kin verbally requested that the decedent be released to Palm Mortuary following his examination. Another report is post mortem toxicology. It appears to be a form generated by NMS Labs that was filled out by somebody from the coroner's office.

"The next form is a toxicology submission form from Clark County Coroner Medical Examiner. Somebody appeared to fill that out. It looks like a request form for toxicology testing for this person. The next form is office of the coroner affidavit of identification of human remains. That was filled out or signed by somebody named Kathy, K-a-t-h-y, Stanley, S-t-a-n-l-e-y. It looks like this person is just saying that she identified Harvey Chernikoff by viewing a post mortem photo.

"The next form is deceased fingerprints. It appears to be a photocopy of some ink fingerprints taken by -- taken of the decedent, and that's also done by the Clark County Coroner Medical Examiner. The next form is also a Clark County Coroner Medical Examiner form entitled Authorization for Release of

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Remains. And the last form I have with me is a poorly photo-copied copy of the death certificate that I'm really unable to read except for the immediate cause of death that says, Choking.

"Q Did you have a chance to review all those documents before the deposition today?

"A Yes.

"Q Okay. And where did you receive the documents? Where did you get those from?

"A From one -- one from you guys. I can't remember. Whoever is paying me for the deposition, that side provided me with the documents.

"Q All right. I just wanted to confirm that. I think we did send you some documents. I just wasn't sure if you got documents from any other office --"

A Any other source.

"Q Any other source.

"A No. Just from whoever I've been in contact with from that legal office.

"Q I'm sorry. Dan was talking to me at the same time, so I kind of missed your last comment, Doctor. Would you repeat that?

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"A I received these through email from whoever was helping me, whoever from that legal office was helping me get prepared for the deposition. Otherwise, if I had no documents, this would be worthless, a worthless one hour of time.

"Q Right. Okay. Do you recall receiving any information from Mr. Cloward's office?

"A No. I'm really unfamiliar with the names of the offices and the people other than the person I was emailing back and forth, and I'm even blanking on her name at this time.

"Q Does the name Kim Hyson sound familiar?

"A No.

"Q Okay. Mr. Cloward tells me that he sent you or had instructed somebody to send you a copy of the video that was on the CAT box. Is that something that you recall receiving in preparation for the deposition?

"A No. If it was sent, I missed it. I would have really liked to have seen that though.

"Q Doctor, did you ever review the video

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that was taken on that day --

"A No.

"Q -- as part of your investigation?

"A No.

"Q Those documents that you have, would you hand them to the court reporter at some point."

Q And then Ms. Sanders says, "And we will have copies made and attached to the deposition, Ms. Court Reporter, as Defense Exhibit A.

"A Yes.

"Q Doctor, how long were you with the coroner's office here in Las Vegas?

"A I am a consultant with the Clark County Coroner Medical Examiner. I probably worked for that coroner's office as a consultant off and on for probably three to four separate years, I believe, starting in 2011. I would generally go out there for usually three day stints and work as a forensic consultant performing post mortem examinations. So I didn't really -- I wasn't salaried or anything like that by them.

"Q So all of your consultations you would just submit a separate billing invoice

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for?

"A Yes.

"Q Okay. Did you ever actually live here in Las Vegas, or did you just come in and out?

"A I came in and out. I live in Colorado. Well, in Colorado, technically Woodland Park, Colorado right now.

"Q Okay. Do you still do consulting work for the Clark County Coroner's Office?

"A I have not in quite some time. I may have gone out there last year at some point, but it's probably been almost a year now, I would say, since I've done any work for them.

"Q Okay. I'm going to ask you some questions about the report of investigation, and I think that you may know some of them and probably some of them you won't know, but I just kind of need to go through it first. So if you could pull up that document and put that in front of you.

"A Okay. I have that.

"Q Can you tell me who Jennifer Deemers is?

"A I don't know her, but apparently

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she's the investigator who generated the report for Clark County Coroner Medical Examiner.

"Q Do you know whether -- or do you have a recollection of whether or not you would have spoken with Ms. Deemers about her investigation of this death?

"A No.

"Q When was it -- okay. Let's clarify. No, you did not talk to her, or no, you don't have a recollection?

"A I don't have a recollection.

"Q Okay. Would it be your normal practice, when you are called in as a consultant to do an exam, to speak with the investigator?

"A Not this specific investigator. We have morning meetings every morning before we do our cases in the morgue. We'll have morning meetings, group meetings with all the doctors who are working that day, as well as all the investigators who are working that day, and the -- as well as the autopsy technicians. And we discuss all the cases and then decide what we're going to do with each one. So Jennifer Deemers may have been in that group discussing

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that particular case, but I can't tell you if she was or not for sure.

"Q Okay. When was it that you did your examination of Harvey Chernikoff?

"A Well, I look at my copy of my autopsy report and it says July 30, 2011.

"Q Did you ever go to the scene of the death? Did you ever see him while he was still on the bus?

"A Only in photos, not the scene.

"Q The photos, is that part of what you received from my office?

"A Yes.

"Q Okay. Did you receive photos?

"A Yes, but I don't have them in front of me.

"Q Do you have an understanding of who took the photos?

"A Well, my -- I don't know for sure who did it, but my thinking would be that it was the investigator involved in the case. So my best guess would be Jennifer Deemers, but I don't know that for sure.

"Q Okay. You told me a few minutes ago that you did not view the video that was taken

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on the bus that day. Do you know whether or not Jennifer Deemers or anyone else from the coroner's office reviewed the video?

"A I do not know that.

"Q Did you ever ask to review the video to assist as far as your own investigation?

"A I don't recall if I did or not.

"Q Okay. Do you have an understanding or do you know how many representatives from the coroner's office actually went to the scene?

"A No.

"Q Would it be -- based on your understanding of how the coroner's office works, would it be most common for just one investigator to go, or would there normally be more than one person that were dispatched to the scene of a death?

"A I don't know the specific protocol from -- I'm sorry. I don't know the specific protocol for the Clark County Coroner regarding that sort of thing. But in other jurisdictions I've worked, it's fairly typical for only one investigator to go to a death scene as long as that investigator doesn't need additional help

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with anything.

"So, you know, if this case with Harvey Chernikoff's death scene involved some supplemental work that needed to be done by a second or even third investigator, then it's very possible multiple investigators could have gone to that scene.

"Q If that had happened, would you expect that person or persons to be identified somewhere on the investigative report?

"A I would expect that, yes.

"Q Okay. As part of your own evaluation of this case, did you ever talk to the driver of the bus, Mr. Farrales?

"A I did not.

"Q Did you ever speak with anyone else that was a representative of First Transit?

"A No.

"Q Prior to performing your own examination on July 30, did you review any documents pertaining to this case?

"A Will you repeat that? I'm sorry.

"Q Okay. Prior to performing your examination on July 30, which is the day after the death, did you review any documents

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pertaining to this case?

"A I can't answer that definitively. I most likely read the Clark County Medical Examiner report of examination, but other than that, I don't know of any other documents that I would have reviewed prior to my examination.

"Q If you had reviewed any kind of documents, would it be your practice to identify those documents somewhere in your own report?

"A No.

"Q Okay. Did you ever speak with Mr. Chernikoff's parents?

"A No.

"Q Did you ever speak with any other representatives of him or his family?

"A No.

"Q The police did report to the scene of this, of this death, and there is a separate report of that. Did you ever speak with the police officer who investigated the death?

"A I don't think that I did.

"Q What about any of the EMTs who were called to the scene?

"A No.

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"Q There's reference made to a caregiver who provided some information about Mr. Chernikoff. Did you ever speak directly with Mr. Joseph Camarillo, the caregiver?

"A No.

"Q What about Kathy Stanley? I think you made reference that there was somebody who identified from photographs, who identified Mr. Chernikoff as somebody from the place that he worked. Did you ever speak directly with Kathy Stanley?

"A No.

"Q You mentioned that there is a meeting in the morning among the staff with regard to the cases that are going to be evaluated that day. Do you have any particular recollection as you sit here now about the discussions at the meeting that morning with regard to Mr. Chernikoff?

"A I can't say that I can recollect any particular comments about this case from that meeting.

"Q Okay. Who normally would be involved in those meetings?

"A Well, the doctors who are assigned to

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"And, even where a special demurrer or motion to make more definite and certain is filed, the particulars of the negligence need not be set forth if the facts are known to the defendant, or such that the plaintiff could not be expected to know them." Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 498, 35 South. 460, the court said: "Under our system of pleading, very general averments, little short of mere conclusions, of a want of care and consequent injury, leaving out the facts which constitute and go to prove the negligence, meet all the requirements of the law." In House v. Meyer, 100 Cal. 593, 35 Pac. 308, the court said: "The demurrer to the complaint was properly overruled. In an action like this, to recover damages resulting from the alleged negligence of a defendant, a general allegation of negligence upon the part of the defendant is sufficient. 'The negligence is the ultim ate fact to be pleaded, and is not a legal conclusion.'" To the same effect is Bliss on Code Pleading, § 211. In Cunningham v. L. Ry. Co., 115 Cal. 566, 47 Pac. 453, the court said: "The demurrer to the complaint was properly overruled. While the negligence was averred in general terms, such mode of presenting the facts is sufficient in this character of action, where, *420 as a general thing, the more specific facts are more largely within the knowledge of the defendant than that of the plaintiff; and the complaint cannot therefore be held open to the objection of uncertainty."

In the case of Gulf, etc., v. Washington, 49 Fed. 349, 1 C. C. A. 288, Judge Caldwell, speaking for the Circuit Court of Appeals for the Eighth Circuit, said: "It is very well settled that a general allegation of negligence, without stating the particular acts which constituted the negligence, is good against a general demurrer." In McGonigle v. Kane, 20 Colo. 298, 38 Pac. 369, the Supreme Court of Colorado said; "As a rule, negligence may be pleaded generally. It is an ultimate fact, and only ultimate facts are to be pleaded. Bliss in his work on Code Pleading (section 211a) says: 'The general allegation of negligence is allowed as qualifying an act otherwise not wrongful. It is not the principal act charged as having caused the injury, but it gives color to the act, makes it a legal wrong. It is the absence of care in doing the act.' Negligence being the ultimate fact to be established, a general allegation is sufficient. 'To allege,' says Rothrock, J., in Grinde v. Railroad Co., 42 Iowa, 376, 'would be to plead the evidence which is not allowable.'" Hill v. Fairhaven & W. R. Co., 75 Conn. 177, 52 Atl. 726. In L. & N. R. Co. v. Jones, 45 Fla. 414, 34 South. 248, the Supreme Court of Florida said: "The rule as established in this state in negligence cases is that it is not necessary for the declaration to set out the facts constituting the negligence, but an allegation of sufficient acts causing the injury, coupled with an averment that they were negligently and carelessly done, will be sufficient. And where the negligence is alleged in general terms, and not confined to any specific acts of negligence, any acts of negligence contributory to the injury may be shown in proof." In Rinard v. Omaha, K. C. & E. Ry. Co., 164 Mo. 286, 64 S. W. 127, the Supreme Court of Missouri said: "The objection urged against it, however, that it does not specify the particular act of negligence which it is claimed caused the injury, is answered by the cases of Sullivan v. Railway Co., 97 Mo. 113 [10 S. W. 852]," etc. "These cases have been cited approvingly and followed in Dickson v. Railway, 104 Mo., loc. cit. 502 [16 S. W. 381]," etc. "In all these cases the negligence was charged in general terms. The negligence charged in the case at bar is as specific as that charged in the Sullivan Case, supra, or in any of the cases that have followed it, and is a substantial compliance with the requirements laid down in the Gurley Case [93 Mo. 445, 6 S. W. 218]. ***" In Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 171, 25 S. W. 492, the Court of Civil Appeals of Texas said: "The Texas & Pacific Railway Company excepted to that part of appellant's petition which charges that it negligently struck the cars of the Galveston, Harrisburg & San Antonio Railway Company upon the ground that it does not show how said train negligently struck said cars so placed there. We think the allegation was sufficient. It is not necessary for a party to plead his evidence. It is only necessary to allege the facts which show the liability of the party complained against. This was done by declaring that the act was negligently done." In Chaperon v. Portland Gen. El. Co., 41 Or. 42, 67 Pac. 929, the Supreme Court of Oregon said: "We have recently held, after a careful review of the authorities, that it is sufficient, in a declaration upon negligence, to specify the particular act, the commission or omission of which caused the injury, conjoining with it a general averment that it was negligently and carelessly done or omitted, and that it is unnecessary to go further and particularize or point out the specific facts going to establish the negligence relied upon." Brown v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839; Senhenn v. Evansville, 140 Ind. 675, 40 N. E. 69; Scott v. Hogan, 72 Iowa, 614, 34 N. W. 444; Louisville, etc., Ry. Co. v. Wolfe, 80 Ky. 82; Dolan v. Alley, 153 Mass. 380, 26 N. E. 989; Rogers v. Truesdale, 57 Minn. 126, 58 N. W. 688; McCarthy v. N. Y. Cent., etc. (Super. Buff.) 6 N. Y. Supp. 560; New York R., etc., v. Kistler, 66 Ohio, 326, 64 N. E. 130; Waterhouse v. Joseph, etc., 12 S. D. 397, 81 N. W. 725, 48 L. R. A. 157, 160. In the latter case the court said: "It is further contended by the appellant that it does not appear from the complaint specifically in what respects the building was negligently constructed, nor

in what respect the materials used were insufficient for such a structure; but it seems in general that a complaint specifying the act, the commission or omission of which caused the injury, and averring generally that it was negligently and carelessly done or omitted, will suffice. 14 Enc. Pl. & Pr. 334, and cases cited." In Cederson v. Oregon R. & Nav. Co., 38 Or. 358, 62 Pac. 642, the Supreme Court of Oregon said: "The third assignment is that the court ought to have required the plaintiff to make his complaint more definite and certain by stating the particular acts and things constituting the alleged negligence and carelessness in the operation of said train or the engine and cars attached thereto. *** It cannot be supposed that strangers should be intimately cognizant of the immediate condition of the appliances, and the exact manner of the management and operation of a railroad and its engines and cars. These are matters peculiarly within the specific knowledge of the persons or company having the road in charge, so that the showing is strengthened by the attendant circumstances. Under such conditions, it was not error to deny the motion." In Texas & P. Ry. Co. v. Easton, 2 Tex. Civ. App. 380, 21 S. W. 576, the Court of Civil Appeals of Texas said: "The plaintiff's petition charges the negligence to which his injuries are ascribed as *421 the negligence of 'the defendant, the Texas & Pacific Railway Company, its agents and employés,' without specifying the particular agent or employé guilty of the negligence causing the misfortune, and without stating the specific act of negligence complained of. The appellant complains of the action of the court in overruling the special exception addressed, on account of the omission stated, to the plaintiff's petition. The facts alleged in the petition justify the inference that the accident described was due to the negligence of the defendant. The evidence developed on the trial showed that this negligence was to be ascribed to the engineer in charge of the defendant's train. This fact, however, the defendant in framing his petition could not be supposed to know. It was, on the contrary, a fact peculiarly within the knowledge of the defendant. This peculiar knowledge, together with the absence of information on the part of plaintiff as to the special source of the injuries complained of, is, we think, naturally to be inferred from the averments of the petition. Under such circumstances, the pleader is not held to the specific averments the absence of which appellant complains of." The complaint in the case at bar specifically alleges: "That on the 22d day of January, 1907, while plaintiff was such passenger in the car and on the train of defendant, and while plaintiff was being carried, transported, and conveyed by defendant, pursuant to said contract, from Ogden, Utah, to Hazen, Nev., upon the train of said defendant, said defendant, wholly disregarding its duty and obligation to plaintiff, carelessly and negligently suffered and permitted to be derailed and thrown from the track at a point near Deeth, Nev., the train on which plaintiff was riding as a passenger and the car in which plaintiff was a passenger; that, by reason of said gross negligence and carelessness of defendant, its servants, and employés, said train and car was derailed and thrown from the track and overturned; that by reason thereof, and as a direct result thereof, plaintiff was thrown down and violently hurt, injured, bruised, and wounded and knocked insensible, and his head broken and the skull bones broken and the left hand broken and crushed and twisted, and on many parts of his body he was cut, bruised, hurt, and wounded, and he was crippled and greatly injured, and his general health impaired, and he was caused to lie in a sick bed for many months and for a long time remained sick and suffered and still continues to suffer great, intense pain and distress, and he was and is now crippled, and plaintiff is informed and believes, and therefore basing the allegation on information and belief alleges the fact to be, that he will remain a cripple for life; that his wounds were attended to at the railroad hospital at Sacramento, Cal., whither he was taken after the wreck; that plaintiff's hand is deformed, and he will never be able to work at his trade as a result thereof; that the injury in plaintiff's head is permanent, causing him pain and suffering, and affecting his hearing; that the injury to his head is very dangerous and permanent." This allegation sufficiently pleads negligence on behalf of the defendant, and is clearly within the maxim and the well-defined line of authorities that a passenger makes out a prima facie case when he proves that he was a passenger and that he was injured without his fault, and it is unnecessary, as we view the authorities, after pleading the fact that the accident which caused the injury was due to the negligence and carelessness of the defendant, to go further and particularize or point out the specific facts going to establish the negligence relied upon, and for these reasons we see no merit in this second assignment of the appellant.

The appellant contends that the court erred in overruling the objection of defendant to the question asked the witness Reynolds calling for oral manifestations of pain on the part of the plaintiff long subsequent to the injury, and in denying the motion to strike. We do not think that the admission of this evidence was erroneous. The witness Reynolds was in the same hospital wherein the plaintiff was convalescing, and gave direct testimony as to what he saw and heard of the manifestations of pain plaintiff suffered. One of the elements for which the plaintiff seeks recovery of damages is for the physical pain he endured by reason of the accident, and, so long as the evidence was confined to direct testimony of

what manifestations of pain the witness observed the plaintiff to be suffering, it was not error. It is conceded that the plaintiff was badly injured, and pain and suffering naturally followed, and whether or not the plaintiff really suffered was a material point to be proven by the plaintiff, also the extent of the suffering. The testimony complained of was quite unimportant, however, and, even if conceded to be error, would not be sufficiently fatal to warrant a reversal. The authorities seem to be uniform that a witness may state the apparent physical condition of a man in cases of this character, so long as the witness speaks directly within his own knowledge.

The Supreme Court of California, speaking through Justice Garoutte, in the case of Green v. Pacific Lumber Company, 130 Cal. 435, 62 Pac. 747, in passing upon an almost identical point as to whether or not the nurse might testify as to the complaints of pain or suffering on the part of the party injured, said: "The witness who acted as a nurse for plaintiff during the first week after her injuries were received was asked the following question: 'You may state any complaints of pain and suffering which you heard.' The objection to this question upon the ground that the witness was not an expert amounts to nothing. No principle of expert evidence is involved in the question. *422 Neither do we consider the evidence objectionable as hearsay. Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical condition. Of course, when these declarations only amount to statements of his past condition, they should be rejected." President Taft, while sitting as Circuit Judge of the Circuit Court of Appeals for the Sixth Circuit of the United States, stated as follows: "Such evidence was clearly admissible. This is expressly ruled in the case of Insurance Co. v. Mosley, 8 Wall. 397–405 [19 L. Ed. 437], where Mr. Justice Swayne, to illustrate how declarations may be evidence as verbal acts, uses this language: 'Upon the same ground the declarations of the party himself are received to prove his condition, ills, pain, and symptoms, whether arising from injuries, sickness, accidents, or by violence. If made to a medical attendant, they are of more weight than if made to another person; but to whomsoever made they are competent evidence. Upon this point the leading text-writers of evidence, both in England and in this country, are in accord.'" B. & O. Ry. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 7.

Counsel for appellant further maintains that the court erred in overruling defendant's objection to the question asked defendant's witness on cross-examination: "Isn't it a fact that usually the smoker is more broken and that the occupants of the smoker are more frequently injured than in any other cars on the road?" Also in overruling defendant's objection to the question on cross-examination as to delays in the delivery of freight, and annoyances to shippers consequent thereto. Also in refusing to instruct the jury to disregard the statement of counsel for plaintiff to the effect that the defendant had failed to produce witnesses whose attendance was not shown to be available. We see no error in the ruling of the court in allowing the witness to answer the question with reference to whether or not the smoker was more broken or the occupants of the smoker more frequently injured than in any other cars on the road. Prior to this question the witness, who was a conductor in the employ of the defendant company, had testified that he had made an investigation of the railroad beds, cars, etc., immediately after the accident, and was unable to come to any conclusion as to the cause of the accident. The question complained of was on cross-examination, and was admissible to test his knowledge as to how thorough an investigation he had made of the cars and character of the wreckage, etc. In any event, the testimony was not prejudicial to the defendant's cause, because in answer to the question complained of the witness answered that he did not know. For the same reason the question complained of as to the testimony of the witness Allen was admissible. Allen testified in his direct examination that he was roadmaster of the Southern Pacific Company on that portion of the road on which the derailment occurred. He had been put on the stand by the appellant to prove the perfect condition of the railroad, and in that connection had gone into detail with reference to the amount of work done on the roadbed, the material used, when the rails had been put down. On cross-examination he was asked why it was necessary to put heavier rails down in 1902, and his answer was on account of the increase of the weight of the rolling stock and the weight of the loads. In negativing the direct testimony of the witness, counsel for respondent on cross-examination had the undoubted right to prove by the witness, if possible, that the improvements on the railroad track had not kept pace with the increasing business of the defendant corporation, and consequently the track was not suited to the greatly increased traffic, the weight of the rolling stock, etc. It was beneficially important to the plaintiff's cause to show, if he could, that the company had not kept pace with the amount of traffic in supplying a proper roadbed, rails, etc. On the cross-examination of the roadmaster, who had testified as to the perfect condition of the road, counsel for plaintiff had the right to shake the testimony of said witness if he could, so long as he confined his examination to the subject-matter brought out in the direct examination. We do not see anything improper in the cross-examination. Neither

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do we see any error on the part of the court in permitting counsel for respondent to draw an inference in his argument that because the train engineer and passenger conductor of the derailed train were not called to testify during the trial of the case by the defendant company that their testimony would be adverse to it; and we do not think it was error on the part of the court to permit counsel for plaintiff to draw the inference in his argument and to state that, they being in the employ of the defendant company and under its control, it was either the duty of the appellant to produce them or to explain their absence. This we believe to be legitimate argument, and in the present case where these two most important witnesses were in charge of the train and present at the time of the accident, they were presumed to be still in the employ of the defendant company, until otherwise shown by defendant company, and we believe their absence should be explained to the jury, or else the jury be permitted to infer, in view of the fact that their presence could be had by the defendant company should it so desire, that their testimony might be adverse to it. We believe the rule upon this subject is properly laid down in Cyc., which reads as follows: "Failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case or to examine such witness as to the facts covered by his special knowledge, especially if the witness be naturally favorable *423 to the party's contention, gives rise to an inference sometimes denominated a 'strong presumption of law' that the testimony of such uninterrogated witness would not sustain the contention of the party. ***" 16 Cyc. p. 1062.

Counsel for appellant further contends that the court erred in permitting the plaintiff to introduce nonexpert testimony as to the speed of the train. The testimony elicited, to which defendant's objection is aimed, we do not believe prejudicial error for which defendant is entitled to a new trial. It cannot be said that the testimony is expert testimony. Indeed, it may with truth be said that, if a passenger is asked to give his opinion as to the rate of speed the train is going, it is not expert testimony, nor subject to any of the strict rules relative to the admission of expert evidence. The testimony is admissible and valuable just for what weight may be given it by the jury. The evidence is competent, but the jury is to weigh the credence they will give it, considering the character of the witness and the knowledge of speed which he may disclose he possesses. The following rule taken from 17 Cyc. p. 105, and supported by cases from practically every state in the Union, we believe succinctly and properly states the rule: "An observer may state his estimate of the apparent speed of moving objects, as animals, a dummy engine, an electric or hand car, a carriage, or railroad train. Such a witness is not an expert and need not have the training of one, although he characterizes the rate of speed as dangerous, fast, high, very fast, reckless, etc."

The three following assignments of error are set forth by counsel for appellant: That the court erred in instructing the jury that it was incumbent upon the defendant to repel by satisfactory proof every imputation of the slightest negligence. That the court erred in instructing the jury that the defendant was legally bound to exercise the highest practicable degree of care, skill, and foresight in the selection and use of suitable cars, motive power, appliances, and servants, and in the proper construction and maintenance of its roadbed and track, and the operating and running of its train. That the court erred in instructing the jury that the derailment of the car in which plaintiff was riding at the time of the wreck was prima facie evidence of defendant's negligence, and that it was the duty of defendant to know and show the facts. We believe the foregoing assignments to be without merit, and to be thoroughly disposed of in the recently decided case of Murphy v. Southern Pacific Company in 32 Nev. —, 101 Pac. 322, wherein, among other things, we stated: "The law is also well established that a railroad acting in the capacity of a common carrier of passengers is bound to use the utmost care and diligence for the safety of the passengers, and is liable for any injury to a passenger occasioned by the slightest negligence against which human prudence and foresight should have guarded." As to the soundness of the doctrine on which railroad carriers are bound, in so far as the law pertaining to the degree of care and negligence is concerned, which we announced in Murphy v. Southern Pacific, supra, which doctrines are still seemingly questioned by counsel for appellant, as illustrative of the trend of modern authorities in support of those doctrines as held in said case, above quoted, we believe it will be profitable to cite the following excerpts from opinions sustaining the law as previously announced by this court: "The company is bound to the highest degree of care and utmost diligence to prevent their (passengers') injury." 2 Rorer on Railroads, p. 1436; Shearman & Redf. Neg. 226. "Street railway companies as carriers of passenger's for hire are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence." Smith v. St. Paul C. R. Co., 32 Minn. 312, 20 N. W. 238. In the case of Southern Pacific Company v. Hogan, decided April 2, 1910, reported in 108 Pac. 240, the Supreme Court of Arizona said: "A railroad company must exercise the highest degree of care practicable in carrying passengers. ***" "Where a passenger is injured by derailment or collision of a train, there is a presumption of negligence by

the company requiring evidence to rebut it." Denver Railroad Co. v. Woodward, 4 Colo. 1; Peoria R. R. Co. v. Reynolds, 88 Ill. 418; Pittsburgh R. R. Co. v. Williams, 74 Ind. 462; Seybolt v. New York R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75; Bergen R. R. Co. v. Demarest, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685. Numerous authorities supporting the above rule are collated in a valuable note to Overcash v. C. E. R. L. Co., 144 N. C. 572, 57 S. E. 377, 12 Am. & Eng. Ann. Cas. 1040. "Carriers of passengers for hire are bound to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants." Sales v. Western S. Co., 4 Iowa, 547; Bonce v. Dubuque, S. R. Co., 53 Iowa, 278, 5 N. W. 177, 36 Am. Rep. 221. "In case of common carriers of passengers the highest degree of care which a reasonable man would use is required by law." Derwort v. Loomer, 21 Conn. 245. "Passenger carriers bind themselves to carry safely those whom they take into their coaches to the utmost care and diligence of very cautious persons." Maverick v. 8th Avenue R. Co., 36 N. Y. 378; Carroll v. Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221. "The trial judge, at the request of the transit company, gave the jury the following instruction: 'While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers, and not liable to them for injuries resulting from *424 such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part.' 'The test of negligence in such cases is whether the defect ought to have been observed practically, and by the use of ordinary and reasonable care.' *** The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care. It requires the exercise of extraordinary care, the exercise of the utmost skill, diligence, and human foresight. It makes the carrier liable for the slightest negligence. It follows from the foregoing that the giving of the instruction complained of was error." Spellman v. Lincoln R. T. Co., 36 Neb. 892, 55 N. W. 270, 20 L. R. A. 318 (38 Am. St. Rep. 753). "A common carrier is not an insurer of the safety of its passengers, but it is required to exercise the highest degree of care and diligence that is reasonably practicable in securing their safety by keeping its cars and appliances in a safe condition, and at all times under the control and management of skilled and competent servants." McAllister v. People's Ry. Co., 4 Pennewill (Del.) 276, 54 Atl. 744. "In affirming defendant's fifth point, the court fixed too low a standard for the duty of the railway company. More is required of a common carrier than mere reasonable precaution against injuries to passengers, and care that its cars and appliances are to be measured by those 'in known general use.' While the law does not require the utmost degree of care which the human mind is capable of imagining, it does require that the highest degree of practical care and diligence shall be observed that is consistent with the mode of transportation adopted." Palmer et al. v. Warren St. Ry. Co., 206 Pa. 581, 56 Atl. 51 (63 L. R. A. 507). "The principles of law regulating the duty owed by a common carrier of passengers are in many respects analogous to those which control a common carrier of goods. A common carrier of goods for hire is bound to deliver them safely, and from this duty can only be exonerated by the act of God or of a public enemy. He is an insurer of their safety. With respect to passengers, a common carrier is bound to use the utmost care and diligence for their safety. Plaintiff in error is a railroad company. It was chartered and is operated for the carriage of goods and passengers. Its duty as such is measured by the principles just announced. With respect to goods it is an insurer. Its duty with respect to passengers is to exercise the highest degree of care for their safety." Norfolk & W. Ry. Co. v. Tanner, 100 Va. 379, 41 S. E. 721. "As I told you, that is the question of law in the case, and our courts have held that, where that relationship is established, then the law casts upon the person who carries, called the 'carrier,' the highest degree of care with reference to the passenger carried. Now, that is simple enough. That is the law of the case." Carroll v. Charleston & S. R. Co., 65 S. C. 383, 43 S. E. 871. "If you find from the evidence that plaintiff was injured by a collision between two of defendant's cars, while a passenger thereon, then I instruct you that the colliding of the cars of defendant is presumptive evidence of negligence on the part of the company." "Carriers of passengers are bound to exercise all possible skill, foresight, and care in the running of their cars, so that passengers may not be exposed to danger an account of the manner in which the cars are run. ***" Topeka City Ry. Co. v. Higgs, 38 Kan. 376, 16 Pac. 669 (5 Am. St. Rep. 754). "Railway passenger carriers in legal contemplation do not insure the absolute safety of their passengers; but they do bind themselves to exercise the utmost degree of human care, diligence, and skill in order to carry their passengers safely. It is meant by this rule (1) that the highest degree of practicable care and diligence should be exercised that is consistent with the mode of transportation adopted; (2) that competent skill should be possessed, which should be exercised in the highest degree. Tested by this rule, for the slightest neglect against which human prudence, diligence, or skill can guard, and by which injuries accrue to passengers, the carriers will be liable in damages. This high degree of care, diligence, and

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skill extends, not only to the running of passenger trains, with a view to the safety of passengers, but to providing against defects in the road, cars, or machinery, or any other thing that can and ought to be done in order to carry passengers safely. Among these duties is that of keeping the track clear of obstructions, and of removing timber and bushes along the track on the land of the company, so as to keep the engineer's view of the track, in running the train, unobstructed. A failure to do this, or any of the duties above mentioned, is negligence. Prima facie, where a passenger, being carried on a train, is injured by an accident occurring to the train, the legal presumption arises that the accident and consequent injury was caused by the negligence of the carriers, and the onus of disproving the presumption of negligence, by showing that the injury arose from an accident which the utmost care, diligence, and skill could not prevent, is on them." Louisville & N. R. Co. v. Ritter's Adm'r, 85 Ky. 368, 3 S. W. 591. "The car leaving the track was prima facie evidence of negligence. This presumption may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the utmost skill, foresight, and diligence. Railways are not insurers of passengers. But passenger carriers by railway are bound to the utmost diligence which human skill and foresight can effect, and if an injury occurs, by reason of the slightest omission in regard to the highest perfection of all the appliances of *425 transportation, or the mode of management at the time the damage occurs, the carrier is responsible." Eureka Springs Ry. Co. v. Timmons, 51 Ark. 467, 11 S. W. 692. "When carriers undertake to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, and whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" Philadelphia & R. R. Co. v. Derby, 54 How. 468, 14 L. Ed. 502. "In the performance of the duties imposed by its contracts with passengers, a carrier is held to the exercise of the highest degree of care." Laub v. Chicago, B. & Q. Ry. Co., 118 Mo. App. 495, 94 S. W. 552. "As we have said, this is a case between a passenger and a carrier of passengers to recover damages for an injury sustained by the passenger in consequence of the negligence of the carrier during the period the above-named contractual relation existed between them. The degree of care required by such a carrier and the precise duty which it owes to such a passenger is clearly defined in the law. The carrier owes to the passenger the exercise of the utmost care and diligence which human foresight can use, though not an insurer of the safety of the passenger." Philadelphia, B. & W. R. Co. v. Allen, 102 Md. 112, 62 Atl. 246. "The street railway company was bound to use the highest degree of care for the safety of its passengers, and, in case of an injury to a passenger from the result of a collision, the burden is upon it to show that it was not guilty of any negligence which in whole or in part caused the injury." Forsythe v. Los Angeles Ry. Co., 149 Cal. 569, 87 Pac. 24. "We think the nonsuit was improperly granted. The plaintiff's intestate occupied this position on the running board because there was no vacant seat in the car, nor standing room between the seats. This was not negligence per se. If the railroad company accepts passengers whom it cannot accommodate inside its car, it must do all that human care and vigilance reasonably can to prevent accident happening to them." Verrone v. Rhode Island Sub. Ry. Co., 27 R. I. 371, 62 Atl. 513 (114 Am. St. Rep. 41). "There was no error in the refusal of the court to give the general charge in favor of the defendant. While it is true that the obligation of a carrier of passengers is not that of an insurer, yet it is held to the highest degree of care, and is bound by its contract to protect the passenger against any injury from the negligence of its employés." Louisville & N. R. Co. v. Mulder (Ala.) 42 South. 743.[1] "The law compels stage proprietors to furnish prudent and skillful drivers, and holds them liable for any injury that a passenger may receive on account of any negligence in this particular. McKinney v. Neil, 1 McLean, 540 [Fed. Cas. No. 8,865]; Stockton v. Frey, 4 Gill [Md.] 406 [45 Am. Dec. 138]; Farish & Co. v. Reigle, 11 Grat. [Va.] 697 [62 Am. Dec. 666]; Sales v. Western Stage Co., 4 Iowa, 547; Stokes v. Saltontall, 13 Pet. 181 [10L. Ed. 115]; Sawyer v. Dulany, 30 Tex. 479; Redfield on Carriers, § 340; Angell on Carriers, § 569." Schafer v. Gilmer, 13 Nev. 338. "'Reduced to the simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely that the means of conveyance employed and the circumstances of the case will permit.'" Le Blanc v. Sweet, 107 La. 368, 31 South. 772 (90 Am. St. Rep. 303). "It follows from the foregoing that the court did not err in instructing the jury that the only rule of diligence applicable to the facts of the case was the duty of extraordinary diligence, and in refusing to charge the law of ordinary diligence. A carrier of passengers in this state is bound to exercise 'extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers,' and this rule applies to the reception, transportation, and discharge of such passengers." Georgia Ry. & El. Co. v. Cole, 1 Ga. App. 36, 57 S. E. 1028. "The

law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable. *** The twenty-second instruction asked by the appellant, and refused, reads thus: 'The court further instructs you that by "negligence," when used in these instructions, is meant either the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances.' This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence; but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care." Louisville, New Albany & C. R. Co. v. Snyder, 117 Ind. 438, 20 N. E. 286, 3 L. R. A. 435 (10 Am. St. Rep. 60). "Plaintiff in error contends that the court erred in giving instruction 5, which is as follows: 'You are instructed that, under the law of this territory, a carrier of persons for reward must use the utmost care and diligence for their *426 safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.' It is sufficient answer to this contention to say that this instruction was in the language of our statute, which provides the degree of care which a common carrier for hire must exercise. *** But it is contended by the learned counsel for plaintiff in error that this provision of our statute is not applicable, since the collision of the defendant's trains occurred in Kansas, and the carriage of the plaintiff was in the nature of interstate commerce, and was not under state control. This contention is not well taken. Independently of any statutory provision, the instruction correctly states the law, upon principle as well as sound public policy." Chicago R. T. & P. Ry. Co. v. Stibbs, 17 Okl. 97, 87 Pac. 293. "Appellant requested the court to charge: 'That it is the duty of a street railway company, engaged in operating street cars for the carrying of passengers, to exercise a high degree of care and diligence to prevent accident to its passengers; that is, it must use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case,' etc. The court declined to give the request, and wholly failed to charge that such degree of care and diligence is owing by a common carrier to its passengers. The degree of care charged was only that of ordinary care; that is, 'negligence consists in the doing of some act, or the omission to do some act or perform some duty which a reasonable and prudent person ought or ought not to do,' and that 'reasonable care and precaution, as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinarily prudent person,' etc. So far as the degree of care required of a common carrier of passengers, the jury was not given to understand that it was any greater than that required to be exercised by the defendant towards persons not passengers, or any greater than ordinary care. Street railway companies are common carriers of passengers, and, as such, are bound to exercise for the safety of their passengers more than ordinary care. The many different forms of expression used in the text-books, and by the courts, in stating the rule as to the degree of care required of a carrier in conveying passengers, all recognize substantially the same test—that is, the highest degree of care, prudence, and foresight consistent with the practical operation of its road—or, as it is sometimes expressed, the utmost skill, diligence, care, and foresight consistent with the business, in view of the instrumentalities employed, and the dangers naturally to be apprehended, and that the carrier is held responsible for the slightest neglect against which such skill, diligence, care, and foresight might have guarded. 3 Thomp. Com. L. of Neg. §§ 2722-2729; 2 Shear. & Redf. § 495; 5 Am. & Eng. Ency. L. 558; Nellis, St. Rd. Acc't L. § 6; Booth, St. Rys. § 328. Appellant was entitled to have the law given to the jury substantially as in the request stated." Paul v. Salt L. City R. Co., 30 Utah, 47, 83 Pac. 564, 565. "The court charged the jury that appellee owed the duty under the law 'to exercise that high degree of care for the reasonable personal safety of passengers on its cars which a very prudent and competent person would use under the same or like circumstances,' etc. We suggest on another trial that the word 'reasonable,' be omitted, since it might be understood to ingraft a limitation upon the well-defined duty of carrier to passengers to exercise the highest degree of care for such passenger's safety." Moore v. Northern Tex. Tract. Co., 41 Tex. Civ. App. 586, 95 S. W. 653, 654.

The final assignment of error of appellant urging the insufficiency of the evidence to justify the verdict, and as to other assignments which we believe to be without merit for the reasons heretofore given in this opinion, we believe, after a painstaking review of the evidence, that we would not be warranted in disturbing the verdict of the jury after the fair trial had in the trial court. Neither do we believe that the judgment should be disturbed because of the alleged excessiveness of the damages. These questions were fairly submitted to a jury under instructions of law, which

we believe to be proper, and there was sufficient material evidence adduced to support the verdict.

The judgment of the lower court is affirmed. It is so ordered.

NORCROSS, C. J., and TALBOT, J., concur.

All Citations

33 Nev. 385, 111 P. 416, Am.Ann.Cas. 1914A,287

Footnotes

1 Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 149 Ala. 676.

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EXHIBIT 2

KeyCite Yellow Flag - Negative Treatment
Holding Limited by Smith's Food & Drug Centers, Inc. v. Bellegarde, Nev., May 28, 1998

36 Nev. 247
Supreme Court of Nevada.

FORRESTER
v.
SOUTHERN PAC. CO.

No. 1,860.
|
Aug. 12, 1913.

Appeal from District Court, Washoe County; W. H. A. Pike, Judge.

Action by Mamie A. Forrester, as administratrix of Dick Forrester, deceased, against the Southern Pacific Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

West Headnotes (22)

[1] **Abatement and Revival**
Statutory provisions

In construing a statute for the survival of actions, the court is not required to exclude from the operation of the law actions which come within the ordinary meaning of the words employed, though the statute is in derogation of the common law.

1 Cases that cite this headnote

[2] **Abatement and Revival**
Statutory provisions

The Legislature has the power to provide that actions for the tortious breach of contract should survive the death of the plaintiff.

2 Cases that cite this headnote

[3] **Abatement and Revival**
Actions on contract

An action by a passenger who had purchased a ticket is an action upon a contract which may be maintained by his administratrix after his death, under Comp. Laws, § 2951, providing for the survival of contract actions.

Cases that cite this headnote

[4] **Action**
Nature of Action

An action for damages for injuries occasioned by the use of excessive force in ejecting a trespasser from a train is an action in tort, and not upon breach of contract.

Cases that cite this headnote

[5] **Appeal and Error**
Verdict

Appeal and Error
On conflicting evidence

In reviewing a verdict based on conflicting evidence, that of the prevailing party must be taken as true as well as reasonable inferences deducible from such evidence.

1 Cases that cite this headnote

[6] **Appeal and Error**
Approval of trial court: effect of remittitur

A verdict approved by the trial court will not be disturbed unless the amount is so excessive or inadequate as to indicate prejudice, passion, partiality, or corruption on the part of the jury.

8 Cases that cite this headnote

[7] **Appeal and Error**
Carriers, railroads and street railroads

In actions for injuries to passengers, instructions *held* harmless error.

Cases that cite this headnote

[8] **Carriers**
Fares, charges, and tickets in general

A condition in a railroad ticket that in case of controversy the passenger agrees to pay the regular fare and apply for reimbursement at the office of the company is unreasonable and void.

1 Cases that cite this headnote

[9] **Carriers**
Rights and liabilities of carrier

The fact that a passenger's ticket was mistakenly punched as to its time limit more than once, but none of the extra punch marks indicated a time which had expired, does not relieve the company from liability for the ejection of a passenger.

Cases that cite this headnote

[10] **Carriers**
Rights and liabilities of carrier

A provision in a railroad ticket that it should be void if it showed any alterations, or if more than one date was canceled, does not relieve the carrier from liability for wrongfully ejecting a passenger upon whose ticket extra punch marks had been placed by the ticket agent.

Cases that cite this headnote

[11] **Carriers**
Actions

In an action to recover damages for wrongful ejection of a passenger by a train agent, who had special authority to take up tickets and remove passengers, evidence *held* sufficient to show that the company had ratified the acts of the agent in ejecting the passenger.

1 Cases that cite this headnote

[12] **Carriers**
Actions

A verdict of $11,115 for injuries to a passenger who was wrongfully ejected from a train under aggravating circumstances, and thereby compelled to beat his way across the desert in inclement weather, which resulted in pneumonia and consumption, *held* not to be excessive.

Cases that cite this headnote

[13] **Carriers**
Actions

In an action to recover damages for the wrongful ejection of a sick passenger who had a ticket, an instruction that a common carrier of passengers must exercise the highest practicable degree of care is proper.

Cases that cite this headnote

[14] **Carriers**
Actions

An instruction that the face of a ticket is conclusive between the train agent and a passenger *held* not applicable to the evidence, where a passenger had a ticket which was sufficient to entitle him to transportation, although defective.

Cases that cite this headnote

[15] **Federal Courts**
Highest court

The construction placed on a statute by the highest court of a state controls the national courts, where such construction does not violate the federal Constitution or statutes or any policy of general law.

1 Cases that cite this headnote

[16] **Damages**
Breach of contract

Exemplary damages may be recovered in actions for the tortious breach of a contract.

Cases that cite this headnote

[17] **Evidence**
Torts in general

Declarations made by a train agent while ejecting a passenger are admissible, as part of the res gestae, in an action to recover damages for wrongful ejection.

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Cases that cite this headnote

[18] **Executors and Administrators**
Existence of assets

A right of action by a nonresident for damages for wrongful expulsion from a train, is sufficient property to warrant the appointment of an administratrix of his estate in the county in which the action was pending.

2 Cases that cite this headnote

[19] **Executors and Administrators**
Collateral attack in general

The appointment of an administratrix by a court of competent jurisdiction cannot be collaterally attacked in an action instituted by the decedent before his death and continued by his administratrix.

1 Cases that cite this headnote

[20] **Labor and Employment**
Intentional acts

A master is liable for exemplary damages for the wrongful, wanton, and oppressive acts of his servants when acting within the scope of their employment, although the particular acts were not authorized or ratified.

8 Cases that cite this headnote

[21] **Trial**
Measure of damages or amount of recovery

An instruction that a railroad company is liable for the ejection of a passenger, even though its agents were honestly mistaken concerning the validity of his ticket, *held* not to be erroneous as allowing a recovery of exemplary damages for such an honest mistake, where another instruction limited the recovery for such mistake to the actual damages.

1 Cases that cite this headnote

[22] **Principal and Agent**
Rights and liabilities of principal

A principal is liable for exemplary damages for the wrongful, wanton, and oppressive acts of his agents when acting within the scope of their employment, although the particular acts were not authorized or ratified.

1 Cases that cite this headnote

***754** Dick Forrester, a painter and paper hanger by trade, 27 years of age and married, purchased at Houston, Tex., from the Houston & Texas Central Railroad Company, acting for itself and as agent of the appellant, a railroad ticket entitling him to transportation from Houston to San Francisco over the lines of railroad of the selling company, its connecting lines, and over appellant's railroad from Ogden to San Francisco. While properly aboard one of appellant's passenger cars, en route from Ogden to his destination, and, according to the evidence on behalf of the plaintiff, after complying with different requirements and requests for the validation of the ticket, he was, on September 22, 1907, by the train agent of the appellant, insulted and humiliated in the presence of other passengers, deprived of his ticket upon the claim that he was not the purchaser, that he was not Forrester, or that he had stolen the ticket or obtained it from a scalper, and without his consent his suit case was searched, and he was finally ejected from the train at Montello, Nev. It is said by appellant's attorney that he was put off the train because the ticket contained too many punch ***755** marks, and because the agent was not satisfied with Forrester's attempts to identify himself by test signatures which differed in appearance from the signatures on the ticket. These signatures are before us, and appear to be in the same handwriting as the two signatures of Forrester upon his ticket. This is not denied. For the respondent it is said no objection that the ticket contained too many punch marks was made by the train agent to Forrester. The train agent was authorized to confiscate tickets, and in addition to salary was allowed by the appellant company a commission upon each invalid ticket taken up by him and charged for improperly confiscating tickets. At the time Forrester was expelled from the car he was ill, and his sickness was known to appellant's employés. "He was without means to purchase a ticket to continue to his destination, and was compelled to proceed to Reno, a distance of about 400 miles, where he had acquaintances, by riding upon cars in exposed situations, in inclement weather, and as a consequence he contracted

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pneumonia, and shortly after reaching Reno he was treated for pneumonia in the county hospital. The disease caused great and continued pain, suffering, and physical and mental distress. Afterwards he went to Stockton, Cal., where he had friends and acquaintances, but his sickness there continued to develop, resulting in consumption." This action was brought by him against the appellant in the district court at Reno, but before it was tried he died there, about five months after the time on which he was ejected from the train. After his death his widow petitioned for letters of administration upon his claim against the appellant, which letters were granted to her by the district court at Reno, and on motion she was substituted as plaintiff in the case. After such substitution there was a trial, and judgment and verdict in favor of plaintiff for $11,115, of which $1,115 was for such items as fare, hospital, nursing, and physician's fees.

The answers made by witnesses to a few questions upon the trial give a better understanding of the facts of the case. In his deposition, taken by stipulation at the request of appellant's counsel about 12 days before his death, and which was introduced on the trial, Forrester gave testimony regarding the taking of his ticket and his ejection from the train, in part as follows: "Q. What was that trouble? A. Well, the whole trouble, why he comes around taking up tickets. I suppose he was a train detective or train agent; everybody was giving him his ticket. Then this conductor followed, checking hats; there was three of them. I don't know what the other man was. I gave him the ticket, and he takes it, and signs it, and gives it back to me, and then says: 'Wait a minute.' He says: 'Give me back your ticket.' I took it and gave it to him, and he says: 'Sign this piece of paper; this piece of card.' He says: 'Sign your name.' He had forgotten to get me to sign it. I turned around and signed it in the window of the car. There were three men in the seat, and it was crowded. I signed it and gave it back to him. He takes it and says: 'Wait a minute.' He went away and came back again. He went away two or three different times, and he came back and says: 'This ain't your ticket.' And I says: 'It's my ticket.' He said: 'Where did you get it?' I said: 'I bought it at Houston, Tex., for $25.' He says: 'Go on and tell the truth here,' he says, 'about this thing.' 'You either swiped this ticket, or got it from the scalpers; tell the truth about it and go on and pay your fare.' He asked me the time I had had the ticket, and I told him it had been taken up four days and four nights about. 'Well,' he says, 'you have got to get off, and the ticket is no good; that isn't your name.' Well, I showed him, I never had any letters, but showed him some union cards, a couple of working permits from Houston that was made out within the same week I purchased my ticket. I showed them to him, and he looked at them, and gave them back. He said: 'They don't belong to you.' I says: 'I suppose they are good.' I had a receipt for money written on the back of one permit to be sent to California for clearance card of different union, and of course I showed him that, and he was mad. He got sore and picked up my suit case, and went all through it looking at my laundry marks. He began to talk louder and got saucy. There were five or six men in the car takes it up, and he got pretty tough. You know they took it up on my behalf, so he finally says: 'We put off five or six men here every day.' I says: 'You do?' I says: 'All right, you will have to put me off. I paid my fare, that's all there is to that.' I had a fever at the time from being changed in climate, and I told him: 'I am not in no condition to be put off, especially on a desert like this, and I haven't got sufficient money to pay my way across the desert, as it amounted to more than where I started from, but I don't know exactly the fare from there Montello to San Francisco.' Q. What happened next? A. Well, the conductor then he says: 'Well, what are we going to do with this man?' This fellow Lilly says: 'Well, I will attend to that.' He takes my ticket and goes off. He says: 'You get off at Montello; you will find a box car there to sleep in.' He says: 'We put them off here every day, five and six and dozens of them. It is a good place for them.' Well, I told him he would have to put me off. I wouldn't get off. He turned around to the conductor and brakeman and takes my grip and slammed it back together, and threw it in the aisle and said, when we got to Montello, he says: 'You get off this train.' He turns around to the conductor and brakeman and says that 'this man is to be put off at Montello,' so he gets off at the next station. *756 He takes my ticket with him. A while after he goes, the conductor came to me and he says: 'Why did you let him take your ticket away?' 'Well, you see, why don't you, he just reached over and pulled it out of my hand and asked to look at it the third time.' The conductor then says: 'You have got nothing now to show the next conductor. You can't show anything that you was ever on this train.' I says: 'All right you fellows just take hold of me and lead me to the door; that's all I want.' He says: 'If we have to do that, we will.' I says: 'All right, you do it.' One got on each side of me. I says: 'You will have to take me and put me off'—and he says: 'All right, we are instructed to do that, and we will have to do that.' He says: 'You have got no ticket even to show the next man that you was ever on this train,' which I didn't have after this agent had taken it up. Well he lead me to the door, and the brakeman takes my grip and puts it off the train, and sets it down, and helped me down off the car, and the conductor says to me, he says: 'You have got a fever; you don't seem well.' * * * Q. After the train agent finally took your ticket from you, did you ask him to return it to you? A. Yes, sir; I

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asked him for a receipt for it, and he says: 'No; you don't need it, the ticket don't belong to you.' Then he says: 'I will give you a receipt under a different name, but not under the name of Dick Forrester.' Q. Now what did he say when you asked him for the ticket? A. He said: 'No,' the ticket belonged to him. Q. He said: 'No,' the ticket belonged to him; did he say then and there in a loud tone of voice that the ticket was not your ticket? A. Yes, sir. Q. Did he say that you did not buy it at Houston? A. Yes, sir. Q. Did he say the ticket didn't belong to you? A. Yes, sir. Q. Did he say that you had swiped it or had procured it from the scalpers? A. Yes, sir. Q. Did he say that your name was not Dick Forrester? A. Yes, sir. Q. Then he demand that you sign your full name? A. He did. Q. Was that said in a loud or low tone of voice? A. Loud voice. Q. Could the other passengers hear that? A. Did they? Yes, sir. Q. Well, now how did you feel when he talked in that way? A. Well, I felt that it wasn't anybody's business. Q. Did you feel insulted? A. I did. I had a right to. Q. Did you feel mortified? A. I did. Q. Now then when the conductor and brakeman put you off of the train at Montello, what did they say, and what did they do? A. Well, I told him— He said: 'Come on and get off; this is Montello'—and I says: 'You got to put me off; I can't get off of my own accord very well, because I have been told by the passengers not to.' So one gets one arm and the other the other, and the brakeman takes my grip and sets it on the outside; and they, one on each side of me, leads me outside of the train."

The following appears in the testimony of James Watson, one of the witnesses for the plaintiff, who was a passenger in the car at the time: "Q. What, if anything, first attracted your attention to Forrester? A. Why a man sitting in the aisle across from me in the seat there, he looked to me as if something was wrong with him, sick or something, I don't know. Q. What was his appearance with reference to his state of health at that time? A. Well, he looked sick to me, and that was the reason I went over and spoke to him. * * * Q. Now when he came back you say the train agent asked him to sign his name again? A. Yes, sir. Q. What did Forrester do then? A. He signed it. Q. And when he signed his name what did he do with the paper that he had signed? A. Why the train agent had the ticket in his hand, a long ticket about that long (shows), and he says, 'That ain't your name,' and there were some threats in it, some threats that it was not right, and I can't recollect what the threats were now, and he said the ticket did not belong to him, and that he thought he had stolen the ticket, and that he would have to get off the train. Q. What did Forrester say when he said—when the train agent said he stole the ticket? A. He said he would have to put him off. * * * Q. What was the train agent's manner and tone of voice at the time that he accused Forrester of stealing the ticket? A. Why it was very loud and boisterous. * * * Q. Just state what the train agent himself said. A. With reference to the ticket he made the remark: 'We put them off here, and they sleep in box cars.' * * * Q. What did Forrester do when the train agent made these remarks and accusations? A. You mean after he signed his name? Q. No, I mean when the train agent directed these remarks to him, and accused him of stealing the ticket, and told him they put off passengers there and they slept in box cars? A. Well, he got nervous and kind of collapsed. I don't know what you would call it. Q. Collapsed? A. Yes, sir." A part of this testimony is contradicted by the train agent and the testimony of appellant.

This appeal is taken from an order denying defendant's motion for a new trial.

Attorneys and Law Firms

Charles R. Lewers, of San Francisco, and Lewers & Henderson, of Reno, for appellant.

Summerfield & Curler and J. B. Dixon, all of Reno, for respondent.

Opinion

TALBOT, C. J. (after stating the facts as above).

[1] Any conflict in regard to the testimony was for the jury, and the facts may be regarded as shown by the substantiated evidence for the plaintiff. Lowman v. Bank, 31 Nev. 306, 102 Pac. 967; Murphy v. So. Pac. Co., 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; Sultan v. Sherwood, 18 Nev. 454, 5 Pac. 71; McGurn v. McInnis, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94; *757 New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1050.

In the able briefs and arguments of respective counsel the contentions of the parties have been clearly presented. On behalf of the appellant it is urged that the entire action abated on the death of Dick Forrester; that the court had no jurisdiction to appoint Mamie A. Forrester as administratrix, or to substitute her as plaintiff; that punitive damages are not allowed in Nevada, and are not recoverable in this action; that the damages are excessive; and that the court erred in the admission of hearsay testimony and in the giving and refusing of instructions.

[2] The attack upon the letters of administration is purely collateral. If it be admitted that such attack may be made when the court is without jurisdiction, we conclude it cannot avail

here, because under the facts shown the court had jurisdiction to grant the letters. Reliance is placed upon the opinion in Re Bailey's Estate, 31 Nev. 378, 103 Pac. 232, Ann. Cas. 1912A, 743. Aside from the holding there that letters may be granted to a nonresident, the facts are distinguishable. Bailey was killed by the explosion of an engine in Lincoln county, and left no property except a gold watch and ring and a little money on his person, and any right of action for damages for his alleged wrongful death. Letters were issued in a different county, and the decision was in a direct proceeding to have them set aside. No question was presented similar to the one raised here as to whether the district court may grant letters of administration in the county in which a person dies, upon his estate consisting of a pending suit brought by him in that county for breach of contract or damages.

[3] For respondent it is claimed that the action, being one to recover damages sustained in Nevada, is statutory, and did not abate on the death of Dick Forrester, that letters of administration were properly issued, and that the responent is entitled to recover uner the following statutes:

"Section 1. Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages.

Sec. 2. Such liability, however, where not discharged by agreement and settlement shall exist only in so far as the same shall be ascertained and adjudged by a state or federal court of competent jurisdiction in this state in an action brought for that purpose by the person injured."

Stat. of Nev. 1905, p. 249.

"Sec. 165. Actions for the recovery of any property, real or personal, or for the possession, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases where the same might have been maintained by or against their respective testators or intestates in their lifetime." Comp. laws, § 2951.

We are also cited to the following cases, which hold that the right of action for the negligent killing of a person is an asset of his estate, and warrants the appointment of an administrator: Jordan v. Chicago Ry. Co., 125 Wis. 581, 104 N. W. 803, 1 L. R. A. (N. S.) 885, 110 Am. St. Rep. 865, 4 Ann. Cas. 1113; In re Mayo, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660; Findlay v. Chicago Ry. Co., 106 Mich. 700, 64 N. W. 733; Hutchins v. St. Paul Ry. Co., 44 Minn. 5, 46 N. W. 79. In the note, 1 L. R. A. (N. S.) 885, it is said that this proposition is sustained by the preponderance of the authorities, and that the right to make collateral attack on the appointment of an administrator on the ground that there were no assets to sustain such appointment is denied in most of the decisions, as cited in the note in 18 L. R. A. 243.

If the deceased left any claim or right of action in the pending suit, we see no reason why it should not be regarded as property, nor why letters of administration may not be granted upon it in the county in which the case is pending if he is a nonresident and leaves no other property in the state. If it be conceded that there is also a right of action in California, this would not make the appellant liable for damages, for as in ordinary rights of action between individuals upon which suits may be brought in different states the judgment of the court first taking jurisdiction may be pleaded as a bar to further recovery. If no right of action survived, this would be a complete defense for the appellant, without attacking collaterally, or otherwise, the letters of administration. The right of action was a transitory one, and the action pending in Washoe county at the time of Forrester's death there was property upon which letters of administration could be issued.

In the case of Pyne, Administrator of the Estate of Henry C. Austin, Deceased, against Railway Company, 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756, Austin, a citizen of Indiana was injured by being run over by an engine in Jeffersonville, Ind. He brought suit in Kentucky to recover damages for the injury, which he claimed was caused by the gross negligence of the company's servants in charge of the engine. Some time after this suit was filed, and while still residing in Indiana, he died. Aside from the suit or cause of action, he owned no property in Kentucky. An administrator was appointed in Kentucky, and the suit was revived in his name. The company defended, denied negligence, pleaded contributory negligence, and *758 alleged that at the time of his death Austin was a resident of Jeffersonville, Ind.; that he owned no estate of any kind in Kentucky, and had no debt owing to him in Kentucky. It was also asserted as a defense by the company that the injury occurred in Indiana, the cause of action arose under the laws of that state, and that it was provided by the statute in Indiana that: "A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person and actions for seduction, false imprisonment, and malicious

prosecution." The statutes of Kentucky provided that letters of administration might be granted in that state in the county where the decedent died, or where his estate or part thereof shall be, or where there may be any debt or demand owing him. The court said: "Construing these sections, it has been held that where a nonresident has been killed in this state by the tort of another, administration will be granted upon his estate in this state, even for the sole purpose of suing to recover damages for the tort, because the statute which gives the right of action to the estate of such decedent for such death, ex necessitate rei, confers jurisdiction, by implication to appoint an administrator to prosecute the suit. Brown v. Louisville & N. R. Co., 97 Ky. 228, 30 S. W. 639. It has also been held that where a resident of this state is killed by the tort of another out of this state, administration may be granted upon his estate in this state. But it has been held, also, that where a nonresident of this state is killed by the tort of another out of the state, and who has not estate or property in this state, there cannot be administration granted upon his estate in this state. Hall v. Louisville & N. R. Co., 102 Ky. 484, 43 S. W. 698, 80 Am. St. Rep. 358; Turner v. Louisville & N. R. Co., 110 Ky. 879, 62 S. W. 1025. * * * Whether an action should survive to the personal or real representatives of the plaintiff is a matter of policy to be settled for itself by each state. It goes to the remedy alone, and does not really affect the cause of action as being actionable. Such remedies are not extraterritorial. Generally the remedy is governed by the law of the forum, and not by the lex loci. As the plaintiff's cause of action accrued to him, not by the statute of Indiana, but under the common law, prevailing there as it does here, when he sued upon it in this state, whether upon his death before the termination of the suit, it would be allowed his personal representative to continue to prosecute it, affects the remedy only, and is a matter wholly within the control of the state where the suit is pending. Baltimore & O. R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677. In this state, as we have seen, the cause of action is permitted to survive, and a revivor in the name of the personal representative of the decedent is allowed."

In the Joy Case the United States Supreme Court held that the right of an administrator to revive and continue an action for personal injuries commenced before the death of the person injured, is controlled by the law of the place where the action is pending, and not by the law of the state where the injury occurred and the cause of action arose; that an action brought in Ohio by the injured person to recover damages for injuries sustained by the negligence of the defendant in Indiana does not abate upon the death of the person injured, but may be continued by his administrator appointed in Ohio, although if no suit had been brought the action would have abated both in Indiana and Ohio, and if suit had been brought in Indiana the action would have abated in that state. The following is the last paragraph of the opinion in that case: "It is scarcely necessary to say that the determination of the question of the right to revive this action in the name of Hervey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the state of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that state, rather than by the laws of the state in which the injuries occurred."

In Martin v. Wabash Ry. Co., 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582, it was held that an action for personal injuries survived under the statute of Illinois, and the court said: "Whether a cause of action survives by law is not a question of procedure, but of right, and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought. Martin, Adm'r, v. Baltimore & Ohio R. R. Co., 151 U. S. 691, 14 Sup. Ct. 533, 38 L. Ed. 311; Baltimore & Ohio R. R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677."

In Webber v. St. Paul City Ry. Co., 97 Fed. 140, 38 C. C. A. 79, it was held that an action for personal injuries did not abate on the death of the person injured, under the statute of Minnesota. It is said in the opinion: "There is nothing in the statute to the effect that a cause of action ex contractu, arising out of an injury to the person, shall survive, while such a cause ex delicto shall abate. In order to sustain the contention of counsel for the plaintiff in error, it is necessary to ingraft a sweeping exception upon the act of the Legislature, so that it *759 will read: 'A cause of action arising out of an injury to the person dies with the person, except in cases in which the injury was the breach of a contract.' * * * When the Legislature has lawfully established a rule which limits the time or manner of maintaining a class of actions, and has made no exception to that rule, the conclusive presumption is that it intended to make none, and the courts have no power to do so. Madden v. Lancaster Co., 27 U. S. App. 528, 539, 12 C. C. A. 566, 573, and 65 Fed. 188, 195; McIver v. Ragan, 2 Wheat. 25, 29 [4 L. Ed. 175]; Bank of State of Alabama v. Dalton, 9 How. 522, 528 [13 L. Ed. 242]; Vance v. Vance, 108 U. S. 514, 521, 2 Sup. Ct. 854 [27 L. Ed. 808]. * * *

Counsel for the respective parties to this action have presented a careful and exhaustive review of the decisions of the English and American courts upon the rule of the common law that a personal action dies with the person. But the statute of Minnesota is so plain and positive in its terms that we do not feel at liberty to disregard, evade, or explain it away, and we must decline to follow them in this discussion. * * * When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and to confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the Legislature must be presumed to have meant what it expressed, and there is no room for construction. Knox County v. Morton, 32 U. S. App. 513, 516, 15 C. C. A. 671, 673, and 68 Fed. 787, 789; U. S. v. Fisher, 2 Cranch, 358, 399 [2 L. Ed. 304]; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168 [34 L. Ed. 767]; Bedsworth v. Bowman, 104 Mo. 44, 49, 15 S. W. 990; Warren v. Paving Co., 115 Mo. 572, 576, 22 S. W. 490; Davenport v. City of Hannibal, 120 Mo. 150, 25 S. W. 364."

In Atchison, Topeka & Santa Fé R. R. Co. v. Sowers, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695, it was decided that an action brought by a resident of Arizona for an injury sustained in New Mexico could be maintained in Texas, notwithstanding the statute of New Mexico, which by its terms would restrict the bringing of the action to the courts of New Mexico; and it was held that the rights of action which exist regardless of statute, such as rights of action for personal injuries, are maintainable wherever courts may be found that have jurisdiction of the parties and the subject-matter, when not inconsistent with any local policy, and that no state can pass laws having force over persons and property beyond its jurisdiction. The court said: "An action for personal injuries is universally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject-matter. Rover on Interstate Law, 154, 155; McKenna v. Fisk, 1 How. 242 [11 L. Ed. 117]; Dennick v. Railroad Co., 103 U. S. 11, 18 [26 L. Ed. 439]."

In Christensen v. Floriston P. & P. Co., 29 Nev. 552, 92 Pac. 210, we held that a right of action for damages for death resulting from personal injuries suffered in California was transitory, and that a suit for their recovery could be maintained in this state.

[4] In the construction given to our act of 1905 by the United States Circuit Court for Utah (Coyne v. Southern Pacific Company [C. C.] 155 Fed. 683), the question regarding whether an action like the present one survives was not before the court, and it is not assumed that consideration was given to the question before us for determination.

[5] We have high regard for the decisions of the federal courts, and when they construe federal laws they are binding upon the tribunals of the different states. On the other hand, the federal courts follow the decisions of the highest court of a state construing the Constitution and laws of a state, unless they conflict with the United States Constitution or federal laws, notwithstanding that the federal court may believe that the opinion of the state court is improper. N. Y. Cent. R. Co. v. Miller, 202 U. S. 584, 26 Sup. Ct. 714, 50 L. Ed. 1155; Union Nat'l Bank v. Railway Co., 163 U. S. 331, 16 Sup. Ct. 1039, 41 L. Ed. 177; Bacon v. Texas, 163 U. S. 221, 16 Sup. Ct. 1023, 41 L. Ed. 132; Supreme Lodge v. Meyer, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146.

Although some courts with judges retained in the principles of the common law have declined to give a liberal construction to statutory enactments which are derogatory to and would overturn common-law principles, and in some instances may have been inclined to adhere to the rule that actions for damages resulting from torts, even when coupled with breach of contract, did not survive, notwithstanding statutory provisions, we conclude that the language of the sections before quoted include the cause of action alleged in this case. As these statutes provide that "all actions founded upon contracts may be maintained by and against executors and administrators in all cases where the same might have been maintained by or against their respective testators or intestates in their lifetime," and that persons causing another to suffer personal injury by neglect or default shall be liable for damages in an action brought by the person injured, and as the injury here arose from the neglect and default of the defendant to keep its contract, and there is nothing in the words used excepting actions founded upon a tortious breach of a contract, and as this action is founded upon contract and is transitory and was properly brought and maintained by the person injured, the decedent, in his lifetime, it follows *760 that it may be continued by his administratrix.

[6] It is not the duty of the court to hold that the Legislature did not mean what the language clearly indicates, or did not intend that this statute which they had taken the time to enact should have some effect different from the law existing at the time it was passed, or that cases which did not survive at common law should be excluded from the operation of the statute if they come within the ordinary meaning of the words employed.

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[7] Notwithstanding the argument that the cause of action should be treated as one in tort which abated upon the death of Forrester, the injury and damage to Forrester and his hardships and suffering while trying to reach his destination resulted from the failure of defendant to comply with its contract for carriage, as evidenced by the ticket sold to Forrester, and the insulting and humiliating words and conduct of the agent of the defendant at the time he ordered him to leave the train were inseparably connected with the breach of the contract by the defendant company. If this were not so, we would still be unable to escape the conclusion that the action is founded upon contract, for if Forrester had not obtained, possessed, or paid for the ticket, which was undoubtedly a contract, or paid fare, the payment of which would in effect be a contract, the company would have been authorized to eject him from the train. In Samuels v. New York City Ry. Co., 52 Misc. Rep. 137, 101 N. Y. Supp. 534, the court said: "If the plaintiff's story is true, he was grossly assaulted, wantonly insulted, and wrongfully ejected from the defendant's car by its servant. * * * On this evidence the defendant clearly committed a breach of its contract of carriage, for which the plaintiff is entitled to recover substantial damage, even though he proved no loss of wages or of time, or physical injuries. He is entitled to recover compensatory damages for injury done to his feelings, and for the indignity suffered. Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25; Gillespie v. Bklyn. Hghts. R. R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; Hines v. Dry Dock, 75 App. Div. 391, 78 N. Y. Supp. 170."

If the action were not based upon the ticket contract both by allegation and proof, it may be assumed that the defendant would have demurred or moved for a nonsuit, because the plaintiff could not recover for being ejected from the train when traveling without a ticket or payment for passage amounting to a contract, when, as in this case, no more force was used than was necessary to remove Forrester from the car, and such removal constituted a breach of contract of carriage. If the action were for some insult, assault, or tortious act of the train agent not connected with the breach of the contract, and Forrester had been given passage in compliance with the terms of the ticket, the provision of the statute for the survival of all actions founded upon contract would not apply.

Cases may arise, and have arisen, in which damages would be recoverable purely in tort for the expulsion of a person from a train when traveling without a ticket or the payment of fare, with the right of the company to eject him in the absence of a contract or obligation of passage. If a person without a ticket or right to be carried were injured by being put off a moving train, or on a bridge or desert, under circumstances of unusual hardship, damages would be recoverable for injuries sustained, but an action for their recovery would not be based upon contract.

[8] If damages for a tortious breach of a contract are recoverable by the party injured, it was within the power of the Legislature to provide that an action commenced by him for their recovery should not abate upon his death. Some states have statutes providing that all causes of action survive, others that all causes of action with specified exceptions survive, and others that certain specified actions survive. Under these statutes actions survive notwithstanding they would abate at common law.

In Melzner v. N. P. Ry. Co., 46 Mont. 162, 127 Pac. 148, it was urged under the citation of cases that the Montana statute providing for the survival of actions did not affect the abatement of an action for personal injury, and applied only to actions which survived at common law. It was held that the suit, which was purely in tort for injuries to a boy from being struck by a locomotive, survived, and that the damages could be recovered by his administrator.

We should not adhere too closely to common-law distinctions or obsolete methods of pleading abolished by our Code which might result in a denial of the right to recover damages for any injury inflicted. The statutes control, regardless of the common-law principles under which actions for tort abated, and exemplary damages were not recoverable in actions on contract or in tort after the death of the person injured. The Legislature long ago abolished the distinction in the forms of action, and in later passing the statutes we have quoted may not have intended to carry the common-law distinctions not mentioned as exceptions to the statute, which if allowed to control would leave the statutes without any force in this case. A liberal view in regard to the form of the action for expulsion of a passenger was taken by the court in Railway Co. v. Brauss, 70 Ga. 368, and in Railroad Co. v. Hine, 121 Ala. 234, 25 South. 857.

[9] If exemplary damages are allowable at all, there is no good reason why, if warranted by statute, and there is wantonness, *761 oppression, and hardship, they should not be recoverable in an action for the tortious breach of a contract, or in a case where the passenger has bought a ticket or paid his fare, and is injured by failure of the company to keep its contract of carriage, as well as if he were injured by a tort in no way connected with the breach of a contract,

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or were expelled from the train with undue force, or under unwarrantable circum stances, when the company had a right to eject him for nonpayment of fare. Under our statutes such an action brought by the person injured and based on contract survives. The damage resulted from the failure of the company to perform its duty and keep its contract, and if exemplary damages are allowable against public carriers as a warning or punishment, and to prevent a repetition of practices injurious to people traveling, they should be allowed under our statute for a wanton and oppressive breach of carriage, and to prevent railroad companies from ejecting passengers who are entitled to transportation.

Although railroads, as the best means for the convenient and speedy transportation of passengers and commodities, are among the most important factors in the progress and prosperity of the civilized world, and when properly managed are of great service and benefit, they are not without their obligations to the public. Many of the great railway systems of the country were built with the aid of government, state and municipal land grants and subsidies, and all of any importance depend upon or exist under public laws providing for incorporation, franchises, and condemnation of private property for right of way. From the profits of these roads, collected from the public, they have been improved and extended, and other roads have been built. Also, it is with money collected from the public that the railroad companies are enabled to pay high salaries and compensation to officers, attorneys, political agents, and other talented and skillful men to manage the business of the railroad companies, so that the best dividends may be paid and the largest revenues may be collected from the public, which is dependent upon the roads for transportation.

It has long been settled by the courts of the country, including the highest, that when the rates fixed by the railroad companies are excessive they may be regulated or reduced by public authority. It must also be conceded that a railroad is liable for damages for failure to comply with its contract, or the terms of the ticket which it has sold. The passenger, whether traveling in a special car or on a first or second class ticket, is entitled to be carried to his destination without being insulted or subjected to discourtteous treatment by the employés of the company. We have heretofore held that railroad companies are bound to the highest degree of care for the safety and protection of passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants. Murphy v. Southern Pacific Co., 31 Nev. 125, 101 Pac. 322, 21 Ann. Cas. 502; Sherman v. Southern Pacific Co., 33 Nev. 404, 111 Pac. 416, 115 Pac. 909, and cases cited.

In view of the amount of the verdict and the important principles of law involved, we have given careful consideration to the contentions of the appellant "that punitive damages are not allowable in any case under the established principles of the law," and particularly that this is so in Nevada under the case of Quigley v. C. P. R. R., 11 Nev. 350, 21 Am. Rep. 757, "that if punitive damages may be recovered in this state in a proper case, they cannot be recovered in this action," and that the company is not liable for the act of the agent in ejecting Forrester from the train.

In considering the objection to the allowance of punitive damages, the Supreme Court of Kansas, in Cady v. Case, 45 Kan. 733, 26 Pac. 448, said: "The principal question discussed in this case upon the argument was whether exemplary damages ought to be allowed in any civil action, and we are asked to re-examine this question, and reverse the prior decisions of this court permitting exemplary or vindictive damages. Our own decisions for a long time have established that, whatever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages. We could not depart from this doctrine now without overruling all of the prior decisions of this court upon this subject, and we are not willing to do so. * * * 'And after all this discussion the Supreme Court of the United States decides the law as laid down in these instructions. Mr. Justice Grier, delivering the opinion of the court, well says: "If repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by the statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." We have no doubt that such is the law. Whether it be founded in sound reason or not is not so much our province to say as to determine if it be law. The writer hereof believes it to be not only good law, but founded on sound principles, and beneficiál in its application. It often furnishes the only restraint upon a bad man, who cares little for his neighbor's character, his person, or his property. The party injured pursues the wrongdoer to punishment when society is too careless to do so.' These decisions have since been followed in the cases of Hefley v. Baker, 19 Kan. 9; *762 Titus v. Corkins, 21 Kan. 722; Jockers v. Borgman, 29 Kan. 109 [44 Am. Rep. 625]; Winstead v. Hulme, 32 Kan. 568, 4 Pac. 994; Railway Co. v. Rice, 38 Kan. 403, 404, 16 Pac. 817

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[5 Am. St. Rep. 766]; Clark v. Weir, 37 Kan. 98, 14 Pac. 533; West v. Telegraph Co., 39 Kan. 93, 17 Pac. 807 [7 Am. St. Rep. 530]; Manufacturing Co. v. Boyce, 36 Kan. 351, 13 Pac. 609 [59 Am. Rep. 571]."

Mr. Sedgwick, in his work on Damages (9th Ed.) at sections 351 and 352, quotes the foregoing language of the Supreme Court of the United States, and from many decisions, showing that courts generally sustain the allowance of punitive damages. He says: "These authorities were followed by such a multitude of cases that the principle became, by the middle of the last century, as fully established by weight of authority as any doctrine of the law. In the first edition of this treatise, the doctrine was recognized as so established; and this opinion, in the face of able and persistent opposition, has prevailed. * * * So in Connecticut, in an action on the case for gross negligence, it was held by Church, J., in delivering the opinion of the Supreme Court of Errors: 'There is no principle better established and no practice more universal than that *vindictive damages or smart money* may be and are awarded by the verdict of juries, and whether the form of the action be trespass or case.' So in Pennsylvania, Gibson, J., delivering the opinion of the court, said: 'In cases of personal injury, damages are given not to compensate but to punish.' " At sections 365 and 366, over the citation of authorities, he says: "Oppression, brutality, or insult in the infliction of a wrong is a cause for the allowance of exemplary damages. * * * A woman in delicate health is wrongfully turned out of her house at night in a storm; she may recover exemplary damages. A passenger, wrongfully ejected from a railroad train with rudeness and violence, may recover exemplary damages, though mere indecorous conduct in expelling a passenger is held not to be sufficient cause for their infliction. So exemplary damages may be recovered where the wrongful act is accompanied with circumstances of insult and outrage. * * * If the injury is wantonly inflicted, exemplary damages may be recovered; as, for instance, where the act was done with reckless disregard of the rights of others, or of the consequences of the act. Thus in Baltimore & Yorktown Turnpike Road v. Boone, where the company exacted illegal fare, and the plaintiff on his refusal to pay was forcibly ejected, it was held that he could recover exemplary damages on the ground that the company had been guilty of criminal indifference to the obligations of public duty, which amounted to malice; and so, generally, exemplary damages may be given against a carrier for ejection of a passenger in wanton disregard of his rights, or for deliberate refusal to stop a train on signal. Thus, also, exemplary damages may be recovered for an unprovoked and causeless battery, and for reckless defamation."

Another eminent text-writer, Mr. Cooley, in volume 2 (3d Ed.) of his work on Torts, page 1017, states: "The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond. * * * So when a railway company puts a conductor in charge of a train, and he purposely and wrongfully ejects a passenger from the cars, the railway company must bear the blame and pay the damages. In this case the company chooses its servant and puts him in charge of its business, and the injury is done while performing it, and in the exercise of the power conferred. If the corporate authorities did not direct the act to be done, they nevertheless put a person of their own selection in a position requiring the exercise of discretionary authority, and, by intrusting him with the authority and with the means of doing the injury, have, through his agency, caused it to be done. As between the company and the passenger, the right of the latter to compensation is unquestionable. So for an assault upon a passenger by the conductor, brakeman, or other employé. A railroad company is liable for the use of excessive force by its employés in ejecting a passenger from its cars. And generally the master is liable for the willful or intentional wrongs of his servant committed in the performance of his duty as servant, or within the scope of his employment."

In Hale on Damages (2d Ed.) at page 326, it is said: "It is usually held that corporations are liable to exemplary damages for the acts of their agents or servants, in cases where the agent or servant would be liable for such damages. This is placed upon the ground that otherwise corporations would never be liable for exemplary damages, since they can act only by agents or servants. Thus it has been said: 'We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of carriers of passengers, and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such act is directly or impliedly ratified; for no such cases will occur.' " And in the same work, at page 381: "Where a carrier fails to carry a passenger to his destination, *763 and sets him down at some intermediate point, compensation may be recovered for all the expenses of delay, including loss of time and cost of a reasonable conveyance to his destination. He may

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also recover compensation for the indignity of the expulsion from the train, and, if there are aggravating circumstances, he may recover exemplary damages. Where by the fault of the carrier's agents, and without the passenger's fault, the ticket is not such a one as he should have to entitle him to passage, the carrier will be liable in damages for expelling him."

In Phila. & Reading R. R. Co. v. Derby, 14 How. (55 U. S.) 468, 14 L. Ed. 502, the Supreme Court of the United States held that the master is liable for the tortious acts of his servant done in the course of his employment, even in disobedience of the master's orders. In Railroad Co. v. Hanning, 15 Wall. 657, 21 L. Ed. 220, that court said: "The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the author is himself the principal and master, not a servant or agent, he alone is responsible."

In Railroad Co. v. Quigley, 21 How. (62 U. S.) 202, 222, 16 L. Ed. 73, it was held that a corporation was liable for the acts of its agents, in contract or in tort, in the course of its business and of their employment, the same as an individual is responsible under similar circumstances.

It was held by the Supreme Court of the United States in Day v. Woodworth, 13 How. 363, 14 L. Ed. 181, that in an action for trespass and actions on the case the jury may give vindictive damages, and in support of this holding a number of cases are cited in the note at page 181, 14 L. Ed.

Apropos to the opposing views of counsel regarding the case of Quigley v. C. P. R. R., 11 Nev. 350, 21 Am. Rep. 757, it is said, in section 359 of Sedgwick on Damages (9th Ed.), that the doctrine of the West Virginia Supreme Court that exemplary damages, so–called, are allowed, but are compensatory or undetermined damages, as the court calls them, appears to be the law in Nevada under the Quigley Case. As Earle, J., did not participate in the decision in the Quigley Case, any statements in the opinion of Hawley, C. J., and Beatty, J., in which both did not concur, are not binding as law because lacking the concurrence of a majority of the court. In that case a number of decisions are cited which sustain the award of exemplary damages, and no rule is promulgated different from the one generally approved by the courts, holding that in proper cases the party injured may recover exemplary, punitive or vindictive damages, which are usually considered the same. Hackett v. Smelsley, 77 Ill. 109; Roth v. Eppy, 80 Ill. 283; Giles v. Eagle Ins. Co., 2 Metc. (Mass.) 146; Louisville & P. R. Co. v. Smith, 2 Duv. (Ky.) 556; Stoneseifer v. Sheble, 31 Mo. 243; Kennedy v. North Missouri R. Co., 36 Mo. 351; Green v. Craig, 47 Mo. 90; Freese v. Tripp, 70 Ill. 496; Meidel v. Anthis, 71 Ill. 241; Freidenheit v. Edmundson, 36 Mo. 226, 88 Am. Dec. 141; McKeon v. Citizens' R. Co., 42 Mo. 79.

[10] In support of the contention of the appellant that if punitive damages are allowed at all, they cannot be imposed on the principal, whether a natural person or a corporation, who did not either direct the wanton or oppressive conduct or afterwards ratify it, we are cited to a number of cases, foremost of which is Lake Shore Railway Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. In that case it was held that a railroad company was not liable for exemplary damages for the illegal and oppressive arrest of a passenger by the conductor of one of its trains, which it had in no way authorized or ratified. The present case is distinguishable because here the train agent, in taking up the ticket and ordering the removal of Forrester from the train, was acting within the line of the special authority which the company had given him to take up tickets and have passengers removed, while in the Prentice Case the company had not authorized the conductor to have the passenger arrested.

If it were admitted for the purposes of this case that, as claimed, punitive damages cannot be recovered from a principal, whether a corporation or natural person, for the act of the agent, when the principal did not direct or ratify the act, it is still apparent that the jury could allow punitive damages in this case, not only because the train agent was specially authorized, above the conductor, by the company, to confiscate tickets and have persons removed from the trains, and there is evidence from which the jury may have inferred that the train agent, in addition to having arrogantly insulted and humiliated Forrester and removed him from the car, was in the habit of ejecting people from the train, and that his conduct in this regard had been known and ratified by the company by keeping him in a position where he would continue to so treat passengers, but also by reason of the ratification by the company of the removal of Forrester from the train by continuing to refuse to give him transportation after notice to the district agent of the company of Forrester's removal from the train and request for transportation for him. By giving the train agent special authority to eject passengers and take up tickets, and allowing him extra compensation for invalid tickets taken up, and by refusing, *764 after such notice and request for transportation, to give relief from his oppressive and wrongful acts in ejecting Forrester from the

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train, the company may be deemed to have ratified the act of their agent so authorized and approved. The Supreme Court of the United States has often sustained the liberal award of damages for personal injuries caused by the acts of agents or servants acting within the scope of their employment, although the acts were not authorized or ratified.

In the case of Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440, a man was employed by a corporation under a written contract to sell sewing machines, with a provision that his services were to be paid for by commissions on sales and collections. It was held that he was a servant of the company, and that the company was responsible to third persons injured by his negligence in the course of his employment. A judgment was sustained against the company for $10,000 for personal injuries resulting from his careless driving of a horse and wagon.

In New Jersey Steamboat Co. v. Brockett, 121 U. S. 645, 7 Sup. Ct. 1041, 30 L. Ed. 1050, it is said in the opinion: "The plaintiff was entitled, by virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the corporation which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if,' as was adjudged in Phila. & R. R. R. Co. v. Derby (55 U. S.) 14 How. 486 [14 L. Ed. 502], 'it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable if the act be done in the course of his servant's employment.' See, also, Phila. W. & Balt. R. R. Co. v. Quigley (62 U. S.) 21 How. 210 [16 L. Ed. 73]. 'This rule,' the Court of Appeals of New York well says, 'is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed.' Higgins v. Watervliet Turnpike Co., 46 N. Y. 27 [7 Am. Rep. 293]. The principle is peculiarly applicable as between carriers and passengers; for, as held by the same court in Stewart v. Brooklyn & C. R. R. Co., 90 N. Y. 591 [[[[[[[43 Am. Rep. 185], a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and copassengers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract."

[11] Differently from the Prentice Case, the decisions generally hold that the principal or master is liable in exemplary damages for the wrongful, wanton, and oppressive acts of the agent or servant when acting within the scope of his employment, although not authorized or ratified.

In Rucker v. Smoke, 37 S. C. 380, 16 S. E. 41, 34 Am. St. Rep. 760, the court said: "As we understand it, the proposition contended for by the counsel for appellant is that a principal cannot be held liable for exemplary damages on account of a wrongful, wanton, or malicious act done by his agent, within the scope of his agency, unless such act be previously authorized or subsequently ratified by the principal. We do not think that this proposition can be sustained either by reason or authority. When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance, or within the scope of his agency, are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him. * * * This view is, we think, fully sustained by authority. In Story on Agency, § 452, quoted with approval by Mr. Justice McGowan in Reynolds v. Witte, 13 S. C. 18, 36 Am. Rep. 678, we find the rule laid down as follows: 'It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances, misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, respondeat superior; and it is founded on public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency. The rule is also well stated in 1 Am. & Eng. Ency. of Law, at page 410, in these words: "A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations, or admissions he makes; whatever negligence he is guilty of; and *765 whatever fraud or wrong he commits: provided, the agent acts

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within the scope of his apparent authority, and provided a liability would attach to the principal if he was in the place of the agent." ' This rule has been repeatedly recognized or acted upon in this state, as shown by the following cases cited by respondent's counsel: Parkerson v. Wightman, 4 Strob. [S. C.] 363; Redding v. South Carolina R. R. Co., 3 S. C. 1, 16 Am. Rep. 681; Epstein v. Brown, 21 S. C. 599; Hall v. South Carolina Ry. Co., 28 S. C. 261 [5 S. E. 623]; Avinger v. South Carolina Ry. Co., 29 S. C. 271 [7 S. E. 493], 13 Am. St. Rep. 716; and Quinn v. South Carolina Ry. Co., 29 S. C. 381 [7 S. E. 614, 1 L. R. A. 682]."

A number of Illinois cases upholding this doctrine of liability are cited in the note in 34 Am. St. Rep. 761.

In Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238, it was held that a person who pays his fare and in good faith accepts a ticket from the ticket agent, who assures him that it will be good for passage, has a right to board a train as a passenger; and, if his ticket is rejected by reason of expired limitation, and he is ejected from the train for nonpayment of fare, he may recover exemplary damages. It is stated in the opinion: "It is true that in actions for breach of contract exemplary or punitive damages are allowable only where the act complained of has been committed willfully and maliciously, or, in the absence of actual malice, where it has been committed under circumstances of violence, oppression, outrage, or wanton recklessness."

In Southern Railway Co. v. Wooley, 158 Ala. 447, 48 South. 369, in an action against a railway company for leaving a passenger at a station short of her destination, there was evidence justifying an inference that the railway company's flagman was guilty of wantonness in directing plaintiff to remove to the wrong car, and it was held that punitive damages could be recovered.

In Company v. Lowry, 79 Miss. 431, 30 South. 634, the conductor on signal failed to stop the street car until it had passed a brick crossing from 20 to 40 feet, and refused to back the car, as there was a regulation of the company against backing cars. The conductor insulted and ridiculed the passenger upon his refusal to go through the mud to the car, and he had several blocks to walk. It was held that the jury in assessing damages were authorized to allow, not only just compensation for the injury, but to inflict a proper punishment for the company's disregard of public duty.

In Harlan v. Wabash Ry. Co., 117 Mo. App. 537, 94 S. W. 737, the collector told a passenger to get off at a station before he reached his destination, and that the train would not stop at his destination. The collector refused to put the passenger off at his station, carried him to the next station, where he was detained for two or three hours, and he was carried back to his destination free of charge. It was held that he was entitled to exemplary damages.

In Alabama R. R. Co. v. Sellers, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17, the conductor, after having passed a station without allowing a passenger to alight, refused to return with the train to the station, and compelled the passenger to alight in a driving rain, 200 yards from the station, whereby she was exposed to the elements while walking that distance, to the injury of her health. It was held that exemplary damages might be awarded, although the actual injury suffered was nominal. It is said in the opinion: "If the jury believed the testimony we have detailed, they would have been justified in the conclusion that defendant's conductor, within the range of his employment, willfully refused to move the train back to the station and willfully compelled the plaintiff to alight in a driving rain several hundred yards from any shelter, so incumbered with her child and baggage as to be unable to protect herself, and necessitating exposure to the elements while walking this distance. We cannot hesitate to affirm that this misconduct on the part of defendant's employè, with knowledge of the situation, was such a willful wrong, committed in such reckless disregard of the necessarily injurious consequences to the plaintiff, as authorized the jury to punish the defendant therefor by the imposition of exemplary damages. New Orleans, etc., R. R. Co. v. Hurst, 36 Miss. 660, 668, 669, 74 Am. Dec. 785; Wilkinson v. Searcy, 76 Ala. 176; Alabama, etc., R. R. Co. v. Frazier, 93 Ala. 45 [9 South. 303, 30 Am. St. Rep. 28]. * * * Acts readily conceivable, which involve malice, willfulness, or wanton reckless disregard of the rights of others, though not within the calendar of crimes, and inflicting no pecuniary loss or detriment measurable by a money standard on the individual, yet merit such punishment as the civil courts may inflict by the imposition of exemplary damages. And upon these considerations the law is, and has long been, settled in this state that the infliction of actual damage is not an essential predicate to the imposition of exemplary damages. Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776; Western Union Tel. Co. v. Henderson, 89 Ala. 510 [7 South. 419] 18 Am. St. Rep. 148; Alabama, etc., R. R. Co. v. Heddleston, 82 Ala. 218 [3 South. 53]. See, also, 1 Sutherland on Damages, 748."

In Sommerfield v. Transit Co., 108 Mo. App. 718, 84 S. W. 172, a street car conductor refused to accept transfer checks, and demanded the payment of cash fare. Such payment being refused, he ejected the passengers from the car. It was held

that the award of exemplary damages was proper. The court said: "The plaintiff was not confined in his recovery to actual damages; the *766 law is firmly established that where the commission of a tort is attended with circumstances denoting malice, or oppression, or where the defendant acts willfully and with wanton disregard of the rights of others, exemplary or punitive damages may be allowed, as well for the punishment of the wrong inflicted as to deter repeated perpetration of similar acts. 2 Sutherland, Damages (3d Ed.) § 391. The propriety of allowing juries to award such class of damages in cases of unlawful eviction from vehicles of common carriers of passengers has been sanctioned alike by this court and the Supreme Court. Hicks v. Railroad, 68 Mo. 329; Malecek v. Railroad, 57 Mo. 17; Evans v. Railroad, 11 Mo. App. 463; Kellett v. Railroad, 22 Mo. App. 356. The cases relied on by defendant are instances where the elements of oppression, insult, and abuse in aggravation of the wrong were wholly absent, and the agents enforcing eviction acted erroneously, but in good faith and without force or violence."

In City Ry. v. Brauss, 70 Ga. 368, the plaintiff and his wife entered a street car, gave tickets to the conductor, and told him where they wished to go. He had them transferred to another car, but gave them no transfer checks. The conductor of the latter car removed them a short distance from a corner, and they had to walk in the mud and in the presence of a number of people. The court said: "We think, as we have before shown, that this is an action ex delicto, founded upon the failure of the defendant to perform a duty imposed by its contract, and that the plaintiff was entitled to recover damages in consequence of this breach of duty, and that the motion was properly overruled. * * * The circumstances under which he was put off, and the place where he and his wife were landed, were well calculated to wound the feelings and mortify the pride of any man of ordinary sensibility."

In Louisville Ry. Co. v. Fowler (Ky.) 107 S. W. 703, it was held that a railroad company had the right to eject a passenger who did not present a ticket or pay fare, but it was liable for punitive damages for injuries resulting from expelling a person from the train, and for insult and indignity offered by the conductor.

In Illinois Cent. Ry. Co. v. Reid, 93 Miss. 458, 46 South. 146, 17 L. R. A. (N. S.) 344, a passenger recovered punitive damages for ejection from a railway train at the last stop before his destination, which was not a regular station. He had made a special contract with the carrier's agent to have his train stop at his destination, but the last conductor threw the tickets in the passenger's lap, telling him he must alight, and refusing to listen to any explanation, saying, "I have heard that before."

In Kibler v. Southern Ry., 64 S. C. 242, 41 S. E. 977, a judgment awarding punitive damages for refusing plaintiff passage on a train on tender of fare was affirmed. The court said: "When the conductor of a train willfully, wrongfully, unlawfully, and intentionally refuses a citizen passage thereon after he has offered to pay the legal fare for such passage, and actually causes him to leave the train before arriving at his destination, a cause of action for punitive damages exists. * * * The evidence tended to show that the citizen who tendered the legal fare was ordered from the train, and that there were other passengers on board to witness the plaintiff's humiliation, when required to leave the train. This testimony was before the jury. * * * It was for the jury to weigh it to see if there was malice, fraud, wantonness, etc. The circuit judge committed no error, as here pointed out. * * * It is quite true that punitive damages do not result from ordinary negligence. Nevertheless, such damages do arise from wantonness, oppression, or rude and insulting conduct of a conductor to a passenger. It was the duty of the jury, and not the circuit judge, to determine if the testimony offered by the plaintiff established such a delict in the conductor towards this passenger."

In Kansas, Ft. Scott & Memphis R. R. Co. v. Little, 66 Kan. 378, 71 Pac. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376, it was held that a passenger has the right to rely upon the representations of the local ticket agent that the train will stop at a point to which he has purchased a ticket, and that the company is liable if he is compelled to leave the train before arriving at his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at that station. It was held that exemplary damages may be allowed where a wrong has in it the elements of negligence which is gross or wanton or willfully oppressive, and that an indignity need not be done to one in the presence of a number of people in order to entitle the person wronged to recover damages for the humiliation and disgrace suffered.

A passenger wrongfully ejected from a train may recover damages without direct proof of the shame and humiliation suffered by him. Chicago, etc., R. R. Co. v. Chisholm, 79 Ill. 584.

In Dixon v. Northern Pac. Ry. Co., 37 Wash. 310, 79 Pac. 943, 68 L. R. A. 895, 107 Am. St. Rep. 810, 2 Ann. Cas. 620, it was held that it is prima facie within the implied authority of

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the brakeman of a railroad train to eject trespassers, and that if in removing them he does not exercise care and caution, but acts wantonly or maliciously, the railroad company will be liable for resulting injury. A number of cases pertaining to this question were considered, and the court said: "But, notwithstanding this distinction, the law, out of regard for common humanity, will not permit a master to allow his servant to unnecessarily *767 abuse or imperil the life or limb even of a trespasser, and, if the company, through its servants, willfully injure him, it will be liable even though he may have been guilty of contributory negligence. It is well settled, generally, that a railroad company is responsible in damages to a trespasser for torts committed upon him by a servant who, in the commission of the tort, is acting within the line of his employment, and within the scope of his authority—not within the scope of his authority as applied to the commission of the tort, for no authority for such commission could be conferred, but within the scope of his authority to rightfully do the particular thing which he did do in a wrongful manner. And, while the master will not be liable for the willful act of the servant not done to further or protect the master's interest, or with a view to the master's service, if the servant is authorized to perform the duty, but in the performance of that duty acts willfully or negligently to the detriment of another, the master will be held liable. So that the pertinent question in this case is, Was the brakeman acting within the actual or implied scope of his employment when he committed the act complained of? * * * It may be that these powers have increased with the changing conditions incident to railroading, and that the observation of this increase in his powers is the cause of the change in judicial decision on this question; for it is noticeable that most of the cases holding to the theory that the brakeman is not acting within the scope of his authority or employment, when ejecting a trespasser from the train, were decided many years ago, while the great majority of the cases holding to the other doctrine are of modern announcement. While this authority, of which we have been speaking, may not be strictly conferred upon the brakeman by the terms of the employment contract, we think that it must be a matter of common observation that such authority is an inference from the nature of the business, and its actual daily exercise."

In Lindsay v. Oregon S. L. R. Co., 13 Idaho, 483, 90 Pac. 985, 12 L. R. A. (N. S.) 187, the court said: "It is contended by counsel for the appellant that the brakeman had no authority to expel a passenger, and for that reason was acting outside of his authority if he had expelled him, and the company would not be liable therefor. There is nothing in this contention, for the correct doctrine on this point is laid down in 3 Thomp., Neg. § 3176; Patterson Railway Acci. Law, § 111; 6 Cyc. Law & Prac. p. 561. As stated in the last-cited authority, it is the duty of the carrier to afford protection for its passengers, and if it has in its employ a brakeman who ejected a passenger from a train who was entitled to ride, the company is certainly liable."

The Supreme Court of Georgia, in Seaboard Air Line Ry. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427, 2 L. R. A. (N. S.) 472, held that punitive damages were recoverable by a passenger who was expelled from the train by the conductor or other employés in charge, and that when the company undertakes to eject a passenger guilty of disorderly conduct, it acts at its peril in determining his identity; and if by mistake the wrong passenger is ejected, the carrier will be liable to respond in damages for the acts committed by its servants, their good faith being available only in defeating a recovery of punitive damages. The court approved the instruction that: "In every tort there may be aggravating circumstances, either in the act or in the intention; and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as a compensation for the wounded feelings of the plaintiff."

In Louisville & Nashville R. R. Co. v. Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640, it was held that a passenger who ignorantly and in good faith tenders a tax certificate for his fare may not be ejected as a trespasser; and if before he is removed from the train another person offers to pay his fare for him, the carrier must receive it and carry him, or be liable for punitive damages.

In Southern Light & Traction Co. v. Compton, 86 Miss. 269, 38 South. 629, it was held that punitive damages were properly awarded to a woman who was rudely ejected from a street car by the conductor, and compelled to walk some distance in the mud, because of her refusal to comply with the demand of the conductor that she change her seat in the car.

In Louisville R. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429, 2 L. R. A. 694, an action to recover for being taken past a station to which the passenger purchased a ticket, it was held proper to give an instruction that if any of the employés of the company were insulting in words, tone, or manner, the jury should find for the plaintiff damages in their discretion, not exceeding the amount claimed.

In Yazoo R. R. v. Fitzgerald, 96 Miss. 197, 50 South. 631, and Cinn. Ry. Co. v. Strosnider (Ky.) 121 S. W. 971, it was held that insulting and oppressive conduct toward a

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passenger, without expulsion, will warrant the recovery of punitive damages.

Where the original purchaser of a ticket was ejected by the conductor because the selling agent had erroneously punched the ticket for a female instead of for a male, and the conduct said it was a "bogus ticket," and ejected the passenger from the train without giving him an opportunity for an explanation, it was held that a recovery of both actual and exemplary damages was warranted. Illinois Central Ry. Co. v. Gortikov, 90 Miss. 787, 45 South. 363, 14 L. R. A. (N. S.) 464, 122 Am. St. Rep. 324. The court said: "Whether the ticket was in fact or not, when bought, punched in the wrong place, so as to show that it was issued to a female, is in our *768 view wholly immaterial. That was a matter for the convenience of the railroad company, and no passenger should be held to be bound by the mistakes of the agent in using his punch. * * * According to the testimony of the plaintiff there was no talk from the conductor on the subject of an erasure or change in the name until the trial of the cause. * * * This ticket shows that it was bought October 27, 1904, and that the return limit was punched so as to show December 14th, although that very ticket provides, as all such did, that it is good for 90 days from its date, to be not later than December 31, 1904. This is conclusive of the contract, regardless of the mistake which the agent says he made in punching the ticket, and was a matter for explanation, to say the least of it, if the conductor had made the point or been willing to accept explanation. In any case it is the duty of the conductor, when doubt arises as to a ticket, whether a general ticket or a special touring ticket with reduced rates, to listen to and accept any reasonable explanation offered, or take the chances. Railroad Co. v. Harper, 83 Miss. 560, 35 South. 764 [64 L. R. A. 283, 102 Am. St. Rep. 469]; Railroad Co. v. Holmes, 75 Miss. 371, 23 South. 187; Railroad Co. v. Riley, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309; Railroad Co. v. Drummond, 73 Miss. 813, 20 South. 7—cited by counsel for appellee. This court is in line with those cases holding that a passenger is not required to see that the selling agent of the ticket made the proper punch marks. The fact that the passenger did not do so does not destroy the validity of the contract. Railroad Co. v. Holmes, 75 Miss. 371, 20 South. 187. In the case at bar it was clearly the conductor's duty to accept the explanation, regardless of the punch marks. But, as we have said, the evidence on the part of the plaintiff is that the conductor made no such objection to the ticket, but put his refusal explicitly on the ground that the ticket had been issued to a female, and was a 'bogus ticket.' Looking to all that appears on this ticket, the expulsion was unnecessary, and from the circumstances shown on the part of the plaintiff it is our opinion that they warranted the recovery of both actual and exemplary damages. Examining the whole ticket, it is clear that the contract was not to expire until December 31st, and, if the punch mark contradicted this, it should not have been considered by the conductor, because the printed contract should be taken most strongly against the railroad company which issued it."

In Louisville & N. R. R. Co. v. Hine, 121 Ala. 234, 25 South. 857, it was held that for an injury caused by a breach of duty which a common carrier owes to its passengers an action lies in tort, as well as on the contract of carriage, and humiliation and indignity are elements of actual damage. The court said: "The carrier cannot shield himself from the consequences of misconduct or mistake on the part of one of its agents acting within the scope of his duties, which has naturally betrayed another of its agents into the final act of injury to the passenger. Murdock v. Boston & Albany R. Co., 137 Mass. 293, 50 Am. Rep. 307; Lake Erie & W. R. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464; Hufford v. Gr. Rapids & Ind. R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859; Head v. Ga. Pac. R. Co., 79 Ga. 358 [7 S. E. 217] 11 Am. St. Rep. 434; L. & N. R. R. Co. v. Gaines [99 Ky. 411, 36 S. W. 174] 59 Am. St. Rep. 465. * * * The issue being found in favor of the plaintiff, he was entitled to recover the damages proximately resulting to him from the wrong, including the expense and inconvenience to which he was put. Humiliation and indignity, if suffered by him from the ejection, are also elements of actual damages. Such damages may arise from a sense of injury and outraged rights engendered by the ejection alone, without regard to the manner in which it was effected, and though done only through mistake. Head v. Ga. Pac. R. Co., supra; Chicago & Alton R. Co. v. Flagg, 43 Ill. 364 [92 Am. Dec. 133]; Phila., etc., R. Co. v. Hoeflich, 62 Md. 300, 50 Am. Rep. 223; Smith v. Pittsburg, etc., R. R. Co., 23 Ohio St. 10."

If a passenger have a misunderstanding and contention with the conductor, and is ordered to leave the train, he is under no duty to remain on the train until expelled by force, and if he refuses when commanded he is coerced. Georgia R. R. Co. v. Eskew, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 490; Atchison, T. & Santa Fé R. Co. v. Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

[12] The amount awarded by the jury is large, and we have considered carefully whether it ought to be set aside or reduced. In actions for damages in which the law provides no legal rule of measurement it is the special province of the jury to determine the amount that ought to be allowed, and the court is not justified in reversing the case or granting a

new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice, or corruption in the jury.

In Solen v. V. & T. R. R. Co., 13 Nev. 138, it is said: "There being no absolute, fixed, legal rule of compensation, appellate courts ought not to interfere with the verdict unless it clearly appears that there has been such a mistake of the principles upon which the damages were estimated, or some improper motive or bias indicating passion or prejudice on the part of the jury. Worster v. Proprietors of Canal Bridge, 16 Pick. [Mass.] 547; Boyce v. Cal. Stage Co., 25 Cal. 461; Schmidt v. M. & St. P. R. Co., 23 Wis. 195 [[[[[[99 Am. Dec. 158]; Klein v. Jewett, 26 N. J. Eq. 480; Penn. R. Co. v. Allen, 53 Pa. 276; Sedgwick on Measure of Damages, 601, 602, and authorities there cited. The amount of the verdict—although perhaps greater than *769 we would have given—is not, in our opinion, inconsistent with the exercise of an honest judgment upon the part of the jury, whose special province it was to determine this question." This language was quoted with approval, and numerous other cases cited following the rule, in Burch v. Southern Pacific Co., 32 Nev. 106, 104 Pac. 225, Ann. Cas. 1912B, 1166, Wedekind v. R. R. Co., 20 Nev. 301, 21 Pac. 682, and Engler v. W. U. T. Co., (C. C.) 69 Fed. 188.

In Cleveland, Cinn., O. & St. L. Ry. Co. v. Hadley, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1, the Supreme Court of Indiana sustained a judgment for $10,000 for an injury to the elbow joint, caused by the falling of a window sash, affecting chiefly the ulnar nerve, resulting in a numb feeling in the arm and the little and ring fingers, and shrunken condition of the muscles of the arm, and loss of grip. The court said: "The general principle is well established that this court will not reverse the judgment of the court below in refusing to grant a new trial on the ground of excessive damages, unless, at first blush, the damages assessed appear to be outrageous and excessive, or it is apparent that some improper element was taken into account by the jury in determining the amount. Michigan City v. Phillips (1904) 163 Ind. 449, 71 N. E. 205; Indianapolis St. R. Co. v. Schmidt (1904) 163 Ind. 360, 71 N. E. 201; Illinois Cent. R. Co. v. Cheek (1899) 152 Ind. 663, 53 N. E. 641; Ohio, etc., R. Co. v. Judy (1889) 120 Ind. 397, 22 N. E. 252; Louisville, etc., R. Co. v. Miller (1895) 141 Ind. 533, 37 N. E. 343; Evansville, etc., R. Co. v. Talbot (1892) 131 Ind. 221, 29 N. E. 1134; Carthage Turnpike Co. v. Andrews (1885) 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; Farman v. Lauman (1881) 73 Ind. 568; Westerville v. Freeman (1879) 66 Ind. 255; Yater v. Mullen (1864) 23 Ind. 562; Picquet v. McKay (1831) 2 Blackf. (Ind.) 465. The determination of the extent of the injury complained of, and the proper compensation therefor, were peculiarly within the province and power of the trial jury, and when its judgment has been fairly obtained and, in the light of all the incidents o f the trial, confirmed by the presiding judge, an abuse of this right and power must be clearly manifest to warrant an appellate court in disturbing the judgment on the ground of excessive damages. Hudelson v. Hudelson (1905) 164 Ind. 694, 74 N. E. 504; Creamery Package Mfg. Co. v. Hotsenpiller (1902) 159 Ind. 99, 64 N. E. 600; Mead v. Burk (1901) 156 Ind. 577, 60 N. E. 338; Lee v. State (1901) 156 Ind. 541, 60 N. E. 299."

[13] If the case did not present so many unusual and serious circumstances of oppression, hardship, and injury, we would feel less inclined to allow the verdict to stand. To insult and humiliate a passenger who is ill and traveling on a ticket he has regularly purchased, search his baggage, take up his ticket when knowing that he is without means to again pay for his passage, eject him from the train at a station which is little more than a side track, several hundreds of miles from his destination and friends, leaving him to beg for assistance, and make his way while ill by walking or riding in exposed positions on coal cars or freight trains, is a serious matter, and a verdict for a liberal amount, which will tend to stop such treatment of passengers by public carriers, is justifiable. From the testimony that the train agent gloated over putting off other passengers, and the fact that the company paid him an extra amount for each ticket he took up as invalid, the jury may have inferred that such was the habit of the company. If there were others ejected, who were able to pay fare for traveling on the next train in a few hours, they may have suffered little damage to warrant the institution of a suit and prolonged litigation with the company, or may have been unable to employ counsel.

It may be doubted whether, for the amount of the verdict, if considered as covering actual damage, the officers and stockholders of the company would want to undergo all that the evidence on the part of the plaintiff indicates Forrester was made to endure by reason of the acts of the train agent; the insult, searching of baggage, accusation that he had stolen the ticket, ejection from the train in the presence of other passengers, the later insulting refusal of the district agent to give transportation when solicited, the humiliation of seeking assistance, the pain and suffering of body and mind in traveling hundreds of miles on engines and coal cars during inclement weather while ailing, the taking of pneumonia, the suffering from it in the hospital, the incapacity

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for work, and the evident shortening of life. In view of all these circumstances, and compared with the amounts allowed by juries and sustained by courts in other cases not nearly so serious, in which insult, humiliation and illness were elements of damage, we are unable to say that the jury acted upon prejudice or passion, or that the verdict ought to be set aside. In comparison with the circumstances, injury inflicted, and consequences, verdicts as liberal have been upheld as meeting the actual damage sustained, and without consideration of the right to award exemplary damages. The amount allowed for personal injuries in different cases has varied greatly, according to the circumstances and the determination of the jury. Seldom has a case come before the courts regarding the expulsion of a passenger in which the conditions were so aggravated and the consequences so serious. The charges of theft and different insults heaped upon Forrester, according to the testimony, his submissive conduct and earnest attempts to identify himself and show his right to remain upon the train, the humiliating denial of his request for transportation after his expulsion *770 from the train, coupled with the charge that he or his case was bogus, and more especially the long distance from his destination when he was ill and without means to buy another ticket, and the resulting privation, hardship, suffering, disease, and shortening of life justify the award of a much larger amount as damage than in ordinary cases where the most injurious of these conditions are lacking. Verdicts for about half the amount of the one in this case have been held not excessive when the aggravation and injury were not half so great.

The Supreme Court of Mississippi, in Railroad Co. v. Hurst, 36 Miss. 660, 74 Am. Dec. 785, said: "It is always matter of grave consideration with courts of the last resort to disturb the verdict of a jury fairly rendered, upon the evidence before them, and more especially when sanctioned by the direct judgment of the court before whom it was rendered, on a motion for a new trial. But, in cases of this character, when the application is based solely on the ground of excessive damages, to warrant the interposition of this court, the verdict must be so flagrantly improper as to evince passion, prejudice, or corruption in the jury. In personal torts, the courts will look narrowly into the circumstances, as they very rarely grant a new trial for excessive damages. 3 Graham & Waterman on New Trials, 1131, and cases cited. It is an authority to be exercised with great caution and discretion. It is the peculiar province of a jury to assess damages, and when, as in actions sounding in damages merely, the law furnishes no legal rule of measurement save their discretion, under the evidence before them, it is very rare indeed that a court will feel itself justified in setting aside a verdict merely for excess. It is not enough that, in the opinion of the court, the damages are too high. It may not rightfully substitute its own sense of what would be a reasonable compensation for the injury for that of the jury. The jury are allowed, and indeed it is their duty in all such cases where the law provides no other penalty, to consider the interests of society, as well as justice to the plaintiffs, and by their verdict, while they make just compensation for the private injury, also to inflict proper punishment for the disregard of public duty. Cook v. Hill, 3 Sandf. [N. Y.] 341; Collins v. Albany & S. R. R. Co., 12 Barb. [N. Y.] 492; Schlencker v. Risley, 3 Scam. [Ill.] 483, 38 Am. Dec. 100; Vreeland v. Berry, 21 N. J. Law, 183; Thompson v. Morris Canal & Banking Co., 17 N. J. Law, 480; Bodwell v. Osgood, 3 Pick. [Mass.] 379, 15 Am. Dec. 228; McNamara v. King, 2 Gilman [Ill.] 432; Johnson v. Moulton, 1 Scam. [Ill.] 532; Vanzant v. Jones, 3 Dana [Ky.] 464; Worford v. Isbel, 1 Bibb [Ky.] 247, 4 Am. Dec. 633; North v. Cates, 2 Bibb [Ky.] 591; Roberts v. Swift, 1 Yeates [Pa.] 209, 1 Am. Dec. 295; Taylor v. Giger, Hardin [Ky.] 586; Deacon v. Allen, 4 N. J. Law, 338; Vanch v. Hall, 3 N. J. Law, 814; Webber v. Kenny, 1 A. K. Marsh. [[Ky.] 345; Respass v. Parmer, 2 A. K. Marsh. [Ky.] 365; Allen v. Craig, 13 N. J. Law, 294; Tillotson v. Cheetham, 2 Johns. [[[[[[N. Y.] 74; Id., 3 Johns. [[N. Y.] 56, 3 Am. Dec. 459; Whipple v. Cumberland Mfg. Co., 2 Story, 661 [[Fed. Cas. No. 17,516]; Coleman v. Southwick, 9 Johns. [N. Y.] 45, 6 Am. Dec. 253; Southwick v. Stevens, 10 Johns. [N. Y.] 443. The law has not intrusted the court with the discretion to estimate damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case. * * * Judges, therefore, should be very careful how they overthrow verdicts, given by 12 men, on their oaths, on the ground of excessive damages. Per Parsons, C. J., in Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; Simpson v. Pitman, 13 Ohio, 365; Fisher v. Patterson, 14 Ohio, 418; Clark v. Pendleton, 20 Conn. 495; Sedgwick on Damages, 39 et seq., and authorities cited. The cases, both English and American, while fully admitting the power and discretion of the court, uniformly concur in the doctrines above laid down."

In an English case the jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial. Merest v. Harvey, 5 Taunt. 442.

In Dagnall v. Southern Ry. Co., 69 S. C. 110, 48 S. E. 97, the plaintiff paid full fare for a ticket which he did not know was limited by the punch marks, and was expelled from the train when using the ticket after the limitation. It was held that he was entitled to passage, as he had paid full

fare, notwithstanding the limitation on the ticket, and that as his expulsion was wanton and willful on the part of the defendant's employés, he was entitled to recover punitive damages, and a judgment for $1,200 was sustained.

In White v. Metropolitan St. Ry. Co., 132 Mo. App. 339, 112 S. W. 278, the defendant street railway company's conductor wrongfully refused to accept a transfer, the plaintiff refused to pay his fare, and the conductor seized him and pulled him off the car, saying that he could not return without paying the fare, and thereupon the plaintiff paid the fare and r eturned to the car, but the conductor continued to treat him in an insolent manner. It was held that whether the conductor was insulting and abusive in his language and demeanor and acted with malice was a question for the jury, and that a verdict for $250 punitive damages was not excessive.

In Cagney v. Manhattan Ry. Co. (City Ct. N. Y.) 2 N. Y. Supp. 402, plaintiff purchased a ticket for a ride on the elevated railroad, and deposited it in the canceling box without the knowledge of the gateman, who refused to allow him to board the train, although the *771 ticket agent, who was superior in authority, said he had sold the plaintiff the ticket and told the gateman to let him ride. There were many people, and plaintiff was apparently mortified at the imputation of attempting to ride without payment. Unable to secure a train without buying another ticket, plaintiff walked home. It was held that the defendant was liable for the malicious act of its agent, the gateman, within the line of his duty, and that both actual and exemplary damages were recoverable. A verdict for $500 was sustained as not excessive.

In Rand v. Butte Electric Ry. Co., 40 Mont. 398, 107 Pac. 88, the employés of a street car company seized, beat, and roughly handled the plaintiff, so that his head and face were badly cut, his nose broken, and he was confined to his bed under the care of a physician for several weeks. In favor of the company it was claimed that he was drunk and disorderly, and that the assault resulted from an attempt to put him on the street car and send him away from the ball grounds back to Butte City, a distance of two miles. A verdict for $2,500 was sustained.

In Little Rock Ry. & E. Co. v. Dobbins, 78 Ark. 553, 95 S. W. 788, an award of $500 compensatory damages and $250 exemplary damages for the ejection of a passenger from a street car with insulting language by the conductor, and for causing the passenger's arrest for alleged disorderly conduct, was sustained.

In Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504, the conductor kissed a female passenger, and for his conduct was promptly dismissed from the service of the railroad. A verdict against the company for $1,000 was sustained. In the opinion it is said: "She was entitled to liberal damages for her terror and anxiety, her outraged feeling and insulted virtue, for all her mental humiliation and suffering. We cannot say that the damages are excessive. We might have been better satisfied with a verdict for less. But it is not for us, it was for the jury, to fix the amount. And they are not so large that we can say that they are unreasonable. Who can be found to say that such an amount would be in excess of compensation to his own or his neighbor's wife or sister or daughter? Hewlett v. Crutchley, 5 Taunt. 276. We cannot say that it is to the respondent. * * * The judgment of the court below is affirmed."

In Railway Co. v. Mynott, 83 Ark. 6, 102 S. W. 380, a passenger was beaten by trainmen, insulted by profane and abusive language, expelled from the train with humiliation before reaching his destination, and compelled to make his way home in the night. On the part of the company it was claimed that he was drunk. A verdict for $1,500 was held not excessive.

In Louisville & N. Ry. Co. v. Cottongim (Ky.) 119 S. W. 751, a passenger after tendering his fare was wrongfully and roughly ejected from the train, and was thrown against the ground so hard that his leg was badly bruised and swollen, and he was compelled to walk while so injured a mile and a half to the next town. The court authorized punitive damages, and it was held that a verdict for $2,500 was not excessive.

In the case of Morrison v. The John L. Stevens, 17 Fed. Cas. 838, the libelant Morrison paid for passage and the exclusive use of a stateroom for himself and his wife, who was an invalid, from New York to San Francisco. Relying on the waybill which was different from the ticket Morrison had secured, the agent at Panama attempted to place a male passenger in the stateroom with Morrison and his wife. Morrison objected, and pleaded for the exclusive use of the room for himself and wife, but she was given a berth in a stateroom with two other females from Panama to San Francisco, and he was deprived of having the exclusive company of his wife. Damages in the amount of $2,500 were awarded.

In New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049, Brockett was a deck passenger on the boat from Albany to New York City, and went asleep on a bale of hops on a part of the boat on which passengers were not allowed. He was assaulted by the watchman, caught

by the collar of his coat, and pulled headlong from the freight, and his shoulder struck a barrel standing near, and was dislocated. A verdict for $5,500 as compensatory damages was sustained.

In Union Mill Co. v. Prenzler, 100 Iowa, 540, 69 N. W. 876, it was held, under a statute providing for the survival of actions, that the death of the party injured, pending suit brought by him for wrongful attachment, and the substitution of his administrator, will not prevent the recovery of exemplary damages which might have been recovered by the decedent himself. A verdict for $770 actual damages and $5,000 exemplary damages for wrongful attachment of the property of a debtor who was seriously ill, and the allowance of $1,200 as attorney's fees, was sustained in favor of the administrator. It is said in the opinion: "When the action is brought by the representative of one deceased, it is to right the wrong done to his estate, and to take from the defendant that which will make the estate whole. But when the action, as in this case, is brought by the person injured, who dies during the pendency of the action, the law attempts to remedy the wrong done to him, and not necessarily to his estate; and the damages in such case are not only compensatory, but may include exemplary as well. * * * The third objection to the allowance of exemplary damages is that they are and were excessive, and out of all comparison with the actual damages assessed. Now, while they are, no doubt, large, yet, as the matter *772 of allowing such damages and the amount thereof rests peculiarly with the jury, we do not think we ought to interfere, except in extreme cases."

In Chicago, etc., R. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318, a verdict for $15,000 for injuries, which did not appear to be permanent, to a stenographer, causing nervous prostration and organic disturbance of the valves of the heart, was reduced to $10,000.

In actions by the husband for damages for injuries making the wife an invalid, verdicts were upheld for $10,000 in Cannon v. Brooklyn City R. R. Co., 14 Misc. Rep. 400, 35 N. Y. Supp. 1039, and for $12,000 in Gulf, etc., Ry. Co. v. Higby (Tex. Civ. App.) 26 S. W. 737.

For injuries to the nervous system weakening the heart, verdicts for $10,000 have been sustained in Galveston R. R. Co. v. Worth, 53 Tex. Civ. App. 351, 116 S. W. 365, and Galloway v. Chicago R. Co., 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468.

In Galveston R. R. Co. v. Vollrath, 40 Tex. Civ. App. 46, 89 S. W. 279, a woman was made a nervous wreck, and to suffer with insomnia, pleurisy, and neuralgia, and a verdict for $14,000 in her favor was upheld.

In the extended note in 16 Ann Cas., page 8, there is a classification of many actions for damages with reference to the amounts allowed.

In the federal court for the district of Nevada, in Brown v. Evans (C. C.) 17 Fed. 912, it was held that in actions where fraud, malice, cruelty, oppression, or wantonness is shown, exemplary damages may be recovered, and that in this class of action evidence may be given of defendant's wealth, and the verdict for $8,000 for a brutal assault and battery was sustained.

The same court in Engler v. W. U. T. Co. (C. C.) 69 Fed. 185, sustained a verdict for $15,000 for a serious compound comminuted fracture of the bones of an ankle.

In Schafer v. Gilmer & Salisbury, 13 Nev. 330, the plaintiff claimed that pneumonia resulted from the upsetting of the stagecoach on which he was riding, and that the disease of his lungs had become incurable. It was held to be the duty of the jury to determine the nature and extent of the injury received by the person injured as a passenger, and a verdict for $5,000 was sustained.

Among the damage cases in this court verdicts have been sustained for liberal amounts. In Wedekind v. S. P. Co., 20 Nev. 292, 21 Pac. 682, there was an award of $7,500 for a rupture received from a slight jolt of a car, which threw the plaintiff against the seat.

In Powell v. N. C. O. Ry., 28 Nev. 40, 78 Pac. 978, $6,000 was recovered for an injury resulting from a fall which caused compression of the brain and atrophic condition of the muscles of the right arm.

In Murphy v. S. P. Co., 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502, a passenger had his leg injured in a collision by being thrown against the seat in front of him. The evidence was conflicting as to whether varicose veins resulted from the injury, or from his failure to take proper care of the injury. The court refused to set aside the verdict for $7,500.

In Burch v. S. P. Co., 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166, the plaintiff, while employed by the company, was struck by a switch and run over by the cars, necessitating amputation of the left leg three inches above the knee, and three toes of the right foot. A verdict for $18,000 was sustained in the federal court, and one for $20,000 rendered

on the trial in the state district court after the remanding of the case from the federal court was sustained by this court.

In Sherman v. S. P. Co., 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, the amount awarded was $15,000 for injuries which crippled Sherman for life, and for suffering in a temperature 20 degrees below zero at the time of the derailment of the train.

In Cutler v. Pittsburg Silver Peak M. Co., 34 Nev. 45, 116 Pac. 418, the plaintiff, an employé of the company, suffered the loss of one finger, burns about the hands and shoulder, by coming in contact with an electric wire negligently maintained. His fingers and arm and shoulder were partially stiffened, but the arm and shoulder were not shown to be permanently injured. It was held that a verdict for $15,000 should be reduced to $7,500.

[14] It is urged that certain statements made by the train agent and the conductor at the time Forrester's ticket was taken up and he was ejected from the train should have been excluded as hearsay testimony. The language asserted to have been used by the train agent that "we put them off here, and they sleep in box cars," is an illustration of these statements. It is said that he had no authority to make such remarks, that an admission by an agent is not receivable against his principal unless he has actual or implied authority to make the admission, and that he may have authority to act, but not to talk. In answer to these contentions it is sufficient to say that following the decisions in Crandall v. Boutell, 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122; Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Phila. & Reading R. R. Co. v. Derby, 14 How. (55 U. S.) 468, 14 L. Ed. 502, and other cases, we have already concluded that a master is responsible for the negligent conduct of his agents or servants within the scope of their duty in the furtherance of the master's business, although in excess of express instructions.

The declarations of the train agent and conductor made at the time of the taking of the ticket from Forrester and of his ejection *773 from the train were properly admitted as part of the res gestæ. In New Jersey Steamboat Co. v. Brockett, 121 U. S. 649, 7 Sup. Ct. 1043, 30 L. Ed. 1052, the Supreme Court said: "The defendant objected, at the trial, to the competency of the statements of the mate. The objection was overruled and an exception taken. It is now insisted that the defendant is not responsible for the brutal language of its servants, and that the declarations of the mate to the plaintiff were not competent as evidence against the carrier. We are of the opinion that these declarations constitute a part of the res gestæ. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently 'pushing' him, while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry, whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff. Vicksburg & M. R. R. Co. v. O'Brien, 119 U. S. 99, 105 [7 Sup. Ct. 118, 30 L. Ed. 299]; Ohio & Miss. R. R. Co. v. Porter, 92 Ill. 437, 439; Toledo & Wabash R. Co. v. Goddard, 25 Ind. 190, 191." See, also, White v. St. Ry. Co. [132 Mo. App. 339], 112 S. W. 279.

Exceptions were taken to the following instructions given at the request of the plaintiff:

"No. 5. The jury is instructed that the law requires a common carrier of passengers to exercise the highest practicable degree of care that human judgment and foresight are capable of, to make its passenger's journey safe. Whoever engages in the business of a common carrier impliedly promises that its passengers shall have this degree of care.

No. 6. The jury is instructed that a common carrier's obligation is to carry its passengers safely and properly, and to treat them respectfully, and if it intrusts this duty to its servants the law holds it responsible for the manner in which they execute the trust. The law is well settled that the carrier is obliged to protect its passengers from violence and insult from whatever source arising. The carrier is not an insurer of its passenger's safety against every possible source of danger, but it is bound to use all such reasonable precautions as human judgment and foresight are capable of to make its passenger's journey safe and comfortable. The carrier must not only protect its passengers against violence and insults of strangers and copassengers, but also against the violence and insults of its own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted, through the negligence or willful misconduct of the carrier's servants, the carrier is necessarily responsible.

No. 7. The jury is instructed that a passenger who has paid his fare to a common carrier, and has received a ticket properly issued and delivered to him evidencing such payment, is entitled to have the same honored by the carrier, and that a

refusal to honor it by an agent, or the agents of the carrier, even though honestly mistaken concerning its validity, does not relieve the carrier from responsibility for such refusal to honor it.

No. 8. The jury is instructed that if it believes from the evidence in this case that improper punch marks, or other mutilations, were made upon the railroad ticket submitted in evidence, were made by any agent of defendant of his own volition, and without the consent of the rightful owner thereof, such fact constitutes no defense to defendant for refusing to honor such ticket."

We find no error in these instructions as applied to the circumstances in this case. They appear to have been prepared from the opinion of the Supreme Court of Maine in the Goddard Case, as approved by the Supreme Court of Montana and the decisions of other courts.

[15] No. 5 follows closely the decision of this court in the Sherman Case regarding injuries resulting from accident. We need not determine whether, in regard to the degree of care, it would be applicable in the case suggested in the brief of a passenger who might be injured by stumbling over a suit case in the aisle. We do conclude that a high degree of care ought to be required before a passenger who is ill and without sufficient means to buy another ticket is expelled from the train hundreds of miles from his destination under the circumstances shown in this case.

Nos. 6, 7, and 8 are supported by different cases which we have heretofore considered, and No. 8 by what we hereafter state regarding defendant's refused instruction No. 11.

In Taillon v. Mears, 29 Mont. 161, 74 Pac. 421, 1 Ann. Cas. 613, it was held that a public carrier of passengers is bound to exercise the highest degree of care for their protection and safety, and is responsible for the negligent acts of his servants injuring a passenger, though such acts are not within the scope of the servant's employment. It is said in the opinion: "From the nature of the business, the actual transportation of passengers is usually intrusted to servants. These servants, therefore, must be charged with the exercise of the same care toward the passenger as is charged upon the master under the statutes and the contract of carriage; and it necessarily follows that any negligence or wrong committed to the passenger by the servant is a violation of such statute and *774 contract, and if injury results therefrom the master is liable. The carrier is bound to do certain acts, and cannot excuse himself from liability upon the ground that he has committed their performance to others. The proper doing of the acts by another, appointed by him alone, is just as obligatory and binding upon him as though he undertook to perform them himself. He is bound to discharge his statutory and contractual obligations to the letter, and, if he commits the performance of these obligations to another, he does so at his own peril. There is no way in which he can shirk or evade their performance. If the servant in such cases does what the master could not do without violating the duties resting upon him, then the master must be held responsible for the acts of the servant, no matter how wrongful, willful, or even malicious they may be. Therefore, whenever the misconduct of the servant causes a breach of the obligation or the violation of the duty of the master, the master is liable for such acts, if injury follow. Wood on Master and Servant, § 321; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; Stewart v. Brooklyn, etc., R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388. This principle is further illustrated and emphasized by cases where the servant of a carrier commits a willful assault upon a passenger. If such act is a violation of the contract of carriage, a fortiori mere negligence on the part of the servant is such a violation. Yet the rule is well established that such an act is a violation of the contract of carriage, and renders the carrier liable. The courts will not allow the carrier to shield himself behind the objection that such act was beyond the scope of the servant's employment. One of the leading cases upon this proposition is that of Goddard v. Grand Trunk R. Co., 57 Me. 202, 2 Am. Rep. 39, where the plaintiff, a pass enger on the railroad of defendant, was insulted and assaulted by the brakeman on the train. The defendants contended that they were not liable because the brakeman's assault upon the plaintiff was willful and malicious, and was not directly or impliedly authorized by them. Judge Walton says: 'The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger and the duty which he owes a stranger. It may be true that, if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable, but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded

as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and copassengers, but a fortiori against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible. * * * The grounds of the carrier's liability may be briefly stated thus: The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say "conclusively presumed," for the law will not allow the carrier, by notice or special contract even, to deprive the passenger of this degree of care. If the passenger does not have such care, but, on the contrary, is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. * * * As to them the contract of carriage imposes upon the carrier the duty, not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents; they are under the duty of protecting each passenger from avoidable discomfort and from insult, from indignities, and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. * * * It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine on principle; and while, as indicated above, there are adjudications against it, the great weight of authority supports it.' In addition to the above-cited authorities, further reference is hereby made to 4 Elliott on Railroads, § 1638; 3 Thompson *775 on Negligence; Richmond, etc., R. Co. v. Jefferson, 89 Ga. 554 [16 S. E. 69, 17 L. R. A. 571] 32 Am. St. Rep. 87, and note 90 to 100; Stranhan Bros. Catering Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634 [4 L. R. A. (N. S.) 506]; Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Kellow v. Central Iowa R. Co., 68 Iowa, 470, 23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858; Thompson v. Yazoo, etc., R. Co., 47 La. Ann. 1107, 17 South. 503; Perez v. New Orleans, etc., R. Co., 47 La. Ann. 1391, 17 South. 869; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Anderson v. Scholey, 114 Ind. 553, 17 N. E. 125; Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Sherley v. Billings, 8 Bush (Ky.) 147, 8 Am. Rep. 451; Bayley v. Manchester, etc., R. Co., L. R. 7 C. P. 415; Tuller v. Talbot, 23 Ill. 357, 76 Am. Dec. 695; Derwort v. Loomer, 21 Conn. 245; Roberts v. Johnson, 58 N. Y. 613; Frink v. Coe, 4 G. Greene (Iowa) 555, 61 Am. Dec. 141; Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; Chicago, etc., R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Lakin v. Oregon Pac. R. Co., 15 Or. 220, 15 Pac. 641; Penn. R. Co. v. Vandiver, 42 Pa. 365, 82 Am. Dec. 520; Dwinelle v. New York Cent., etc., R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; White v. Norfolk, etc., R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489; Houston, etc., R. Co. v. Washington (Tex. Civ. App. 1895) 30 S. W. 719; Haver v. Central R. Co., 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647."

[16] It is said that the prejudicial effect of instruction No. 7 is apparent when considered with the ruling of the court that the defendant is liable for punitive damages. In this regard it should be observed that the instruction does not mention punitive damages, and that the court, quite favorably to the defendant, in its instruction No. 2, told the jury that if it believed from the evidence that Forrester was wrongfully ejected from the train, but that such ejection was accomplished in good faith by the defendant's agents, and without malice or unnecessary force, and without any willful and wanton disregard for Forrester's rights, the company was not liable beyond the actual damage sustained by Forrester for the price of the ticket, the lost time resulting from the expulsion, and the actual expenses incurred by him in the employment of physicians and nurses and for hospital indebtedness.

[17] If there were any statements in these instructions regarding the mutilation of the ticket which were not law, still their presentation to the jury would be error without prejudice. From the evidence it appears that the train agent claimed to take up the ticket because Forrester was not the purchaser,

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notwithstanding he complied with different requests to show that he was the purchaser, and the signatures he made for the train agent were suflicient to identify him as being the person that originally subscribed his name to the ticket as the purchaser. The ticket contains extra "L" punch marks from being doubled over and punched twice instead of once when its limitation was punched. The date of the sale, "Grand Central Depot Company, Houston, Texas, Sep. 22, 1907," is clearly stamped in four places on the back of the ticket, and its limitation, September 27, 1907, is clearly indicated by three punch marks over the figures "1907," the letters "Sep." and the figures "27." The other scattering "L" punch marks, not directly over dates, do not possibly indicate any earlier limitation after the sale of the ticket, or that it had expired at the time it was taken up. If two dates of limitation had been punched on the ticket, one of which had expired at the time Forrester was expelled from the train, we can see how a train agent, while acting with due care and in good faith, might have taken up the ticket if the punch marks showing that it had expired were not satisfactorily explained, so that the company would be relieved from punitive damages. But scattering or extra punch marks on the ticket, none of which show any date for its expiration after its sale which had expired at the time it was taken up, cannot be an excuse for the confiscation of the ticket and expulsion of the passenger, even if, as contended by the appellant, the law required only ordinary care to be exercised by the company.

[18] Consequently, in this regard, if plaintiff's instruction No. 5, requiring extraordinary care, did not state the law applicable to this case, its giving was harmless error, for the defendant would not have been less liable for rejecting the ticket because it contained extra punch marks if the law and instruction required only ordinary care.

[19] The ticket provides that if limited as to time it is not good for passage unless used to destination before midnight of the date canceled by the "L" punch in the margin. As there was no such date after the sale of the ticket punched, which had arrived at the time of Forrester's expulsion from the car, the company was not warranted under this provision in refusing to carry him. The ticket also provides: "6th. This ticket will be void if it shows any alterations or erasures, or if more than one date is canceled, and if more than one station is designated as the terminal point, it will be honored only to that station, indicated by punch marks nearest the starting point of that coupon." Passengers are required to observe reasonable regulations made by a public carrier, but such carrier is not authorized to eject a passenger, and cannot relieve itself of liability for failure to keep its contract of carriage because one of its agents may accidentally place extra *776 punch marks upon the ticket, as in this case, for which the passenger is in no way responsible. We have already referred to decisions sustaining this conclusion, and it is apparent that a railroad company, or any party to any contract, cannot justify a breach of its agreement by the negligent or willful act of its agent when the other party to the contract is without fault. In McGinnis v. Mo. Pac. R. Co., 21 Mo. App. 399, it was held that one who purchases a ticket of the railroad company's agent at its office has a right to rely upon the agent to give him a ticket expressive of the contract, including the time for carriage. This decision is in consonance with the one in Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198, 57 Am. St. Rep. 238, and Ulinois Cent. R. Co. v. Gortikov, to which we have heretofore referred, and with the opinion of the United States Circuit Court of Appeals, by Judge Hawley, in N. P. R. R. Co. v. Pauson, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730. This and other cases are cited with approval in Scofield v. Pennsylvania Co., 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, and Pennsylvania Co. v. Lenhart, 120 Fed. 61, 56 C. C. A. 467.

[20] Exception was taken to the refusal of the court to give defendant's instructions Nos. 3 and 11, which are somewhat similar. The following, No. 11, includes substantially the objection involved in regard to No. 3, and may be considered as the antipode of plaintiff's instructions Nos. 7 and 8: "The jury are instructed that the face of the ticket is, as between the conductor or train agent and the passenger, conclusive evidence of the latter's right to transportation, and, where the ticket is defective or invalid, even through the fault of an agent of the carrier, the conductor or train agent cannot be expected to listen to the passenger's account of the transaction, but the passenger should either pay his fare or leave the train, and if the invalidity or defect of the ticket was due to the fault of some agent of the company, the passenger would be entitled to bring an action against the company for breach of contract, but, should he attempt to retain his place in the car without paying fare, and be expelled by the conductor or train agent, he can recover no damages for the expulsion. Hence, if the jury believe, in the case at bar, that at the time Dick Forrester presented his ticket to the defendant's train agent, such ticket was defective by reason of having too many dates punched out, and the jury further believe that the defective condition of such ticket was due to a mistake or fault, on the part of some agent of the company, other than the agent to whom such ticket was presented for transportation, and the agent to whom such ticket was presented for transportation

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refused to honor the same because of its defect, then I instruct you that it was the duty of Dick Forrester to either pay his fare or leave the train, and that neither he nor the plaintiff in this action can recover any damage because the said Dick Forrester was ejected from defendant's train as a result of his refusal to pay his fare or leave the train of his own volition." If it be conceded that ordinarily, as contended by appellant, the conductor has a right to treat the ticket as conclusive, and that when there is any doubt the passenger should make a full explanation of how he came by the ticket, it is apparent from the evidence that Forrester, in addition to making signatures which were sufficient, duly endeavored to show that he was the original purchaser of the ticket, and as there were no punch marks or anything on the ticket showing that it had expired, these instructions were inapplicable to the facts in the case, even if the law were as appellant contends, for the ticket, not having expired, taken for its face value with the extra punch marks, did not warrant Forrester's expulsion from the train.

[21] There was nothing in the circumstances which required him to pay a second time for his passage in order to have the right to be carried to his destination. A condition printed upon a ticket that in case of controversy with the conductor and his refusal to accept it the passenger agrees to pay the regular fare and apply for reimbursement at the office of the company has been held to be unreasonable and void. O'Rourke v. Street R. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639; Cherry v. R. Co., 191 Mo. 489, 90 S. W. 381, 2 L. R. A. (N. S.) 695, 109 Am. St. Rep. 830.

The judgment and order of the district court are affirmed.

NORCROSS, J., concurs. McCARRAN, J., having become a member of the court after the argument and submission of the case, did not participate in the opinion.

All Citations

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

CHARLES H. ALLEN, ESQ. (*Pro Hac Vice*)
Georgia Bar No. 009883
ALLEN LAW FIRM
400 West Peach Tree Street, Unit 3704
Atlanta, GA 30308
Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **PLAINTIFFS' BENCH BRIEF REGARDING NEVADA PATTERN JURY INSTRUCTION "4NG.45 — DUTY TO DISABLED, INFIRM, OR INTOXICATED PERSON, OR DUTY TO A CHILD"**

COME NOW, JACK CHERNIKOFF and ELAINE CHERNIKOFF who, by this brief, seek to provide support for Plaintiffs' proposed jury instruction, instructing the jury regarding the duty of care owed to disabled individuals.

As this Court is aware, Harvey Chernikoff was a "mildly retarded" man who died while a passenger on Defendant First Transit's paratransit bus — a bus that was provided specifically to assist

mentally and physically disabled individuals. Defendant First Transit — through the Regional Transportation Commission — required Harvey and his parents to submit to an interview to determine whether Harvey qualified for First Transit's paratransit services. After the interview it was determined that Harvey met the disability qualifications and First Transit informed its drivers that Harvey was a "C" — meaning cognitively disabled. As a paratransit provider — specifically providing transportation services to individuals like Harvey who they know are disabled — Defendants owed Harvey a heightened duty of care.

Plaintiffs seek to instruct the jury regarding Defendants' heightened duty through Nevada Pattern Jury Instruction **4NG.45 DUTY TO DISABLE, INFIRM, OR INTOXICATED PERSON OR TO A CHILD**:

> When a carrier is aware that a passenger is mentally disabled so that hazards of travel are increased as to him, it is the duty of the carrier to provide that additional care which the circumstances reasonably require. The failure of the defendant to fulfill this duty is negligence. See American President Lines, Ltd. v. Lundstrom, 323 F.2d 817 (9th Cir. 1963).

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The Ninth Circuit has recognized this heightened duty of care for over 50 years.[1] The jury must be informed that Harvey was entitled to a higher standard of care than a non-disabled individual would otherwise require/receive.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Nevada Pattern Jury Instruction 4NG.45 — DUTY TO DISABLED, INFIRM, OR INTOXICATED PERSON, OR DUTY TO A CHILD — Should be Given.

The Ninth Circuit addressed the heightened duties owed to disabled individuals over 50 years ago in American President Lines, Ltd. v. Lundstrom.[2] In Lundstrom, the Court considered the duty

[1] See American President Lines, Ltd. v. Lundstrom, 323 F.2d 817 (9th Cir. 1963). (A copy of this case is attached for the Court's convenience as Exhibit 1.)
[2] See id.

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you -- like you.

And it was about less than a year later that this cousin called Jack's mentor, his name was Heinz Gross [phonetic], and he told Heinz that he really needed a salesperson. And he said, Can you spare Jack for a little while, I need somebody to go on a trip for me. So Heinz said to Jack, Would you like to go to New York and work with Heinz Ernst [phonetic].

And Jack really thought this was a great opportunity for him to make more money and whatever, and he went to New York and started selling jewelery. And from then on that's what he did. He was a jewelry salesman, diamonds mostly.

Q And while we're in Maryland, were you working?

A I didn't work until the boys went into high school, and then I also sold jewelry, but just in the Los Angeles, in the suburbs of L.A. And I was always home most of the time that the guys got off of the buses. They went to -- well, they were in separate schools most of the time. So, you know, they came home and I was usually home by the time they got there, or they went to a neighbor's right next door if I knew I wasn't going to get home in time.

Q Let's move forward. So we leave Maryland, we come to California, okay, you with me?

A Mm-hmm.

Q Try to tell the Harvey story chronologically; is

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that okay?

A Yep.

Q So tell what -- where did you all move to California, what part of California?

A Well, we had heard from the teachers that the special school that Harvey went to in Maryland, that California was offering the Sullivan method of teaching reading, and they were far advanced in education for the mentally retarded. And so Jack got this opportunity from the company he was working with that they would move us to California. But before we went, I found out later we had cousins there, but when he was offered this position, I really wasn't aware that we knew anybody there.

I had one friend that had moved, oh, ten years before, and I hadn't spoken to her from the time she moved to California. So I was very reluctant. I had a good support system in Maryland. I had my mother and my step-father, his parents. His sister loved to babysit. I had many, many friends in Maryland. So I was very reluctant to go to California where I didn't know anybody and didn't have anybody, you know, to help me.

Anyhow, but we went, and when we got there I called the board of education to find out what kind of schools they had for Harvey with his disability. And I asked him, you know, I said, We have an opportunity to live anywhere here in

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Southern California, can you tell me where my son would get the best education. And they said, Well, Beverly Hills has the most money per student, so she said that that would be probably the place that Harvey would get the best education. And then secondly, she said, Santa Monica would be fairly right behind.

So I got the names of -- we lived in Santa Monica. We knew, you know, we would be living in Santa Monica. It's not that big. So we got the name of the school and I called and I went over and spent the day, or a good part of the day with the teacher in the class that they thought Harvey would go into. It was -- he would have been in junior high in the Maryland school, where they just had one building with all the classes in it.

But Harvey again, he was really small and shorter than I by about 2 inches, 2 1/2 inches. So they thought that he shouldn't go to a regular junior high school. I mean, he was used to one small schoolhouse. So they put him back a grade and he went to a regular elementary school. And they first started trying him in the regular classroom, but then it didn't work.

So he was in a special ed class within the regular junior -- elementary school, and was there for about a year. And they worked with him with this Sullivan method of reading and --

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Q What is that?

A It was a fairly new way that they taught teachers to read. It was a book -- well, a guide, I guess, that the teachers used in order to teach the children how to read.

Q In rough when, the early '70s here? What time --

A Yeah. We moved to California in 1972.

THE COURT: I think the jury needs a little break. All right. I'm sorry. Can you hold that thought, please, for about ten minutes, ma'am. I think the jury needs a chance to stretch. It gets a little stuffy in here in the afternoon.

All right. Ladies and gentlemen of the jury, please come back about 3:15. Again, don't talk about the case, don't research the case, don't form or express an opinion.

(Jurors recessed at 3:03 p.m.)

THE COURT: Counsel, be back in ten minutes.

(Court recessed at 3:04 p.m. until 3:16 p.m.)

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

THE COURT: Ms. Chernikoff, if you'd like to make yourself comfortable. Ma'am, you are still under oath at this time. All right. Please sit down and make yourself comfortable.

Whenever you're ready.

MR. ALLEN: Please the court, Your Honor.

DIRECT EXAMINATION (continued)

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BY MR. ALLEN:

Q Mrs. Chernikoff, we're still trying to concentrate on Harvey's brain, okay, and how it was taught. And when we left for break, you were telling us about being in California and what was the way they were teaching -- remind us the way in which they were teaching to read, was it?

A Yes.

Q What was the name? What was the name --

A It was called the Sullivan method of teaching reading. And I don't think they were using that method in the United States anywhere other than California, because actually in California was probably the highest rating of all schools elementary, junior or high school, and their colleges, so.

Q And was he able to read?

A No. I mean, he never was able to read more than a first grade level. I think I explained that earlier. He couldn't read a newspaper. He couldn't read even an elementary school book other than maybe to a first grade book.

Q Ms. Chernikoff, what did he do at school -- what was he -- what would he do day to day at school in California? I think he would be about the age of 13; is that about right?

A Yes. He was in a special ed class. He didn't mix in with the other so called normal children. And they would do basically the same thing as you would in a regular school. They had an arithmetic -- arithmetic class. I mean, a time

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where they did math, they did reading, they went out on the playground, anything that a normal class would do in a regular -- in the regular school except that they geared everything to people with the learning disabilities like Harvey.

Q And Neil was a couple years behind him. Were they ever in the same school together?

A I believe in high school they may have overlapped. But again, Harvey was in a completely separate building on the same high school campus, and so they didn't go in the same bus and they didn't really intermingle in high school at all.

Q So from the age of 13 to the age of 18, let's take that time frame. He graduated in a special education --

A Yeah.

Q -- ceremony?

A He graduated from Santa Monica High School in the special ed program. They tried to mainstream him into like the woodshop, but they were afraid he'd get cut on the machinery that they used there. He really never was able to fit into any of the so called normal classes in the high school. So again, he was in a special ed building on the campus right next to the high school.

Q Mrs. Chernikoff, did you describe for us up until the time he was 18 roughly, or the best you can give us a definition of, what you saw his mild mental retardation was, I

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think is how they [inaudible]?

A Yes, mildly retarded.

Q Okay. Is there anything else that we need to talk about, about that, before we move on to something else?

A Not really. His attention span got a little bit better. He was still on meds. Actually, they increased his medications as he got older and especially, well, later on, when he went into group homes. But that's about --

Q We'll talk about when he left your house in a minute. But was it this time in which he was diagnosed with a term called schizophrenia?

A Oh, yes. When Harvey was about 15, I think he really started to notice the difference between him and Neil. Neil was allowed to go to Boy Scout camp. Neil was going to Hebrew school then. Harvey did have a bar mitzvah and our cantor at the synagogue and rabbi worked special -- special -- made a bar mitzvah just for him. He didn't have to do all of the prayers or everything, but he had his own bar mitzvah.

But he saw that Neil, I think he realized that Neil was smarter than him and could do more than he could do. And we went to, I think it was just Jack and Harvey and I, we went to a grocery store, and we came out and there was a popsicle on the sidewalk and it had melted. And Harvey stopped right in front of it and he looked down and he said, That came out of me. And Jack and I said, What? He said, That came out of

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And he got like hysterical out of nowhere. And we didn't understand what was going on. We said, No, it's just a melted popsicle, Harvey. What are you, you know -- I mean, he was just really shook up over this. So we got him in the car and he was saying things that were not like him. I mean, I can't even remember what. We got home and we called our doctor. I'm trying to think of his name, but I guess it doesn't make much difference, and he gave us the name of a psychiatrist.

Up to then Harvey hadn't worked with a psychiatrist. And I'm sure we must have taken him in. But he put him on this drug called Stelazine, and Harvey took the pill when he got home or whatever. We got it from the pharmacy. And he couldn't stop moving. He couldn't sit down to eat. He just walked around our house from room to room to room to room. And he would open our front door and run across the street and walk around our neighbor's house.

I mean, we had to call the neighbor because the first time it happened was in the evening. It was already dark and we thought God forbid the neighbor was going to think that somebody was in their back yard and really hurt him. Then he'd come back in. And we had laid a mattress next to our bed so that we could keep an eye on him, you know, everybody sleeps. And the next thing, we'd hear the door

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close and we'd be running after him.

So we called the doctor -- I mean, it was only like that one day, but it seemed like forever. And so then the next day they -- we spoke to the doctor or we went there, I don't remember. But they put him on Mellaril -- Meladryl, and it had a crazy effect on him too. He couldn't sit down. If he went to sit down he'd just fall over like this [indicating]. So I was walking around behind him like this [indicating] making sure that he didn't fall. If he tried to go back, I'd lower him to the floor.

So we just again, the next morning we called the doctor and told him what reaction he was having to this medication, and he went to UCLA to their behavioral unit. And he was there for, I would say three, maybe four weeks, and they finally got him on what they called a therapeutic dose of medications to calm him down. And for the depression. When I said nervous back then it went in -- he went into a depression after that, and so he was there about a month.

And they also worked with him on ignoring, that if somebody teased him. Neil was always there to tell the other kids leave Harvey alone or whatever. But Harvey was teased, but Neil, as I said, was there for him. So they wanted to teach Harvey to ignore these people that bothered him.

Q And was this -- where would people bother him?

A In school sometimes, I think, when they were -- when

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he was going to his classroom or maybe on the bus that he took to the high school.

Q And then who is teaching him?

A Pardon?

Q Who was teaching Harvey at this time?

A He was in the --

Q UCLA?

A Well, he was only in UCLA for a month.

Q Who was teaching him how to deal with people --

A Oh, UC --

Q -- and watching his meds? Who was that?

A Yeah. UCLA, in the behavior unit or ward, so.

Q Okay. Did that help?

A Oh, yeah. He learned to ignore. In fact, we were sitting at the dinner table and he did something and I said, Harvey, and he didn't answer me. And I said, Harvey, did you hear me. I said, Harvey. He says, I'm ignoring you. We did everything in our power not to laugh because it was so funny. That's the first thing we could actually observe that he was ignoring. And that was -- and then he was able to go back to his classes, and he was on medications.

Q Is that a good example of him and his schizophrenia? Is that -- any other good examples of his schizophrenia when he was in high school before we move on?

A Yeah. Sometimes he would, you know, fly off the

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handle and yell at somebody, obscenities.

Q Did you see the medication would help him?

A Oh, yes.

Q What other things would help?

A It wasn't too much. It wasn't really -- he didn't usually go off or have a behavior that much until he went into the boarding care places that he lived.

Q Now, did -- you know, we're going to move forward. But did his -- did his behavior get better as far as his temper as he aged?

A I think it got worse. It wasn't all the time. But if somebody did something he didn't like or -- Harvey came home -- well, can I go?

Q Go ahead. Give me an example.

A From high school, when he graduated from high school, I hope I'm not going too fast, he graduated with the regular class and he had his gown and he had his hat and he was excited. And about a year and a half before he graduated from high school we had spoken with the counselor there and probably Regional Center there.

And Regional Center is a place where they have services for people that are developmentally disabled or retarded, whichever word you want to use. And they had told us about a program in Santa Barbara. So it was an independent living program where he would live in an apartment with a

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couple of other people. They would have some supervision, but it wouldn't be somebody there 24/7.

And so we, you know, started telling Harvey, you know, when you graduate you're going to be able to go to Santa Barbara to this great program and they're going to teach you how to cook and how to be on your own. And so he was looking forward to that. And the program was great.

Q How long was he in the program?

A It only lasted about a year, because Harvey was fine when they were teaching him how to do jobs so that he could get a job to work and when somebody was at the house with him supervising. But when there was no one there, Harvey didn't know what to do with his idle time.

Q Let's move you on.

A Okay.

Q Where did he go next?

A Then he came back and lived with us for a few -- a month or so while we found placement through again, Regional Center. And they found a wonderful place in Glendora, California called Casa Carmen. And there were 107 residents, between 107 and 112 residents there, and he had to share a room with them.

Q How long was he there?

A He was there for 23 years. And he went to a day program. He went to workshops. He used their -- they had

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their own buses to transport them on field trips. They had their own bus to take them to the different job sites. Harvey had several different jobs when he was living there. And he did really very well except that he -- he liked to eat and he was eating -- well, he was diabetic.

I think maybe I didn't tell it. Harvey was a diabetic from the time he was like 20 years old. And he was eating the wrong kinds of food. He would steal them off of somebody else's plate, or they had vending machines and he would buy candy.

Q He liked junk food?

A Oh, yeah. So anyway --

Q And did -- I'm sorry. I didn't mean to interrupt you.

A So I mean, while he was living there, you know, he was happy. He would -- we would pick him up whenever there was a birthday party or something special going on, or if we went on a trip he would go with us. And he came home about every other week and spent the weekends with us. So, you know, we were really very close always.

Q So this happened for about 23 years?

A Yes.

Q So we'd be -- Harvey's in his early 40s; is that about right?

A Yeah. Yeah.

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Q And why did -- where did he go after -- or why and where did he go after, is it Casa --

A Casa Carmen.

Q -- Casa Carmen?

A He went to board and care, a six bed all male house, a board and care house. And we felt that it would be better for him because there was, on the hours that they were awake there was two people staffed there, so they could monitor what he ate and made sure there were no vending machines where he could help himself to candy or food or whatever.

But that was short lived because they over-medicated Harvey, and he came home -- we were living in Vegas then and he came here to visit. And he got off the plane and he looked like a zombie, drooling, saliva was coming out of his mouth, his eyes were going everywhere. And I said to him, Harvey, what's the matter with you, are you okay?

And he said -- he said -- the woman that was taking care of him, the staff, he said, Jackie gave me a blue pill. And I said, What do you mean, a blue pill? And I didn't know what it was. They always sent his meds home with him for while he was with us. So I --

Q What did you -- what was the blue pill?

A Oh, I was just going to say when I got home I called where he lived, because the pills he brought home, there was no blue pill. And it was Dalmane, which is a sleeping drug.

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And --

Q They gave that to him --

A -- they gave it to him in the morning. And so anyway, he was so lethargic and was acting different, we called 911.

And the paramedics came and they started giving him intravenous and checked him over. And his sugar was out of control, and they stayed there probably an hour or so until they felt that he was stable and they took off the intravenous. Maybe it was longer than an hour. And then he was fine, you know.

Q And then --

A Then so we called the place where he lived and we told them we're not sending him back. And so he stayed with us until again, I called Regional Center in California. It was the San Gabriel office. Anyway, they gave us the -- well, I called them and I called the Casa Carmen where Harvey had been for 23 years to ask them for a recommendation of where Harvey could live.

And they, Casa Carmen, the owners of Casa Carmen owned quite a few homes where there were six, five residents, six residents, whatever, and they had an opening in one of their houses. So Harvey went to a board and care there where he lived there for six years. That's where he met the caregiver that he had here, Joseph.

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And he did fairly well there. His diabetes was always under control. He had a few what they call behaviors where he acted out, but he was -- it'd be over in a minute and he would be very apologetic.

Q And if I may, ma'am. We're now at another home?

A Yes.

Q And he was in that home for how long before he came to Vegas?

A Six years. Six years.

Q Six years. Okay. And is that where he met Joseph, who we've heard of?

A Yes. Joseph was the supervisor of that house. He would make sure that they had the proper staff there and whatever, and was there all the time. Not all the time, but he was supervising them. And Harvey and he got a really close bond. Joseph's sister had worked at Casa Carmen, so Harvey had known her for 20-some years.

And Joseph had been there a couple of times and, you know, he didn't have any real interaction with Harvey, but Harvey had met him. So, you know, right away he was Harvey's friend when he went to the five bed, six bed board and care place.

Q Okay. Thank you. And so moving forward, the decision's made to -- for Harvey to come to Las Vegas; is that right?

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A Yes.

Q Okay. And part of that decision was having Joseph come with him? Can you explain to the jury about that?

A Yeah. Again, we went to Regional Center here in Las Vegas and we asked about a placement for Harvey, if they had a board and care here that he could go to, and they said that there was a waiting list about yay long [indicating].

And we knew -- we knew Joseph quite well. Whenever we'd pick Harvey up we'd take him to lunch and, you know, we had a very good relationship, as well as Harvey, with Joseph. And we knew that he was unhappy there, that he was looking to do something else.

So we called Joseph and spoke with him and asked him if he would be interested in coming to Las Vegas. Harvey wanted to be independent and we wanted him to have his own place to live. And Joseph was willing. He said, Yeah, I am so burned out I'm ready to move anywhere.

So Harvey was with us. We went looking for houses and apartments with a real estate person, and he helped to make the decision on the house that we rented for them. Joseph wanted to give notice. He gave, I think, a month's notice. And Harvey had come actually for Harvey -- for Neil's birthday. It was in February.

And Neil's my valentine. He was born on the 14th of February. So in fact, he just had a birthday and we all

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celebrated. We had Ben and Charles over for dinner and we had a birthday cake. And if Harvey had been here, it would have been planned last birthday.

But anyway, so Harvey was living with us until Joseph was able to come. And we went and bought all the furniture for his house. He picked out a bedroom set. And we went to the Salvation Army place on Stephanie and he found a dining room -- a kitchen set. And we got new mattresses, and he was just having a ball getting his house all fixed up.

And during that period of time we went, Harvey, Jack and I, we went to Florida to see our granddaughter. Jack, I think, explained to you that our godson had gotten married and we were very, very close with them, and then they had this little girl. And Harvey had seen Rachael --

Q Elaine --

A -- oh, several times. Pardon?

Q Can you stay with me for a second?

A Mm-hmm.

Q We'll talk about that in a minute; is that okay?

A So --

Q Can -- let's stay in Las Vegas, okay, and Harvey is in Las Vegas.

A Oh, he was in Las Vegas and we just went to visit in Florida.

Q Yes.

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A Then we came --

Q You came back.

A -- back, and it was in the first -- the house that we rented was available and all the furniture and everything had come in, and Joseph came about the 1st of April and --

Q And this was what year?

A This was 2010.

Q 2010. Okay. And when Joseph's here, Harvey's here, they're in their house.

A Yes.

Q Okay. You with me? That's where I want to start.

A Mm-hmm.

Q Because I want the jury to understand now, you know, what was the need for First Transit. Okay. We're going to concentrate on that right now.

A Okay.

Q Are you with me?

A Yes.

Q Okay. So tell the jury about how Harvey was transported around when he was in Vegas, Las Vegas before First Transit.

A Well, when Harvey -- also when Harvey first came to Vegas we went to Desert Regional Center and they interviewed him. They looked at his records that were sent from California, and they suggested that Harvey go and see a couple

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of workshops, and one was Transition Services.

And they told me about First Transit, that they specialized in taking people with disabilities to wherever they needed to go, and they gave me a telephone number to call them to -- when I, you know, Harvey was situated in a workshop, et cetera.

And then we went to Transition Services, which is on Spring Mountain, and they talked with us, with Jack and Harvey and I, and told them about the program. And they did say that Harvey could -- Harvey could start there on a three day a week basis.

Q This Transition Service does what?

A Transition Services is a workshop for the developmentally disabled, and they -- they make paper which they later cut into size papers to make greeting cards, and then put seeds into the, like flower seeds into the mix when they were making the -- I don't really understand this because I never actually saw them do it.

But they put rags and stuff in to make the paper, and they would put the flower seeds in it. And then after people bought them and wrote them, the person who received these cards could tear it up in pieces and actually plant the paper. And that was the main project that they did at this particular facility. And they also made other kinds of gift items that they sold in one of their other facilities that had

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like a gift store in it.

Q Okay. Thank you. So back to the transportation.

A Okay. So when we were talking to Cathy Stanley [phonetic], she's the supervisor of this facility where Harvey worked, she also told us that Transition -- First Transit, the bus company, transported almost everyone that worked at that workshop and that they were a very safe company. They only dealt with people with disabilities.

And when we walked out of the meeting there, there must have been four, maybe five of their buses there waiting for the other clients to leave their job. And so we --

Q What did you have to do to get Harvey to ride that bus?

A Well, as I told you, the man from Regional Center had given me First Transit's telephone number. And once we knew that he had a job, we called and set up an appointment for him to be interviewed to see if he was eligible for the buses. And we had an appointment and we went, just Harvey, Jack and I, and we met with a lady who asked us a million questions about Harvey. And he -- they took him privately and asked him questions by himself when we weren't present.

And after the interview they told us that Harvey was eligible to use their buses. And that's how we found out about them and got him -- I was taking -- it took a while, maybe a week or so before we got the interview and were told,

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so I was taking Harvey back and forth to his job. And then --

Q He wasn't with Joseph at this time?

A No. He was still living with us, because he started -- he came to Vegas like February 10, for Neil's birthday, and then he stayed on.

And I believe he started the workshop the very end of February or like the first week in -- the end of February, and then he got the bus, I believe, started picking him up at my house the first part of March, and then they would take him to the workshop. The workshop would make sure that he got on the right bus to go home, and then Harvey would come home.

Q How did Harvey like riding the bus?

A Oh, Harvey -- Harvey loved the bus. He had been riding buses, you know, from the time he started in Casa Carmen for his jobs, for outings and whatever. And he loved going on the bus. He had his seat and he was really mad if somebody else would have gotten on the bus before he did and sat right behind the driver. That was Harvey's seat, and most of the time he had that seat.

Q Was that everywhere, or just here or -- that he liked to drive in the front seat?

A You know what, I never asked him and I was never -- even when we lived in California, I never went on the bus with him. I don't know if he -- I would imagine he did.

Q Back to the -- so we're a little bit further in

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time. Joseph comes around April.

A Right.

Q And so you got the place for him. So I want to take the jury -- if we can take the jury to like a typical day in the life of Harvey and Joseph, you know, from this April time frame, you know, up until the, you know, just for the next few months. What -- tell us what -- concentrate on that.

A Okay.

Q So what would Harvey do every day?

A Harvey would get up in the morning. He could take care of himself. He'd brush his teeth. If he showered the night before he didn't shower, but if he -- you know, he got showered, ate his breakfast. So Joseph had called -- you have to call three days ahead of time to make your reservation for the bus. So Joseph would have called, and the bus came usually at 7:00 o'clock or around 7:00 o'clock.

So Harvey was up, ready and waiting for the bus driver. The bus driver would pull up in front of his house, and Harvey would have the door open so he'd hear them. I was told that the bus driver would actually come to the front door, but Harvey would run out with his lunch box and get on the bus. And then the bus driver would take him to Transition Services, and they had people outside to receive the people that got off the bus.

And then Harvey would go in to the workshop, do

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whatever he did there in his workshop. And then I believe it was at 2:00 o'clock the buses would be out in front of Transition Services, and he would get back on the bus and they would take him back to home. And I just trusted that, you know, he would get there safely and he would get taken home safely. I never really was concerned about it.

Joseph did not drive, and so he would make special arrangements. Harvey went to dances at the Opportunity Village. Every month they had a big dance, and Joseph and he would go to the dances together. Harvey joined a bowling league and they would do that on Saturday, and Joseph would make the arrangements for the bus.

And if I wasn't home for some reason or -- we still continued to go back to Ocean City in the summertime, Jack and I. And so Joseph had to make Harvey's doctor's appointments and had to get to the grocery store. So he would use First Transit to do those type of things, and they used the service a lot together. But mostly Harvey went to work. He always went to work by himself and came home by himself.

Q Show the jury one quick picture of the Transition Services. This is Plaintiff's Exhibit 7-6, Photo 6. It's right there on your screen. Here you go. Is that picture --

A I have it.

Q You have it?

A Actually, this wasn't Transition Services.

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Q What is this?

A This was taken back in 1988, when Harvey was at Casa Carmen and he was selected to be a walk-on in a movie called Winnie. It was a TV movie about people with learning disabilities. And one of the scenes that they shot was this one where Harvey's at a table in a workshop.

And man, he couldn't wait. Every day he would say, Is that movie going to be on tonight, am I going to be able to see that movie tonight. And he just really was ecstatic that he was chosen to be in this movie.

Q Anything else you would like to tell the jury about Harvey's life up until the -- his last day of life?

A Yes. Probably the first dance that Joseph and Harvey went to at Opportunity Village he met a girl. Her name was Rosemary [phonetic]. And Rosemary was small like Harvey. She was even shorter than Harvey, maybe 4 foot 5, maybe. And she was just the perfect girlfriend for him because she was shorter. Every -- all the other girls were too tall for Harvey.

And so they met at a couple of dances and they danced together. And they ended up being in the same bowling league, so they would bowl together. And Joseph would make sure that they had lunch. Either he would bring lunch or they would buy it. There was a stand in the bowling alley. They bowled in either Gold Coast or -- oh, gosh, one of the other

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Coast hotels. And so he would make sure that they had lunch, and he'd let them sit and lunch by themselves.

And he would invite -- he would invite Rosemary -- he'd let Harvey invite Rosemary for dinner. And she would come probably once or twice, maybe three times a month, and come over to the house. And Joseph set up a karaoke machine up to his computer, and they would sing and they would dance in the house. And he taught Harvey and Rosemary how to make cookies, and they would spend a fair amount of time together.

Rosemary played softball, and Harvey and Joseph would take the bus and go to her games and cheer her on. And Harvey's medications, psychotic medications were cut probably less than half of what he was taking when he was in the five bed facility -- a six bed facility.

Q What do you attribute that to?

A Pardon?

Q Why?

A Well, he really was living a normal life. He didn't have the stress from the other clients. He was happy. He and Joseph didn't have any problems. He was living in his own house. His -- even his personality changed when he went off of these drugs. He got so funny, and he would be able to spend more time just listening.

He used to always, you know, he wouldn't stay still for long periods of time. And now he just was more normal, if

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you can call it normal, than he'd ever been. His diabetes was under control. The doctors here really made sure that he was checked every three months, would make sure his sugar levels were good.

He just got better, better care at home in Las Vegas once he came here. And he was happy. He was the happiest he'd ever been in his life. He was proud of his house. He was proud of his bedroom.

Q I'm going to ask you a question that's a little different than the question I asked your husband about. Remember I asked him when he found out Harvey passed, and he told us about that, where you were. When did you find out that Harvey had choked to death on a sandwich?

A We had already gone back home. Of course, as soon as we got the news -- as soon as we got the news, my friends tried and made reservations for us to get on the first plane out of BWI, and it was the worst trip I've ever taken in my life. We were home. And we got home, it was early Saturday morning by the time we got home.

Neil we -- we had called Neil and told him what happened, and he came with a family friend from where he lived in California to Vegas. So they were there before we got home, and Neil was sitting out there on the curb waiting. And Saturday is our sabbath, so we couldn't make any arrangements. So we had to wait until Sunday.

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We made all of the funeral arrangements, and Harvey was buried on Monday morning. And I believe it was that Monday that we got the death certificate in the mail, and it said that Harvey died from choking. And that was the first time that I knew how he died. And I couldn't believe it.

I just -- I trusted that he'd be safe on that bus. I never dreamt that anything could happen like that. I was stunned. I think if the bus company had done their job and trained their driver, Harvey wouldn't be dead. He'd be alive and he would have never choked to death.

MR. ALLEN: Pass the witness, Your Honor.

THE COURT: Cross.

MS. SANDERS: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. SANDERS:

Q Ms. Chernikoff, you have never viewed the videotape from the bus.

A No, and I don't want to.

Q So you don't have any information yourself about the events that occurred on the bus on July 29, 2011; is that correct?

A No. I got a death certificate that said what happened and I know that the coroner didn't make a mistake.

Q Ma'am, my question was, you'd never learned about the actual events that occurred on the bus, correct?

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A I've heard different parts of how he died on the bus, yes.

Q Now, you don't have any medical training yourself, do you?

A No.

Q And you've never had any first aid training?

A I had some basic first aid training 50 years ago before they did the Heimlich maneuver. I don't even think they did CPR back then. We learned about tourniquets and how to stop blood and things of that nature.

Q You have not yourself had any training on the Heimlich maneuver, correct?

A No.

Q And you're not trained in CPR?

A No.

Q You had -- you would agree with me that choking is much more likely to occur in a home or a restaurant, something like that as opposed to a bus, wouldn't you?

A Anywhere you're eating.

Q Anywhere you're eating there's a possibility of choking to occur, correct?

A Yes.

Q Now, you fed Harvey many meals over the course of his lifetime yourself; isn't that true?

A Oh, yeah. Sure.

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Q And of course you recognize that choking could have occurred in your own kitchen, correct?

A Yes.

Q Now, we talked a little bit about some of these things, but isn't it true that Harvey had a lot of medical conditions?

A I wouldn't say a lot. He had diabetes. He was schizophrenic, but, you know, he never harmed anybody really.

Q I'm talking about medical conditions. Schizophrenia really isn't so much a medical condition. He had high blood pressure, true?

A I said that in my deposition, but it wasn't high blood pressure. It was high cholesterol. I made a mistake.

Q Okay. He did have high -- high blood pressure, didn't he?

A No, not to my knowledge.

Q Okay. Have you reviewed any of the records from Dr. Reddy [phonetic], his personal care physician?

A Have I reviewed them? No. I went with him to his appointments.

Q Okay. Are you aware that there are many references to Harvey being diagnosed with and having the condition of hypertension?

A No, I'm not.

Q He also had skin cancer, didn't he?

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A Oh, yes.
Q And actually had surgery for that, correct?
A Yes. Many times. He had to have his whole ear reconstructed.
Q And hadn't he been diagnosed with soft bones or osteo -- I think the term is osteoporosis?
A Osteoporosis, yes. He fell and broke his femur bone at the hip, and when the doctor performed the surgery he said his bones were very soft and they started him on, I think it's called Fosamax, which is a medication that people with osteoporosis take to strengthen their bones, so yes.
Q And he had some vision issues, correct? In fact, he had some surgeries on his eyes, correct?
A Yes. He had a very rare skin cancer underneath his eyelid, which they couldn't -- there was no doctors here in Las Vegas that could treat that, and so we took him back and forth to UCLA, to the Jules Stein Eye Institute. And they were able to remove the cancer under his eyelid, and he had a cataract that they also removed at a different surgery. But it was in a matter of probably a month to six weeks that we were going back and forth, back and forth for.
Q He was on medication for the diabetes; isn't that true?
A Yes.
Q And he'd been on that medication for many years

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before his death?

A Oh, yeah. From his early 20s.

Q And you did say that he had high cholesterol, correct?

A Yes.

Q I think you told us in your deposition that he took a lot of medications?

A He did, yeah.

Q Now, when Harvey went to Transition Services, he was there for the better part of the day; isn't that right?

A Yeah. He would be picked up at 7:00 o'clock in the morning. He was supposed to be there at 8:00, and was there from 8:00 to 2:00.

Q And he left from the house that he shared with Joseph; is that correct?

A Yes. At first from my house until Joseph came to live in Las Vegas with him, and then from his house, yes.

Q When was it that Joseph came to Las Vegas to live with Harvey?

A The first part of April 2010.

Q Okay. And so for just what was it, a period of maybe a couple of weeks or a month or so that the bus would pick him up at your house before he went --

A Yeah, approximately.

Q Now, while he was still living with you, you didn't

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ever talk to any of the bus drivers, did you?
A May have said hello or waved to them. I don't remember having any big conversations with them.
Q Were you aware that Harvey took a lunch with him --
A Oh, yes.
Q -- after he moved into his own house?
A You know, as I said, he was diabetic. He took his lunch and he took his snack every day.
Q And that was something that was made for him -- after he moved into the house with Joseph, that is something that was made --
A Yeah. I made his lunch too when he --
Q Okay. That's what I'm trying to get at. After he moved into the house with Joseph, did you still make his lunches --
A No.
Q -- or did Joseph?
A Joseph and Harvey made them.
Q Okay. So from April of 2010 through the time of his death, it was -- he was living with Joseph in the house, yes?
A Correct.
Q And it was Joseph and Harvey maybe helping him who are making those lunches, correct?
A Yes.
Q Was there a time when he went to Transition Services

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every day?

A Yeah. In the beginning he went three days a week and after a couple of weeks he started going five days a week.

Q Now, you did on occasion take Harvey to restaurants, didn't you?

A A lot, yes.

Q And it's anticipated in a restaurant that you will eat, correct?

A Of course.

Q Did you ever check to see whether or not the food servers were trained in first aid?

A No.

Q Did you ever take Harvey to the movies?

A Yes.

Q Did you ever buy candy, popcorn, anything like that?

A We bought popcorn. He never had candy -- I never bought him candy to eat in the movies.

Q Did you ever check to see if any of the movie attendants were trained in first aid?

A No, I didn't.

Q There's a possibility, you recognize, that a person could choke in a movie theater, correct, if they're eating?

A It could happen.

Q It can happen anywhere you put something in your mouth, can't it, ma'am?

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A It could. The only difference is that when Harvey was on the bus, they, First Transit specialized in taking handicapped people, people with mental disabilities and other disabilities, and it never dawned on me that they wouldn't be trained. They should have been trained. Every bus driver needs to be trained.

Q Can I stop you and ask you to just answer my questions?

A Oh, I'm sorry.

Q You didn't check to see whether or not First Transit drivers were trained in first aid, did you?

A No. Harvey had been riding on special buses for 30 years and there was never an incident.

Q Okay. Now, one of the things that you didn't tell the jury is that Harvey had a driver's license in California --

A Did, oh, yeah.

Q -- is that true?

And you helped him study for it?

A I most certainly did.

Q And you drive a car?

A Yes.

Q And he was able to take the test and to pass the test for the driver's license --

A We -- yeah. I --

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Q -- correct?

A -- started when he was probably five years old saying that's a stop sign and this is a yield sign and this is a railroad crossing sign. But when he was 12, he always wanted to drive. He knew every car that was on the road. I used to buy him magazines, motor whatever of cars, and we would tell him what new models they were and whatever.

He knew cars. He wanted a driver's license probably more than anything else he ever wanted. And we started -- I got him a manual and we would go over it almost every day, some parts of the manual for him to learn to drive.

Q And I think that I read somewhere in the records that he actually got his learner's permit when he was about 15. Do you remember that?

A He got a learner's permit. He went to the -- at Samohi he was in driver's ed class.

Q He took driving classes?

A Yes, he did. And we hired Easy Method Driving School. They took him out and drove with him. I drove with him, but I don't think Jack ever drove with him. I used to take him to a parking lot to drive, and he also -- back then California didn't have traffic like it has now, and we would drive in the neighborhood. Yeah, he -- and he passed the test. They gave it to him orally.

And after they gave him the first test, the guy, I

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think, was really surprised that Harvey did so well, and he said, he asked Harvey if he minded -- he asked him some questions from another test, and Harvey answered every single one. But it was repetition, repetition, repetition. Like I said, he was 12, maybe 13, but I think 12 when we started going through that manual over and over and over again.

Q And as a result of that he was able to take the driver's exam and to pass it, correct?

A Oh, yes.

Q And he did get his California driver's license?

A That's correct.

Q And he did get it maintained or renewed during the time that he was in California; isn't that correct?

A Pretty much up until he was living at M and Z [phonetic], that was the last board and care that he lived at. Harvey never drove by himself. I mean --

Q But he did drive with you, correct?

A He drove with me. His brother, Neil, would take him out and let him drive with him. But even though he had a license, and I think that's what really made Harvey happy was to have the license. I don't think he cared that much about actually driving the vehicle. But he had that license and there wasn't another person in the 100 and some room facility or the workshops -- he would show his driver's license and be very, very proud of it.

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Q And in order to get that driver's license, he had to -- even though he took it orally, he had to prove to the examiner that he had the knowledge and proficiency to answer the questions?

A Right.

Q And I think you've told us that he understood traffic signs, that kind of thing, correct?

A Yes, he did. But what I was going to say to you is that when they went to renew it when he was in the six bed facility, the staff that took him there said in front of the person who was going to renew it, the DMV person, he said to Harvey, Well, you don't drive without your brother. And the woman said, You mean you don't drive by -- you don't drive your car by yourself? And that's when his license was -- he got to keep the one that he had, but they didn't renew it. So it was suspended.

Q And as I think you've told us in your deposition, that he was able to understand signs and pictures and that kind of thing, correct?

A He was -- he understood the driving signs because as I said, I went over -- repeatedly over and over for four, three or four years. So yes, all of the driving signs that are in the manual, he knew what they were.

Q I think you told us that in your view Harvey didn't require any kind of special monitoring or care while he was

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riding the paratransit bus, correct?

A That's correct.

Q He did have a caretaker in Joseph; isn't that correct?

A Yes, he did.

Q And Joseph did ride with him. You said that Joseph and he used the paratransit quite a bit, but that Harvey would also ride by himself?

A Harvey rode to and from the workshop by himself because the bus driver knew where he lived. He picked him up right in front of his door, the driveway, and he dropped him off at a place, and they always had somebody outside to make sure that he got back on the right bus, that he got off of the bus.

It wasn't like he went to a grocery store or somebody else's house where he would, if he was dropped off at the wrong place, he wouldn't know where to go or how to get back on a bus, he would get on a wrong bus. Even if it was a paratransit, you know, any bus, he wouldn't know to go on the right bus, so we always had Joseph. If I didn't drive them there Joseph would go on the bus with Harvey.

Q Okay. But as far as going back and forth to Transition Services, you felt that he was okay to take care of himself to go there?

A Oh, for sure, yes. And I trusted them.

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Q Okay. Now, you --

A I mean, I trusted that bus company to keep him safe, yes.

Q You know that Harvey had been approved to have a personal care attendant ride with him on the bus; isn't that right?

A Yes, when we were interviewed she told us that. But she didn't say that he had to have one, only if we wanted him to be accompanied on the bus.

Q You knew it was okay for him to ride with a personal care attendant, but he wasn't required to ride with a personal care attendant, correct?

A That's right.

Q And Joseph, I think you told us before, had medical training, correct?

A Yes, he did. When he was the supervisor of the board and care where he met Harvey, he had to have first aid, he had to have a certificate for medications. I don't know. He once showed them to me. He had like four or five certifications for the -- yes.

Q Now, you never rode on the paratransit bus with Harvey, did you?

A No.

Q And as far as you know, your husband never rode on the paratransit bus with him?

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A For sure not.
Q And you told us before, other than saying hi in the morning, you never talked to the drivers of the paratransit buses?
A No. I mean --
Q And Joseph did ride with Harvey, you said, to doctor's appointments, grocery store, dances, those kinds of things, correct?
A Yes. Yes.
Q And Joseph knew Harvey's conditions and his mental kind of capabilities, correct?
A Yes.
Q And now, Joseph is a person of normal intelligence; isn't that correct?
A Probably high intelligence, yes.
Q He could read English?
A He spoke English well and he read, yes.
Q And he could understand signs?
A Joseph, of course.
Q And you've told us before that you know that it was okay for Joseph to ride on the paratransit with him?
A Yes.
Q So if Joseph saw something or were told something about rules on the bus, you would expect Joseph to pass that information on to Harvey, wouldn't you?

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A Not really. I mean, unless there was a situation that would have made him have to tell Joseph. But I -- I trusted First Transit to be the one who would tell the clients on the bus the rules and that they would enforce the rules on the bus. I didn't expect Joseph to tell Harvey the rules. I mean, I don't even know if he'd know what the rules were on your buses.

Q Okay. If there was a sign on the bus, you would expect him to understand it, wouldn't you?

A Yeah, he would.

Q Now, you've talked about First Transit, but could you maybe have misspoke and actually meant RTC? I think the interview that you went to was actually at RTC. Do you recall that?

A Yeah. But doesn't -- isn't RTC owned by First Transit?

Q Okay. That's what I want to get at, ma'am. You understand that there is a different company, the Regional Transportation Company is a different company from First Transit; are you aware of that?

A No. I mean, I -- no. I know you said something here in your opening, but no, I didn't know that.

Q And that's what I'm trying to clear up. When you say that you got a telephone number to call, make an appointment, the appointment that you actually made was with

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the RTC. Does that sound a little more like it?

A I just knew it was a bus company. I didn't pay -- yeah. And I saw these buses at Transition Services, the buses that Harvey took, I guess, and they do say RTC on them.

Q Okay. And the RTC, I think, is the place that you actually went to the interview that you were talking about earlier?

A Yes.

Q Does that sound right?

A Yeah, that sounds right.

Q Okay. So the telephone number that you got to check about the paratransit service was actually a telephone number for somebody at the RTC then?

A Yes.

Q And that's where you went for the interview with Harvey and your husband?

A Correct.

Q And at the end of that interview, the interviewer told you that you would be -- or that Harvey would be approved for --

A That he was approved, yes.

Q -- that Harvey was approved for riding the paratransit bus, correct? Yes?

A Yes.

Q You have to answer out loud.

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A Oh, that's right. Yes.

Q And that he was approved to ride with a personal care attendant, correct?

A Only if he -- only when I wanted him to, that he didn't have to ride --

Q Yes, exactly.

A He didn't have to have a caregiver with him.

Q Exactly.

A Okay.

Q And after you were told that, you got information -- I think you told us in the deposition you got information about the paratransit service, correct?

A Can you repeat that? I don't understand what you're asking me.

Q After the interview process and you were told that Harvey was approved to ride the paratransit, in the mail you got information about the paratransit service, correct?

A I don't remember if it was in the mail, but yes, I did get something and -- yes, I did get something.

Q And in your deposition you were shown something called an RTC Rider's Guide, and you told us that you had recalled getting that document in the mail, correct?

A Yes.

Q Let me show you a copy of that.

MS. SANDERS: Could we have Exhibit A6? It's in the

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[inaudible].

(Ms. Sanders confers with the clerk.)

MS. SANDERS: I didn't realize this. You have exhibit binders behind you. Your Honor, may I go behind and help her?

THE COURT: Yeah. That'd probably be easier actually.

(Ms. Sanders assists the witness.)

BY MS. SANDERS:

Q The exhibit that's been marked for identification purposes is Exhibit A6. This is the document that you told us in your deposition you had received from the RTC, correct?

A Yes, I did see that.

MS. SANDERS: Your Honor, may I move for admission of -- in the evidence of Exhibit A6, please?

THE COURT: Any objections?

MR. CLOWARD: None.

THE COURT: Admitted.

(Defendant's Exhibit A6 admitted.)

BY MS. SANDERS:

Q Now, this is a document that's called the Paratransit Guide. Do you see that?

A Yes, I do.

Q Okay. And you received a copy of this document in the mail sometime after the --

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A I don't --

Q -- the interview process?

A I don't remember how I got it, but yes, I did have a copy.

Q And I think you've told us before that you remember getting the document, but that you don't think that you read through it thoroughly. Do you recall that?

A Yes. Harvey had been --

Q So -- I'm sorry?

A I was going to say Harvey's been riding on special buses for 30 years, and I think the main thing that I was interested in was the information to call to set up the appointments for the rides.

MS. SANDERS: Brian, could you pull up and put on the screen page 8 of the Exhibit 6, please.

BY MS. SANDERS:

Q Can you turn to page 8, please. Or you can see it on --

A I can see it on there.

Q Okay. And you see there that on page 8, there's a section called Rider Rules?

A Yes.

Q And the information there, it says that RTC's goal is to provide a safe comfortable commute for individuals traveling on RTC vehicles. "To assure a pleasant commute for

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all, please observe the following rules:

"Seat belts are required by passengers on vehicles.

"No eating is allowed on the vehicle, and drinks must be in a spill proof covered container.

"Smoking is prohibited on the vehicle.

"Proper attire, including shirts and shoes or appropriate foot coverings is required on the vehicle.

"Personal musical devices are allowed with headphones as long as the sound is not audible to others.

"Please do not distract the driver while the vehicle is in motion.

"Medications and other personal belongings are the responsibility of the rider to plan for when riding paratransit."

Did I read that correctly?

A You did.

Q Now, you were not aware of the rider rules because you didn't read the entirety of the paratransit --

A But I didn't -- oh, go ahead.

Q You didn't read the entirety of the paratransit rider guide, did you?

A That's correct. I didn't read it, but I sure trusted the bus company to take Harvey to and from wherever he went in a safely -- I expected the drivers and thought that the drivers were trained. This was a special bus. This

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wasn't a bus that you just got on and off of. This was a special bus that just took handicapped people.

Q You understand now, ma'am, that these -- this paratransit guide is something that is sent to the person who's going to be using the bus or that person's caretakers, and are expectations for that person to know about for the paratransit ride, correct?

A Correct. But if I had read these to Harvey, he would have heard them, but he needed repetition. He wouldn't have remembered what I said. And it was the bus company -- as far as I'm concerned, it was the bus company and the driver's responsibility to continually every day tell them don't eat on the bus, fasten your seat belts. He should say, are your belts fastened, we're going to take off now. I mean, these weren't people with our intelligence that knew these kind of things.

Q Do you know the level of intelligence of all the people that were riding the paratransit bus?

A No. They differed. Every person was different, but every person was handicapped in one way or another.

Q Okay. But they weren't all mentally handicapped, were they?

A No. I said that -- I didn't say that.

Q Now, you didn't ever read the rules yourself, so you didn't read them to Harvey, did you?

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A No, I did not.
Q And you didn't give them to your husband to read to Harvey?
A No.
Q And you didn't give them to Joseph to read to Harvey?
A No.
Q Now, you see the second bullet point up there says, No eating is allowed on vehicle, and drinks must be in spill proof covered containers, correct?
A [No audible response.]
Q Again, that's part of what you didn't yourself read or explain to Harvey, correct?
A Correct. But these rules --
Q Now, you knew --
A -- should have been reinforced all the time.
Q Ma'am, please. You'll have an opportunity, but I really would like you to just answer my questions.
A Oh, okay.
Q Now, you knew that Harvey took a lunch with him every day to Transition Services?
A Yes.
Q And you never told him not to eat on the bus, did you?
A No.

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Q And you never asked anyone at either RTC or First Transit if there were any rules for riding on the bus, did you?

A No, but I'm sure they would have told me.

Q And they did tell you in this rider guide, didn't they?

A It's written in the guide.

Q Okay. You never met my client, Jay Farrales, did you?

A No.

Q And you never actually met any of the other paratransit drivers who transported Harvey?

A No. Not met them. Like I said before, I waved to them or said hello.

Q You don't know whether or not it was the same or different drivers that would drive him on a daily basis, did you?

A It was different drivers. Sometimes the same driver, but it varied.

Q And you never asked anybody about the type of training that the drivers had?

A No. I expected them to be trained not only how to ride the bus and use the mirrors, but to enforce the rules of the bus.

Q You had certain expectations, but you didn't try to

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find out if your expectations were correct, correct?

A Correct.

Q Is that true?

A Correct.

Q Yes. And you've already told us you didn't ever ask anybody if the drivers had first aid training, did you?

A No, I didn't.

Q And if you'll turn to page 11 of that rider's guide.

THE COURT: Is it too small?

THE WITNESS: If you can make it a little larger it would help.

MR. CLOWARD: Can you blow it up, Brian?

THE WITNESS: Oh, that's better. Thank you.

MS. SANDERS: Do you see that there's a section there -- let me make sure I got the right page. A section there about what drivers -- can you all see it?

THE COURT: No.

MS. SANDERS: Something's wrong. Is there a way to make it bigger?

THE COURT: Can you see it now?

THE WITNESS: Yes, thank you.

BY MS. SANDERS:

Q There's a section there on what drivers are allowed to do and not allowed to do. Do you see that?

A Mm-hmm.

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MR. ALVERSON: Your Honor, can I move that screen a little closer to the jury box? I did bring an extension cord.

THE COURT: That's fine. It's hard to see.

MS. SANDERS: I'm probably about done with it, so it may not be necessary. Are you able to see it now?

THE COURT: Can you guys see it?

MS. SANDERS: Let's try to muddle through --

MR. ALVERSON: Okay. All right.

MS. SANDERS: -- a little more and see if we're okay.

BY MS. SANDERS:

Q This is a list of the things that you were given in the RTC rider's guide, information about riding the paratransit and different things that were or were not going to happen, correct?

A Correct.

Q And according to that, do you see anything indicated on there as far as what the drivers were or weren't going to do that indicates the drivers were going to be trained in first aid or would provide any type of medical care to the paratransit passengers?

A No.

Q There's nothing in there about providing any kind of emergency medical care, is there?

A No, there isn't.

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Q Now, ma'am, you were telling us before about that Harvey liked to eat.

You can take that one down.

That Harvey liked to eat, and that sometimes when he was at Casa Carmen he would sneak food off of other people's plates and get into the vending machines, that kind of thing.

A Yes. He did like to eat.

Q Now, you certainly knew about Harvey's eating habits, didn't you?

A Yeah.

Q And I think you've told us that even at home you had to kind of watch him because he'd go for candy or things that he knew he shouldn't have, correct?

A Yes.

Q You never brought that to the attention of anybody at the RTC, did you?

A What, that he liked to eat?

Q Yes.

A I probably said something to Cathy, or maybe not. I'm -- he always had his lunchbox. We bought him a red lunchbox because that was his favorite color, and it zipped across the top. And there was a section in the top that had little compartments, and we would put his snack in there so he'd know that the snack was separate from his lunch, so yes.

Q Cathy is at Transition Services, correct?

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A Correct.
Q Not at the RTC?
A Correct.
Q So you didn't yourself tell any of his drivers, hey, you got to watch him, he likes to eat and he might try to sneak food; you didn't say anything like that to them, did you?
A No, I did not. As I said earlier, I just thought that Harvey would -- I trusted that Harvey would be safe on the bus, that he would follow the rules, that the driver would tell him the rules. Harvey wouldn't have known the rules.
Q If you had read the rider's guide and read it to Harvey and told him the rules, he would have known the rules, correct?
A For a minute.
Q Ma'am, you told us before that Harvey ate normally, that he didn't eat too quickly, that you didn't know of any kind of problem with choking, he didn't have any of those kinds of issues. Do you recall that?
A Not -- yes. Oh, wait a minute. No, he didn't. Sometimes, you know, if he was really hungry he might eat more quickly than he normally would or, you know, yeah.
Q Isn't it true that you told us that he was evaluated by the Pomona -- the San Gabriel and that kind of thing.
A The Pomona.

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Q Let me just ask this. During the time that Harvey was in California, as I understand it, you and your husband were appointed as his conservators, correct?

A That's correct.

Q And so you were responsible for making medical decisions for him, financial decisions, that kind of thing, correct?

A Yeah.

Q So if there was something that he needed medically or was recommended medically, that's information that would be given to you; isn't that right?

A Yes, right.

Q Isn't it true that about five or six years before Harvey's death, when he was in California, there was a concern raised by the caregivers that he had a tendency to eat too fast and stuff food into his mouth, and there was a concern of choking? Do you recall that?

A No, I don't.

MS. SANDERS: May I approach, Your Honor?

THE COURT: You may.

MS. SANDERS: Let's see if there's a document here that would refresh you on that.

THE WITNESS: Okay.

MS. SANDERS: And Counsel, I'm referring to Exhibit E, page 69.

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BY MS. SANDERS:

Q These are records from the San Gabriel center. And do you see there that there's an indication in a nursing assessment that says Harvey unsupervised will eat foods that are contraindicated for his disease, and then a little further down, Staff has concern with Mr. Chernikoff's eating style. Staff stated that --

A Will you wait a minute? I'm not seeing what you're --

Q Okay. I'm sorry. Let me just point it out to you.

A Yeah. Please do.

Q Right --

A Oh, okay.

Q "Staff has concern that -- with Mr. Chernikoff's eating style. Staff stated that he eats too fast and will stuff his mouth with food. Coughing during mealtime is not uncommon. A choking evaluation and possible care plan is recommended." Do you see that?

A Yes.

Q Were you told about that at the time?

A No.

Q Do you know whether or not Harvey ever had the choking evaluation that was recommended?

A No.

Q You told us a little earlier that Harvey was in

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pretty good health during the time that he was in Las Vegas, that he was doing better.

A Much better, yes.

Q Are you -- and his primary care physician at the time was Dr. Reddy; isn't that right?

A Yes.

Q Were you aware that just a week and a half or so before he died Harvey had gone to Dr. Reddy because he was having complaints of balance problems?

A Yes.

Q Do you know whether or not he ever got that balance evaluation done that Dr. Reddy recommended?

A No. They did make an appointment, but he never got there because he died on the bus. He choked.

Q Now, other than short periods of time, Harvey didn't live with you as an adult from the time that he was 18; isn't that right?

A Yeah, except for maybe a month here or a couple months in between the different facilities he lived in.

Q As I understand it, you and your husband were on the East Coast when you learned of Harvey's death, correct?

A Yes.

Q And you had plans and spent summers in Maryland, I think; isn't that true?

A Yes, from the time we moved to Las Vegas until

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Harvey passed away.

Q And after the funeral you and Jack went back to -- to the East Coast, correct, for the rest of the summer?

A Several weeks later. We had left all of our clothes. We had to close up the apartment we were renting. So yes, we had to go back.

Q We talked about this a little bit earlier, but there is a history of heart disease in your family; isn't that true?

A Yes. I have no problems and my son Neil doesn't have a problem. Jack has had. When he was in his 70s, he had a triple bypass.

Q And your mother actually died of a heart attack, didn't she?

A Yes, she did.

Q Harvey didn't provide any financial support to you, did he?

A I'm sorry?

Q Harvey didn't provide any financial support to you, did he?

A No. I mean, he earned anywhere from 50 cents for two weeks up to $12 and 80-some cents was probably the most he ever earned a week.

Q Now, you've told us that -- that Harvey was buried just on a Monday. You and your husband did not want an autopsy done, correct?

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A That's correct. In our faith they don't allow or they don't want you to have an autopsy. That's part of the Jewish religion. And we told -- there was no foul -- foul play. I mean, he wasn't shot on the bus, he wasn't murdered on the bus. So at that point we did say we didn't -- we would prefer that they didn't do an autopsy, but if the coroner had said that they had to for some reason, we would have allowed it.

Q You understand that without an autopsy certain medical conditions that may have caused or contributed to Harvey's death will never be known by this jury?

A There was none. The coroner black and white said he died of choking. There's no question that there was anything else.

Q That was based on the external examination, correct?

A Well, they didn't do it -- they didn't go in his body, yes.

Q That's right. And because they didn't do that, there are certain things that we'll never know about Harvey's death, correct?

A I know that he died because he choked to death on that bus. I will never believe differently.

Q So what you're saying is that you are willing to accuse my clients of negligence in causing Harvey's death on the strength of just that external examination alone; is that

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right?

A Yes. I trusted the bus company to keep Harvey safe. I didn't -- I thought the bus driver was trained. I never -- it would never have dawned on me in a million years that he would have choked to death and he would have died on that bus.

Q Ma'am, you told us before that you drive a car, correct?

A Yes, I do.

Q And you know that as a driver of a car you're expected to follow certain traffic rules, correct?

A Of course.

Q And if you violate those rules, then there can potentially be consequences, correct?

A That's correct.

Q So if you are driving and you run a red light, maybe you're going to get away with it, correct?

A Well, I mean --

Q If nobody sees you?

A I don't think I've ever run a red light, but yes, there could.

Q Go with me hypothetically.

A Okay. Yes.

Q It's expected that you will follow the rules and stop at red lights, correct?

A Correct.

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Q And if you run a red light, it's possible that a police officer may see you, correct?
A Yes.
Q And if so, he may stop you and he may give you a warning, he may say you're not supposed to run a red light, correct?
A Correct.
Q Or he may give you a ticket?
A Correct.
Q So that police officer has to see you violating that rule in order to know to either take action or just remind you of the rule; isn't that correct?
A Yes.
MS. SANDERS: Thank you. I have no further questions.
MR. ALLEN: Please the Court.

REDIRECT EXAMINATION

BY MR. ALLEN:
Q Just a couple follow-up questions. Defense counsel talked to you about signs on the bus. Remember that?
A Mm-hmm.
Q Exhibit A18-1, as soon as I lay the foundation.
In your deposition, do you remember getting a copy of that? Do you remember seeing that in your deposition?
A Yes.

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Q Okay. This is A18-1. Put it up. Exhibit No. 12.

MS. SANDERS: It's not in evidence yet.

MR. ALLEN: Okay. I'm sorry. I'll lay the foundation.

BY MR. ALLEN:

Q You've seen that?

A Yes.

Q And defense counsel crossed you and talked to you about that in your deposition, and that's the same one.

MR. ALLEN: And please put it into evidence as exhibit --

THE COURT: Any objection?

MS. SANDERS: I have no objection.

MR. ALLEN: Plaintiff's 12.

THE COURT: Okay. It will be admitted.

MS. SANDERS: I just wanted him to do it right.

(Plaintiff's Exhibit 12 admitted.)

MR. ALLEN: Thank you. Ready? Can we publish it now, Your Honor?

THE COURT: I'm sorry?

MR. ALLEN: Can we publish it now?

THE COURT: Yes.

BY MR. ALLEN:

Q Okay. You've got that in front of you. Defense counsel talked to you about Harvey's driving test and the

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signals. Were any of these signs on Harvey's driving test?

A No.

Q This is the sign that was on Harvey's bus the day Harvey died. Do you believe that Harvey understood those signs?

A No.

Q Why?

MS. SANDERS: I'm just going to object based on speculation.

THE WITNESS: He would have thought it was a fork, knife and -- is that a napkin next to it --

THE COURT: Hold on a second.

THE WITNESS: -- or a cigarette?

THE COURT: Hold on, hold on.

THE WITNESS: Sorry.

THE COURT: She objected based upon speculation.

MR. ALLEN: Yeah.

THE COURT: Anything? I'm going to sustain the objection. I do believe it is speculation. She doesn't know. She would have to guess or speculate as to what Harvey would, would not have known. So it's sustained.

BY MR. ALLEN:

Q Well, did you ever train Harvey in any way, shape or form -- scratch that.

In all the years of Harvey's training and teaching,

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was he ever able to read?

A Just a little bit.

Q Would he have been able to read any of those words on that page?

MS. SANDERS: Objection. Calls for speculation.

THE COURT: I'll allow a little leeway.

THE WITNESS: No, he wouldn't.

BY MR. ALLEN:

Q In all the years of his training or teaching and everything that he went through, are you familiar with anybody or any of the schooling that would have showed him any of those signs?

A No, I'm not.

Q The -- there was a brief talk about Harvey's PCA, Joseph.

A Yes.

Q Okay. What -- explain to the jury when Joseph would ride the bus with Harvey and when he wouldn't and why.

A Joseph never rode on the bus to and from Harvey's -- or their house to the workshop because I felt safe for Harvey to ride. He was picked up right at his door, he was delivered to the workshop. They had staff outside that would make sure that he got off the bus and went into the workshop, and the reverse. They would put him on the correct bus, or make sure that he got on the correct bus. The bus driver was given the

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address where to take him, and of course Harvey would recognize his own house.

So I felt that he was safe going to and from the job and his home. But when Harvey went anywhere else, like to a dance or to the grocery store or a doctor's appointment that I couldn't take him to, Joseph did go with him. I was afraid that Harvey wouldn't get back on the right bus or that he would get lost, or I just didn't feel safe when he was going anywhere other than to the workshop, so Joseph always went with him.

Q Defense counsel talked to you about Harvey getting on the bus and you would take -- when you took Harvey to the bus; remember that?

A Yes.

Q Harvey would carry a lunch pail with him, like a red lunch cooler, right?

A Correct.

Q And tell the jury how big the red cooler was.

A It was probably 7 or 8 inches wide and 4 or 5 inches -- 4 or 5 inches this way [indicating] and depth, and probably 8 or 9 inches tall.

Q Did you ever hear the bus driver tell Harvey, ever tell him don't eat on the bus?

A Never.

Q What would -- never?

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A I never heard the bus driver tell him.

Q Would you pull up page 1 of the RTC rules. Just the very first page.

MR. ALLEN: Please the Court, can she step right here?

THE COURT: Sure.

BY MR. ALLEN:

Q So look at these rules [inaudible] over here. Anywhere on there by the rules of the driver must look in the mirrors every few seconds for the safety of his patients -- of his passengers? Do you see that on there?

A No.

Q It's not, is it, ma'am?

A Pardon me?

Q It's not on there, is it?

A No.

Q Okay. Is there ever anything -- is there any on the rules there that the driver must make a safe left-hand turn?

A No.

Q Is there ever anything in there about the driver when he exits the bus and gets back on the bus that he must check the safety of his passengers?

A No.

Q Is there ever anything on that bus that when he gets back on he's supposed to check to see if Harvey or a passenger

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like Harvey was buckled?

A No.

Q Is there ever anything on that bus that before he takes off after writing in his manifest that he's supposed to look in his mirror and make sure patients or passengers like Harvey are safe?

A No.

Q [Inaudible.] And who did you trust what to do this?

A I trusted the bus company and I trusted the bus company to train their drivers so that Harvey would be safe on that bus --

Q Thank you, ma'am.

A -- that Harvey would have been --

Q Thank you, ma'am.

MR. ALLEN: No further questions.

THE COURT: Do you have any additional questions?

RECROSS-EXAMINATION

BY MS. SANDERS:

Q Ma'am, you understand that what counsel just went over with you is rules for passengers on the bus, not for drivers; you understand that, don't you?

A Pardon?

Q This rider, RTC paratransit guide that you got from RTC is intended to provide information to you and to Harvey as passengers on the paratransit; isn't that -- isn't that your

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understanding?

A Yeah. Yes.

Q You got a copy of this rider guide yourself, correct?

A Yes.

Q There would be no reason for you to get any kind of driver's training, would there?

A Not for me to get trained, but the bus driver should have been trained.

Q We're talking about the information that you got, ma'am.

A Okay.

Q There would be no reason for you to get any information about what the driver is or isn't trained on, correct?

A Correct.

Q Okay. And you never asked that question of RTC, did you?

A No.

MS. SANDERS: Nothing else.

THE COURT: Ms. Chernikoff, if you'd like to step down. And we're going to call it a day, ladies and gentlemen. Again, we'll see you tomorrow at 1:00 o'clock. And don't talk about the case, don't research the case, don't form or express an opinion. Thank you.

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(Jurors recessed at 4:54 p.m.)

THE COURT: All right. Counsel, before anyone leaves, Kathy needs Plaintiff's Exhibit No. 12. It is Joint Exhibit A18.

THE CLERK: You referred to it as Plaintiff's 12, and I don't have a 12, but it is Joint A18?

MR. ALLEN: Yeah.

MS. SANDERS: Which one is that, Charles? Is that the rider guide?

THE CLERK: That's the photo of the signs?

MR. ALLEN: The signs.

THE CLERK: [Inaudible.]

MS. SANDERS: The sign, yeah.

MR. CLOWARD: I'll print it right now.

THE CLERK: No, I have it. But it wasn't referred to on the record in its proper location [inaudible].

MS. SANDERS: Oh, okay. So it's in the --

MR. ALLEN: I started to and somebody said it was 12.

MS. SANDERS: Yeah. No, it's in the joints, I think.

THE CLERK: Yeah, as A18.

MS. SANDERS: Yeah, yeah.

THE COURT: Okay. Is there anything else we need to address before we go off the record?

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MS. SANDERS: Not for us, Your Honor.

THE COURT: All right. Bye everyone. See you tomorrow.

(Court recessed for the evening at 4:55 p.m.)

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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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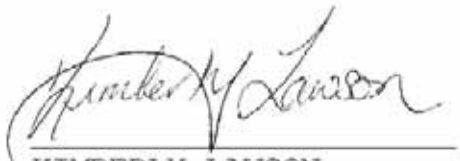

KIMBERLY LAWSON

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

CHARLES H. ALLEN, ESQ. (*Pro Hac Vice*)
Georgia Bar No. 009883
ALLEN LAW FIRM
400 West Peach Tree Street, Unit 3704
Atlanta, GA 30308
Fax (866) 639-0287
Attorney for Plaintiffs

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 inclusive, Defendants.	CASE NO. A-13-682726-C DEPT. NO. XXIII **PLAINTIFFS' BENCH BRIEF REGARDING "COMMON CARRIER" JURY INSTRUCTION**

COME NOW, JACK CHERNIKOFF and ELAINE CHERNIKOFF who, by this brief, seek to provide support for Plaintiffs' proposed jury instruction, instructing the jury regarding the standard of care imposed upon "common carriers," such as Defendants.

As this Court is aware, Harvey Chernikoff died while a passenger on Defendant First Transit's paratransit bus. This case is about whether or not Harvey's life could have been saved if Defendant

First Transit had properly trained its drivers and if Defendant Farrales had followed the safety rules in First Transit's employee handbook. As a paratransit provider, Defendants are clearly "common carriers" and a heightened duty of care should be imposed on them through the following Jury Instruction:

> The jury is instructed that the law requires a common carrier of passengers to exercise the highest practicable degree of care that the human judgment and foresight are capable of, to make its passenger's journey safe. Whoever engages in the business of a common carrier impliedly promises that its passengers shall have this degree of care. Failure to do this is negligence. See Sherman v. Southern Pac. Co., 111 P.416 (Nev. 1910); see also Forrester v. Southern Pac. Co., 134 P.753 (Nev. 1913).

The Nevada Supreme Court has recognized this as the standard for common carriers for over 100 years. [1]

MEMORANDUM OF POINTS AND AUTHORITIES

The Supreme Court first addressed the issue of common carrier duties in 1910. In Sherman v. Southern Pac. Co.[2], the plaintiff was injured as a result of the derailment of defendant's train. At issue on appeal, among other issues, was whether the trial court "erred in instructing the jury that the defendant was legally bound to exercise the highest practicable degree of care, skill, and foresight in the selection and use of suitable cars, motive power, appliances, and servants, and in the proper construction and maintenance of its roadbed and track, and the operating and running of its train."[3] The Sherman Court summarily concluded that such arguments were "without merit."[4]

In support of its position, the Sherman Court reasoned as follows:

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[1] See Sherman v. Southern Pac. Co., 111 P.416 (Nev. 1910); see also Forrester v. Southern Pac. Co., 134 P.753 (Nev. 1913).
[2] 111 P.416. (A copy of this case is attached for the Court's convenience as Exhibit 1.)
[3] Id. at 423.
[4] Id.

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> The law is also well established that a railroad acting in the capacity of a common carrier of passengers is **bound to use the utmost care and diligence for the safety of the passengers, and is liable for any injury to a passenger occasioned by the slightest negligence against which human prudence and foresight should have guarded**.[5]
>
> . . .
>
> The company is **bound to the highest degree of care and utmost diligence to prevent their passenger injury**.[6]
>
> . . .
>
> Street railway companies as carriers of passengers for hire are **bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence**.[7]
>
> . . .
>
> Passenger carriers **bind themselves to carry safely those whom they take into their coaches to the utmost care and diligence of very cautious persons**.[8]
>
> . . .
>
> The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers **shall exercise more than ordinary care. It requires the exercise of extraordinary care, the exercise of the utmost skill, diligence, and human foresight. It makes the carrier liable for the slightest negligence**.[9]

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Finally, the Court concluded:

> The rule as to the degree of care required of a carrier in conveying passengers, all recognize substantially the same test — that is, **the highest degree of care**, prudence, and foresight consistent with the practical operation of its road — or, as it is sometimes expressed, **the utmost skill, diligence, care, and foresight consistent with the business**, in view of the instrumentalities employed, and the dangers naturally to be apprehended, and that **the carrier is held responsible for the slightest neglect against which such skill, diligence, care, and foresight might have guarded**.[10]

Just three years later, the Nevada Supreme Court again addressed the heightened duty imposed on common carriers. In Forrester v. Southern Pac. Co., a railroad passenger was kicked off of

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[5] Id. (emphasis added)
[6] Id. (citing 2 Rorer on Railroads, p. 1436; Shearman & Redf. Neg. 226) (emphasis added).
[7] Id. (quoting Smith v. St. Paul C.R. Co., 32 Minn, 312, 20 N.W. 238) (emphasis added).
[8] Id. (quoting Maverick v. 8th Avenue R. Co., 36 N.Y. 378) (emphasis added).
[9] Id. (quoting Spellman v. Lincoln R.T. Co., 36 Neb. 892, 55 N.W. 270) (emphasis added).
[10] Id.(emphasis added).

defendant's train when one of the defendant's employees was not satisfied that he had a valid ticket.[11] At the time he was kicked off the train, the passenger was ill and his illness was known to the employee. The passenger did not have money to purchase another ticket and was exposed to inclement weather. As a result, he contracted pneumonia and eventually died.

In analyzing the railroad carrier's liability, the Forrester Court reasoned that the carrier was liable for the actions of its employee because "every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed."[12] In addressing the duties of common carriers, the Court instructed that a heightened duty applied:

> The principle is peculiarly applicable as between carriers and passengers; for . . . **a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed** . . . and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.[13]

In furtherance of this heightened duty, the Forrester Court upheld a jury instruction that is nearly identical to Plaintiffs' proposed instruction.

> Exceptions were taken to the following instruction given at the request of plaintiff:
>
> No. 5. The jury is instructed that the law requires a common carrier of passengers to exercise the highest practicable degree of care that human judgment and foresight are capable of, to make its passenger's journey safe. Whoever engages in the business of a common carrier impliedly promises that its passengers shall have this degree of care.
> . . .
>
> We find no error in these instructions as applied to the circumstances in this case. No. 5 follows closely the decision of this court in the Sherman case regarding injuries resulting from accident.[14]

The heightened duties imposed on common carriers by the Sherman and Forrester courts have not been disturbed and are binding upon this Court.

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[11] 134 P.753 (Nev. 1913). (A copy of this case is attached for the Court's convenience as Exhibit 2.)
[12] Forrester, 134 P. at 764.
[13] Id. (citing Stewart v. Brooklyn & C.R.R. Co., 90 N.Y. 591) (emphasis added).
[14] Id. at 773.

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Plaintiffs in this case are asking for the Court to allow their "common carrier" jury instruction, which clearly echoes the duties and obligations the Nevada Supreme Court has imposed on common carriers for over 100 years.

CONCLUSION

Based on the foregoing, this Court should allow Plaintiffs' proposed "common carrier" instruction, which is consistent with over 100 years of Nevada precedent regarding this issue.

DATED this 22 day of February, 2016.

CLOWARD HICKS & BRASIER, PLLC

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BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South 6th Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 12 day of February, 2016, I caused the foregoing **PLAINTIFFS' BENCH BRIEF REGARDING "COMMON CARRIER" JURY INSTRUCTION** to be served as follows:

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

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

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

[ ] by hand delivery

to the attorneys listed below:

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

An employee of CLOWARD HICKS & BRASIER, PLLC

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EXHIBIT 1

33 Nev. 385
Supreme Court of Nevada.

SHERMAN
v.
SOUTHERN PAC. CO.

No. 1,820.
|
Nov. 1, 1910.

Appeal from District Court, Washoe County; John T. Orr, Judge.

Action by C. E. Sherman against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Affirmed.

West Headnotes (12)

[1] **Appeal and Error**
Sustaining Challenge or Excusing Juror

Any error in sustaining a challenge to or excusing a juror is harmless if no objectionable persons are on the jury as finally constituted.

2 Cases that cite this headnote

[2] **Appeal and Error**
Error in Question Cured by Answer or Failure to Answer

Overruling an objection to a question is harmless where the witness answers that he does not know, cannot tell, or does not remember.

Cases that cite this headnote

[3] **Carriers**
Care Required and Liability of Carrier in General

The carrier owes to a passenger the duty to exercise the highest practical degree of care, skill, and foresight in the selection and use of suitable cars, motive power, appliances, and servants, and in the proper construction of its roadbed and track, and the operating and running of its train.

2 Cases that cite this headnote

[4] **Carriers**
Pleading

The complaint alleging injury to plaintiff while a passenger on defendant's train, through the derailment thereof, caused by the negligence of defendant and its servants, is sufficient, without pointing out the specific facts going to establish the negligence; a prima facie case of negligence being made out by showing the derailment.

Cases that cite this headnote

[5] **Carriers**
Presumptions and Burden of Proof

It is incumbent on the carrier in an action for injury to a passenger from derailment of a train to repel by satisfactory proof every imputation of the slightest negligence.

Cases that cite this headnote

[6] **Carriers**
Res Ipsa Loquitur and Presumption or Inference of Negligence in General

The derailment of the car in which a passenger is riding is prima facie evidence of the carrier's negligence, and it is its duty to know and show the facts.

Cases that cite this headnote

[7] **Damages**
Subsequent Physical Condition

A witness may testify to the manifestations of pain he saw plaintiff exhibit while in a hospital because of the injury for which he sued.

Cases that cite this headnote

[8] **Evidence**
Rate of Speed

A nonexpert may testify to the speed of a train.

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Cases that cite this headnote

[9] **Jury**

Business Connection or Transactions with Party or Attorney

The relation of landlord and tenant between a juror and a party authorizes the sustaining of a challenge to a juror under Comp. Laws, § 3259, subsec. 3, making it ground for challenge for cause to a juror that he is "united in business" with either party.

1 Cases that cite this headnote

[10] **Trial**

Comments on Failure to Produce Evidence or Call Witness

Permitting counsel for plaintiff in an action for injury to a passenger from derailment of a train to draw an inference in his argument that because the engineer and conductor of the train were not called or their absence explained their testimony would have been adverse to defendant was not error.

3 Cases that cite this headnote

[11] **Witnesses**

Knowledge or Source of Information

A conductor of defendant who in an action for injury to a passenger from derailment of a train has testified for the carrier that, immediately after the accident, he made an investigation of the railroad bed, cars, etc., and was unable to come to a conclusion as to the cause of the accident, may, to test his knowledge as to how thorough an examination he made, be asked as to whether or not the smoker was more broken or its occupants more frequently injured than in any other cars.

Cases that cite this headnote

[12] **Witnesses**

Management and Operation of Machinery, Railroad, or Other Conveyance

The roadmaster who, in an action against a carrier for injury to a passenger from derailment of a train, had testified for defendant as to the perfect condition of the road, and gone into detail with reference to the amount of work done on the roadbed, the material used, and when the rails were put down, was properly allowed on cross-examination to be asked why it was necessary to put heavier rails down in a certain year, to which he answered that it was on account of the increase of weight of the rolling stock and the loads; plaintiff, who contended the improvements had not kept pace with the increase of business, having the right, if he could, to shake witness' testimony by cross-examination so long as he confined it to the subject-matter brought out in the direct examination.

Cases that cite this headnote

*417 See, also, 31 Nev. 285, 102 Pac. 257.

Attorneys and Law Firms

Lewers & Henderson and Frank Thunen, for appellant. Cheney, Massey & Price and Smith & Fink, for respondent.

Opinion

SWEENEY, J.

This action was instituted on the 28th day of September, 1907, in the district court of the Second judicial district of the state of Nevada in and for Washoe county, to recover from the defendant the sum of $20,000 for personal injuries sustained by plaintiff by reason of the derailment of one of defendant's trains near Deeth, Nev., on which the plaintiff was traveling en route from Ogden, Utah, to Tonopah, Nev., on the 22d day of January, 1907. It appears from the transcript that the respondent, a miner by occupation, 40 years of age, and in perfect health, purchased a railroad ticket from the Southern Pacific Company in Ogden, Utah, to Tonopah, Nev. When about a mile east of Deeth, in the state of Nevada, the seven cars behind the express left the track. Respondent was in the smoker, which, owing to the derailment, was thrown over an embankment, turning on its side, and from the wreck respondent emerged with injuries, which, as alleged, crippled him for life. On account of these injuries sustained by reason of the wreck, and the suffering respondent was forced to undergo in a temperature registering 20 degrees below zero at the time of the derailment, and other physical sufferings

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endured by respondent by reason of the accident, upon the case being tried before the court, sitting with a jury, the respondent was awarded a verdict in the sum of $15,000. The defendant interposed a motion in the trial court to set aside the verdict and for a new trial upon the grounds: First, excessive damages appearing to have been given under the influence of passion and prejudice; second, insufficiency of evidence to justify the verdict; third, that said verdict was against law; fourth, errors in law occurring at the trial and excepted to by the defendant; fifth, misconduct of the jury by which defendant was prevented from having a fair trial. The motion was denied, and the defendant prosecutes this appeal from the final judgment and order.

Aside from the specifications of insufficiency of the evidence to sustain the verdict, there are 35 separate assignments of error in the proceedings of the trial court. We will consider those assignments of error, which are urged as reversible errors, in the order in which they are presented.

In the selection of the jury, appellant assigns that the court erred in sustaining the challenges of plaintiff to the jurors, H. H. Clark and S. H. Wheeler, upon the ground *418 that the relation of landlord and tenant existed between defendant and said jurors. It is maintained by counsel for appellant that nowhere in our statute which sets forth what circumstances shall be sufficient to disqualify a juror otherwise competent from sitting in any particular case is there a ground of challenge because of the relationship of landlord and tenant, which makes such relation a disqualification. The third subdivision of section 164 of the civil practice act (Comp. Laws, § 3259) of Nevada, which enumerates the grounds for which challenges for cause may be taken, reads as follows: "Third. Standing in the relation of debtor or creditor, guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner, or united in business with either party; or being security on any bond or obligation for either party." We believe under this section, where it appears that the relation of landlord and tenant exists, there is sufficient statutory authorization for the court to grant the challenge. All parties to an action should be entitled to a fair, unprejudiced jury, and it requires no stretch of imagination to understand that under some circumstances a tenant may for business interests be influenced or embarrassed in his verdict. "United in business," as expressed in the statute, should be construed to mean any business relation which would, within the sound discretion of the trial court, indicate that the juror might be interested, biased, influenced, or embarrassed in his verdict. The rule, we believe, is stated clearly in Cyc. as follows: "A person is not competent to serve as a juror in an action where there exist any business relations between him and one of the parties calculated to influence his verdict. This rule applies when a party and a juror are partners in business, or where there exists between them the relation of master and servant, employer and employé, landlord and tenant, or attorney and client." 24 Cyc. p. 276. At common law, a juror standing in the relation of landlord and tenant was disqualified. "A tenant holding land from year to year as a cropper is disqualified as a juror in a case where his landlord is a party." Pipher v. Lodge, 16 Serg. & R. (Pa.) 214; 5 Bacon's Abridgements, 352; Coke's Littleton, 158 A and 157 B.

The great trend of modern authority is to exclude from juries all persons who by reason of their business or social relations, past or present, with either of the parties, could be suspected of possible bias, even though the particular status or relation is not enumerated in the various state statutes and codes, most, if not all, of which, like the statutes of Nevada, are merely declaratory. Thus the Kentucky Court of Appeals has held that a stockholder in a corporation which owns stock in another corporation is disqualified to act as a juror in an action against the latter corporation. McLaughlin v. L. El. L. Co., 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. The Supreme Court of Florida held (1906) that in the trial of a baggagemaster for embezzlement of the property of a passenger it was the better practice to exclude from the juries employés of the same company as the defendant. Hopkins v. State, 52 Fla. 39, 42 South. 53. The Supreme Court of Pennsylvania has decided that in an ejectment suit by the heirs of an insolvent debtor the executor of a deceased creditor was not a competent juror. Smull v. Jones, 6 Watts & S. (Pa.) 122. The Supreme Courts of Nebraska and Colorado have held that a shipper over the railroad of one of the parties who has received favors in the past and hopes for others in the future is disqualified as a juror. Railway Co. v. Cook, 37 Neb. 435, 55 N. W. 943; Denver, etc., Ry. v. Driscoll, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

The Supreme Court of Iowa has held that the court may on the ground of probable prejudice sustain a challenge to a juror, although the relationship is not within the degree prescribed by statute as rendering the juror incompetent. Wischart v. Dietz, 67 Iowa, 121, 24 N. W. 752. The Supreme Courts of Colorado and Louisiana have held that where there is a family connection reasonably calculated to prevent the juror from being impartial, although not amounting to actual relationship, the juror is disqualified. Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; State v. Kellogg, 104 La. 580, 29 South. 285.

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The identical point urged by counsel for appellant in this assignment of error has been decided by the Supreme Courts of Pennsylvania and of New York adversely to appellant's contention. "That the juror is a tenant of a party is in itself a sufficient ground of challenge." Harrisburg Bank v. Forster, 8 Watts, 304; Hathaway v. Helmer, 25 Barb. 29. But even where the action of the trial court is open to criticism, it does not amount to reversible error. It has been held many times that a party has no right to any particular juror, but only to a trial by an impartial jury. State v. Hamilton, 35 La. Ann. 1043; State v. Kluseman, 53 Minn. 541, 55 N. W. 741. If the trial court errs in sustaining a challenge for cause, the error is without prejudice if an impartial and unobjectionable jury is subsequently obtained to try the case. State v. Carries, 39 La. Ann. 931, 3 South. 56; State v. Creech, 38 La. Ann. 480; State v. Hamilton, 35 La. Ann. 1043, supra; State v. Barnes, 34 La. Ann. 395; State v. Kluseman, 53 Minn. 541, 55 N. W. 741; Omaha, etc., R. Co. v. Cook, 37 Neb. 435, 55 N. W. 943; Armsby v. People, 2 Thomp. & C. 157; State v. Harding, 16 Or. 493, 19 Pac. 449; State v. Ching Ling, 16 Or. 419, 18 Pac. 844; *419 Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755, affirming 3 Dak. 38, 13 N. W. 349; Southern Pacific Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416. In Southern Pacific Co. v. Rauh, decided by the Circuit Court of Appeals for the Ninth Circuit, it was held: "Rejection by the court of a challenged juror for insufficient reasons is no ground for exception when it appears that the remainder of the jury was made up of persons to whom the excepting party made no objections." In Northern Pacific Railway Company v. Herbert it was held: "A trial by an impartial jury being all that a party can demand, the allowance of a challenge for cause, even if the cause was insufficient, is no ground of complaint where a competent and unbiased jury was finally selected." Northern Pacific Ry. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755.

In the case at bar, it does not appear that there were any objectionable persons to appellant upon the jury as finally constituted. In the recent case of Murphy v. Southern Pacific Company, 32 Nev. —, 101 Pac. 322, in passing upon the question of a juror challenged for cause, who was formerly in the employ of the defendant corporation for 15 years, though not in the employ of the company at the time of the trial, and otherwise qualified as a juror, we said: "While it is true the mere fact that a juror has been in the former employment of one of the parties to an action, where he is an otherwise competent juror, is no disqualification, yet it is further true that the court as a trier of challenges is given a great deal of discretion in allowing or disallowing challenges to the end that a fair and impartial jury may be secured. *** In cases of a civil character, the authorities are practically uniform in holding that by reason of the large discretion reposed in the trial judge in determining challenges that a judgment will only be reversed where it is shown that there has been a gross abuse of such discretion. In the present case it is not denied but that a fair and impartial jury was afterwards secured, and that was all that a defendant could demand." The action of the trial court, after discovering from an examination of the jurors on their void dire that the relation of landlord and tenant existed between them and the defendant company, in allowing the challenges for cause we believe was proper under subdivision 3 of the Statutes and the great weight of modern authorities.

It is next urged by counsel for appellant that the court erred in overruling the objection of defendant to the introduction of any testimony on behalf of the plaintiff on the ground that the complaint did not state facts sufficient to constitute a cause of action. This objection was mainly based on the ground that no allegation appeared in the complaint as to how or in what manner or in what method or in what particular the defendant was guilty of negligence. The appellant, through this contention, seems to believe that it is incumbent upon the plaintiff to allege in his complaint in minute particular the exact cause of the derailment by which the train was thrown from the track, other than in the general allegation of attributing the accident to the neglect of the defendant. In view of the allegation of negligence herein pleaded, which we will review, we do not believe there is any merit in this contention. Were such a contention sound, carriers would be in many instances immune from the consequences of their negligence. A train drops through a bridge. How are the injured passengers to know whether it was from rotten timbers, washing out of the piers, defective steel, or other wanton negligence? A head-on collision occurs. Can the injured passengers allege that it was because of a drunken engineer, an incompetent conductor, an absent switchman, or a sleepy train dispatcher? How is an injured passenger to say, when a derailment occurs, that it was because the track was defective, a slide occurred, a truck had broken, or an old and inferior car had been used? That such is not the law has been held by the overwhelming weight of modern decisions. The maxim, "res ipsa loquitur," has a peculiar application to this class of cases. 6 Cyc. 628, and cases therein cited. That proof of a derailment of a train is prima facie evidence of defect in the track or machinery or fault in the operation of the train has been often held by practically every state in the Union. A complaint charging defendant with an act injurious to the plaintiff with a general allegation of negligence in the performance of such act is sufficient.

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 02:58 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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DANIEL F. POLSENBERG
Nevada Bar No. 2376
JOEL D. HENRIOD
Nevada Bar No. 8492
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com

LEANN SANDERS
Nevada Bar No. 390
ALVERSON, TAYLOR,
MORTENSEN & SANDERS
6605 Grand Montecito Pkwy.
Suite 200
Las Vegas, Nevada 89149
(702) 384-7000
LSanders@AlversonTaylor.com

Attorneys for Appellants

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A Yes.
Q And you had another child?
A Yes. Neil.
Q And how did he -- how many years after that?
A Five.
Q And so Harvey's the oldest, Neil's the youngest?
A Yes.
Q And this is Neil in the corner?
A Yes.
Q And the jury will get to meet Neil on Monday. And this is your wife, Elaine?
A Fifty-seven years.
Q And this is Harvey's mom?
A Yes.
Q Is that right, 57 years?
A Yes.
Q Any other children?
A No.
Q Before we talk about Harvey, just tell us what you did for a living to support your family.
A After I was married, my uncle gave me a chance to go from Washington D -- I'd never been -- we were born and raised in Washington, D.C., and I had never gone any further than Washington, D.C. to New York City. And my uncle said to me that I could take a five week trip in his -- in his place. I

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took a trip. I liked it. And I was a diamond broker until I retired, selling to the retail jewelers and to the manufacturers.

Q And how many years did you do that?

A All my life. Oh, I stopped working at about 58, 59 years old.

Q And so Harvey would have been about 37?

A Yes, I would say so.

Q And then where did you live when you retired?

A In Los Angeles, Santa Monica, California.

Q And where was Harvey living at that time?

A At that time I believe he was living in -- well, we -- we came to California, Santa Monica, and then he lived in the Glendora area at a 120 -- approximately 120 bed facility, a home with other handicapped people.

Q And the jury will be able to hear from your wife and your son, and they're going to tell the jury as well about your son. Okay?

A Sure.

Q And you may get a little more detail, since we're close on time.

But Harvey lived at home with you until he was 18; is that right?

A Correct.

Q And then at the age of 18, there was a decision to

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take -- to do what? What was the decision for Harvey to live?

A We -- the reason we came, I guess I should back up just a little bit. The reason that we moved for one year to Santa Monica, California, and it ended up 47 years on the West Coast, was that they were teaching what they called the Sullivan Method in Santa Monica schools. They had nothing in the Washington, Maryland immediate area for him.

So they were mainstreaming children like him into the school system, and he was in a special ed class in the normal school facilities. So that's why we moved to -- to help Harvey and to see how much, you know, we could -- for his education.

Q Now, was Harvey around 13 or so when you moved out there?

A Yes. He was just about 13.

Q So he got -- he got about five years in mainstream schools?

A Yes, he did. Five to six years. It was -- he was a little -- a little late, you know, in a special graduation.

Q Yes, sir. And he did graduate a special --

A Yes. Yes, he did, with a diploma.

Q And what was it? What do you mean by special graduation?

A Well, what I'm saying is, is that it shouldn't be, I guess, that way. He was in a special ed class, but he did

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graduate with the other high school children.

Q All right. And so after he graduated high school, where did he -- you said he left the home, your house?

A Yes.

Q Where did he go?

A We -- we then found a place, I think it was first in the Santa Barbara area. There was a more of a dependent living, self-dependent, and the residents lived in individual apartments, maybe two or four people in an apartment, and he went every day to a workshop.

Q And if I may just to sort of summarize, because we'll hear from your wife, do you think she's a little better historian than you on the dates and times?

A Much better.

Q Okay. All right.

A Not a little.

Q So as I understand, if I could, he lived in sort of an apartment setting for a while?

A Yes.

Q And then he lived in a group home setting for a while?

A At Casa Carmen.

Q And that was fewer people living together?

A No. That was 100 and some people that were living together.

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Q Okay. Then he had that 100-something people living together, then he went to a smaller one?
A Yes.
Q With like six people?
A Correct. Six beds.
Q And then he went to another one with about six people?
A Correct.
Q And then the jury will hear on Monday, but there was a decision to bring Harvey to Las Vegas; is that correct?
A Yes, that's correct.
Q And then Harvey -- and that was about a year and a half before Harvey passed away?
A Yes, it was.
Q And at that time, and you'll hear more on this on Monday, but Harvey then had a house that you rented for him; is that correct?
A In Las Vegas.
Q Yes, sir.
A Yes. We leased a house.
Q And you had a person which -- a personal care attendant, the jury's heard that story, his name was Joseph.
A Correct.
Q And Joseph actually came from California; is that correct?

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A Yes, he did.

Q He had worked with Harvey in California, and a decision was made by the family --

MS. SANDERS: Your Honor --

BY MR. ALLEN:

Q -- that you could bring him closer to home and have --

THE COURT: Yes. Hold on, Counsel. I'm sorry?

MS. SANDERS: Never mind.

BY MR. ALLEN:

Q -- Harvey full time; is that correct?

A I'm sorry. I was --

Q And have Harvey full time?

A She overtalked me.

Q And there was a decision made by the family to bring Harvey to Las Vegas?

A And to be full time, yes. Correct.

Q And part of that decision was knowing that Joseph could be there with him in the home?

A Yes.

Q Okay. And we'll hear more detail about that. And so there was about a year and a half he lived here in Las Vegas before he passed away, yes?

A Yes. Yes.

Q Okay. So what I'd like to do, because we're short

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on time, is that there have been some photographs that we're allowed to show to the jury. And so what I would like to do is I would like to put these photographs up and let you explain to the jury who Harvey is and what he's doing, okay?

A Yes.

Q Is that fair? Okay.

THE COURT: Is there an objection to the photographs?

MS. SANDERS: They're not in evidence yet. They have to be admitted, I think.

MR. ALLEN: Okay.

THE COURT: Counsel, perhaps --

MR. ALLEN: I'm going to hand to you first --

THE COURT: Counsel, one thing. Form it a question, please. This is direct.

MR. ALLEN: Is this direct?

THE COURT: This is direct. There's a lot of leading going on.

MR. ALLEN: I know. I was trying to go for speed.

THE COURT: That's fine.

MR. ALLEN: I was trying to get the jury --

THE COURT: Just please in the future, thank you.

MR. ALLEN: Because, Your Honor, we'll hear it in a lot more detail on Monday.

THE COURT: That's good.

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BY MR. ALLEN:

Q Do you have in front of you what's marked 0070004?

A Yes.

Q We're going to take one photo at a time. All right.

A Okay. 007, we can go to that first, I believe. This is 004.

Q Tell you what I'll do. Let me do it this way. I'm going to hand them to you one at a time.

A Sure.

Q So we know we're on the same page.

A Sure.

Q Take a look at that photograph, sir.

A Yes.

Q And have you seen that photograph before?

A Yes, I have.

Q And who took the photograph?

A It was taken by either an associate and kind of as close as a brother of mine who went to the Special Olympics. And we attended the Special Olympics which Harvey was in, you know, supported by some of the Kennedy family, I believe.

Q And is this Harvey at the Special Olympics?

A Yes, it is.

MR. ALLEN: Then move for Photograph Exhibit 007-00004 into evidence.

THE CLERK: Which exhibit is that?

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MR. CLOWARD: Plaintiff's 7.
MR. ALLEN: Plaintiff's 7.
THE COURT: Any objections?
MS. SANDERS: It's Exhibit 7?
MR. CLOWARD: Plaintiff's 7.
MS. SANDERS: No.
THE COURT: No?
MS. SANDERS: No objection.
THE COURT: Okay. They'll be admitted.
(Plaintiff's Exhibit 7-4 admitted.)
THE COURT: And are you seeking to publish?
MR. ALLEN: Can we see that photograph?
BY MR. ALLEN:
Q What I'd like you to do is, if it's easier for you to see there --
A Yes, but most definitely.
Q Okay. But we want to talk to the jury.
A Sure.
Q Why don't you look at this photograph and maybe talk to the jury for you.
A Sure.
Q Tell us what we see. Who is that; Harvey?
A Well, this is Harvey, and he was in the Special Olympics at UCLA and he was going to run in a race. It wasn't particularly any, you know, certain distance or something like

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that. But he was quite excited there and they all wore the same uniforms. And we were real proud of him too. He got a little trophy and we still have it.

Q How old was he? My notes say it was about 1986; is that about right?

A About right, yes. I'm sorry on the age, you know, the years, but...

Q Do you -- for the jury to understand, have you been diagnosed with any sort of early onset?

A Yes, I am. And I go to the Cleveland Center, which was fortunate to get in, and my memory is not the best. And I'm taking some medication for it. God willing, it won't get any worse.

Q All right. And so now you told us that a friend of yours took this photograph. I want to hand to you -- an associate; is that correct?

A Yes, that's correct.

Q I want to hand to you what's out of Exhibit 7, Photograph 3. Is this your friend, his wife and Harvey?

A That's correct.

Q And they're in the same event; is that correct?

A They are at the event. They're not participating in the same event.

MR. ALLEN: I'd like to move Exhibit 7, Photograph 3 in there.

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MS. SANDERS: No objection.

THE COURT: Admitted.

(Plaintiff's Exhibit 7-3 admitted.)

THE WITNESS: And this is Benny and Evelyn Dusen [phonetic]. And for 22 years Benny and I traveled together. He lived near us, and it was like a brother from another mother. We were very -- the whole family, we were really, really close. And the day that I stopped traveling, Benny passed away the next month.

BY MR. ALLEN:

Q Tell us the types of things that Harvey would do with them.

A Harvey loved everyone that he met, and he would ask your age, how tall you are, what kind of a car you drive. When I needed to know a car when we were in the car on the road, I'd ask Harvey, and darn if he didn't know every car that there was. He remembered many times their names, but he always remembered the face and the car. The car was very important to him.

And he had a lot of friends. He went to a workshop. He wasn't great at the workshop, but he went. He glued -- one day he came home and he had glue from head to toe because they were making some kind of paper. He glued himself too. And anything Benny and Evelyn and I and Elaine and Harvey and sometimes Neil, we were very, very close.

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And the other things he liked to do is that I would, in the early days we would build some Revell plastic airplanes and things like that, and Harvey would spend time with me and Neil, you know, doing what he could making the airplanes. He really rode a bike really good, a gear shift bike. But we were afraid to let him go too far, so Elaine would kind of walk a little ways in back of him.

And one day on the bike path Harvey got ahead of her and he got lost, and Elaine was real worried. She went back home, because they weren't too far away from the house, and got the car, and all of a sudden here comes Harvey. How did he find his way home? He stopped the mailman that delivered mail to us, and this was a little ways away from the house, and he told the mailman he can't find his way home, and the mailman brought him home.

But he loved to go places. He would say when he was at the house to Elaine, he would say, What's on the agenda for today? And it didn't matter where he went. He just wanted to go. And sometimes I'd be exhausted, because as soon as he got home he wanted to go again, you know.

And other things that Harvey did, Harvey was very funny. He had a wonderful sense of humor. He really did. And he -- he was very much like my father, who was a frustrated comedian we used to say, and he and I had an extra special relationship. Not that I don't love Neil equally too.

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But it was a different kind of relationship where every night before he'd go to bed, we'd have a ritual of saying the same thing. Like -- like I used to say to him, Harvey Parvey puddin' pie kissed all the girls and made them cry, because I think there was something like that once when we were kids. And he'd say, Why did I make the girls cry, you know. That was hard to explain. I couldn't.

And then other times where I was really surprised, only a few, when President Obama was running, election time, I was home alone with Harvey. We were sitting on the sofa and I was explaining to him who the President of the United States was and what they're doing, and if he wins he'll be -- and he was so interested.

Because Harvey didn't know about news, bad things or wars or anything like that. He liked fun things on television and whatnot. And he didn't watch much television. He didn't have patience to sit down. And in later years he sat a little. But when Elaine came -- I looked at him as if to say who's talking to me, it's so serious, you know. And when Elaine came home I said the same thing to her, I can't believe it, the way Harvey was talking to me.

And I have to share -- I know we have limited time, Your Honor.

THE COURT: No. You'll be back Monday, I think.

THE WITNESS: Well, I think so. But Harvey, because

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it was so great, Harvey -- I'm sorry if I went off the subject. It's something --

BY MR. ALLEN:

Q What would you like to share with us, Jack?

A Yeah. I went off of it. It'll come back, but I'm sorry.

Q Let me ask you this, Jack. Were there times when Harvey, he lived away from the home, right?

A Yes.

Q He would get -- make a phone call to you?

A [No audible response.]

Q Can you tell the jury about how you guys interacted when he called you?

A Yes. We got Harvey a telephone. He wanted a telephone in his house where he was with Joseph. And Joseph was his caretaker at the six bed residence and he got burned out and he wanted to come live with us. And so when he would come home from work every day, and if I was there, he would call us. We programmed the button, like number one was Harvey, you know, the house to us from Harvey.

And he would say, How ya doin', Pop. What's goin' on. And after a few times he would say, Let me speak to Mom. And I'd say, Okay, Harvey. And I'd go away from the phone and I'd come back and I'd say, Harvey, how are you, did you have a good day in school today? He'd say, Dad, I asked to speak to

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Mom. I couldn't fool him. It was impossible to fool Harvey.

But the other funny thing, now it came back and I have to tell you. Harvey, the children were bullying him, you know, because he was different and things like that, and children are like that when they're young sometimes. And Harvey, we took him to UCLA to a registered nurse, and she taught Harvey to ignore, to ignore the kids, don't answer them, you know, just ignore them, don't get angry.

And so one day Neil and Elaine and I and Harvey, we were having dinner. And Harvey did something, I don't know what it was, at the dinner table, and Elaine said Harvey a few times, Harvey, I don't like what you're doing. Harvey wouldn't answer. He said, finally he said, I'm ignoring you. Well, we did everything in the world not to laugh, because we were teaching him, you know, they were teaching him that.

And but he and I would joke and cut up and do things. And from repetition, over and over, he'd learn songs. Like there was that song maybe you all know, the cookie man or something. I probably have the wrong name. But finally, after he sang me just a little bit, I looked on the computer and darn if that, the cookie man, the cookie whatever. And so we used to sing a lot of songs together.

His grandmother, my mother-in-law used to sing Harvey one of his favorite songs from a little infant. And Harvey used to say, Dad, you know that song, sing that one to

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me that Grandma does. And it was a song from World War, maybe it was I, and it was such a cute song. And do you all want me to sing it to you? I don't have a good voice.

Anyhow it was, Do you see my little Harvey marching up the avenue. There was Harvey as thick as starch with his daddy on the 17th of March. Were you there and did you, and something, and Harvey was out of step. Everyone was out of step but Harvey. And he used to love those kind of songs that, that he could remember after many, many times.

Q Do you miss him, sir?

A Yes.

MR. ALLEN: I think, Your Honor --

THE WITNESS: That's enough of that? I'm sorry, Your Honor.

MR. ALLEN: I think Your Honor wanted to take a break at this time. Is that correct, Your Honor?

THE COURT: Yeah. I have to get them off the clock before 5:00. So, sir, I'm sure we will see you again on Monday.

Ladies and gentlemen of the jury, have a wonderful weekend. Again, don't research the case, don't form or express an opinion about the case, and do not talk about the case. We'll see you back on Monday at 1:00. And Jason will give you more information about next week if you guys need it.

(Jurors recessed at 4:53 p.m.)

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THE COURT: We need clarification on the exhibits. We were under the assumption that you were going to admit all of seven; is that right?

MR. ALLEN: Yes.

THE COURT: So what was the question?

THE CLERK: All of seven, because there's 14 photos.

MR. ALLEN: Yes, there are. They're going to come in on three different witnesses.

THE CLERK: Okay. So --

MR. ALLEN: So those 14 photos, can I just put them in, or do you want me to put them in one at a time?

MS. SANDERS: No, put them in.

MR. CLOWARD: Just put them in.

THE CLERK: Perfect. Thank you.

MR. ALLEN: Okay. Thank you.

THE COURT: Okay. So we'll move all those into evidence.

(Plaintiff's Exhibit 7-1, 7-2, 7-5, and 7-14 admitted.)

THE COURT: Is there anything else we need to address before the day is over?

MS. SANDERS: I just would like to ask a question, because we are kind of behind. We've got experts scheduled next week and I'm trying to get some idea. We've got Dr. MacQuarrie coming in. The only time he can come is Wednesday afternoon. Is that going to present a problem, and

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if so can we take him out of turn if necessary?

MR. CLOWARD: If necessary, no problem at all.

MS. SANDERS: But do you think you'll be done by then?

MR. CLOWARD: Absolutely.

MS. SANDERS: All right.

MR. ALVERSON: Oh, you do?

MR. CLOWARD: Your Honor, we just wanted to --

I don't think that'll be a problem at all. Either way, we'll make sure to work with you.

The only thing I wanted to know was when is the Court scheduled next week as it currently stands? Monday through Thursday, 1:00 to 5:00?

THE COURT: I know Monday, Tuesday, Wednesday is 1:00 to 5:00. Maria, do you know Thursday and Friday?

UNKNOWN SPEAKER: Thursday we have an evidentiary hearing, I think, Judge.

THE COURT: Okay. Can you see which one it is?

THE CLERK: They have you starting at 1:00.

THE COURT: I probably have evidentiary hearings Thursday and Friday, but it sounds like we're going to need full days on Thursday and Fridays. I will talk to my secretary to see if the Thursday and Friday ones are moveable. I can let you know by Monday. Is that enough time?

MR. CLOWARD: Yeah. That's fine.

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THE COURT: I just don't know what they are off the top of my head.

MS. SANDERS: Well, then maybe -- does he need to come in on Thursday?

THE COURT: We can take your witness out of order whenever they're available.

MS. SANDERS: Okay. All right.

THE COURT: I think there's -- I don't see plaintiff objecting.

MS. SANDERS: If that's okay with you, then we'll just kind of go with the flow.

MR. ALVERSON: It sounds like half-days anyway.

MR. CLOWARD: It's no problem.

THE COURT: Okay. And I don't think there's anything else we need to address, correct?

MS. SANDERS: I don't think so, Your Honor.

MR. CLOWARD: Correct.

THE COURT: Have a good weekend. Thank you.

(Court recessed for the evening at 4:56 p.m.)

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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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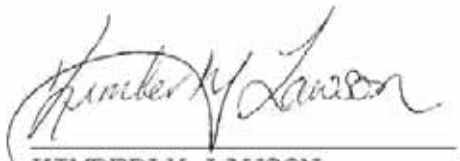

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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 4

MONDAY, FEBRUARY 22, 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.

RECORDED BY MARIA GARIBAY, COURT RECORDER
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LAS VEGAS, NEVADA, MONDAY, FEBRUARY 22, 20016, 1:08 P.M.

* * * * *

(Outside the presence of the jury.)

THE COURT: So it is Estate of Chernikoff vs. First Transit, A682726. Other than the motion on the Rule 26(b), are there other matters we need to address?

MR. CLOWARD: Yes, Your Honor, there are a couple, a couple of issues.

THE COURT: A couple of issues?

MR. CLOWARD: There are a couple of issues.

THE COURT: Okay.

MR. CLOWARD: I have a bench brief that was filed this morning. May I approach?

THE COURT: Yes. Did the defense counsel --

MS. SANDERS: We did.

THE COURT: Thank you. Please approach. Thanks. Okay. What else?

MR. CLOWARD: The second one was -- so there's basically the bench brief regarding our expert, Berkowitz [phonetic], the bench brief that I just handed to Your Honor regarding exhibits, and then a motion to strike Laidlaw's policy. And all three of them are important issues that we feel like could create a reversible issue, and so we wanted to maybe spend a minute and talk about the issues.

THE COURT: Well, I haven't had a chance to read the

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bench brief on exclusion of irrelevant information. I've obviously read the ones pursuant to 26(b) as far as your expert and the defense's opposition.

MR. CLOWARD: And I think -- Your Honor, I think that one can wait. But I think more important is the bench brief that we just handed the Court. And if I may, I can provide a little bit of background what it's for. I think the issues are pretty clear.

THE COURT: Hold on.

(Pause in proceeding.)

THE COURT: Okay. So just real quick, with respect to the items that plaintiff wants excluded, did defense intend on using any of those anyways?

MS. SANDERS: We have identified exhibits, Your Honor, because if we don't have them on our exhibit list then we can't use them if we need them. We don't know what the evidence is going to present, and so if we need an exhibit, for example, for impeachment or to refresh memory, then it needs to be in our exhibit list. I don't really know which one of those exhibits we may or may not need.

And what I had told counsel is that rather than introducing the entirety of a packet of records, for example, if there is a particular page in those records that I need for impeachment or refreshing or whatever the issue may be, I'm happy to go ahead and use just that page and seek to introduce

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just that page. But at this point, not knowing what the evidence is going to be from the plaintiffs, I'm not sure what will or will not be necessary to use.

THE COURT: Okay.

MR. CLOWARD: In response, and I'm sorry that this was brought in this late day. I attempted to confer with counsel at the 267 as to the reasoning for the exhibits, and she has a right to do that, but the response was that, you know, she doesn't have to tell me due to attorney work product. So I understand that.

Over the weekend is when I read the opening and saw, okay, this is what's going to, you know, they're going to focus on the heart issues, this is why the records are potential exhibits, and that's fine for her to do. My fear is -- and I think it's fine if she moves in particular one exhibit, or one page at a time.

But my fear is these are 5, 600 page exhibits. I'm afraid that if the jury is shown -- if she's allowed to publish any page to the jury to go to the cardiac issues, there are other issues that might be on that particular page that are just too prejudicial to our side.

And so my request would be that we get an agreement that she's only allowed to talk about issues related to the heart, and that the records are not allowed to be published to the jury until both sides can sit down and have a minute to

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redact and make sure that everything that's off the page needs to be off the page, so that when the jurors go back to deliberate, they're only given the specific relevant issues.

Because there are things in there that are quite sensitive to both Jack and Elaine and to Harvey, and quite frankly, some of the, you know, sexual issues that happened 30 years ago with Harvey, if the jurors are shown that information, that's an automatic mistrial. I mean, that's so prejudicial that bell just cannot be un-rung.

With Jack's records, you know, he's there seeing -- and this is embarrassing for him, but he's there seeing the doctors for hemorrhoids and impotency, and I mean, you know, those shouldn't be shown to the jury. They have no relevance.

And so I guess all I want is a limitation from the Court saying, look, you can admit these, but they won't be published to the jury, they won't be given to the jury until the case is actually given to the jury after the parties have looked at the pages and made sure that everything is redacted, and then obviously a limitation that, you know, their expert, they're not going to try and back door some reference in --

THE COURT: Well, on exhibits, the way it works is once those are marked, you guys do not get those back and they cannot be changed once they're marked.

MR. CLOWARD: So I mean, I guess that's the -- that's the concern that I have is that, you know, because the

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records are so voluminous, I mean, I believe the pages are 400 pages for Jack, 500 pages maybe, you know, 6, 700 pages for Harvey. There's a lot of information in there that is just simply way too prejudicial to allow in, and it would -- we would be back here in two years from now doing this all over again if that went back to the jurors, or if their expert, you know, put up a record that had some reference, you know, on there that was highly prejudicial, you know, the jurors would see that and, you know, that's just -- it just can't be done.

THE COURT: All right.

MS. SANDERS: Well, Your Honor, I can assure Your Honor and counsel and his clients that it is not our intention to try and embarrass this couple by bringing in things about other things that they may have seen doctors for. But until we know what they're going to present in direct examination, to just go ahead and say you can't get this, you can't get that, if it's something that we need for impeachment, if it's something we need to refresh memory, then we should be allowed to introduce that to ask the witness about it.

Like I say, I am not intending to try and embarrass this couple. There may be things however that they bring up in direct that may be relevant as far as preexisting conditions, anything like that. Mr. Cloward assumes what he thinks we may want these records for there. He may or may not be correct, but that's something that will unfold as the

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evidence comes in.

THE COURT: I think that this is a bit premature. It's very difficult for me to know whether or not it's relevant until I see what evidence comes out in the case.

MR. CLOWARD: I understand.

THE COURT: And I think all of you would agree that the only portions that need to be shown to the jury are things that are relevant to the issues at hand.

MR. CLOWARD: I agree. I guess I just wanted to very clearly put on the record for appellate purposes that if, you know, these highly sensitive other issues are brought out, I will be seeking a mistrial. We'll do a formal motion. I just think that they're too -- it's too dangerous --

THE COURT: Do whatever you need to do to protect the record.

MR. CLOWARD: Okay. Certainly. Thank you, Your Honor. Appreciate it.

THE COURT: All right. The other issue is -- was brought up because of, I guess, plaintiffs had an expert who took over for Dr. Einstein [phonetic]. That was Mr. Berkowitz, Dr. Berkowitz, and he was designated as an expert and I think he adopted Dr. Einstein's report. So he was deposed, and now plaintiff has redesignated him as a non-testifying expert. And you cite 26(b)(4)(B) for your position that there should be no reference whatsoever to Dr.

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Berkowitz because he's been -- his designation's been changed.

I'll tell you, I went through -- before I even got the defense's opposition, I went through and I read the cases you provided and I went through and read whatever I could find, and they all seemed to indicate the same thing as the defense indicates in their opposition, is that this rule is really used more in discovery settings.

I mean, obviously I think there's a policy to want people to be able to consult with experts to learn the value of the case, the strengths and weaknesses of the case, and I think that's one of the reasons 26(b)(4)(B) is in place. However, at this particular point, I mean, the cat's really out of the bag.

I mean, the individual's been deposed. I'm assuming that their expert, the defense expert's been provided with the opinions of Dr. Einstein and, you know, and subsequently Dr. Berkowitz because he adopted Mr. Einstein's report. So I didn't find any authority whatsoever for it to be utilized in this fashion.

MR. CLOWARD: May I address that, Your Honor?

THE COURT: Mm-hmm.

MR. CLOWARD: First off, Dr. Berkowitz was never asked in his deposition whether his opinions were to a reasonable degree of medical probability or to more likely than not. So the deposition never comes in pursuant to

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Morsicato vs. State, Williams vs. Eighth Judicial Court, never comes in. So the fact that it never comes in and the fact that I'm not calling him as a witness, their expert has absolutely nothing to comment upon.

As Mr. Allen talked about yesterday during his direct exam of Dr. Stein, he had the board and he said, Doctor, if an expert, based on what was said in opening, came in and --

MR. ALLEN: If someone comes in.

MR. CLOWARD: Yeah. If someone comes in and talks about this, this and this, how would you respond. Dr. Stein then gave certain testimony. I'm not going to be calling Dr. Berkowitz either live or by testimony, so therefore their expert, when he takes the stand, those questions would never be appropriate to ask, because I'm not -- I wouldn't have presented that evidence in my case in chief.

So he's commenting on something that happened in the discovery phase that has absolutely nothing to do with anything. The only reason that it would come in is for the improper purpose really of saying, hey, they hired an expert and they didn't bring him, so ladies and gentlemen, that is somehow probative of something.

It's not probative of anything. It would maybe be probative if I hired this guy and he agreed and said, you know what, the ADA doesn't say that they have to do this and this,

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I agree. And then all the sudden I'm like, oh, I hired this guy and he disagrees with me and that's not why I'm bringing him.

The reason that we're not bringing him is because Dr. Einstein said some things that were very questionable that I felt like I may violate my duties of candor to the Court, so I sought leave to have him removed and have somebody take his position.

Commissioner Bulla, I think to split the baby, said, okay, you can hire somebody, but he's going to have to adopt Einstein's opinions. Dr. Berkowitz was of the opinion that the ADA, that the industry standards, that all of these things require bus companies to do certain things. So his testimony actually supports our position.

So any impeachment that they may have of, well, where's their expert that's, you know, they didn't bring an expert, we're not going to bring an expert, so any testimony that Mr. Daecher might have similar to Dr. Stein of, well, what if somebody comes in and says this, this or this, there's nobody that's going to say this, this or this. We're not calling him.

And they can't use the deposition, because it doesn't say reasonable degree of medical probability on a more likely than not basis, or reasonable degree of transportation certainty. Those words were not used. So, Your Honor, really

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the only probative, the only probative information that this has is, hey, they hired an expert and he's not here. That's the only probative value that this has. That's it.

And it's highly inappropriate for them to try and somehow suggest that because we were handcuffed because I hired an expert that said things that were -- that really caused me to be worried, and I didn't want to come in here and have somebody that said things that were not true. So I take the high road, do what I do to substitute him and now I'm getting pounded over the head for it. I mean, that's the frustration for me.

And I guess if Ms. Sanders can explain how, how it's probative, given that his deposition cannot be used, the magical words were not used. So Morsicato, Eighth Judicial, Williams v. Eighth Judicial clearly state it has to be to a reasonable degree of probability. Those questions were not used, so his deposition will absolutely not be used by either party.

So how is it if I'm not using him, if I'm not calling him, how is it that their expert can take the stand and say, well, you know, I know that hypothetically maybe if somebody came in here and said this and this then I respond that way? There's no hypothetical because we're not bringing him. So it's really inappropriate to even comment on it.

THE COURT: Okay.

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MS. HYSON: Your Honor, Mr. Cloward is getting hung up on whether the words to a reasonable degree of certainty were used in the deposition. They were used in the production of an expert report by Mr. Berkowitz. And so the opinions that he testified to were those same opinions which he adopted to a reasonable degree of certainty. So that really isn't an issue.

Our -- as it was our understanding up until this motion was filed that Mr. Berkowitz -- or Dr. Berkowitz was going to be a witness and was available as a witness as identified on both plaintiff's pretrial disclosures and pretrial memorandum. It's disingenuous to say that his designation as an expert has been retracted by plaintiffs, because it was not until this motion was filed that any attempt was done to do so.

Additionally, our experts have relied on not only the expert report of Dr. Berkowitz, but also on his testimony on the same -- on the same opinions in preparation of their opinions in this case. It would only be fair for them to be able to address those or hypotheticals as they may come up during testimony.

MR. CLOWARD: Your Honor, may I respond?

THE COURT: Hold on, please. So basically when you have your expert on the stand, you may ask your expert what they relied upon in formulating their opinions?

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MS. HYSON: Yes.

THE COURT: Okay.

MR. CLOWARD: May I respond?

THE COURT: Hold on. Is there anything else?

MS. HYSON: No.

THE COURT: All right. Yes.

MR. CLOWARD: Thank you. I'm sorry. I'm just a little eager on this issue. Number one, that's an incorrect statement of the law. I learned this lesson the hard way in a trial with Bill McGaha next door with Judge Williams. Tom Winter and Bob Winter forgot to have their trucking expert talk about his opinions -- they forgot to have him testify on the stand that the opinions were to a reasonable degree of probability.

Bill McGaha filed a motion to strike the entire testimony. Because Judge Williams decided, I believe, Morsicato and Eighth Judicial District -- Williams v. Eighth Judicial, he understands this, he says absolutely not, it's not coming in, but what I will allow you to do is fly this guy back in from San Francisco to say the magic words.

THE COURT: I think that you're -- I don't think that you and defense counsel are on the same page. I think there's a distinction from what you're talking about versus how they're going to do it. I think that it is fair game for their expert to be able to indicate the documents that they

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relied upon in coming to their opinions.

And it sounds like that's one of the main -- I mean, I can guess certain ways I think the defendant's going to utilize the report, but that sounds like one of the main ways they're going to do it. You guys are not really saying the same things.

MR. CLOWARD: Well, what I'm trying to clarify --

THE COURT: I mean, what -- okay. Taking your argument and applying it to how defendants are indicating they're intending to use it is basically -- well, I don't know. I guess it would basically preclude their need for an expert.

But you don't want -- you're trying to keep their expert from stating the basis for their opinions, and the basis for any expert's opinions are important, because that's part of what the jury looks at in determining the weight to be given to those opinions. You're basically trying to just knock that out.

MR. CLOWARD: Here's the problem. He was an initial expert. We disclosed the reports at the same time.

THE COURT: But I'm saying -- okay. If he's initial -- I mean, I don't know what he did or did not rely upon. I don't have a copy of the expert report. And if I reviewed it months ago, I frankly don't remember the details. I mean, to the extent that Mr. Einstein or subsequent to him

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Dr. Berkowitz was -- their opinions were part of what came out in the defendant's expert report or a rebuttal expert's report, I mean, I think that's fair game.

MR. CLOWARD: Well, may I address that? Because --

THE COURT: You're asking me to do -- here's my problem with some of these motions, is it's kind of difficult because you're asking me to speculate how the evidence is going to come out over the course of the trial.

MR. CLOWARD: Well, I guess, you know, I think that just looking at this, we're not putting Berkowitz on, we're not putting his report. His report is hearsay, it doesn't come in. So any statement of reasonable degree of probability in the report, that doesn't cut it. Morsicato's clear. Williams is clear. It's got to be on the stand for it to come in.

THE COURT: Counsel, you're asking me -- I don't know, and it's -- and I don't have -- and defense counsel does not have to tell me their theory of their case.

MR. CLOWARD: I understand.

THE COURT: And so I mean again, I can speculate because I've sat through a few hundred of these, but that's all it would be. I mean, if anything it's premature. I don't know what that expert's going to testify to. I don't know what the expert's going to testify as far as the basis for the opinions that an expert came up with. And so I am really

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reluctant just to issue some blanket decision.

MR. CLOWARD: I understand.

THE COURT: I'm sure defendant understands there's ways they can and cannot get information from Dr. Berkowitz into evidence.

MR. CLOWARD: Yeah. I guess I just wanted to discuss the issue, to discuss that the deposition cannot be used because it doesn't have the magic words that are required, and the report is hearsay. I'm not going to be putting him on to evidence. He was not designated as a rebuttal. He was designated as an initial.

So by saying he relied on my guy's report, that's really a flimsy argument to try and get it in and say, well, you know, he relied on it. No, he didn't rely on it. He wrote his report at the same time that our expert wrote ours.

THE COURT: Obviously they're going to have to lay a foundation.

MR. CLOWARD: I understand. Okay. Thank you, Your Honor.

THE COURT: Okay. So at this point it'll just be denied, and we can readdress it depending on how the evidence evolves at trial.

MR. CLOWARD: Okay.

THE COURT: Is there anything else we need to do before we bring the jury in?

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MR. CLOWARD: Just the motion to --
MR. ALLEN: Use the restroom real quick?
THE COURT: Of course. We can start in a couple minutes.
MR. CLOWARD: The third issue was the motion to strike the Laidlaw policy.
MS. HYSON: Did you file something on that?
MR. CLOWARD: Yeah. We filed that probably a week or two ago.
MS. HYSON: We never received that.
MS. SANDERS: No, we have not received.
THE COURT: I haven't either.
MS. SANDERS: A Laidlaw policy?
MR. CLOWARD: Yeah, the late disclosed policy.
MS. SANDERS: You mean the handbook?
MR. CLOWARD: Yeah, the handbook.
MS. SANDERS: Oh, we have not received anything.
MR. CLOWARD: Okay. I'll get the Court the brief. I'll get counsel the brief.
THE COURT: Sure.
MR. CLOWARD: It was filed, I believe, a week ago, and essentially the basis of the motion was it wasn't until probably four weeks ago that the defense disclosed a Laidlaw policy and employee handbook. And so for the same reason that the Court excluded our photographs and our eulogy, we're just

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asking the Court to exclude their late disclosed document.

THE COURT: Okay. I'd have to look at it. My general rule is the same regardless of the party, that if it's not within the discovery cutoff then it's not going to be admissible absent a stipulation of the parties.

MR. CLOWARD: Certainly, Your Honor.

THE COURT: But I obviously haven't looked at the motion. Okay. Is there anything else before we bring the jury back in?

MS. SANDERS: Nothing from us, Your Honor.

MR. CLOWARD: No.

THE COURT: All right. Jason. Do we need him? He's just using the restroom. We can get them situated.

Is Mr. Chernikoff going to be back on the stand?

MR. CLOWARD: Yes, I believe so.

THE COURT: Okay. We'll just get him situated when the jury comes in, or he can sit down now. It doesn't matter.

MR. CLOWARD: Okay.

(Mr. Allen enters the courtroom.)

(Jurors enters at 1:32 p.m.)

THE COURT: Welcome back, ladies and gentlemen of the jury. I hope you had a wonderful weekend. When we left off, Mr. Chernikoff was on the stand.

Sir, would you like to make yourself comfortable. Come on up, Mr. Chernikoff. All right. Mr. Chernikoff,

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you'll recall on Friday you were under oath. You are still under oath at this time, sir. Do you understand that?

THE WITNESS: Yes.

THE COURT: Thank you, sir. If you want to take a seat, please.

JACK CHERNIKOFF, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

THE COURT: And whenever you're ready.

MR. ALLEN: Please the court, Your Honor.

THE COURT: Yes.

DIRECT EXAMINATION - (Continued)

BY MR. ALLEN:

Q Good afternoon, sir. How are you?

A I'm pretty good. Thank you.

Q We tried to hurry and finish your direct on Friday. So I want to have a few more minutes with you, and then defense counsel will be able to ask you some questions, okay? Are you with me?

A Yes.

Q When we left, you were talking to us about Harvey and we were going through some photos. If it's okay with you, we would like to --

MR. ALLEN: These photos are already in evidence, Your Honor.

THE COURT: Mm-hmm.

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BY MR. ALLEN:

Q I'd like -- do you have a photo in front of you that -- this one right here?

A Yes.

Q Okay. I'd like to show -- it's Plaintiff's 7, Photo 12. And tell the jury what you see there, sir.

A Yes. This photograph was taken in Elaine and my house. And it was my 74th birthday, but they were having some fun and they put 47th birthday. I wish it could have been 47th birthday. Joseph, who was a really good cook and pastry, I guess, maker, you'd say, Joseph made the cake with the help of Harvey.

And Harvey said, I like cheesecake. So Joseph incorporated little wedges of cheesecake, it was very clever, around the other cake. It was really good. So that is the picture of our -- of my 74th birthday with Harvey and Joseph.

Q And remind the jury --

A Not Joseph, I'm sorry. Joseph took the picture with Harvey and me.

Q Remind us, the jury as to who Joseph is.

A Joseph was Harvey's companion and housekeeper.

Q And if it was your 74th birthday, why does it say 47?

A Because they were having fun with me, so they took the candles and made them 47.

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Q And did Harvey enjoy birthdays?
A Harvey enjoyed them so that once you had a birthday, or even himself, he was already preparing for the next birthday. He loved birthdays.
Q And this is 74, and you're how old today, sir, 79?
A Seventy-nine.
Q So that was five years ago?
A Yes.
Q And when is your birthday?
A January 28. It was 1937.
Q You just turned 79, correct?
A Yes.
Q Let's move to Exhibit No. 5, Plaintiff's 7, Photo No. 5. And tell the jury who's in the photo.
A In the photo is Harvey and his brother, Neil, Elaine and myself. And as usual, how Harvey loved birthdays, we made a picture here. We took a picture of him at his birthday party.
Q And do you remember what birthday that was?
A I'm sorry, but I don't remember the number. I'm sorry.
Q That's okay. Now, moving forward, we have two more photos. I've got Photo No. 1, and can you tell the jury who we have pictured here?
A Well, this is kind of a special photo for me.

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Sitting on the left is Neil. This is Harvey's brother. And then we'll skip over to the --

Q Well, tell us who the next person is.

A Well, that's Randi [phonetic]. And Randi is the sister to the -- to Jason, who has his arm around his sister. Jason is my godson. And even better than being my godson, Jason got married. And when one day his wife gave us a call on the phone and Elaine was talking to her and she said, What would you like to be called? And Elaine said, Well, you call me Elaine and you call Jackie, Jackie. She said, No, I mean, would you like to be called Grandma or would you like to be called Bubbie?

Well, in Jewish, Bubbie is an old, old grandma. So Elaine said, No, I'd rather -- she said, Why are you asking again? And she said, Well, what would Jack like to be called? So she said, He'd like to be called Zayde, which is in Jewish is a grandpa, old grandpa, and Grandpa in English. So I said I'll be called Zayde, because I had a Zayde too. So and we said, But why are you saying that? And she said, Because we're pregnant and I would like to make you and Elaine grandparents.

Well, just to go back a little bit, Jason and his sister, their mother who had passed away, Rita, I was not only very, very close with Rita, I was even her date for her sweet sixteen. And that was a special sweet sixteen because -- we

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always had a sweet sixteen party at home, somebody's house. And this one was in a hotel in Washington, D.C. with a band. That was really special. And I remember the dress, green velvet that Rita was wearing. But Elaine was there too, a little competition.

But we all knew each other, you know. We were all friends. So it was -- she was very special, Rita, and quite a wonderful person. Next to -- and the honor of being grandparents, we would not have been grandparents. It's like when -- and I'm sorry to use my brain to work. Rachael, it's like when Rachael, we went to see her parents and Rachael in Florida once --

Q And Rachael is the daughter --

A My granddaughter.

Q The daughter [inaudible].

A Yes, granddaughter. Rachael came home on the school bus, and Elaine, Harvey and myself were visiting and we were waiting for her from the bus. And the first thing she did when she came off the bus, she ran over to Harvey, and she was little, Harvey was little too, but she was smaller, and she grabbed Harvey kind of around the waist and, Uncle Harvey.

Well, I'll tell you something, it made us all feel so good, because Harvey was so proud that she called him Uncle Harvey. No one ever said that to him. Harvey of course is in the picture. And then the guy is Marty with the guitar, and

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Marty was also Rita's son. So that's the picture there.

Q Tell you what. We'll just stop with that photo. Let me ask you a question, sir. You look very nice today. You're dressed up. And did Harvey like to get dressed up?

A Harvey --

Q Can you tell us about that?

A Harvey loved to get dressed up, and I'd like to say he got it from his father. Because I got dressed every day to go to work, you know, in proper -- which was proper for me. And I used to get teased by people that -- in the family that I took longer than a woman to dress up. But anyhow, my tie had to be point to point and all that kind of stuff, and I loved to get dressed.

Well, Harvey loved to get dressed too. And he would come home from work and he would change his clothes to another outfit. And he loved watches, so he'd change his watch to another watch. And he would sometimes dress in a suit when we were going with a tie somewhere maybe. And he would say, I feel like a lawyer in a suit. And yeah, he loved it. He loved to dress up.

And he kept all of his clothes -- I have to tell you really quickly, because I know I'm taking too much of your time. Even when Harvey was real young, when Harvey went to sleep at night he would put his shoes away, and I've got the same habit. And he would put them so they were, you know,

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next to each other and just perfectly, you know, next to the toe to toe kind of thing. And if they weren't right, he'd get out of bed and he'd put those shoes like that again.

And that was -- I kind of remembered that from, I don't know, maybe he was five years old that he did that. And, well, Neil was Neil. When Neil said he was sleepy, he'd go to sleep against the wall before Elaine would take him up to bed. And Elaine would say, I'm not going to clean your room until you do. It was the opposite. So that's -- yeah, he loved to.

Q Anything else you want to tell the jury before we talk about Harvey's passing?

A [No audible response.]

Q Okay. Let's talk about Harvey's passing.

A Yeah.

Q When did you learn -- where were you when you learned he passed?

A In the apartment we rented in Ocean City, Maryland. And that particular apartment in Ocean City, Maryland, it's about three hours from Washington, D.C. And the two buildings, ten floor buildings right on the beach. All my friends, all, a good ten couples that we were brought up together with, including my best man who is still my best man and friend today, which was Rita's -- which was Rita's brother.

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So we were all kind of intermingled there. We were in -- I was in the apartment and Elaine was on the balcony reading a book and the phone rang. I'm sorry for the -- a little hard. The phone rang and someone was hysterical on the phone, hysterical, and I didn't know who it was. And then I finally said, Joseph, is this you? And it was Joseph. And Joseph said something to the effect of Harvey died.

I don't know if we had a whole lot more conversation on that, Joseph and I. But I immediately called up Ronnie in the building and his wife, and I called across the hall our other good friend, Bobby, and they came over. And Elaine came in after, just came in, you know, was finished on the balcony, and she noticed that they were there. Well, I guess she thought that was a little bit strange and she said, What's going on? And I had to tell her.

I said, Joseph called, something like that. I said to her, Harvey died. And she said, after she was crying, everyone was crying, she said, And how? I said -- I talked again, I called back, but I couldn't make any sense of Joseph, but I understand he was on the bus. And Elaine was crying and she said, He died all alone on the bus. And then they made arrangements for us to go 300 -- three hours away to the Baltimore airport.

It was the worst ride and transfer to another plane

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that I'll ever want to take again in my life. And when we were leaving to get -- we were going into the car for Bobby and Stanley to take us, there were about 20 of our friends, ten couples or more that were all standing at the curb on the parking lot. They didn't say a word and we didn't say a word. But they knew Harvey too. And the [inaudible] was when we got home, Neil was [inaudible] couple friends, and that's what happened.

Q And --

A And if I can add one thing to that, please.

Q Yes, you can.

A We didn't expect -- it wasn't Washington, D.C., where we were born and raised, and we didn't expect many people at the funeral. And after the funeral, it's kind of customary that we go back to the house, we have some food prepared for when they come back, the people that want to that were at the funeral. And people came back and stayed a few hours that we never knew. We never knew.

But they knew Harvey, because he talked with them and loved -- he just loved people. And I asked them who are you and this and that. And those were people within the workshops and different places. One man was the man where Harvey knew he could get a free doughnut and -- when he'd walk past the bakery. And a lot of people knew Harvey, they came.

Q Is there anything else you would like to tell the

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jury about your son or your loss before I let defense counsel [inaudible]?

A My loss, I say I lost my -- the number one son, and a jovial inherited humor of my father and my grandfather. And I'd have a good time too joking and carrying on and cutting up with Harvey and, well, he's not there anymore to cut up with.

We go regularly to the cemetery, which is maybe three blocks from our house, King David, and we stand there -- matter of fact we did before we came here, and we sing him, Neil does and Harvey -- I'm sorry. Neil does, myself and Elaine, we'll sing him the songs that he enjoyed even if he didn't know to sing them, but he enjoyed them and he would ask me to sing them or Elaine.

And every time that Neil comes to Vegas, he goes to one of the grocery stores, chain stores where a lady has been doing flowers, arrangements there for 28 years, and he buys flowers to bring to Harvey at the cemetery first, and then he brings his mom flowers, and always goes to see Harvey when he comes and when he leaves. They were so close. Good brothers. That's all I -- good memories.

MR. ALLEN: Please the Court, I'd pass the witness.

THE COURT: All right. Cross.

MS. HYSON: We don't have any questions, Your Honor.

THE COURT: Mr. Chernikoff, thank you for your time. If you'd like to go sit down by your lawyers.

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THE WITNESS: Thank you, Your Honor.
THE COURT: Thank you, sir.
All right. The next witness by the State -- I'm sorry, by the plaintiff. I'm usually in criminal trial, so I'm sorry.
(Marshal assists the witness.)
MR. ALLEN: Yes, Your Honor. If it'd please the Court, we'd like to call the bus driver, Mr. Farrales.
THE COURT: Okay. Come on up. And the same question. Are you going to call your client in your case in chief?
MS. SANDERS: Yes.
THE COURT: So you'll be limited to cross, correct?
MS. SANDERS: Right.
THE COURT: All right.
JAY FARRALES, PLAINTIFF'S WITNESS, SWORN
THE CLERK: Would you please state and spell your first and last name for the record.
THE WITNESS: My name is Jay Farrales, spelled J-a-y, F-a, double R, a-l-e-s.
THE COURT: Whenever you're ready.
MR. ALLEN: Please the Court.
DIRECT EXAMINATION
BY MR. ALLEN:
Q Mr. Farrales, we've met before?

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A Yes.

Q I had the opportunity to meet you and take your deposition a while back. Do you remember that?

A Yes, sir.

Q And I get a chance to ask you some questions right now, and you understand that your lawyer will be able to ask you questions when I'm finished? Do you understand that?

A I understand, sir.

Q And so I'd like to ask you a few questions. And first I'd like to talk to you about the employee handbook.

A Okay.

Q The employee handbook which has been previously marked as Exhibit 2, you acknowledged that -- let me ask you this. You acknowledged that you had read that book and you had signed a document stating that you'd read the rules and you understood the rules of the employee handbook. Do you remember that?

A I remember, sir.

Q And the handbook is a set of safety rules for the company that the company intended for you to follow; is that true?

MS. SANDERS: Objection to the characterization of a set of safety rules.

THE COURT: I'll overrule it.

THE WITNESS: The handbook, yes, sir, is a document

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that they give it to us and we are accept to -- we asked to follow it. And this handbook are guidelines and mostly are informations that we have in our hands to look at and be informative for us.

MR. ALLEN: Your Honor, I'd like to publish his deposition.

THE COURT: Any objections?

MS. SANDERS: I don't have an objection. I just don't have a copy of it, I think.

THE COURT: And what page, Counsel, are you going to show him?

MR. ALLEN: I want to show him page 21, in his deposition.

BY MR. ALLEN:

Q And while she's doing that, do you remember when I took your deposition that your lawyer was with you when I took your deposition?

A Yes, my lawyer was with me.

Q And just like today, you were sworn to tell the truth, the whole truth and nothing but the truth on that day. Do you remember that?

A Yes, sir.

Q And in fact, you had an opportunity to have the deposition sent to you after it was typed up and read it. Did you do that?

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A Yes, I did, sir.
Q And you had an opportunity to change anything. Did you do that?
A What do you mean by change, sir?
Q You had an opportunity to change anything in your deposition by filling out a form. Did you ever do that?
A I don't quite understand what you mean by --
Q It's actually been two years since I've taken your deposition. Did you tell anybody, write down or tell anybody to let me know that your opinions or your testimony may have changed? Did you ever do that?
A I don't remember changing anything, sir.
Q Okay. Here's your deposition, sir. Would you please turn to page 21.
A Yes, sir.
Q Line 21, would you follow along with me as I read it.
A Yes, sir.
Q "Do you believe the employee handbook that we've just gone over is a set of safety rules that's intended for you to follow?
"A Yes."
Did I read that correct, sir?
A Yes, you did, sir.
Q Thank you. And one of the reasons you follow that

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employee handbook is to prevent harm to people, true?

A [No audible response.]

THE COURT: Sir, close your deposition, please.

THE WITNESS: Okay.

THE COURT: Thank you. And then I don't know if you heard his question.

BY MR. ALLEN:

Q And one of the reasons for you to follow the employee handbook is to prevent harm to people, true?

A That's true, sir.

Q And you expect a company to be able to tell you and to teach you to know those rules, true?

A To teach us and give us all the information, sir, yes.

Q Yes. Okay. Yes. And they train you to ensure you that you have the ability to act upon the proper policies, true?

A That is correct, sir.

Q And that's for everybody's safety, true?

A That's correct, sir.

Q Even your own safety?

A My own safety too, sir.

Q And you believe your passengers are entitled to have a bus driver that follows the company rules, true?

A It's true, sir.

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Q And you believe that Harvey's parents, Elaine and Jack, are entitled to have a bus driver that follows their company rules?

A Well, I have a lot of things in the rules that -- well, I need to accept this and understand it, and try to do and follow as most as I can and without having to hurt anybody or anything like that.

Q Sir, is it reasonable for Harvey's parents to rely on you to follow your company rules?

A Yes, sir.

Q And do you believe it's the company's job to make sure you know those rules and enforce those rules?

A Not really to like know everything in the whatever it is in the book.

Q Would you say that again, sir? I'm a little hard of hearing.

A It's not really like when you have this handbook, you would read it and not necessarily say, you know, everything that's in it is like you -- you say understand everything and like what you call this, like remember everything that's in it. But to read it and do the best thing that you can do to understand everything, yeah.

Q Do you believe that it's the company, your company's, First Transit's job to make sure that you know these rules and you enforce these rules?

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MS. SANDERS: Objection. It's overbroad.

THE COURT: Overruled.

THE WITNESS: To know those rules, yes, sir.

BY MR. ALLEN:

Q And enforce the rules?

A Enforce the rules, yes.

Q Yes. And one of the ways the company enforces those rules is they give you tests, don't they, where they train you with tests?

A Will train us. They will go to all the different classroom training and do all BTWs and talk about everything about in the classroom and hours and hours of understanding it, yes.

Q And so they give you these tests and the reason for those tests is for you to learn, right?

A For us to -- I didn't...

Q For you to learn?

A Yes.

Q Okay.

A Of course.

Q And you're learning what the company expects of you, true?

A Well, that's true too, sir.

Q And who's responsible for who, that's one of the things you learn too, true?

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A Responsibility comes with, you know, people in the like -- it's -- there are rules that you follow and then -- I'm sorry. I was never in this situation before and so I apologize.

Q I want to hand to you what's part of your personnel file.

A Pardon, sir?

Q I want to hand you a document that's part of your personnel file.

A Yes.

Q Okay. And I'm going to ask you about Question No. 5.

A Yes, sir.

Q Okay. Do you recognize that test? The title of the test is Mobility Device Written Test. Do you see that?

MS. SANDERS: Can we have the page number, Counsel?

MR. ALLEN: Yes. I'll actually give you my copy.

BY MR. ALLEN:

Q Do you see the top of that page?

A Yes, sir. "Mobility device written test."

Q Yes?

A Yes, sir.

Q And would you read to the jury the Question No. 5, that has a mark across it?

A Okay, sir. "It's one of the vehicle operator's

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responsibility or Laidlaw's to ensure all necessary steps are taken to ensure passenger safety."

Q And do you have four options, Option A, the vehicle operator's responsibility, that's you?

A Yes, sir.

Q Or Option 2, Laidlaw, the company's responsibility, that's Option B?

A That's correct, sir.

Q And Option C is both, and Option D is neither. Did I read that right?

A Yes, sir.

Q And you answered C, both, right?

A That's correct, sir.

Q And you got that wrong?

A I got that wrong.

Q Tell the jury when the company graded your test and said that answer was wrong, that both you and the company were responsible for passenger safety, who did they say was the correct answer?

A It's me, the driver.

Q It's all your responsibility --

A Yes, sir.

Q -- according to your company, and that's how they trained you, true?

A Well --

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Q That's how this company trained you, that they have no responsibility, true?

MS. SANDERS: Objection. That's argumentative and overbroad.

THE COURT: Sustained.

MR. ALLEN: But -- go ahead.

THE COURT: The objection --

MR. ALLEN: When the answer was --

THE COURT: -- was sustained.

MR. ALLEN: -- you answered --

Yes, ma'am. Thank you, Your Honor. I apologize.

THE COURT: No worries.

BY MR. ALLEN:

Q When you answered both and you got it wrong, were you surprised?

A Well, I'm -- I'm not really -- because the question over here, they were just giving us reality on what you as the driver, they have an idea. And what -- when we talk about responsibility, it shows here that you as the driver were driving or doing all this task.

Q And what --

A Like to have those responsibilities over you and not necessarily saying that it's not their responsibility too, like that's the way I understand that. I'm sure you're in the corporate business too, sir.

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Q Anything else, sir?

A No. That's it.

Q Thank you. You got that employee handbook and they gave you on the employee handbook, page 3 of the employee handbook. And if I may hand you a copy of what's previously marked as Exhibit 2, page -- page -- pardon me, page 8, of the employee handbook, the safety rule handbook. And that is page 8; is that correct, sir, the bottom of the page, left-hand corner?

A Oh, right here. Yes, sir. Page 8, yes.

Q And I'm going to read for the jury the last bullet on that page, if you would follow along with me. It says, "No person is authorized to make oral exceptions to the handbook and written exceptions are permitted only when signed by the president of First Transit." Did I read that correct?

A Yes, sir.

Q And you had never ever gotten anything in writing from the company saying that page 70 of the employee handbook did not apply, true?

A No, sir.

Q And matter of fact, no one ever trained you on page 70, true?

A No, sir.

Q Is that a true statement?

A We read about this information as a general

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information what was given to us.

Q You did? Turn to page 70 of your deposition. Would you turn to page 70, of that sworn testimony --

A Yes, sir.

Q -- when I took your deposition?

Two years ago you were under oath, with your lawyer next to you, to tell the truth. Would you read what -- are you at page 70?

A I'm on 70.

Q You are? Page 70, line 2. Okay. Were you ever given any instruction in writing saying -- excuse me. The wrong quote.

Turn to page 21, line 8.

A You said page 21?

Q Twenty-one, line 8. Are you with me, sir?

A Page 21, line what, sir?

Q Twenty-one, line 8.

(Pause in proceeding.)

MR. ALLEN: I'm sorry. I'm sorry. I was right. Turn to page 71. Excuse me, you-all. My notes are backwards.

BY MR. ALLEN:

Q Turn to page 71, line 6.

A Yes, sir.

Q Follow with me.

"Q The question is, did anybody in

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training you or in your history at First Transit ever say page 70, the first aid, choking does not apply to you?"

Your answer, line 10: "Nobody." Did I read that correctly?

A Yes, you did, sir.

Q I did?

A Yes, you did, sir.

Q And did anybody verbally tell you that you were not required to know page 70 in your handbook?

A Yes, we are not required.

Q Did any -- let me turn you to page 71, line 6. Read with me. The question is: Did anybody in training you or in your history at First Transit ever say page 70, the first aid, choking does not apply to you?

MS. SANDERS: I'm going to object, Your Honor. We just went over this.

THE COURT: Hold on.

BY MR. ALLEN:

Q Your answer on line 10, Nobody.

THE COURT: Is the objection cumulative?

MS. SANDERS: Yeah. We just went over this exact same thing.

THE COURT: I'll allow it.

MR. ALLEN: I did not.

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THE COURT: I'll allow the question. Please ask it.
MR. ALLEN: What, you'll allow it?
THE COURT: Overruled.
MR. ALLEN: Overruled?
THE COURT: Overruled, yes.
MR. ALLEN: Yeah, I'm sorry.
BY MR. ALLEN:
Q I'm going to read it again, sir. Page 71, line 6. The question, read along with me, Did anybody in training you or in your history at First Transit ever say page 70, the first aid, choking does not apply to you? Your answer, line 10, Nobody. Did I read that correctly?
A Yes, sir.
Q And the company had trained you and explained to you that the reason to not let people eat on the bus is the risk of choking, true?
MS. SANDERS: Objection. It's overbroad.
THE COURT: I'm sorry. I couldn't even hear the question.
BY MR. ALLEN:
Q Your company trained you and explained to you that the reason to not let people eat on the bus is the risk of choking --
THE COURT: Overruled.

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BY MR. ALLEN:

Q -- true?

A It's true.

Q True?

A Yes, sir.

Q And --

A Where anywhere it can be true.

Q -- that's not a comfort rule. That's a safety rule, isn't it, sir?

MS. SANDERS: Objection. Calls for speculation.

BY MR. ALLEN:

Q It's a safety rule --

A It's a safety --

THE COURT: Overruled.

BY MR. ALLEN:

Q -- for your passengers' safety?

A For passenger safety --

Q Yes.

A -- and --

Q And your company explained to you that one of the risks of choking was that somebody could die, true?

A Can you repeat that question, sir?

Q The company explained to you that one of the risks of choking was that somebody could die?

A That could die?

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Q Yes.
A It's possible, sir, yes.
Q And you understand as an operator of a paratransit bus that when somebody eats on the bus and chokes --
A Yes, sir.
Q -- that death's foreseeable harm, true? That's a foreseeable harm?
A What do you mean by --
Q That if somebody --
A It can happen and it can -- it can do harm like a possibility of choking, is that what you mean?
Q Yes. And dying.
A And dying?
Q Yes.
A That's a possibility, yes.
Q And you did not enforce the rule of no eating on the bus on the day that Harvey died, true?
MS. SANDERS: Objection. Misstates --
THE WITNESS: I did not.
BY MR. ALLEN:
Q But you had enforced that rule on the bus before, true?
A You are asking me if I did enforce that rule to Harvey?
Q No. I'm asking --

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A I did not. I didn't know that he was eating or doing --

Q The question is --

A -- so how could I enforce it?

Q -- did you -- have you enforced the rule --

A Yes, sir.

Q -- of no eating on the bus before --

A Before, yes.

Q -- to other passengers?

A To other passengers. And not only eating, other kind of things that would came up, like a lot of things that our passengers are doing that are inappropriate or they're not supposed to be doing, yes.

Q And the jury saw the video, I'm not going to show it right now, that started at approximately 7:59 a.m. and lasted for about 45 seconds when you got -- walked off the bus and you helped the passenger by the name of Kincaid on and off the bus.

A Yes, sir.

Q And when you came back on the bus, you did not look, when you got back on the bus, at Harvey, true?

A That's true, sir, I did not look.

Q And when you leave the bus and come back on the bus, you're supposed to look. It's your job.

A Say it again, sir.

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Q When you leave the bus and you come back on the bus, your job is to look, true?

MS. SANDERS: Objection. Overbroad.

THE WITNESS: We make --

THE COURT: Objection what? I couldn't hear you. I'm sorry.

MS. SANDERS: It's overbroad, vague and ambiguous.

THE COURT: Overruled.

BY MR. ALLEN:

Q Would you like me to repeat it?

A I did not look, sir. I did not look.

Q You did not look.

A Yeah. But I know he was there when -- when I went past the mirror, I know and --

Q But you didn't look?

A At that time. At that time I'm aware that he's still there.

Q You didn't look?

A I didn't look. But I can see him in my peripheral vision and when I passed to him, and I can still be like him still over there, and then I went to sit down on my seat and did my paperworks and then left.

Q Finished?

A Yes, sir, I'm finished.

Q Thank you. Thank you, sir. So when you got back on

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the bus and you started up the bus --

A Yes, sir.

Q -- and you drove the bus, you drove the bus without ensuring that Harvey was safely seated in his seat, seat-belted, right; true?

A I'm aware of him being there and I know in my mind I think he's still safe and --

Q Sir --

A -- and I -- I certainly did not look, that's the --

Q You didn't. You didn't look?

A -- that's the truth.

I didn't look, yes.

Q So you got back on the bus and then you sat down at the seat and it looked like you filled out some piece of paperwork --

A That's correct, sir.

Q -- right?

A That's correct.

Q And you started the bus and then you left, and in that entire time, so the jury's clear, you didn't look, did you?

A Yes, sir.

Q Sir, if you had looked at him and you thought that he needed help, you would have gone over and tried to help him, wouldn't you --

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MS. SANDERS: Objection. Calls for speculation.
BY MR. ALLEN:
Q -- before you started the bus?
THE COURT: I'm sorry. I can't even hear the question. Counsel.
BY MR. ALLEN:
Q If you had looked and you thought that Harvey needed help, you would have gone over and tried to help him before you started the bus, true?
THE COURT: Overruled.
THE WITNESS: When if -- I'm not sure if I would be able to recognize him, and but that's not what happened. I just went on, and in my mind I know that he was still there and then I went on.
BY MR. ALLEN:
Q Sir, if you turn to page 104, line 3 of your sworn testimony --
A One, oh, four?
Q Yes, sir.
A Yes, sir.
Q Please follow with me as I read it. Make sure I read it correctly, please. "And you were going to get off the bus and exit the bus --"
A Number 4 [inaudible].
Q One, oh, four, line three?

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A And three, yes.
Q Yes?
Line 4 now. "When you get off and exit the bus, did you look at Harvey and see whether he was eating or acting inappropriately? No." Did I read that correctly?
A [No audible response.]
Q Did I read that correctly?
A [No audible response.]
Q So far?
A I'm still reading it, sir.
Q Yes, sir. Okay. I'm sorry.
A Pardon me. I'm -- I want [inaudible].
Q Take your time.
Did I read it correctly?
A I -- the reason I'm looking at it was the sequence of what is going on over here, if we may go back to like a little before, back a little way.
Q Then go back a little bit.
A Yeah. Let me --
Q But what --
A Can you --
Q What I want to ask you --
A Can you read it again for me, sir?
Q Yes, sir. Will you follow? 104, line 3, "And when you're going to get off and exit the bus, when you get off and

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exit the bus, did you look at Harvey to see whether he's eating or acting appropriately?" Your answer was, No.

A No.

Q Did I read that correctly?

A Yeah. You did, sir.

Q Okay. Now, the next question --

A I'm just trying to understand what was in this part of it where why were you -- the way it was really going where I exit the bus, when was the time I was -- I was doing this. I'm just trying to remember and recall what you were trying to --

Q And that's why I took your deposition two years ago, to ask you those questions. Would you turn to the next page.

A One, oh, five?

Q Yes, sir. 105, line 4. Okay. Are you with me, 105, line 4?

A Yes, sir.

Q Okay. "Okay. And if you would have looked at him this time with the bus stopped and thought he needed help, would you have gone over and tried to help him before starting the bus?" Your answer, "I would."

A Yes.

Q Did I read that correct?

A [No audible response.]

Q Yes?

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A Yes, it does.

Q And you would have helped. Let's talk about the use of mirrors. You use mirrors to check the inside of your vehicle; is that correct?

A Yes. Inside and the interior and exterior of the bus.

Q And when you sit down at your bus before you even take off out of the parking lot, explain to the jury how you set your mirrors to make sure you see the inside of the bus and the outside of the bus.

A You mean --

Q Tell the jury. Just tell the jury, you're in the bus, you come to work in the morning, you sit down, you know, and you sit in that bus, you know, how do you -- how do you set your mirrors to make sure that you see outside and inside?

A What we would do in the morning during our pre-inspection, we would get in and we check the interior, the -- is there anything [inaudible] the bus, and then we check on the mirrors, the left in front of it and the right mirror, and we adjust it if there's a reason for you to adjust it, because you can see the one behind you and you set the mirror over here [indicating] to see the back and the surroundings and the back of the bus.

Q And you're trying to see whether you can see everybody on the bus, true?

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A Yes, that's true.

Q That's part of what you're doing. And you, you're proficient in using the mirrors to be aware of your surroundings; is that true?

A That's true, sir.

Q And what you're doing when you're using the mirrors for the inside of the bus, you're using the mirrors to make sure that the passengers are safe, true?

A That's part of it, sir. You see, check on them if there's like out of the ordinary going on or somebody trying to stand up while you are driving, and the hazards, you know, are the one next to the bus or behind the bus and all those kind of things, and be aware with it.

Q And so you're looking at the -- part of looking at the mirror or having those mirrors inside the vehicle is to be able to see that all the passengers are following all the safety rules on the bus, true?

A That's part of it, checking on them, yes.

Q And the first time that you saw Harvey was when he was -- was when you looked at your mirror and you saw him leaning, true?

A I saw him in the mirror, yes. After we -- after we stopped, yeah.

Q And that was the first time that you were aware that Harvey was leaning between the time that you dropped off

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passenger Kincaid and the time in which the jury saw you stop and your head kind of -- eyes pop up in the mirror, that was the first time?

A It was the first time I saw him in the mirror, yes.

Q And you were wearing, I think wearing sunglasses?

A Yes [inaudible], sir.

Q You use reading glasses like I do. Do you --

A I wasn't -- I wasn't using this at that time.

Q Those weren't prescription glasses, those were just sunglasses, right?

A Those were sunglasses.

Q All right. And when you looked up and you saw him when the bus was stopped, you then went and gave him some -- looked at him and then you got back in the vehicle, then you pulled the vehicle over to the side of the road.

A To the side of the road.

Q And when you looked at him with the bus stopped, had you known CPR or first aid training, would you have performed what's on page 70? If you'd have known that, would you have performed the Heimlich maneuver and first aid training?

MS. SANDERS: Objection. Calls for speculation.

THE COURT: Overruled.

THE WITNESS: If I know it, yes, professionally, like to go through the training and all that. And I would say this. Regardless of whether it's a company rule or not a

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company rule, I could probably -- but I can say for, you know, like -- like if I'm capable really of that, but I would do it.

BY MR. ALLEN:

Q You would have done it?

A I would have done it.

Q You would have done page 70, if they had trained you, true?

A That's true.

(Pause in proceeding.)

MR. ALLEN: I think that's all the questions I have, sir. Thank you for your time.

MS. SANDERS: I have no questions at this time, Your Honor.

MR. ALLEN: At this time. At this time.

THE COURT: Okay. Mr. Farrales, there's no further questions. If you want to go sit down, please.

THE WITNESS: Yes.

THE COURT: The next witness by the plaintiff.

MR. CLOWARD: Elaine Chernikoff, Your Honor.

ELAINE CHERNIKOFF, PLAINTIFF'S WITNESS, SWORN

MR. CLOWARD: Your Honor, may I provide this to Ms. Chernikoff?

THE COURT: Sure.

THE CLERK: Would you please state and spell your first and last name for the record.

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THE WITNESS: Elaine Chernikoff, E-l-a-i-n-e, then C-h-e-r-n-i-k-o-f-f.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. ALLEN:

Q Good morning -- or good afternoon. It feels like morning because we just started. How are you doing?

A Hanging in there.

Q Yes, ma'am. I'd like if you'd tell the jury -- you're Harvey's mom; is that right?

A Yes.

Q And tell the jury about the time -- let's just give a little history here. You're born -- excuse me. Where were you born?

A I was born in Washington, D.C.

Q And when did you meet your husband, Jack?

A When we were in high school. I was supposed to double-date with Jack and another girl. Not myself. I was with someone else, and Jack didn't show up. So we went to this party by ourselves and then Jack came in and I met him at this party. And the next day I got a call from Jack, and then he called up and wanted to go out with me, and that's how we started our relationship.

Q And how soon after that did you get married?

A I was 16 when we met and we got married when I

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was 19. Three years.

Q And how soon after that did you find out you were pregnant with your first son?

A We got married October 19, 1958, and Harvey was born October 8, 1959. A year. A little over a year.

Q And how was that birth?

A The pregnancy was pretty normal. They said that my birth canal was small and that I shouldn't gain a lot of weight because Harvey -- well, I didn't even know then. They couldn't tell you whether it was a boy or a girl. That the baby would have a difficult time if it was too big, and so I only gained like 12 pounds. And then when I went into labor, I was in labor 13 or 14 hours. The baby wasn't in position, and when he finally did start to come out, they had to use forceps to guide him out properly.

Q And how long was he in the hospital?

A He was in the hospital eight days. We lived quite far out in the suburbs, and it -- Harvey's circumcision was done in the hospital. That's part of the Jewish ritual when a baby is born. And so we held the circumcision in the hospital. But Harvey was also only 5 pounds, 5 ounces.

And they didn't use an incubator, but they called it a hot box. It was about that big [indicating], and like lamp lights would focus on him. And he was in there because he was very small and he actually lost a couple of ounces, and they

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were trying to build him up before we went home.

Q And what -- let's move forward in time. When was the -- how old was Harvey before you realized Harvey had some special needs?

A You know, there's sort of a set time when babies turn over by themselves and then when they start crawling and when they start walking. And Harvey was always within the norm, but to the very end of the norm. So he was slow. When he was born he had cross-eyes, and we took him to a specialist, a doctor that could correct it. And Harvey had two surgeries very early on, one probably before he was a year old, and the other one when he was about three. And then he had his tonsils out and his adenoids before he was five.

So, you know, people would tell me, oh, you're too protective of him. But he was an infant. I mean, I don't think I would have -- was any more protective of him than any other mother would have been. And he was born, as I told you, in October. And boys are slower than girls and, you know, no one ever actually said that Harvey had mental disabilities.

But when he was -- went to nursery school and he was about four, for a few hours every day, I don't know, two or three hours a day, and when he would color, he would more or less scribble. He never tried to color within the lines. And also when he cut, he never cut where he was supposed to. He would just cut anyplace. And so his small motor control was

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not good.

But then he went to kindergarten, the normal kindergarten, and at the end of the semester it was suggested that they keep Harvey back in kindergarten for another year. And Jack and I spoke with our pediatrician and told him what was going on and he said ask the school to test him. So they were supposed to do testing on him to see whether or not why -- possibly why he shouldn't go into the first grade.

And it was summertime and close to when school was starting, and the school principal had never set anything up or there was a backlog, I don't remember quite the reason why they didn't do it. But we were able to set up an appointment in Baltimore at Johns Hopkins University hospital, and so we took Harvey over there for testing.

And they did things with blocks and with paper, like to color in the lines and all kinds of different kind of mentally testing for his IQ. And of course they spoke with him and had conversations with him and whatever else they do to see if he was socially at his age level.

And I'm not sure if we went back or if it was all in the same day, but the doctor had us come in, Jack and I, and they told us that Harvey was mentally retarded. And we had never used that word before for Harvey. It was always Harvey's slow, but never ever said retarded. I guess it was like a little bit of a -- not a little bit. It was a big

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shock to me.

But socially, as I think I mentioned, Harvey communicated very well and they said socially he was above average for his age group. So we contacted the school and told them what the findings were, and I believe Johns Hopkins sent the principal a letter. And so Harvey was put in another school for people with mental disabilities. It was separate from the regular normal so called elementary school, and it was about a half an hour from our house.

And Harvey was in the special ed program and remained in the special ed there for several years. He was -- his IQ was probably in the 60s, maybe low to middle 60s, and 70 is what they call normal. So he was sort of higher functioning, I would say, than most of the other students at that school. And Jack had an opportunity for his job to move to California, and I went --

Q You slowed down a little.

A Pardon? Did I --

Q Are you okay?

A Am I --

Q Take a break. Deep breath. All right. There you go. Tell us, you're living in the D.C. Baltimore area.

A We were living right outside of Washington, D.C. --

Q All right. And so --

A -- in a small city called Bowie, Maryland.

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Q So about what age was Harvey when you moved from Baltimore area or the Maryland area out to California?

A He was 12.

Q So everything that you just told us was the first 12 years of Harvey's life roughly?

A Yeah, pretty much. I mean, I could tell you the vacations we went on and the things --

Q We'll get on that, but I really want the jury to understand, or we want -- I think the jury wants to understand his mental capacity.

A Okay.

Q Okay.

A Yeah. Well --

Q So --

A Hmm?

Q Are you nervous?

A Yeah, I am.

Q I am too.

A Harvey was at this special school in Laurel, Maryland, and as I told you, he was sort of more functioning a little better than a lot of the pupils in his class. He didn't need somebody to take him to the bathroom and help him, or he had those kind of skills. But things really didn't improve that much. He didn't -- he never could color within the lines even when he was an adult. He was very friendly,

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outgoing, always talked to the other children in his classroom.

But he couldn't make change. He eventually learned what a dime was and a quarter and a nickel, but he didn't really know the concept of what they -- that a nickel was five cents and it would only buy a little bit. You know, as the coins get bigger they can buy more, that he never got. He probably could have told you what one and one was and maybe two and two, but above that, I don't think he had those kinds of concepts.

Q And when was this?

A While he was in Laurel, Maryland.

Q While he was in Maryland.

A Or actually, forever. Harvey never did -- he knew what a dollar was. He wouldn't know what a -- he knew what a five dollar bill was or a ten dollar bill, but he couldn't tell you a hundred dollar bill and he could never make change. So this was all of his life. But, you know, way back then they would be teaching you how to count one is one and -- or this is one apple and this is two -- another apple, how many apples. He might be able to tell you two, but he never went to three.

Q In Maryland, if you take the jury to Maryland, where was he in -- was he in school there? Did he go --

A Yeah. It was a special school. Like I said, it

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wasn't a regular elementary school. It was a school for people with disabilities, mostly mentally, mental retardation children, and they tried to teach them to read. And he would bring home books and we would read, but he never got above a first grade level, maybe even a little lower than first grade. And we used to use the flashcards and go over the words over and over.

But he might be able to tell you what the word was on a card, but if you gave him a piece of paper like a book or a newspaper, he wouldn't know what that word was. But when it was written really big, and hat, hat, things like that he could -- eventually he learned to read the flashcard, but he never read from a book or a newspaper.

Q And you say he never, I mean, even at the end of his life?

A No. He couldn't read you a book or pick up a newspaper and actually read a column to you. He could watch television when he was older. When he was young he never sat for more than two minutes. He was always hyper, running around.

Q Was he hyper in Maryland?

A Yes.

Q Did they give him a diagnosis that you --

A Well, he was hyperactive and he was put on medications for that.

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Q So what kind of medication was he taking when he was first 12 years of life?

A He took Ritalin, I think it was.

Q And that was for -- what did you understand that was for; hyperactivity?

A For the hyperactivity, yes. And I'm trying to think of what other medications. I don't recall any other medications that he was on.

Q Did they give him medications to calm him down in any way?

A Yes.

Q Other than Ritalin, was there other medications?

A Possibly there were. I mean, that was 50-some years, now it's probably 56 years or 50 years ago. I don't really --

Q That's okay. Just what you can. So up until the time you moved from Maryland to California he went to a special school; is that what you just told us?

A Yes.

Q And you told us about his -- how he could think, how he could use his brain. Can you give us any other examples before we move on to California? If not, that's okay.

A No. As I said, he didn't have any money concept. He couldn't -- couldn't -- his motor control, his small motor control was always bad. He couldn't catch a ball. He could

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roll a ball on the floor, but if you threw it to -- and catch it, but if you threw him a ball, out of a hundred times maybe he'd catch it once.

Q And Harvey had a little brother, right?

A Oh, yeah, Neil.

Q And that's Neil. We met Neil earlier. They're about three years apart, right?

A Two and a half, yeah.

Q Okay. And can you tell the jury, and when you're in Maryland you all lived together?

A Oh, yeah.

Q The whole family, right?

A Right. Definitely.

Q Can you explain to the jury how Harvey would interact with his brother?

A Well, I give Neil credit because he always treated Harvey like an equal. He never ever put him down or in front of his friends he would always include Harvey. They always played together.

At that time Jack had a job selling toys, and he would bring home all kinds of Matchbox cars. And they each had a suitcase with their Matchbox cars and they would zoom up and down the floors in our family room, and they would make their own bridges out of different things and they would -- they played very, very well together.

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As they grew older, Neil got to be a little taller than Harvey and he would call him, I'm your older brother, but you're my big brother. And he would always tell Neil that he was his big brother. And they loved each other. Harvey was very lovable and Neil was very lovable and very caring. He was very protective of Harvey.

We went on vacations together. We went to -- we went to Disney World when they were quite young. It had just opened up in Florida. And we stayed in, I want to say Continental Hotel. Anyway, it was a hotel and the monorail went through it, and Harvey was just fascinated with that. So was Neil. And we would ride in this monorail to the park and back because Harvey just loved to be on the monorail.

I guess when they were probably five and seven we went to Ocean City, Maryland. That's about an hour and a half from the Washington, D.C. area. It's a beach community, and we rented a small house. And we just had a good time as a family. We loved the beach. I was the sun worshiper. Unfortunately I didn't know what sun can do to you.

Q Thank you. Thank you, Elaine.

A About all I can say.

Q The jury got to meet your husband.

A Right.

Q Jack. Okay. All right. I want to talk about how Harvey and Jack interacted while you all are still in

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Maryland. Okay. Can you explain to the jury what, you know, how Jack was as a father and how they interacted?

A Well, he was a very good father. He wouldn't change diapers. One night I went out and left him, and I came home and the whole crib was soaking wet and Jack was completely oblivious of the wet diapers. But he loved both Harvey and Neil and like I said, I think he was a very good father. He used to joke with them. He would bring home all kinds of toys for them to play with.

We were fortunate. Our parents -- well, my mother and step-father and his mother and father lived not too far, maybe a half an hour, 45 minutes from us, and we were always together on the weekends. And either we went into Silver Spring, Maryland or they came out to where we lived in Bowie.

Jack was a great father. Harvey loved him, loved doing things with him. Jack wasn't a beach person, but I sure was. But he would come to the beach on the weekends and spend time with Harvey and Neil, and then he would go back home, go to work.

Q And what was he doing for a living at that time?

A When we first started going to the beach he was working for a toy jobber, and he sold toys and -- yeah, he sold toys to retail stores. And then he went with his mentor to New York to one of the toy stores and met a cousin. And the cousin has said to Jack, Boy, I wish I had a salesman with

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