

1 This was a door to door service that the drivers
2 picked the passengers up at wherever they were instructed to
3 -- to pick them up, took them directly to the place that they
4 were going, helped with providing additional assistance with
5 boarding and -- and deboarding, is that a word, getting off
6 the bus. They provided special assistance with mobility
7 devices. They provided special assistance with other kinds of
8 assisted devices.

9 You'll see from the video, we showed a few clips of
10 it, but the driver, Jay in this case, provided additional
11 assistance to not only Harvey, but other passengers. Help
12 with safety belts, seatbelts, help with answering questions,
13 he stopped for Harvey to get off and go to the bathroom.
14 These are all additional things that the drivers for
15 paratransit provide in the way of additional accommodation for
16 disabled people. But they even went one step further and --
17 well, the RTC and First Transit allowed disabled passengers,
18 including Harvey, to ride with a personal care attendant if
19 they felt like they needed something like that to provide
20 additional assistance.

21 So they did provide additional assistance there.
22 They did what was reasonably required under the circumstances,
23 and that's the standard that you see reflected to you in the
24 jury instruction. And by so doing, Jay and First Transit
25 complied with that heightened duty of care that was owed by a

1 common carrier.

2 Now, in this case, the plaintiffs' negligence claims
3 hang by exceedingly thin threads, and those threads really
4 don't hold up when you start scrutinizing the actual evidence
5 here. But going through them kind of in a generalized way, as
6 to First Transit the plaintiffs claim that First Transit
7 should have trained their drivers in first aid. And you heard
8 a lot about that when Mr. Cloward was up here talking.

9 As to Jay, they claim that he should have looked at
10 Harvey when he got back on the bus after helping, I think her
11 name was Ms. Kincaid, off the bus. And that had he done so,
12 he would have, I guess, seen -- seen Harvey, seen that he was
13 in distress. They also say that Jay should have enforced the
14 no eating rule. And you've heard a lot about that during the
15 course of this trial. And finally, they say that Jay should
16 have seen Harvey if he was scanning his mirrors.

17 Now, none of these claims have been proven to you by
18 a preponderance of the evidence. But let's review what you
19 did see. Whoops. Like Mr. Cloward, I'm getting my PowerPoint
20 mixed up.

21 You saw an awful lot of this one page, and the
22 plaintiffs claim against First Transit with regard to the
23 first aid training is based entirely upon this one page in the
24 employee handbook, the 2010 First Transit employee handbook.
25 Plaintiffs are trying to create a standard based on this one

1 page that simply does not exist. They're trying to create a
2 duty that does not exist.

3 Public transportation, as you heard from Jennifer
4 McKibbins and from Matt Daecher is a very highly regulated
5 business and is subject to many federal, state, and local
6 regulations, guidelines, industry standards. And you heard
7 from Matt Daecher that -- and Jennifer McKibbins, that the ADA
8 also provides requirements for what type of things are to be
9 trained in and what types of things are not to be trained in
10 for paratransit service. But there's nothing in any of those
11 guidelines, any of those regulations that require first aid
12 training. None of them.

13 Now, think about that. The federal government, the
14 state and local governments have the opportunity, have the
15 right to mandate if there's something that they believe should
16 be trained. They do provide guidelines. They do provide
17 regulations. First aid is not among those.

18 Now, Jennifer McKibbins also told you about the
19 contract between First Transit and RTC. And certainly RTC
20 could have negotiated and could have said we want you to
21 provide first aid training to drivers, but they didn't do
22 that. The contract that you have, you'll be able to look
23 through it, sets out the type of training that was negotiated
24 on and agreed upon by the contract. And that's what First
25 Transit was -- was to comply with and it's what they did

1 comply with.

2 Now, you may not like that. You may think first aid
3 training should be taught. It should be something that
4 everybody should have. But this is the law that First Transit
5 was required to follow. This is the standard that they were
6 required to, and did, comply with.

7 And your job in this case is not to recreate the law
8 or to say that there should be another law. Your job is to
9 determine whether or not First Transit complied with the law
10 that was in effect at the time. And all of the evidence that
11 you've seen in this case clearly indicates that, in fact, they
12 did comply with the industry standards and with all of the
13 federal and local regulations that apply to public
14 transportation, and in particular, paratransit.

15 You also learned that there are good, safe reasons
16 for why first aid is not considered the best possible
17 alternative to deal with a medical emergency. Mr. Cloward
18 talked to you about all it would take is \$88 to train these
19 people in first aid. But do you think, truly, that an
20 eight-hour course in first aid is going to provide as much
21 medical training as having trained paramedics who have
22 specialized medical training come on scene and deal with true
23 medical emergencies?

24 The policy that was in place was in metropolitan
25 areas such as Las Vegas we want to get trained medical people

1 there as quickly as we possibly can. We want to not take a
2 chance that a driver, who isn't -- who may be trained in first
3 aid but doesn't use that every day and doesn't have
4 specialized medical training is going to do something to
5 create a worse situation.

6 The best possible thing for somebody that is
7 suffering from a medical emergency in a -- in a situation, in
8 an area such as Las Vegas that has good medical response teams
9 available is to get medical treatment there as soon as
10 possible. And you heard that from Matt Daecher, you heard it
11 from Jennifer McKibbins, you heard it from Dr. MacQuarrie.

12 And you also know from Dr. MacQuarrie that first aid
13 in this situation would not have changed the outcome for
14 Harvey Chernikoff. Now, Mr. Cloward wanted to make fun of Dr.
15 MacQuarrie, and I will admit that he was a little dramatic
16 with some of his demonstrations of choking and what you would
17 see. But he was trying to emphasize to you that this is not
18 something that can happen without -- without the victim having
19 some kind of outward response.

20 The difference is that counsel would -- would have
21 you believe that this was all disrespect on Dr. MacQuarrie's
22 part. But, in fact, he was helping you to look for the truth
23 and what was actually going on with Harvey Chernikoff. I'll
24 talk more about that in just a few minutes, but please don't
25 let plaintiffs convince you that this one page in the employee

1 handbook is anything more than merely informational. It is
2 actually listed in the table of contents as first aid tips,
3 not training.

4 The information on choking is just that. It says
5 choking information. It doesn't say training. Does First
6 Transit want their employees to read and be familiar with this
7 page just like every other page in the employee handbook? Of
8 course they do. There isn't anything in writing. Mr. Cloward
9 is right. There isn't anything in writing from Brad Thomas
10 saying don't read those pages.

11 This handbook goes to every single employee of First
12 Transit. That includes the office staff, it includes the
13 mechanics, it includes the accountants. It's information just
14 like a lot of the other information in the employee handbook
15 that First Transit wants its employees to be familiar with.
16 It does not mean that they are necessarily going to get
17 trained in every single thing that's in the employee handbook.
18 And that includes this section, just like it includes any
19 other section.

20 And if you look through the employee handbook,
21 you'll see that there is a lot of additional information in
22 that handbook. It's not just a set of safety rules. Yes,
23 there are safety rules in it, but it has a lot of additional
24 information, too. Information that any of the employees are
25 expected to and should know.

1 And plaintiffs did not present any evidence to the
2 contrary. They didn't present any evidence to come in here
3 and show you by evidence that first aid training was required,
4 either by the employee handbook or by any of the applicable
5 regulations. They did not prove that element, that theory of
6 negligence against First Transit or Jay Farrales.

7 What's the next thing they -- they focused on? They
8 next -- the plaintiffs claim that Jay should have looked at
9 Harvey when he first got back on the bus after assisting Ms.
10 Kincaid off, and that had he done so he would have, I guess,
11 seen that Harvey was in distress.

12 What did do?

13 Well, Jay told you truthfully that he didn't look
14 directly at Harvey when he got back on the bus, but he was
15 aware. He used his peripheral vision. He knew that Harvey
16 was still in the same place, he had not changed positions, he
17 was not making any noise, he was not up, he was not walking
18 around.

19 And remember, too, that Jay had only been off of the
20 bus for about less than 30 seconds. And just a few minutes
21 before that is when he had assisted Harvey to get off, go to
22 the bathroom, and assisted him on the bus. So he helped him
23 with his seatbelt, so he knew that he was belted in. There
24 wasn't anything as he was coming back on the bus that showed
25 Harvey in any type of situation that was out of the ordinary.

1 And that's what you were told the drivers were
2 supposed to do, is look for anything that would be out of the
3 ordinary with their passengers. Yes, they were to monitor
4 their passengers, but what they were looking for is something
5 that would catch their attention that they would need to deal
6 with. He didn't see anything like that.

7 As Jay was getting back on the bus, which is the
8 time he would have looked directly at Harvey if he was going
9 to, this is what he would have seen.

10 That's not it. Can you figure out what I'm -- okay.
11 This is the one I want. Oh, I'm sorry.

12 MR. ALLEN: She's been given warning all trial long.

13 MS. SANDERS: My apology. I'll go very quickly and
14 be past it. Maybe let's let them go. I'm very sorry.

15 At the time Jay was getting back on the bus at
16 8:00:36, you can see Jay just coming back on the bus. And
17 this is what Harvey would have looked like at the time. And
18 this is not much different than -- now, it's not exactly the
19 angle that Jay would have seen because he's coming onto the
20 bus.

21 And, of course, this video view is -- is straight
22 on. But it's not much different than how Harvey had looked at
23 other times earlier in the bus ride when he appeared to be
24 napping or reaching for something. And I would ask that you
25 go back and look at the earlier parts of the video and you'll

1 see what I mean. He moved around quite a bit and there were
2 many times when he looked very similar to this.

3 But the important thing about this is that there
4 isn't really anything that's too out of the ordinary about the
5 way that Harvey looks at that particular point. Should Jay
6 have assumed that he was choking and rushed over to do the
7 Heimlich maneuver? And what about this lady? This we -- we
8 talked about a little bit earlier in the -- in the testimony
9 last week. This is a little earlier in the trip.

10 And this lady is leaning over to the -- in the aisle
11 with her hand almost touching the floor in a position that's
12 almost identical to what you see with Harvey in this shot.
13 Should Jay have assumed that she was choking and rushed over
14 to do CPR on her? Do you think she would have appreciate
15 that? The entire notion here is a desperate grasp to create a
16 basis for imposing liability where none exists.

17 They have not proven that there was any negligence
18 with regard to Jay when he came back on the bus not looking at
19 Harvey. In fact, the plaintiffs have offered no evidence
20 whatsoever that Jay even had a duty to look at Harvey when he
21 first got on the bus. You didn't hear that from any of the
22 witnesses who testified in this case. That only came from Mr.
23 Cloward.

24 Jay himself, Jennifer McKibbins, and Matt Daecher
25 all told you that there is not a specific duty when a driver

1 gets off the bus to come back and look at -- look specifically
2 at every single one of the passengers as opposed to monitoring
3 generally to be sure that the passengers are -- are okay.
4 He's to generally check them.

5 Let's talk about the no eating rule. You can't stop
6 what you can't see. And it's absolutely clear from the
7 evidence, absolutely undisputed that Jay did not see Harvey
8 eating that sandwich. You heard no evidence whatsoever to the
9 contrary on that.

10 And, of course, that's not surprising because when
11 you look at the video, and even Dr. Stein said that Harvey
12 wolfed down that sandwich in about a minute and a half. Was
13 he trying to hide it because he knew that he shouldn't be
14 eating on the bus, or was that just his normal way of eating,
15 his normal tendency? We don't know.

16 But Jay was focusing on his job, his job of driving.
17 If he had had his eyes glued to Harvey Chernikoff every five
18 seconds as plaintiffs suggest that he should have, how safe do
19 you think his driving would have been? Jay didn't violate a
20 rule to enforce the no eating rule because he did not see
21 Harvey eat the sandwich. He, therefore, could not have
22 violated it.

23 Now, you remember this photograph that you were
24 shown. This is Exhibit A19. Now, this is the actual mirror
25 view from that interior mirror that is mounted in the -- in

1 the bus. That's what Jay could see, not what the video shows.

2 And if you can look at this view, even if he had his
3 eyes glued directly to Harvey the entire time, the most he's
4 be able to see really here is maybe the top of his head. He
5 wouldn't be able to see down in his lap, and we know from the
6 video that the fare box was also placed in that area so he
7 would certainly not have been able to see anything that's
8 going on with Harvey's hands, anything like that. This is the
9 view that Jay would have had, not the video.

10 And he's focused on driving at this point. He told
11 you where he was in this whole scenario, the maneuvers that he
12 was going through to -- to get turned in and off of the D.I.
13 Arterial. His focus was, as it needed to be, on driving and
14 driving safely. That's what he was focused on.

15 Now, it's true that Jay was trained to remind
16 passengers about the rider's rules if he saw somebody
17 violating them, to tell them you shouldn't be doing this, you
18 shouldn't be doing that, but it was not his job in the first
19 instance to tell the passengers what those rules were. That
20 was part of RTC's job and they did that verbally when they met
21 with the persons to determine eligibility, but they also sent
22 out the rider guide that you've heard about, the RTC rider
23 guide.

24 And that had a lot of information in it about how to
25 schedule rides, what they could and couldn't -- passengers

1 could and couldn't do on the bus, but it did include some
2 rider rules. And you've seen the rider guide here. It's
3 Exhibit A6.

4 Please look through the entirety of it. You'll see
5 that there's a lot of additional information that's included
6 in there. But the RTC rule was something that was given to
7 the passengers or their caregivers. And the passengers were
8 expected to read that rule and to be familiar with it and
9 follow that when they were riding the bus.

10 Now, in Harvey's case, Mrs. Chernikoff told you that
11 she recalls getting the RTC guidebook, but she didn't review
12 it thoroughly and she didn't read the rules, the rider rules,
13 so she wasn't aware of the no eating rule. But she didn't --
14 so she didn't read that or explain that to Harvey. Mr.
15 Chernikoff didn't read it, and apparently Joseph, the
16 caregiver, was not provided with that information, either.

17 Now, who do you think is truly in the best position
18 to know Harvey's mental abilities, to know his eating habits,
19 to be able to make sure that he understands what he is or is
20 not expected to do on the bus? It would be his parents, his
21 caregivers. And Joseph, we know, was a personal care
22 attendant, was somebody that provided care to Harvey, and he
23 even rode on the bus with Harvey at times. We heard that he
24 rode with him to dances, to doctor appointments.

25 And apparently Joseph didn't read the rider's guide,

1 either, but surely he could have understood and interpreted
2 the sign that was on the bus that you've seen several times
3 and should have been able to tell Harvey, hey, Harvey, look at
4 this sign, that means no eating, no drinking from an open
5 container on the bus, no smoking. But apparently that didn't
6 happen, either.

7 Instead, Mrs. Chernikoff told you that she relied on
8 the driver to inform Harvey about the rules, a driver who
9 transports hundreds of passengers every week, a driver who
10 doesn't know the extent of his cognitive abilities, doesn't
11 know how he learns. Is it fair to blame Jay for not enforcing
12 a rule when the plaintiffs themselves didn't teach Harvey that
13 rule in the first place?

14 The plaintiffs told you about their expectations
15 with First Transit. They expected the drivers to be well
16 trained, and they were. They expected the drivers to tell
17 Harvey about the rules and to enforce them. They expected the
18 drivers to be trained in first aid. But they never tried to
19 find out whether their expectations matched the reality.

20 There are over 2 million people in Clark County, and
21 I'm sure that every single one of us has a different
22 expectation about what's provided in the way of services on a
23 paratransit bus. Some people may even expect that the
24 paratransit buses will be equipped with trained EMTs to
25 respond to medical emergencies that might occur on the bus.

1 We know that that's not the reality, however.

2 What we do know is that they were allowed,
3 passengers, once they were determined to be eligible, were
4 allowed to ride the bus with a personal care attendant if they
5 felt like they needed extra assistance. Expectations are not
6 always reality, and an individual or a corporation is not
7 negligent because they can't and don't meet every single
8 expectation of every possible passenger, whether reasonable or
9 not, or that passenger's family. That would be impossible,
10 and it's not what is required in the industry, it's not what's
11 required of First Transit.

12 In this case the evidence is undisputed that First
13 Transit complied with all federal state laws. It complied
14 with the requirements of the ADA; it complied with the terms
15 of the contract with RTC. Those are the expectations that it
16 needed to meet and it did.

17 Now, Mr. Cloward told you in his opening that Jay
18 helping Harvey Chernikoff to untwist the bottle on his -- on
19 his water suggested to Harvey that it was okay for him to eat,
20 also. Now, that's a pretty far-fetched speculation even in
21 and of itself. Because there's no way that any of us,
22 including Mr. Cloward, could possibly know what was going
23 through Harvey Chernikoff's mind at the time.

24 But did you see any evidence, did you hear any
25 evidence to support that speculation? Of course not. And we

1 know that the rule against eating on the bus is different than
2 the rule that pertained to drinking on the bus. The RTC rules
3 right here tell you that if somebody has a covered container
4 that it's okay for them to drink on the bus. Eating, however,
5 is completely different. Eating and drinking are not the
6 same.

7 Again, plaintiffs have not met their burden, have
8 not shown you by a preponderance of the evidence that any kind
9 of a duty was owed to Harvey Chernikoff in this particular
10 case or that it was breached. Jay did not see Harvey eating
11 the sandwich. He did not violate a rule about enforcing that.

12 The last thing that they want to focus on is the
13 mirrors. Plaintiffs' counsel has tried to convince you that
14 Jay was required to scan his interior mirrors every five
15 seconds, and had he don't that he would have seen Harvey
16 sooner and saw that he was in distress. But you didn't hear
17 that as far as evidence in this case. It's an allegation that
18 was not proven.

19 Jay, Jennifer McKibbins, and Matt Daecher all told
20 you that drivers are trained to scan their mirrors every five
21 to eight seconds, but that's primarily for the purpose of
22 evaluating the traffic outside. These are drivers first and
23 foremost. Their job is to drive that bus safely, to get their
24 passengers safely to their destination. Part of what they
25 have to do to do that is to look in their mirrors to see what

1 kind of traffic hazards are out there. That's their primary
2 purpose in using the mirrors.

3 Now, yes, they are to -- they are trained to monitor
4 their -- their passengers to determine if there is anything
5 that is out of the ordinary with the passengers. If they're
6 up, if they're moving around, if they're smoking, if they're
7 in a fight. Anything that would be other than what you would
8 expect normally to see on a bus. That's their primary purpose
9 for even reviewing the interior mirrors. But their job, their
10 -- their primary reason is to drive safely.

11 And Jay told you that he did scan his mirrors, he
12 did check for anything that seemed out of the ordinary. And
13 after he got back on the bus after helping Ms. Kincaid, he
14 scanned the mirrors at that time and he will tell you that at
15 first he didn't -- he did tell you that at first he didn't see
16 anything that seemed to be out of the ordinary. He thought
17 that Harvey, because he was quiet, might be sleeping.

18 But when he got to the stop sign and had a little
19 more time to focus on the passenger because his driving job
20 was not taking as much of his attention, that's when he looked
21 around and he saw that Harvey was slumped into the aisle way.
22 And he -- he did respond quickly. He got up immediately to --
23 to check on Harvey, to try and revive him. When he couldn't
24 revive him he pulled to the side and contacted dispatch right
25 away to try and get emergency services there.

1 He did exactly what he was trained to do and what
2 Matt Daecher and Dr. MacQuarrie both told you was the best way
3 to try and get emergency medical attention to this man as
4 quickly as possible. Jay did what he was supposed to do as
5 far as scanning his mirrors. And plaintiffs have not proven
6 that there was a duty or that there was a duty breached with
7 regard to the scanning of the mirrors.

8 Plaintiffs have failed to prove any of their
9 negligence claims. They presented nothing to refute the
10 expert testimony of Matthew Daecher who is a transportation
11 safety expert. It's the only thing that he does. And he
12 spent a lot of time going through with you each of these
13 things that the plaintiffs claim First Transit and Jay did
14 wrong. And he told you that with regard to his review of the
15 applicable regulations, the video, everything that Jay did,
16 everything that First Transit did fully complied with the
17 regulations and the standards in the industry that were
18 applicable.

19 You also heard about the ADA requirements and you
20 know that there was not anything in the ADA that required
21 anything that is identified here. It didn't require first aid
22 training. You have to ask yourself if there was really any
23 support out there for plaintiffs' position, if their claims and
24 their theories in this case.

25 Why is it that they didn't bring in their own safety

1 transportation expert to tell you what those standards were
2 and to tell you how Jay and First Transit breached their duty?
3 The reason for that is because there is none. They can't
4 prove it, so they didn't bring anybody in that could tell you
5 what those standards were and tell you how First Transit or
6 Jay Farrales breached those duties.

7 Let me turn, now, to this second element, the
8 causation element. Did the negligent conduct, if any, of Jay
9 or First Transit cause the plaintiff's injuries? And the
10 answer to that, like the answer to negligence, is no. Now,
11 you may still be unclear on what exactly killed Harvey
12 Chernikoff. We believe the evidence is very clear that he
13 most likely died of a sudden cardiac arrest. But we do have
14 the coroner's finding of this huge bolus of chewed up what
15 appeared to be sandwich that was so tightly impacted in his
16 airway that it took the coroner ten minutes to -- to remove
17 it, and he had to use a special tool to do it.

18 Now, maybe Harvey did die of choking. But it's
19 important to bear in mind that Dr. Lingamfelter, the coroner,
20 didn't ever look at the video. He had the opportunity to look
21 at the video immediately after Harvey's death and at the time
22 that he was doing his external examination, but he chose not
23 to look at it at that time. Now, Mr. Cloward made some
24 references to what happened at the deposition. That was well
25 after, two years after he had already identified a potential

1 cause of death as choking for Harvey Chernikoff. Dr.
2 Lingamfelter never looked at the video.

3 And that's important because had he done so, he
4 would have probably been taken by the same thing that all the
5 other witnesses have -- have noticed, which is there was
6 nothing showing on the video, you've seen it yourselves, to
7 indicate any of the type of choking activity that one would
8 expect to see. No gagging, no coughing, no panicky movements,
9 no clutching the throat, any of those kinds of things.

10 In fact, Dr. Lingamfelter told you that with choking
11 he would expect to see those kinds of -- of movements because
12 it's something that causes anxiety with a person who is
13 suffering from choking. So had he looked at the video,
14 perhaps he would have questioned his own conclusions of
15 choking, at least as a total cause of this man's death. But
16 what he, as well as Dr. Stein and Dr. MacQuarrie all told you
17 is that we can't know for sure because there wasn't an autopsy
18 done. And that's important because without that, plaintiffs
19 can't prove that this was totally a choking death.

20 Now, I want to talk a little bit about Dr. Stein,
21 the plaintiffs' medical expert. He came all the way out here
22 from St. Louis to tell you that Jay, the driver, should have
23 been able to tell from an open lunch box beside Harvey with
24 paper coming out of it, and from some hand movement and him
25 rubbing his -- Harvey rubbing his head, and from a presumed

1 smell of peanut butter that Harvey was choking and that he
2 should have performed the Heimlich maneuver.

3 And all of this should have been clear to Jay in a
4 matter of seconds in spite of the fact that Jay did not see --
5 Jay did not see Harvey eating the sandwich, Jay did not see
6 Harvey clutching his throat, Jay did not see Harvey making any
7 kind of panicked or frantic or unusual movements, and Jay did
8 not see Harvey showing any kind of signs of distress. No
9 gagging, no choking. He didn't see him rubbing his head. He
10 didn't see the hand movement. And as you saw from the video,
11 Jay wasn't even on the bus. He was off the bus when this was
12 occurring.

13 And we know that Dr. Stein wasn't even honest with
14 you about the lunch box. You saw the video yourself last
15 week, and Dr. Stein had told you that that lunch box was open
16 beside -- beside Harvey at the time that Jay went to check on
17 him and that the paper wrapping should have given him a clue.
18 But you saw the video of Harvey putting the sandwich back, the
19 wrapper back in his lunch box, zipping the lunch box up, and
20 setting it beside him.

21 If you don't really recall that, we did go through
22 it quickly, but it starts at about 7:59:36 on the video. And
23 if you look at the door view, I think you get the best -- best
24 view of that. But we know that Dr. Stein was not truthful
25 with you as far as that part of his testimony. And Jay has

1 told you that he never smelled peanut butter. He was
2 concerned about what was going on with Harvey. Dr. Stein just
3 pulled that one totally out of thin air.

4 Dr. Stein also told you that if the Heimlich
5 maneuver had been started by -- I think at the latest he said
6 8:01:36 that Harvey would be alive and that he would have his
7 -- his prior full brain function. But this is what Harvey
8 looked like at 8:01:36, totally slumped down into the aisle.

9 And this is what Dr. Stein told you Harvey -- or Jay
10 should have done, try to encourage him, try to get up, try to
11 do the back blows, all on somebody that was totally slumped
12 into the aisle. Try to get him up, try to do these different
13 things, try to do the Heimlich maneuver on a person who had no
14 signs whatsoever of choking.

15 What does your common sense tell you about the
16 credibility of that entire scenario? And bear in mind, of
17 course, that Dr. Stein even agreed that there were no signs of
18 choking. This is all 20/20 hindsight. We have to look at,
19 and you need to evaluate what Jay -- what information Jay had
20 available to him at the time.

21 And did Dr. Stein give you any rationale for his
22 opinions? Did he tell you how the Heimlich maneuver could
23 have removed that huge, tightly impacted ball of sludge? No.
24 Did he tell you how a finger sweep could have removed that
25 bolus of food when it was all the way down in the vocal cords?

1 No. Did he tell you how CPR could have possibly revived
2 Harvey when he was not getting oxygenated blood? No.
3 Instead, he gave you several broad, sweeping, conclusions, but
4 they had no substance. As my dad used to say, he was all
5 fluff, but no stuff.

6 Jury Instruction No. 13 talks about credibility of
7 the witnesses. And if you believe that a witness has lied
8 about any material fact in the case, you may disregard the
9 entire testimony of that witness or any portion of the
10 testimony which is not proved by other evidence. And I would
11 -- I would suggest that you take that jury instruction, keep
12 that in mind, and consider that when you are discussing the
13 testimony of Dr. Stein in your deliberations.

14 Now, Dr. MacQuarrie, Mr. Cloward tried to make fun
15 of -- of Dr. MacQuarrie. And I admit that he was rather
16 dramatic at times when he was trying to demonstrate for you
17 how somebody would appear when they are choking. But I spent
18 a lot of time going through Dr. MacQuarrie's education, his
19 qualifications, his background because it was important, I
20 thought, for you to understand and to know the special
21 qualifications that he has to speak to the issues in this
22 case.

23 He's a -- he's a graduate of Dartmouth College, a
24 graduate of Cornell Medical College, both highly regarded
25 schools. He did his residence at the Columbia Trauma Center

1 and developed his own special program in emergency -- in
2 emergency medicine. He spent 20 years training paramedics and
3 providing advanced life support. And he's been practicing
4 emergency medicine for over 30 years.

5 Now, Jury Instruction No. 16 is another one I'd like
6 you to take a look at. It tells you to look at the relative
7 qualifications of the experts in judging and evaluating their
8 opinions. Do any of you even remember hearing where Dr. Stein
9 went to medical school? Did you hear anything about any
10 special qualifications that he might have to deal with the
11 issues in this case? We do know that he's never performed the
12 Heimlich maneuver. He's never taught it to residents. How
13 reliable is -- is his opinion on this issue as compared to Dr.
14 MacQuarrie?

15 Now, it was Dr. MacQuarrie's opinion that Harvey
16 Chernikoff died an unexpected medical -- of an unexpected
17 medical event. And whether a sudden cardiac arrest from a
18 heart attack, whether choking, or whether a combination of
19 factors, we can't know for sure. But the only thing that
20 should be very clear to you by now is that this was a tragic,
21 but nature death, which could not have been stopped by
22 anything that Jay or First Transit did or didn't do. And
23 that's true of anybody that may have intervened in that time.

24 Dr. MacQuarrie explained to you his opinions that --
25 and he did this in great detail with demonstration. He told

1 you how tightly impacted. He showed you on the -- the visual
2 with the trachea how tightly impacted this 50 gram bolus of --
3 of sandwich would have been and the fact that the Heimlich
4 maneuver is not something that is designed to remove that type
5 of an obstruction.

6 The Heimlich maneuver is something that if it's
7 going to work, and even Dr. Stein agreed that it doesn't work
8 in all cases, it's for something solid, a solid piece of
9 steak, something like a marble, like a coin that you can get
10 air pushed underneath to -- to push -- hopefully push that
11 out. But Dr. MacQuarrie told you that in this particular
12 case, because of the size of that bolus and because of how
13 tightly it was impacted in his airway, that's not something
14 that would have worked on Harvey Chernikoff.

15 And Jay certainly could not have removed that entire
16 bolus clear down at the level of the vocal cords with just a
17 sweep of the finger in his mouth as Dr. Stein suggested. And
18 Dr. MacQuarrie also explained why CPR would not have been
19 effective to revive Harvey. You have to have oxygenated blood
20 in order to impact survivability with CPR. And in this case,
21 because of that large obstruction in his airway, Harvey could
22 not get any oxygenated blood.

23 We even went through the time sequence for
24 survivability, and even under the best case scenario, Dr.
25 MacQuarrie told you that Harvey would not have survived. He

1 didn't tell you that because he knows me. He didn't tell you
2 that because he has acted as an expert in other cases. He
3 told you that because that is his honest medical opinion about
4 what actually happened to Harvey Chernikoff.

5 He told you very emphatically that this could not
6 have been solely a choking death because there was no
7 evidence, no signs, no symptoms of choking, and you see that
8 when you look at the video itself. Choking is something that
9 is reflexive, it's automatic. Something that we as humans
10 will automatically experience if we are the victim of choking.

11 And he demonstrated that a little dramatically, but
12 it's also something that you heard from Dr. Stein who told you
13 that somebody who is a victim of choking will have a panicky
14 look on their face. They will react. They have time to
15 react. They don't just fall over.

16 We know that Harvey Chernikoff was capable of having
17 those kinds of reactions. You saw in the video earlier when
18 he was drinking water and he was drinking fast. And it -- the
19 water apparently went down the wrong pipe and he coughed. He
20 had that normal automatic reflexive reaction. But yet what
21 you see on the video from 7:59:36 through 8:00:32 is a man who
22 quietly slips away. Someone who without a sound, without a
23 glance, without a gesture slips to the side without any
24 indication of distress, without any indication of struggle.
25 Exactly like Dr. MacQuarrie told you happens to 360,000 people

1 every year.

2 There's more than one kind of heart attack, and Dr.
3 Stein only told you about the type of heart attack where
4 people have some kind of symptoms, have some kind of signs.
5 But 360,000 people a year die without any kind of symptoms,
6 without any kind of risk factors for heart disease.

7 Now, in Harvey's case he did have risk factors. But
8 even if he didn't, this is still something that can happen to
9 even -- we probably all heard stories about young athletes who
10 die suddenly of a cardiac arrest. It can happen at any age,
11 it can happen to anybody. But more importantly for this case,
12 Dr. MacQuarrie told you that due to that large bolus of food
13 that was lodged in his airway, it would have been impossible
14 for Harvey to be revived with CPR, with the Heimlich, with
15 back blows, with quicker response from emergency personnel.

16 Even emergency personnel, even paramedics would not
17 have been able to remove that bolus with the kind of equipment
18 that they had on the -- on the ambulance at the time.
19 Harvey's was a tragic, unexpected, but natural death to be
20 sure. But nothing these defendants did could have changed
21 that outcome. Without negligence and without causation, there
22 can be no award for damages.

23 We believe the evidence is clear that Harvey
24 Chernikoff's death was not the result of anything that Jay or
25 First Transit did or did not do, but you may feel otherwise.

1 And if you feel that blame must be assigned for his death, you
2 need to look at all the contributing factors. Did Harvey
3 Chernikoff cause his own death by eating the sandwich, by
4 violating the no eating rule? Well, if you believe that he
5 died solely of a choking death, then probably so.

6 But we don't know how much Harvey was actually able
7 to learn, how much he was able to understand. Certainly he
8 violated the rule against no eating on the bus, but who was
9 responsible for making sure that he knew and followed the
10 rule?

11 Would his death have been prevented if his parents
12 had taken the time to read the RTC rider guide and explain to
13 Harvey the different rules that he was going to be subjected
14 to when riding on the bus, or to make sure that Joseph did so?
15 Would it have made a difference if Joseph or somebody else had
16 ridden on the bus with him? It's for you to decide the
17 relative fault of the parties. Jury Instruction No. 29
18 explains that to you and explains to you the -- the duties of
19 the different parties, particularly with regard to
20 contributory negligence.

21 Now, in this case the plaintiffs themselves took
22 Harvey -- took Harvey down to the RTC. They went through the
23 eligibility process with him and they got him signed up to
24 ride the paratransit bus. And if they had not done that, he
25 would not have died on the bus that day. Maybe he would have

1 died someplace else, but he wouldn't have been on the
2 paratransit bus.

3 Now, no one is faulting the plaintiffs for taking
4 him down, for getting him signed up for that. It was the
5 right thing to do and the paratransit service is a good
6 service. It was certainly appropriate for Harvey to -- to
7 take advantage of that. And it's a good and beneficial
8 service for people who have disabilities. But in accepting
9 the benefits, the parents also took on the responsibility to
10 be sure that they and that Harvey knew the rules for riding
11 the bus.

12 It's simple. If you accept the benefits, you also
13 need to accept the responsibility. That means making sure not
14 only that they knew the rules, but also to make sure, and more
15 importantly, that Harvey knew the rules and what he needed to
16 do to follow them.

17 They told you that Harvey could learn. He could
18 learn with repetition. And if he had things repeated to him
19 several times, he would -- he would do that. He would be able
20 to -- to follow instructions. Who would be best suited to
21 know this about Harvey, the bus driver who gets a C on a
22 manifest from RTC, or his parents who have lived with him and
23 known him his entire life, or his caregiver?

24 You know that the bus drivers are not allowed to
25 have any particular information about the particular

1 disability of the passengers that ride the bus. They get one
2 letter code to tell them the type of disability, but they are
3 prohibited by law from having complete information, complete
4 medical or other kinds of information about the passengers
5 that are riding on the bus.

6 And that's the same way that it would be if they
7 were riding on a regular fixed transit -- or fixed route
8 transit service. Drivers are not allowed to know the medical
9 condition of the passengers that are riding on the bus, and
10 it's the same way with the paratransit. The drivers have very
11 limited information.

12 And if a rider can't or doesn't understand the
13 rules, you heard the testimony from Czarina Mendez, the RTC
14 interviewer who actually evaluated the eligibility for Harvey
15 and determined that he was eligible, that if they can't
16 understand, that would be a good reason to have a PCA ride
17 along with -- with that person. In fact, in Harvey's case Ms.
18 Mendez approved him to ride with a PCA, even though his
19 parents didn't ask for it. She obviously saw something in
20 Harvey that made her believe that he needed to have or should
21 be provided with some additional help, some additional
22 assistance.

23 Now, in Harvey's case his parents both told you that
24 he didn't need to ride with a PCA, that he was able to do
25 that, able to ride the bus independently. But neither Jay nor

1 First Transit could make that determination. They certainly
2 could not require him to ride with a PCA. That's something
3 that was totally and solely in the hands of Harvey himself and
4 his caregivers, his parents.

5 Now, we know that the plaintiffs were aware that
6 Harvey had been approved to ride with a PCA because Mrs.
7 Chernikoff told you that. In fact, Joseph, his caregiver, had
8 ridden with him on the bus several times to dances, to doctor
9 appoints, and that kind of thing. Now, would it have made a
10 difference in the outcome if Joseph had ridden on the bus with
11 him that day?

12 If you believe that Harvey died strictly from
13 choking, then Elaine Chernikoff's own testimony is telling.
14 She was deposed on March 12, 2014, and this is her own sworn
15 testimony. If Joseph had been with him, Joseph would have
16 been there. He knows CPR, he knows the Heimlich maneuver, he
17 knows first aid. This would have never happened. Never.

18 Only Harvey or his parents, the plaintiffs in this
19 case, could make the choice of whether or not have him ride
20 with a PCA. The plaintiffs accepted the benefits of riding --
21 of having Harvey ride the paratransit, but now they want to
22 pass off their own responsibilities to Jay, and that they
23 cannot do.

24 Maria, can we switch over to the Elmo, please.

25 Now, this is the verdict form that -- that you'll

1 need to fill out. And Mr. Cloward did go through this a
2 little bit with you, but I wanted to point out a few more
3 things. I don't think that you will get beyond the first two
4 questions here in your evaluation of the evidence because I
5 think the evidence in this case is so clearly on the defense
6 side that you only need to go as far as the first two
7 questions.

8 But if you find that -- that Jay and First Transit
9 were not negligence and that they did not cause Harvey's
10 death, then the answer to both of these questions should be
11 no. And if you answer no to those two questions, you don't
12 need to go any further. You need to just sign the verdict
13 form and hand it back to the marshal.

14 But if, in fact, you feel that you need to go
15 further, you need to assess blame in the case, then you need
16 to look at the relative conduct of all the parties. And if
17 you believe that Harvey died from choking, you also need to
18 evaluate on the second page the conduct of the plaintiffs and
19 assess the relative liability as between the plaintiffs and
20 the defendants.

21 Were his parents negligent in not reading or
22 explaining the RTC rider rules to Harvey and making sure that
23 he understood them, or for not having a PCA ride with him on
24 the bus? It's for you to decide these issues and fill out
25 this form accordingly. But we believe that the only fair and

1 just verdict is one as filled out here.

2 During jury selection you were asked if you could
3 put aside any feelings you may have of sympathy and any -- any
4 natural feelings that you may have to -- of sympathy to the
5 parents because they lost their son and determine this case
6 based strictly on the facts and the law. And I think you can
7 understand why we were so concerned about that because Mr. and
8 Mrs. Chernikoff seem to be very genuinely nice people who
9 clearly miss their son. All of you, I'm sure, were very
10 touched and moved by the many stories they told about Harvey
11 and the memories that they have of him.

12 But each of you made a promise at the beginning of
13 this case to use your head and not your heart to decide the
14 issues. And Jury Instruction No. 6 tells you that a verdict
15 may never be influenced by sympathy, prejudice, or public
16 opinion. Your decision should be the product of sincere
17 judgment and sound discretion in accordance with these rules
18 of law.

19 Now, it was clear to me, and I'm sure it was clear
20 to you, that Harvey Chernikoff had a very good life. He had
21 parents who loved him, a brother who adored him, he had his
22 own personal gourmet chef. He traveled to Israel, to
23 Graceland, to Hawaii. He had summers on the coast. In spite
24 of his disabilities, Harvey Chernikoff was a lucky man. But
25 even lucky, well-loved men sometimes die unexpectedly.

1 Neil Chernikoff himself told you that his parents
2 initially felt that Harvey's death was just God's plan. What
3 changed that for them? The coroner's report that identified
4 choking as a cause of death. Without seeing the video to know
5 what really happened, and with only the strength of an
6 external examination without verification or confirmation of
7 the cause of death, they went looking for somebody to blame
8 and landed on Jay Farrales.

9 Now, Jay is alive, but you know from his testimony
10 that he's a victim in this case, as well. He's had these
11 allegations hanging over his head for four and a half years
12 now threatening his livelihood, threatening his professional
13 reputation, threatening his family and his way of life. Jay
14 isn't asking for sympathy. What he's hoping for with your
15 verdict in his favor is vindication. Only you can give him
16 that and give it to First Transit.

17 Now, in a few minutes Mr. Cloward is going to have
18 the opportunity to come up here and talk with you again.
19 Because the plaintiffs have the burden of proof on this case,
20 he has an opportunity to -- to speak twice. Now, he did
21 mention to you when he was up here before those big dollars
22 that you heard about in -- in the jury selection process.

23 I'm not going to have an opportunity to respond to
24 anything that he says up here, but I trust that you listen to
25 all of the evidence and that you will judge this case fairly

1 for yourselves. You may be tempted to award the plaintiffs
2 some amount of money. It would be the easy thing to do.

3 They've suffered a loss, they miss their son. It
4 would be an easy thing to award them a little something for
5 that. But your job in this case is not to do what is easy.
6 Your job is to do what is right. Use your head, consider the
7 law, consider the facts, and apply your common sense. If you
8 do that, I'm confident that you will return a verdict in favor
9 of Jay Farrales and First Transit. Thank you.

10 THE COURT: Do you want to give them just a short
11 break?

12 MR. CLOWARD: Sure. My rebuttal is pretty short,
13 but --

14 THE COURT: Oh, is it pretty short?

15 MR. CLOWARD: -- whatever -- whatever you'd like to
16 do.

17 MR. ALVERSON: Let's go forward, Your Honor.

18 THE COURT: Yeah, let's just go forward, then, if
19 it's short.

20 PLAINTIFFS' REBUTTAL CLOSING ARGUMENT

21 MR. CLOWARD: So I've -- I've had the chance to do a
22 few trials, never a wrongful death case. But as I -- as I
23 listen to the closing arguments of counsel, I always wonder,
24 you know, are they going to -- are they going to make the
25 choice to get up and actually, after all the evidence has been

1 presented, after all of the evidence from the witnesses, are
2 they going to finally make the choice to do the right thing
3 and to say, you know what, we made a mistake, here are all the
4 rules that we violated, we're sorry. It's never happened, and
5 it didn't happen here. Instead, they just come up with some
6 more excuses, so let's address those.

7 They say that -- that the Chernikoffs accepted the
8 benefits. No, they paid for Harvey to ride the bus. Okay.
9 They paid. So they had an expectation that that company would
10 follow its own policies and procedures. What Harvey paid with
11 is his life.

12 And Ms. Sanders tries to explain away what we saw
13 from that doctor in that witness box. There is a huge
14 difference between being dramatic and being disrespectful. A
15 huge difference. That's -- that's a choice that they make
16 when they come into this courtroom to try and win this case.
17 That's what they do.

18 One thing to keep in mind, only six of eight of you
19 need to agree, okay. So once six of eight of you agree, once
20 six of eight of you agree, that's when you have a verdict. So
21 what does the law require? Ms. Sanders gets up here and she
22 says, you know what, we brought in Mr. Daecher and he
23 testified to this, he testified to that, why didn't the
24 plaintiff bring in an expert, why didn't the plaintiff talk
25 about this, all of these things?

1 Well, let's actually look at what the law states.
2 Rather than -- rather than write some things, some nice cute
3 things up on the board here, let's actually look and see what
4 the law of this case is, okay. Because the law doesn't
5 require a statute for CPR and for Heimlich. The law -- I
6 mean, if they want to have their cake and eat it, too, then
7 essentially there's got to be a law that says that Jack and
8 Elaine had to read the rules to Harvey. There's going to be a
9 law that says -- or a statute that says they've got to provide
10 him with a PCA. They can't have their cake and eat it too,
11 okay.

12 The thing with negligence is that negligence,
13 there's absolutely no way for the legislature -- we would have
14 to pay full time legislatures 24 hours a day, 365 days a year
15 to come up with laws specific laws to govern all of the things
16 that people do. Just like when I said if I threw a ball off
17 the balcony, there's no law that prevents me to do that. No
18 specific statute, I mean, that says, hey, don't do that.
19 That's negligence, though. So let's take a look at the
20 negligence in this case. Ms. Sanders writes this up on the
21 board and she starts to tell you things like, you know, it's
22 only what's reasonably required. That's not the law. Don't
23 look at this, okay.

24 You will actually have a packet, a booklet of the
25 laws in this case. This right here does not go back with you.

1 This is not the law. What the law is is the highest degree of
2 care. That's the paratransit company. And she says that
3 First Transit is not -- or is not like Derek Jeter, that's not
4 right. That's not right.

5 Let's take a look at the law, and I'm going to show
6 you the law again so that it's clear. Because if it's a
7 common carrier, you're the regular old starter, okay. If it's
8 the regular bus, common carrier, you're Brock Holt. But if
9 you're transporting disabled passengers, you are the
10 all-stars. You are the all-stars. You are the Derek Jeter.
11 The law expects more of paratransit buses.

12 So let's go -- Jury Instruction No. 32. This is the
13 law. This right here, this right here is the law. Not this.
14 Not this. What does it say? To use the highest degree of
15 care. So does the highest degree of care allow somebody, a
16 bus driver, she explains it away that the bus driver, well,
17 you know what, he got on, he got on that bus and he kind of
18 maybe saw something in his peripheral vision, kind of maybe.

19 Is that using the highest degree of care to just
20 expect and assume that your passenger is okay? Really? This
21 is what the law is. No. 34. Jury Instruction No. 34, this is
22 the law. Not this right here. Let's actually -- let's
23 actually look at the specific law in the case, okay. When a
24 carrier is aware that a passenger is mentally disabled, it is
25 the duty to provide that additional care.

1 So if that means they put somebody else on the bus,
2 a bus monitor, then that's what's required. But that is their
3 obligation because that's what they're getting paid to do. So
4 this any claim that, you know, there's no specific law to
5 support this, no, there is, and it's right here. Jury
6 Instruction No. 34, Jury instruction No. 32.

7 Excuse No. 9, I mean, when I say this out loud it is
8 unbelievable to me. It is unbelievable to me. It is safer to
9 rely on 911 that takes ten minute to arrive. Wow. That is
10 literally the position that this company is taking. It's
11 safer to rely on 911. That's the safest thing, that's the
12 best thing, and so that's what we do.

13 Well, it doesn't -- it -- it really does not matter
14 how trained the person is. You can have a trained paramedic.
15 You can have a trained EMT. If the person is dead by the time
16 that you arrived, you could have a triple board certified ER
17 physician, it doesn't matter. That's why you train to do this
18 on the bus so that when additional folks get there the person
19 is not so far gone that there is absolutely nothing that can
20 be done.

21 And then she says -- she talks about Jay's training.
22 You know, Jay's training this, Jay's training that, Jay this
23 and Jay that. Yet, remember on the stand, Jay, we don't want
24 you to go over your training, we'll do that with Ms.
25 McKibbins. Jay -- Jay, don't tell us about your training.

1 Hold on, we'll get to your training through Ms. McKibbins.

2 Well, Jay, yeah, hold on, don't tell us about your training.

3 That was said two or three times. Why do you think
4 so? Because they want Ms. McKibbins, the polished witness, to
5 get up and take the stand and talk about all the things rather
6 than Jay. I mean, if -- if Jay's training was so great, why
7 don't you have it come from the horse's mouth? Why don't you
8 have Jay tell us the training that he did or that he received?

9 This whole thing about proximate cause and she's
10 claiming there's -- there's no causation, no causation, the
11 death certificate form the coroner of Las Vegas said that he
12 died from choking. It does not get any clearer than that.

13 Excuse No. 10, he didn't see anything out of the
14 ordinary when he got on the bus. Well, he didn't see anything
15 out of ordinary because he's not looking. And if you're not
16 looking, you can't see anything. And they show you these
17 clips, okay. They show you these poster boards, wherever they
18 put them, all of these poster boards.

19 Well, remember Mr. Alverson, he had the poster
20 boards going through with Mr. Daecher, well, look at this
21 little poster board here and let me show you this little teeny
22 sliver of this person on the paratransit bus, this lady that
23 looks like she's sleeping, doesn't it look like these people
24 are sleeping on the bus, well, isn't that what Jay would have
25 seen?

1 Again, you're taking a little teeny slice out. When
2 you take a little teeny slide out, you don't see the full
3 pictures, okay. You're going to have the video. You're going
4 to have all three views. And there are really only two, it's
5 the side view and the front view that show anything. The
6 other ones don't really show anything.

7 Watch the whole thing. Watch the whole sequence. I
8 haven't shown it out of respect for my clients because I
9 wanted them to have the opportunity to be in here. Watch the
10 full video. Because Jay had every opportunity had he simply
11 looked to see that Harvey was slowly and painfully fighting
12 for his life and dying.

13 Excuse No. 11, there's no duty to pass -- to check
14 on your passengers. Are you kidding me? There is no duty to
15 check on your passengers. I honestly -- I don't believe this.
16 There is no duty to check on your passengers? That is what
17 Ms. Sanders just told you. There is no duty when you get on
18 the bus to actually look at your passengers. That's what she
19 just said five minutes. That is honestly what she just said.
20 There's no duty to check on your passengers. Are you kidding
21 me? You are a paratransit company. This is what you do.

22 And then the rearview mirrors by Daecher, you know
23 Mr. Daecher goes out and takes all of these photos. Again,
24 trust but verify. Mr. Daecher, why aren't you inviting me or
25 anyone from my office to come so that we can review what

1 you're doing? Why didn't you tell us about it? We'd sure
2 like to be there. We'd sure like to see how you're taking
3 these photos when you're going to come in and talk to these
4 jurors. I'd like to see. Yet we have to just rely. We have
5 to just trust. We can't verify what Mr. Daecher said because
6 we weren't given that opportunity.

7 So, again, the expectations of Jack and Elaine, is
8 it reasonable to expect First Transit to simply follow their
9 own rules? That's what we're looking at when we're dealing
10 with Jack and Elaine. What about the promises made to the
11 community? Isn't that worth something?

12 I mean, they hold themselves out as being this
13 company that is so safe and reliability and all of these
14 things. They -- you know, they come in and come into our
15 community and bid on this massive project or this massive
16 proposal, \$230 or \$220 million, whatever it is. They come
17 into our community for this contract, yet they want to come in
18 and say, well, you know what, we don't -- we don't have to do
19 what we tell you we're going to do.

20 Safety is -- we don't -- we don't have a duty to
21 check on our passengers. That's what they just said to you.
22 Jay didn't see this, he didn't see that, he didn't see this,
23 he didn't see that. Again, if you're not looking, you're not
24 going to see. Period. End of story. You can't see what they
25 don't look at.

1 And then finally, the discussion about the -- the
2 heart. This was a heart attack, this was a heart attack, this
3 was a heart attack. Charles very helpfully went through with
4 their doctor all of the records leading up to the death to
5 show Harvey's heart was just fine, yet they come in here
6 through that witness, a 20 year pal of Ms. Sanders, and they
7 come and they tell you what they do. That's a story that
8 they've told in this courtroom.

9 Your job today on a special day, February 29th, this
10 leap year, you have a job today and it's a very special day.
11 And your job is very special. You have the power, the
12 ultimate power to say what happens in this case in this
13 courtroom on this day. Your job will be to determine whether
14 the life of a 51 year old mentally retarded male is worth that
15 of somebody else. Your job will be to determine whether all
16 lives matter in America, or just some.

17 The final thing I want to leave you with is this. I
18 want to go back in time 50 some odd years. Jack and Elaine
19 are at Johns Hopkins. Here is Jack, here is Elaine, Harvey is
20 with them. He's a young man. He's a little baby. Here is
21 the doctor from Johns Hopkins. The doctor says to Jack and
22 Elaine, your son is mentally retarded.

23 Like Elaine told you, it hit her in the stomach for
24 the first time that had been used, that word had been used.
25 Until then it had never been used before. So their life now

1 changes. Their life now requires them to trust certain folks
2 with the life of their son. Imagine the first time that
3 Harvey went to Casa Karma. They drive up to Casa Karma and
4 they take Harvey in. They drive back home.

5 They lay down in their bed and they ask I hope that
6 they will respect Harvey, I hope that they will love Harvey, I
7 hope that they will protect Harvey, I hope that they will
8 honor him. When they put him in the care of Casa Karma, the
9 last people that they put Harvey in their hands destroyed that
10 trust. Now is the time that Harvey is given to you. Harvey
11 is in your hands. This is your decision. Please honor him.
12 That's all that we ask. Thank you.

13 THE COURT: All right. Thank you.

14 Can he get sworn in.

15 (Marshal sworn to take charge of the jury.)

16 (Jury retired to deliberate at 3:55 p.m.)

17 THE COURT: All right. Counsel, if you'd leave us
18 contact information, please. They'll deliberate until 5:00
19 tonight and then come back at 9:00 tomorrow morning.

20 (Court recessed at 3:56 p.m., until 5:15 p.m.)

21 (Outside the presence of the jury.)

22 THE MARSHAL: Court is now back in session with the
23 Honorable Joanna Kishner presiding.

24 THE COURT: Okay. As you know since I'm filling in
25 on Case No. 682726, I just want to make sure are all parties

1 present and clients who wish to be present; is that correct?

2 MR. CLOWARD: Yes, Your Honor.

3 MS. HYSON: Yes, Your Honor.

4 THE COURT: Okay. So then at this junction bring
5 the jury in. Thank you so much.

6 (Pause in the proceedings.)

7 THE COURT: You know what, are you all going to want
8 to talk to the jurors afterwards?

9 MR. CLOWARD: Yeah.

10 MS. HYSON: Yes.

11 MR. ALLEN: If they wish to.

12 MR. CLOWARD: Yeah, if they wish to.

13 MR. ALLEN: If they wish to, Your Honor.

14 THE COURT: Pardon?

15 MR. ALLEN: If they would like to.

16 MR. CLOWARD: We'll respect the wishes of the juror,
17 but certainly we would like to talk to them.

18 THE COURT: My standard practice may be a little bit
19 different than Judge Miley. Usually since --

20 You all already submitted them to get paid; right?
21 So they can go down to --

22 THE CLERK: Yes.

23 THE COURT: -- jury services to get paid? I just
24 tell them that counsel may be down there to speak with them
25 and that it's up to them. It's very helpful for counsel to

1 speak with them. It's up to them whether they wish to or not.

2 MR. CLOWARD: Perfect.

3 THE COURT: Does that work for you all?

4 MR. CLOWARD: Yes, Your Honor.

5 MS. HYSON: Yes, Your Honor.

6 MR. CLOWARD: Thank you.

7 THE COURT: I know each judge does that a little bit
8 different, but that's --

9 MR. CLOWARD: Okay.

10 (In the presence of the jury.)

11 THE COURT: Thank you. Okay. The Court will note
12 the presence of the jury and the presence of counsel and
13 clients at this juncture.

14 Ladies and gentlemen of the jury, have you selected
15 a foreperson?

16 JUROR NO. 7: Yes.

17 THE COURT: Okay. And can that foreperson please
18 hand the verdict to the marshal. The marshal will in turn to
19 me. I will in turn hand it to the clerk.

20 Thank you so very much.

21 Okay. Madame Clerk.

22 THE CLERK: District Court, Clark County, Nevada,
23 Case No. A682726, Department 23. Jack Chernikoff and Elaine
24 Chernikoff, plaintiffs, versus First Transit, Inc. and Jay
25 Farrales, defendants.

1 No. 1, do you find from a preponderance of the
2 evidence that the Defendant Jay Farrales was negligent and
3 that such negligence was a proximate cause of the death of
4 Harvey Chernikoff? Answer, yes.

5 Do you find from a preponderance of the evidence
6 that Defendant First Transit, Inc. was negligent and that such
7 negligence was a proximate cause of the death of Harvey
8 Chernikoff? Answer, yes.

9 Do you find from a preponderance of the evidence
10 that Plaintiff Jack Chernikoff was negligent and that such
11 negligence was a proximate cause of the death of Harvey
12 Chernikoff? Answer, no.

13 No. 4, do you find from a preponderance of the
14 evidence that Plaintiff Elaine Chernikoff was negligent and
15 that such negligence was a proximate cause of the death of
16 Harvey Chernikoff? Answer, no.

17 No. 5, using 100 percent as the total combined
18 negligence which acted as a proximate cause of the injuries
19 complained of by Plaintiffs Jack Chernikoff and Elaine
20 Chernikoff, what percentage of the total combined negligence
21 do you find from the evidence is attributable to: Jay
22 Farrales, zero percent; First Transit, Inc., 100 percent; Jack
23 Chernikoff, zero percent; Elaine Chernikoff, zero percent,
24 totaling 100 percent.

25 No. 7, without regard to the above answers, we find

1 that the total amount of the plaintiffs' damages are divided
2 as follows. Pain and suffering by Harvey Chernikoff, \$7.5
3 million. Grief, sorrow, loss of companionship, society,
4 conform, and loss of relationship suffered by Plaintiffs Jack
5 Chernikoff and Elaine Chernikoff, \$7.5 million. Total, \$15
6 million.

7 Dated this 29th day of February, 2006, Freddy Acuna,
8 Foreperson.

9 Ladies and gentlemen of the jury, are these your
10 verdicts as read?

11 JURY PANEL: Yes.

12 THE COURT: Okay. Do either counsel wish the jurors
13 to be individually polled?

14 MS. HYSON: Yes, Your Honor.

15 THE COURT: Okay. At this juncture, ladies and
16 gentlemen, what that means is that the clerk is going to read
17 each of your names and ask you individually if that is your
18 verdict as read. So you need to answer in some manner that
19 basically we can hear you, okay. Thank you so very much.

20 Madame Clerk.

21 THE CLERK: Juror No. 1, John Laury, are these your
22 verdicts as read?

23 JUROR NO. 1: Yes.

24 THE CLERK: Juror No. 2, Alitzah Martinez, are these
25 your verdicts as read?

1 JUROR NO. 2: Yes.

2 THE CLERK: Juror No. 3, Dexter Layola, are these
3 your verdicts as read?

4 JUROR NO. 3: Yes.

5 THE CLERK: Juror No. 4, Denise Hinds, are these
6 your verdicts as read?

7 JUROR NO. 4: No.

8 THE CLERK: Juror No. 5, Jesse Colyar, are these
9 your verdicts as read?

10 JUROR NO. 5: No.

11 THE CLERK: Juror No. 6, Sandra Perez, are these
12 your verdicts as read?

13 JUROR NO. 6: Yes.

14 THE CLERK: Juror No. 7, Freddy Acuna, are these
15 your verdicts as read?

16 JUROR NO. 7: Yes.

17 THE CLERK: Juror No. 8, Darrel Shakespear, are
18 these your verdicts as read?

19 JUROR NO. 8: Yes.

20 THE COURT: Okay. Well, ladies and gentlemen of the
21 jury, although I was not your trial judge, I have been told
22 that you all have been working incredibly diligently. And I
23 know from at least hearing, since I'm next door, that you all
24 have been working very hard throughout this whole trial. And
25 I know on behalf of Judge Miley and her staff and behalf of

1 all counsel and then clients, I want to thank you so very
2 much.

3 Your jury duty service is so very important to our
4 democratic process. Without it, we really can't have our
5 system of justice. And so I know for each and every one of
6 you this has taken time out of your personal lives. It's been
7 hard to listen to a lot of information and be here in the
8 courthouse, but we do really appreciate it. So with that, a
9 sincere thank you on behalf of everyone.

10 At this juncture, the staff has been so fantastic
11 they have already called down to jury services so that you can
12 get paid. And the good news about that is you can go down and
13 get your checks today versus having to come back and pick up
14 your checks.

15 One of the things that you'll also find down --
16 potentially down in jury services is that counsel may be
17 wishing to speak with you, okay. Now, just so that you know,
18 ladies and gentlemen, at least the protocol we do in my
19 courtroom and I know most all the judges do it the same is
20 it's really helpful for counsel to get an idea of kind of what
21 your thoughts are.

22 Because as much as we all would like to be flies on
23 the wall and know what was going on exactly, it's always very
24 helpful for people to speak with the jurors to have a better
25 understanding, you know, about what your thought are,

1 impressions, etcetera. Because we want to find out not only
2 are there things that can be done better, but also just your
3 general thoughts. So you might find counsel downstairs when
4 you're getting your checks.

5 Once again, though, it is up to you completely
6 whether or not you wish to speak to counsel. I can appreciate
7 with the late hour sometimes people are in a rush to go. At
8 the same time I can appreciate from counsels' standpoint the
9 importance of trying to speak with jurors. So at this
10 juncture, ladies and gentlemen, is there anything else from
11 counsels' perspective?

12 MR. CLOWARD: No, Your Honor.

13 MS. HYSON: No, Your Honor.

14 THE COURT: Okay. There being nothing else, then
15 thank you so very much. Your verdict is going to be entered
16 into the minute by the clerk, and we are done. Thank you so
17 much.

18 MR. CLOWARD: Thank you, Judge.

19 (Jury excused at 5:24 p.m.)

20 THE COURT: Okay. Counsel, we're still on the
21 record. I just want to make sure is there -- counsel. And I
22 appreciate that you want to do that, I just want to make sure
23 is there any other matters that Judge Miley needs to take care
24 of that I should give her a heads up on?

25 MR. CLOWARD: No, Your Honor.

1 MS. HYSON: No, Your Honor.

2 MR. CLOWARD: Thank you.

3 THE COURT: Okay. So at this juncture I'm going to
4 say thank you so very much. I mean, I know she would be
5 saying the same thing. So thank you for your professionalism.
6 I know this is one of those trials that has been very long and
7 I know that people have been working incredibly hard on
8 everybody's side. So thank you so very much. And as you
9 heard, I told the jury that you may be downstairs. And with
10 that I'm going to excuse myself and wish you all a nice rest
11 of the week. Thank you so very much.

12 MR. ALLEN: Thank you, Your Honor.

13 MS. HYSON: Thank you, Your Honor.

14 MR. CLOWARD: Thank you.

15 (Proceedings concluded at 5:25 p.m.)
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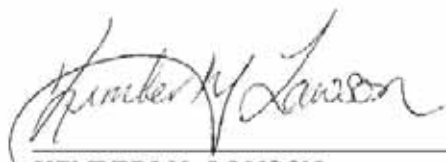
CERTIFICATION

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.

**KARR REPORTING, INC.
Aurora, Colorado**


KIMBERLY LAWSON

KARR Reporting, Inc.

47

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ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

BY, *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

DISTRICT COURT**CLARK COUNTY, NEVADA**

1 JURL

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7 **JACK CHERNIKOFF; ELAINE**
CHERNIKOFF

CASE NO. A682726
DEPT. NO. XXIII

8 Plaintiff(s),

9 -vs-

10 FIRST TRANSIT, INC.

11 Defendant(s).

AMENDED JURY

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16 1. JOHN LAURY
 17 2. ALITZAH MARTINEZ
 18 3. DEXTER LAYOLA
 19 4. DENISE HINDS
 20 5. JESSE COLYAR

6. SANDRA PEREZ
 7. FREDDY ACUNA
 8. DARRELL SHAKESPEAR

ALTERNATES

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23
24 1. PATRICIA CARVALHO
 25 2. LATESHA BROWN

A-13-682726-C
 AJUR
 Amended Jury List
 4527728



48

48

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

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

Plaintiffs,

vs.

VERDICT FORM

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

Defendants.

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

3Y. *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

A-13-682726-C
VER
Verdict
4527728



VERDICT FORM

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

5 ANSWER: Yes ☒ No ☐

6 2. Do you find from a preponderance of the evidence that Defendant First Transit,
7 Inc. was negligent and that such negligence was a proximate cause of the death of Harvey
8 Chernikoff?
9

10 ANSWER: Yes ☒ No ☐

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

13 3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff
14 was negligent and that such negligence was a proximate cause of the death of Harvey
15 Chernikoff?
16

17 ANSWER: Yes ☐ No ☒

18 4. Do you find from a preponderance of the evidence that Plaintiff Elaine
19 Chernikoff was negligent and that such negligence was a proximate cause of the death of
20 Harvey Chernikoff?
21

22 ANSWER: Yes ☐ No ☒

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

Jay Farrales	<u>0</u> %
First Transit, Inc.	<u>100</u> %
Jack Chernikoff	<u>0</u> %
Elaine Chernikoff	<u>0</u> %
Totaling	100%

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

Pain and suffering by HARVEY CHERNIKOFF	\$ <u>7.5 million</u>
Grief, sorrow, loss of companionship, Society, comfort, and loss of relationship suffered by Plaintiffs JACK CHERNIKOFF and ELAINE CHERNIKOFF:	\$ <u>7.5 million</u>
TOTAL	\$ <u>15,000,000</u>

Dated this 24 day of FEBRUARY, 2016.

Frederick A. Gorman
FOREPERSON

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

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

Plaintiffs,

vs.

JURY INSTRUCTIONS

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

Defendants.

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

5:21 pm

BY, *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

A-13-682726-C
JI
Jury Instructions
4527730



INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

001723

INSTRUCTION NO. 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person.

001724

INSTRUCTION NO. 4

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4 The evidence which you are to consider in this case consists of the testimony of the witnesses,
5 the exhibits, and any facts admitted or agreed to by counsel.

6 Statements, arguments and opinions of counsel are not evidence in the case. However, if the
7 attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard
8 that fact as proved.

9 You must not speculate to be true any insinuations suggested by a question asked a witness. A
10 question is not evidence and may be considered only as it supplies meaning to the answer.

11 You must disregard any evidence to which an objection was sustained by the court and any
12 evidence ordered stricken by the court.

13 Anything you may have seen or heard outside the courtroom is not evidence and must also be
14 disregarded.
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INSTRUCTION NO. 5

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4 You must decide all questions of fact in this case from the evidence received in this trial and
5 not from any other source. You must not make any independent investigation of the facts or the law or
6 consider or discuss facts as to which there is no evidence. This means, for example, that you must not
7 on your own visit the scene, conduct experiments, or consult reference works for additional
8 information.
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INSTRUCTION NO. 6

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3 Although you are to consider only the evidence in the case in reaching a verdict, you must
4 bring to the consideration of the evidence your everyday common sense and judgment as reasonable
5 men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify.
6 You may draw reasonable inferences from the evidence which you feel are justified in the light of
7 common experience, keeping in mind that such inferences should not be based on speculation or
8 guess.
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10 A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision
11 should be the product of sincere judgment and sound discretion in accordance with these rules of law.
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INSTRUCTION NO: 7

One of the parties in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

INSTRUCTION NO. 8

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4 You are not to discuss or even consider whether or not the plaintiffs were carrying insurance to
5 cover medical bills, loss of earnings, or any other damages they claim to have sustained.

6 You are not to discuss or even consider whether or not the defendants were carrying insurance
7 that would reimburse them for whatever sum of money they may be called upon to pay to the
8 plaintiffs.

9 Whether or not either party was insured is immaterial, and should make no difference in any
10 verdict you may render in this case.
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INSTRUCTION NO. 9

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4 If, during this trial, I have said or done anything which has suggested to you that I am inclined
5 to favor the claims or position of any party, you will not be influenced by any such suggestion.

6 I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to
7 which witnesses are or are not worthy of belief, what facts are or are not established, or what inference
8 should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion
9 relating to any of these matters, I instruct you to disregard it.
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INSTRUCTION NO. 10

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

001731

INSTRUCTION NO. 11

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

001732

INSTRUCTION NO. 12

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

001733

INSTRUCTION NO. 13

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

INSTRUCTION NO. 14

Discrepancies in a witnesses testimony or between his testimony and that of others, if there was any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

INSTRUCTION NO. 15

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

001736

INSTRUCTION NO: 16

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2 A person who has special knowledge, skill, experience, training or education in
3 particular science, profession or occupation may give his or her opinion as an expert as to any
4 matter in which he or she is skilled. In determining the weight to be given such opinion, you
5 should consider the qualifications and credibility of the expert and the reasons given for his or
6 her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem
7 it entitled.
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INSTRUCTION NO. 17

An expert witness has testified about his reliance upon an article and books that have not been admitted into evidence. Reference by the expert witness to this material is allowed so that the expert may tell you what he relied upon to form his opinions. You may not consider the material as evidence in this case. Rather, you may only consider the material to determine that weight, if any, you will give to the expert's opinions.

INSTRUCTION NO. 18

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4 A hypothetical question has been asked of an expert witness. In a hypothetical question, the
5 expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an
6 opinion based upon those assumed facts. You must decide if all of the facts assumed in the
7 hypothetical question have been established by the evidence. You can determine the effect of that
8 admission upon the value of the opinion.
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INSTRUCTION NO. 19

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4 Whenever in these instructions I state that the burden, or the burden of proof, rests upon a
5 certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That
6 unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same
7 to be not true.

8 The term "preponderance of the evidence" means such evidence as, when weighed with that
9 opposed to it, has more convincing force, and from which it appears that the greater probability of
10 truth lies therein.
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INSTRUCTION NO. 20

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4 The preponderance, or weight of evidence, is not necessarily with the greater number of
5 witnesses.

6 The testimony of one witness worthy of belief is sufficient for the proof of any fact and would
7 justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the
8 contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the
9 various factors of evidence, you believe that there is a balance of probability pointing to the accuracy
10 and honesty of the one witness, you should accept his testimony.
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INSTRUCTION NO. 21

A proximate cause of injury, damage, loss, or harm is a cause which, in natural and continuous sequence, produces the injury, damage, loss, or harm, and without which the injury, damage, loss, or harm, would not have occurred.

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INSTRUCTION NO. 22

Plaintiffs are the heirs of the deceased, Harvey Chernikoff. In determining the amount of losses, if any, suffered by the heirs as a proximate result of the death of Harvey Chernikoff, you will decide upon a sum of money sufficient to compensate each heir for the following items:

1. The heir's loss of companionship, society, comfort, and relationship.

You may also consider:

- a) The age of the deceased and of the heir;
- b) The health of the deceased and the heir;
- c) The respective life expectancies of the deceased and of the heir;
- d) Whether the deceased was kindly, affectionate or otherwise;
- e) His or her habits of industry and thrift; and
- f) Any other facts shown by the evidence indicating what benefits the heir might reasonably have expected to receive from the deceased had he lived.

2. Any damages for pain, suffering, or disfigurement of the decedent.
3. Any grief or sorrow suffered by their heir and any grief or sorrow reasonably certain to be experienced in the future.

INSTRUCTION NO. 23

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with care and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

001744

INSTRUCTION NO. 24

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiffs prove each item of damage by a preponderance of the evidence.

INSTRUCTION NO. 25

The plaintiff seek to establish liability on one or more different legal bases. One of the plaintiffs' claims is negligence. I will now instruct on the law relating to this claim.

001746

INSTRUCTION NO. 26

Negligence is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances. Ordinary care is that care which person of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. You will note that the person whose conduct we set up as a standard is not the ordinarily cautious individual, not the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be administered and encouraged, the law does not demand it as a general standard of conduct.

INSTRUCTION NO: 27

The plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: duty, breach, causation, damages.

The defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: As an affirmative defense, that some contributory negligence on behalf of plaintiffs Jack and/or Elaine Chernikoff, was a proximate cause of any damage Harvey Chernikoff, Jack Chernikoff or Elaine Chernikoff may have sustained.

INSTRUCTION NO: 28

The plaintiffs have the burden to prove that the plaintiffs sustained damage, that the defendants were negligent, and that such negligence was a proximate cause of the damage sustained by the plaintiffs.

The defendant has the burden of proving, as an affirmative defense, that some contributory negligence on the part of the plaintiffs themselves, was a proximate cause of any damage plaintiffs may have sustained.

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INSTRUCTION NO: 29

Defendants First Transit, Inc. and Jay Farrales seek to establish that Plaintiffs Jack and Elaine Chernikoff were contributorily negligent.

Contributory negligence is negligence on the part of Plaintiffs Jack and Elaine Chernikoff which, cooperating to some degree with negligence of another, helps in proximately causing decedent Harvey Chernikoff's death.

Plaintiffs Jack and Elaine Chernikoff may not recover damages if their contributory negligence contributed more to decedent Harvey Chernikoff's death than the negligence of the Defendants First Transit, Inc. and Jay Farrales. However, if Plaintiffs Jack and Elaine Chernikoff were negligent, the Plaintiffs may still recover a reduced sum, so long as their contributory negligence was not greater than the negligence of Defendants First Transit, Inc. and Jay Farrales.

1 the bus and was injured on the platform.

2 And so the court discussed how this elevated common
3 carrier application or standard only applied not necessarily
4 when they were seated on the bus or when they were off -- I
5 guess this was a train, seated on the train or off the train,
6 but specifically in the boarding and alighting. Because
7 common carrier, and specifically even more so in this case,
8 what this common carrier does is has elevated assistance for
9 handicapped individuals in boarding and alighting.

10 They don't provide a medi-car service or additional
11 visual or monitor -- visual monitoring of passengers because
12 of disability. They assist additionally in the boarding and
13 alighting. And so the distinction in McBride versus Atchison,
14 which was the case that American President is linked to
15 discusses that the distinction for handicapped individuals is
16 in the boarding and alighting for common carriers.

17 MS. BRASIER: And, Your Honor, just to back up a
18 little bit because I think she started talking about some
19 cases that were about boarding and alighting, but this
20 American President Line case, which I have an extra copy if
21 Your Honor would like to read it --

22 THE COURT: I have it up.

23 MS. BRASIER: -- is a cruise ship case that talked
24 about what to do during an emergency drill. It wasn't about
25 boarding and alighting. It was about someone who had a

1 physical disability on a cruise ship and they didn't make --
2 they didn't use heightened care to accommodate her disability.

3 I think importantly this -- this instruction doesn't
4 talk about it's only for mental or physical -- or it's only
5 for physical disability. The instruction actually gives you
6 many different options. It says it's when a passenger is
7 mentally or physically disabled, feeble or infirm,
8 intoxicated, a child traveling alone. So basically it's meant
9 to encompass all of our most vulnerable members of society
10 that if a common carrier is aware of their vulnerable status,
11 they have to use a heightened duty of care.

12 And in this case First Transit certainly knew that
13 Harvey had a mental disability. I mean, he qualified to use
14 their services. They even designated him as a C for
15 cognitive, meaning he had mental problems. So, you know, to
16 try to make that -- that very narrow scope of it's only
17 boarding or alighting and it's only if it's a physical
18 disability, I think that's -- that's not what this instruction
19 is meant to encompass, and it's not what the American
20 President Lines case talks about, which is, again, a Ninth
21 Circuit case. It's over 50 years old.

22 You know, there might be another line of cases that
23 cite to it that then deal with boarding and alighting, but
24 this case dealt with a cruise ship passenger and -- and the
25 duties during an emergency drill, not -- not boarding or

1 alighting the cruise ship. So, you know, First Transit knew
2 about Harvey's disability and that's what this pattern jury
3 instruction is meant to -- is meant to address is those
4 situations where a carrier is aware of someone's mental or
5 physical disability.

6 MS. HYSON: I didn't mean to misrepresent anything
7 by any means just to clarify. I agree with -- with counsel
8 that the American President's Line case does not make the
9 boarding or alighting distinction. That's absolutely true.

10 My point, rather, was that the case that American --
11 if you -- if you Shepardize American President Lines, a case
12 that it cites to and it is based off of is this McBride v.
13 Atchison case, an earlier case, and that case does make the
14 distinction about boarding and alighting and how that is the
15 time frame that is relied on in common carrier cases where
16 this heightened standard for handicapped individuals applies.

17 THE COURT: Okay. Is there anything else?

18 MS. BRASIER: Just if Your Honor would like I do
19 have a copy of the pattern instruction just so you can see it.

20 THE COURT: Sure. Thank you.

21 MS. BRASIER: So our instruction is just the -- you
22 know, it gives you several options. Our instruction is
23 verbatim from the pattern instruction, but just using the
24 mental disability which would apply in this case.

25 THE COURT: I'm going to allow it. I do think that

1 it's relevant in this particular case. I mean, in this
2 particular case the -- the basis for being able to ride the
3 First Transit bus anyway was that there was a disability. And
4 they were, in fact, aware of the disability, in fact, before
5 they could qualify for the bus. They had to go in and be
6 interviewed by the RTC and everything else, and, you know,
7 even then there was testimony that when the drivers when to
8 get the various individuals, although they may not have
9 specificity regarding the type of disability, they nonetheless
10 knew that they had a disability.

11 So, I mean, I think they're specifically holding
12 them -- I mean, obviously, in my mind, they're specifically
13 holding them out as someone who is going to provide a service
14 to someone who has a disability, whether it's a physical
15 disability, mental disability. So I am going to allow it.
16 And I think that the -- and I agree that the American -- let's
17 see, American President Lines versus Lundstrom is not as
18 specific as the other case cited by the defendant. So I'm
19 going to allow the proposed instruction by the plaintiff.

20 Would you like to take these back, please?

21 Okay. Let's go through the defense's.

22 MS. BRASIER: However counsel wants to handle it,
23 but I think most -- there are some that depending on how Your
24 Honor rules regarding whether or not comparative negligence
25 will be allowed, we may be able to stipulate to other ones.

1 It's just kind of --

2 MS. HYSON: Yeah, it's kind of all or nothing.

3 MS. BRASIER: It's one big topic that encompasses, I
4 think, all of the contested instructions.

5 THE COURT: So the comparative negligence is eating
6 on the bus when he wasn't supposed to?

7 MS. BRASIER: Well, and they also want to argue
8 comparative negligence against the parents, as well.

9 MS. HYSON: Correct.

10 MS. BRASIER: So we have issue with both of that.

11 THE COURT: All right. You want to argue
12 comparative negligence? I'm not seeing the comparative -- how
13 are you coming up with comparative negligence of the parents?

14 MS. HYSON: They were provided with a copy of the
15 rider's guide. Mrs. Chernikoff testified that she recalled
16 receiving a copy of that guide.

17 THE COURT: Uh-huh.

18 MS. HYSON: She didn't read it thoroughly. She was
19 not aware of the rule against eating. She did not provide
20 that guide to Mr. Chernikoff or the caregiver, nor did she
21 read the rule or instruct Harvey as to the rule.

22 MS. BRASIER: But, Your Honor, in this case I think,
23 even though we've been talking about Harvey obviously as a
24 mental disability, but he was an independent adult. They had
25 no guardianship over him. They had no legal responsibility

1 over him. So any assistance they gave him was gratuitous. I
2 mean, it was out of their -- because they loved him, but they
3 weren't obligated to teach him rules, to do different things.

4 In the eye of the law he is an adult no different
5 than any other 50 year old man that's walking down the street.
6 And so to put -- to put the parents responsible for their son
7 just because they wanted to help him would be similar to if we
8 had, you know, a parent of a college aged student who was over
9 18 and is giving them financial responsibility and still, you
10 know, pretty actively involved in their lives. We do then put
11 comparative negligent onto that parent because their son or
12 daughter, you know, is relying on them for -- for financial
13 support, but they didn't instruct them about, you know, maybe
14 certain rules that they were supposed to follow.

15 I mean, he was an independent adult in the eyes of
16 the law. And so to try to put some -- some duty onto the
17 parents, there is no duty. They have no legal duty towards
18 Harvey. They have no legal duty to First Transit. So without
19 a duty, you can't have a breach.

20 THE COURT: And extending that argument, assuming I
21 agree with your argument, then what about the comparative on
22 Harvey if he is, in fact, an adult and he is -- there's no
23 guardianship on him. I mean, wouldn't he be expected to
24 comply with the rules of riding the bus?

25 MS. BRASIER: I agree with that, Your Honor, if he

1 was a party to this -- or his estate was a party to this
2 litigation. We named his estate in the very beginning. Our
3 office got the case very close to the statute of limitations.
4 The prior attorney hadn't set up an estate. But we named the
5 estate just not knowing kind of if an estate had actually been
6 set up. And it was actually the defense who said, no, you
7 need to take the estate off the caption. We did a stipulation
8 and order that took the estate of Harvey Chernikoff, got rid
9 of him with prejudice as a party in this case. So he's no
10 longer a party to the case.

11 Now, if you look at the Banks v. Sunrise decision by
12 the Nevada Supreme Court, that says if you're going to talk
13 about a non-party's negligence, you've got to say they are
14 entirely responsible and so you need to give a defense
15 verdict. They can't be on the verdict form for comparative
16 negligence when they're not a party.

17 Because if that were the case, then, you know, we
18 could put anyone who might have some involvement in Harvey's
19 life who is not a party to this case on the verdict form. But
20 they chose to dismiss, and they actually requested we
21 stipulate to dismiss the estate from this action. They didn't
22 file a cross-claim, they didn't file a third-party complaint
23 alleging compared negligence against the estate. They got rid
24 of him. He's not a party.

25 So, you know, I think they can discuss his behavior,

1 but it's got to be an all or nothing. They can't put him on
2 the verdict form under Banks v. Sunrise, which, you know, is a
3 seminal case about comparative negligence and how you can
4 argue it with non-parties. It says it's got to be all or
5 nothing for a non-party. You can't argue comparative
6 negligence against a non-party.

7 MS. HYSON: Harvey's mother testified that she
8 received the rider's guide, that she didn't provide it to
9 anybody, she didn't read it, she didn't provide the
10 information to anybody. And so the onus is on her regarding
11 that information. With regards to Harvey, he -- his
12 negligence can be imputed to the plaintiffs regardless of
13 whether he's here as a plaintiff or not, this is about his
14 death. And so his behavior is at issue whether he contributed
15 to his death or not.

16 They can't have it both ways that nobody's
17 contributory negligence can be on the verdict form. If -- if
18 there is contributory negligence, somebody can be on the
19 verdict form. It's not all or nothing. They can't talk out
20 of both sides. Somebody's applies here. And so whether it's
21 both or at least one, it's not nobody's.

22 MR. ALVERSON: Your Honor, didn't the -- didn't the
23 mother assume the duty when she went down to the RTC, signed
24 him up, did everything for him, accepted the rules on behalf
25 of the RTC? They didn't give them to Harvey. They gave her

1 the rules.

2 MS. HYSON: That's true. The rules --

3 MR. ALVERSON: And it --

4 MS. HYSON: -- were actually --

5 MR. ALVERSON: -- sounds to me like she went in, she
6 didn't have to do it, but once you go in and you assume the
7 responsibility and initiate something, you then have to do
8 that in a -- in a non-negligent manner, use reasonable care.
9 And in this case the reasonable care is make sure that Harvey
10 knows what the rules were that were conditional upon him
11 signing up in the first place. I think she created the duty.

12 MS. HYSON: The rules were actually sent to the
13 parent's home, not Harvey's home because he was still living
14 with the parents at the time.

15 THE COURT: And she testified Harvey would not have
16 been able to read anyway. He had very basic reading
17 abilities.

18 MS. BRASIER: But in the eyes of the law, Your
19 Honor, he is an independent adult. So that would be no
20 different than if you had a child who was away at college and
21 something got sent to you and you didn't tell him about it.
22 Now is it your responsibility because, you know, you have an
23 adult child who didn't know what the rules were?

24 I mean, if we started doing this, if Joseph took him
25 to the interview, if someone from Desert Regional Center took

1 him to the interview, if someone from Transition Services took
2 him to the interview, would we then put that person on the
3 hook for making sure that he knew and understood the rules?
4 We can't create these legal duties because then no one would
5 help disabled people because why would I -- why would I want
6 to assume this potential liability; right?

7 You're creating a duty where there is none. He's an
8 independent adult. It would be totally different if they had
9 some kind of guardianship over him, but they didn't. They
10 provided him transportation for the interview. They sat in
11 there. But if you remember Ms. Mendez's testimony, she talked
12 to the parents to get some information, but she interviewed
13 Harvey separately from the parents.

14 THE COURT: All right. I need to mull this one over
15 a bit.

16 MS. HYSON: Your Honor, if I --

17 THE COURT: I mean, I think that there should
18 probably be some comparative negligence on the ballot -- I
19 mean, on the verdict form. I mean, the thing is there was a
20 bunch of evidence presented that there was no eating on the
21 bus. And clearly Harvey was eating in contravention of what
22 the rule was. It's just I'm trying to figure out whether it
23 should come by way of the parents since I think the defendant
24 has a point, or Harvey.

25 MS. HYSON: Your Honor, if I --

1 MR. ALVERSON: Well, Your Honor, one of things, too,
2 we have to remember is they can't have it both ways in the
3 sense that the mother testified that Harvey could not remember
4 anything.

5 THE COURT: I know.

6 MR. ALVERSON: Could not remember anything. It was
7 important for them to keep reestablishing things with him.
8 Driver's licenses is a good example. When she took him down
9 and signed him up, he didn't go by himself. He went down
10 there by himself, they probably would not have even signed him
11 up if they knew that he was the only one that was --

12 MS. BRASIER: Well, he was a teenager at that time.

13 MR. ALVERSON: Well, given his -- his mental
14 situation, they would probably have insisted on something
15 else. The testimony didn't come in, but there's no indication
16 that he could have even found his way down there by himself.
17 And on the -- as to the rules, if the mother says he didn't --
18 couldn't remember the rules, he couldn't follow the rules,
19 what better testimony do we have that when she signed him up,
20 she also signed up for the responsibility of making sure that
21 he followed the rules and took whatever was necessary.

22 Now, the person at the RTC took one additional step
23 and she -- she authorized a personal attendant. The mother
24 didn't do that. They did it upon themselves because they
25 realize that Harvey himself may have -- needs some additional

1 needs. I think this is a clear case of you don't have to go
2 down and sign up Harvey. You don't have to stop by the
3 roadside to try to help somebody. But if you do, you have to
4 do it in a reasonable manner and follow through on it.

5 MS. BRASIER: Your Honor, if -- if -- if the
6 Chernikoffs taking Harvey to that appointment was somehow
7 going to obligate them, I'm sure the RTC, First Transit,
8 somebody would have had them sign an acknowledgement saying I
9 am taking responsibility for making sure that my adult
10 independent son knows the rules.

11 THE COURT: I'm going to mull it over a bit, but, I
12 mean, my main concern is this. I mean, I think it's more of a
13 technicality they didn't get a guardianship over Harvey. I
14 think there's plenty of testimony out there that Harvey wasn't
15 capable of living on his own. And, in fact, he did and he
16 lived with Joseph.

17 I mean, there was testimony from his mother that he
18 could read maybe at a kindergarten level. So, you know,
19 providing the book to Harvey would have pretty much done
20 nothing because he would have no ability to go through and be
21 able to understand it. That responsibility would have had to
22 come by the way of a caregiver to explain the rules to him.
23 And, you know, obviously the mother did go down there, was
24 proactive, got him signed up, she did receive the book. So
25 let me think about it a bit.

1 MS. BRASIER: And if I may -- if I may just before
2 we finish, Your Honor.

3 THE COURT: Yeah. So all these go into what -- who
4 is going to be the one, if any, who is --

5 MS. BRASIER: Yeah.

6 THE COURT: -- on the verdict form as comparative?

7 MS. BRASIER: Yeah. And, I mean, just one last
8 thought. If Your Honor is, you know, obviously we made our
9 record on our position that there should be no comparative.
10 But I think just legally if there is somebody that's on the
11 verdict form for comparative --

12 THE COURT: Well, I'm going to do some research on
13 my own. I'll be honest with you.

14 MS. BRASIER: Okay. My thought would be that it
15 should be Harvey because he is a legal adult. It's not --

16 THE COURT: If your position, though, if there's no
17 comparative on the verdict form, basically it's --

18 MS. BRASIER: It's are the defendants negligent, yes
19 or no.

20 THE COURT: So all or nothing?

21 MS. BRASIER: Yeah.

22 MS. HYSON: Your Honor --

23 MS. BRASIER: And I have our proposed verdict form
24 if Your Honor --

25 THE COURT: And, again, my problem is clearly Harvey

1 violated the rules of the bus.

2 MS. HYSON: Right. And moreover, Your Honor, it --
3 it kind of -- it's kind of like this argument is --
4 plaintiffs' position is going both ways. It's like Harvey
5 wasn't capable of doing anything on their own is their
6 position, but at the same time they're position is, well, but
7 then the parents shouldn't be comparatively negligent because
8 he was an adult and could function on his own. So which --
9 which one is it? How are we supposed to choose between those
10 two? You can't have both.

11 MS. BRASIER: In the eyes of the law, he is an
12 independent adult. If the parents were deceased and Joseph
13 was taking care of him, would we then put this obligation onto
14 Joseph?

15 MR. ALVERSON: One -- one last parting shot. The --
16 I think something that is telling is that we have the do not
17 eat sign on the bus, and we asked the mother about that. And
18 she says he doesn't know what that is, you could never teach
19 him what that meant, it would take a lot of -- lot of
20 repetition.

21 So the problem now that you have is you, from our
22 standpoint, is we -- is the RTC sends the rules, the mother
23 doesn't read them, the mother doesn't tell him. You put him
24 on the bus and there is a sign that she says he doesn't
25 understand what the sign means. What is First Transit

1 supposed to do? They've given the rules, they put a sign up.
2 And she can't take -- have it both ways.

3 If he can't figure out what's on the sign and they
4 can't teach him what's on the sign to understand, they better
5 have a personal attendant go along with you. They can't turn
6 their back on the personal attendant which is the only thing
7 that the RTC and First Transit can do to help protect this
8 person short of having the bus driver go back every five
9 minutes to check on him. That's the only thing they can do,
10 and they wouldn't have him go on the bus with Harvey.

11 THE COURT: You know, frankly, my question that --
12 what I was waiting to come up and obviously it never did was
13 what do they do with these people who have disabilities? I
14 mean, it sounds like giving them the book is pretty much a
15 waste of time. But that really didn't come up much during the
16 course of it. All right. Let me think about it.

17 MS. BRASIER: Your Honor, just -- I know you're
18 going to think about it --

19 THE COURT: Because I would -- I would venture that
20 there is a bunch of people that ride those buses that probably
21 don't understand the books that are given.

22 MS. BRASIER: Well, and don't have parents that are
23 as involved as the Chernikoffs. Just for -- so we can -- what
24 time would Your Honor like us to come back to get a decision
25 so that we could get the instructions together?

1 THE COURT: Oh.

2 MS. BRASIER: I know. Sorry to --

3 THE COURT: I mean, this case I'm just kind of
4 thinking through, it just has so many different layers the
5 jury is going to have to go through. Because they're going to
6 have to -- there's potentially going to be a causation issue,
7 as well, if they get that far. Can you come back like at 10
8 after?

9 MS. HYSON: Yeah.

10 MS. BRASIER: Yes.

11 THE COURT: Thank you.

12 MS. BRASIER: Thank you, Your Honor.

13 MS. HYSON: Thank you so much, Your Honor.

14 THE COURT: You're welcome.

15 (Court recessed at 1:37 p.m., until 1:54 p.m.)

16 (Outside the presence of the jury.)

17 THE COURT: Okay. So thinking this through, really
18 talking this through and thinking of our discussion, I think
19 I'm going to do this in the following way. Present to the
20 jury a preliminary question. Because what we want back and
21 forth on was whether the mother had assumed a duty. As I
22 previously indicated, I think that not having a legal
23 guardianship is just kind of a technicality in this particular
24 case.

25 But the real question is a factual determination,

1 whether the mother assumed a duty by all the different things
2 she did, you know. Because there's testimony out there that
3 she was the one that the parents really spearheaded, you know,
4 getting them signed up for the paratransit service, they went
5 down there, they were given the information, they gave their
6 address instead of Harvey's address even though he lives
7 separate from them. When documentation -- an address for
8 documentation to be sent from the paratransit service.

9 So the question is really, and it's a factual
10 question, did she assume a duty. Depending on how the jury
11 comes back on that question, it would be whether or not they
12 were comparatively negligent. And, you know, and receiving
13 the book and not instructing Harvey on it or giving it to
14 Joseph to instruct Harvey on or requiring that Harvey rode the
15 paratransit bus with Joseph all the time. But I think that's
16 the only way to really break it down.

17 So we would -- you guys, I want you to come up with
18 like basically an interrogatory that will send the jury back.
19 They come back with the answer to that, and then it would be
20 -- depending on that we would -- would depend whether or not
21 we had the instructions on the comparative negligence or no
22 comparative negligence.

23 MS. BRASIER: Okay. And just to be clear because we
24 just -- we've been talking about Elaine a lot. Is it just
25 whether or not Elaine assumed the duty?

1 THE COURT: Well, okay, so --

2 MS. BRASIER: Because I think --

3 THE COURT: -- my recollection is --

4 MS. BRASIER: -- Jack didn't receive it or wasn't
5 really involved in the process.

6 THE COURT: You know, Elaine stands out in my mind
7 because Elaine was the one testifying to it. Was it just
8 Elaine that went down there? It was both of them, the parents
9 together?

10 MS. BRASIER: They both went. I mean,
11 notwithstanding any of our objections to any of this, Elaine
12 went down there with Jack, but I think the testimony from both
13 of them was that Elaine was the one who would take care of
14 these things. Jack didn't really have any involvement with
15 it.

16 THE COURT: I think it would be both parents.

17 MS. HYSON: I mean, Jack -- Jack did go.

18 THE COURT: He went.

19 MS. HYSON: The rider --

20 THE COURT: They both sounded like they did stuff
21 together for the benefit of their son.

22 MS. BRASIER: So would you like the interrogatory to
23 be separate to each of them? I think that would be most
24 appropriate to know who would be on the verdict form for --

25 THE COURT: That's not a bad idea.

1 MR. ALVERSON: I think that -- I think that's right.

2 MS. HYSON: Okay.

3 THE COURT: Yeah, because it is, again, it's a
4 factual determination as to each of them. They can weigh the
5 respective things that each of them did. So come up with the
6 language of it, but I think you understand where I'm going
7 with it.

8 MR. ALVERSON: Okay.

9 THE COURT: And then -- then with that being said,
10 have you guys agreed to the comparative negligence
11 instructions?

12 MS. HYSON: Yeah, I think we decided if comparative
13 negligence was in, then those were fine.

14 MS. BRASIER: Yeah, but I wouldn't -- I'm just
15 wondering how we -- because --

16 MS. HYSON: I guess some of them -- well, it
17 depends. Are we just talking that comparative negligence
18 would be in for the parents depending on that response and not
19 Harvey?

20 THE COURT: We're going to have to send -- we might
21 have to -- I'm thinking we might have to -- I really -- this
22 is kind of a unique situation. Let's see, if I give them the
23 jury instructions, it would have all of them. So maybe we
24 give them the jury instructions pertaining to that one
25 question they need to answer, send them back. They come back

1 with a decision, and then that would guide the remainder of
2 the jury instructions that are given to them. I think it
3 would be the least confusing if we divide it up like that so
4 they know specifically what applies to that question.

5 MR. ALVERSON: Are you --

6 THE COURT: Or if you could think of a better way to
7 do it.

8 MR. ALVERSON: Well, let's -- I hate to do that. I
9 understand that the dilemma. Let's see if we can work out
10 something.

11 THE COURT: Yeah, see, hers might -- the dilemma, if
12 we don't bifurcate it, then I have it to include the
13 comparative.

14 MR. ALVERSON: But you can include the comparative
15 by saying if you find that Jack and Elaine were -- assumed a
16 responsibility, then, boom.

17 THE COURT: Then what?

18 MR. ALVERSON: Then -- then you -- then you go then
19 the answer in the verdict form, or you can figure the
20 comparative. If you find that they assumed the
21 responsibility, then you will -- then you will answer the
22 question as to whether the -- it was comparatively --
23 comparatively negligent.

24 THE COURT: So just put that on the verdict form is
25 what you're saying?

1 MR. ALVERSON: Yes. Uh-huh.

2 MS. HYSON: I mean, you could probably preface the
3 jury instruction with something like that, too. We would just
4 have to have the jury instructions back so we could rewrite
5 them.

6 MR. ALVERSON: I think you'd want a jury
7 instruction, and then the verdict form. I think sending them
8 back out isn't a good idea.

9 MS. BRASIER: Yeah, I'm just --

10 THE COURT: That can go on the verdict form. So, I
11 mean, because we're going to have to step on through it
12 anyway.

13 MS. HYSON: And we can write that together.

14 MS. BRASIER: I understand the Court's decision on
15 the parents. What about comparative negligence against Harvey
16 because we talked about the fact that he's not a party. And
17 under Banks, he can't be listed on the verdict form or be
18 assessed to any comparative negligence since he's not a party.

19 MR. ALVERSON: I -- I think that's probably true.

20 THE COURT: I think so, too. All right.

21 MS. BRASIER: Okay.

22 THE COURT: So what do you need back from me? I
23 don't -- did I take anything of yours? I took your Sherman
24 case.

25 MS. HYSON: Yeah, I gave you -- I think I gave you

1 that stack of jury instructions.

2 THE COURT: Oh, goodness. I'm notorious for --
3 things pile up.

4 MS. HYSON: I think you took them back with you.

5 THE COURT: I don't know. All right. Let me go
6 look on my desk, the abyss.

7 (Pause in the proceedings.)

8 MS. SANDERS: I've been kind of trying to get
9 working on my closing and letting them argue, but with -- oh,
10 sorry.

11 THE COURT: Do we have an attorney for the
12 plaintiff?

13 MS. HYSON: Oh, no. She disappeared. Let me --

14 THE COURT: Well, I have one.

15 MS. HYSON: Let me get her.

16 (Pause in the proceedings.)

17 THE COURT: Ms. Sanders.

18 MS. SANDERS: You know, Your Honor, I -- I think
19 that Harvey has to be included on the verdict form. It's a
20 wrongful death case. You don't have to have an estate for
21 that, an estate in order to have that. And his negligence, if
22 any, would be imputed to the plaintiffs.

23 So to the extent that there is comparative for
24 Harvey not -- you know, for violating the rule about eating on
25 the bus, his negligence is -- is certainly relevant and is

1 something that would be imputed to the plaintiffs who are
2 suing on his behalf. There isn't a reason to let that
3 negligence just go by when they're suing for wrongful death.

4 MS. BRASIER: Well, Your Honor, I disagree with that
5 on two points. First, Banks v. Sunrise says you cannot do
6 that. If it's non-party, you have to say it's all or nothing.
7 Either it's this non-party's fault or it's our fault. You
8 cannot do comparative negligence. That's what Banks v.
9 Sunrise is all about is that you can't -- you can't argue
10 comparative negligence for a non-party.

11 The second part of that is, again, you know,
12 initially, you know, it was kind of the accusation that I was
13 talking out of both sides of my mouth and I feel like that's
14 happening now on the flip side of it is that either the
15 parents assumed a duty and now they're responsible for telling
16 Harvey what the rules are because he was incapable of doing
17 that or Harvey is. You can't have it both ways as they tried
18 to point out to me. So, you know, it's --

19 THE COURT: I actually agree with you.

20 MS. BRASIER: And I think -- I mean, most
21 importantly as far as just for the record and for making sure
22 that -- you know, that we proceed as the Supreme Court wants
23 us to is that Banks v. Sunrise says you can't -- you can't put
24 a non-party on the verdict form and argue comparative
25 negligence against a non-party.

1 THE COURT: You know, I tend to agree that it's not
2 both. I mean, it's one or the other. And actually we
3 discussed that earlier. I'm looking at Banks right now.

4 MS. BRASIER: It's later in Banks. It's towards the
5 end of the decision. I apologize I didn't bring an extra
6 copy.

7 THE COURT: That's okay.

8 So, Ms. Sanders, what are you asking for, that we
9 have comparative negligence of the parent and Harvey on there?

10 MS. SANDERS: Yes. It's two independent acts of
11 negligence. He was eating the sandwich in violation of the
12 rule, and the parents didn't warn him about it, tell him the
13 rules, tell him what he needed to do as far as riding the bus.
14 They didn't provide a PCA.

15 MS. BRASIER: Again, Your Honor, that goes back to
16 was he an independent, legal -- legally independent adult, in
17 which case the parents would not have any duty because they
18 don't have any obligation towards Harvey, or, like Your Honor
19 was saying, is it a case where the Court sees it as just a
20 formality that the parents didn't have a guardianship over him
21 and that -- you know, that they were assuming responsibility
22 of them. It can't -- it can't be both.

23 THE COURT: I agree with you.

24 MS. SANDERS: Well, the parents are the ones that
25 are saying Harvey couldn't even read. So if they're signing

1 up for paratransit service --

2 THE COURT: Uh-huh.

3 MS. SANDERS: -- they are -- they definitely are
4 assuming the responsibility to make sure that he understands
5 the rules and is truly eligible to ride the bus.

6 THE COURT: Well, I agree that there's a potential
7 argument of comparative negligence on the parents. I'm just
8 not seeing the ability to sustain one against Harvey and the
9 parents at the same time because the -- the negligence of the
10 -- the comparative negligence to the parents would be because
11 Harvey has an inability to do this on his own, they assumed
12 the duty on his behalf.

13 I'm just -- I guess I'm not seeing how they could
14 both be on there. I think the argument for comparative would
15 be on the parents. I think there is an argument whether or
16 not his parents assumed a duty for him. Because, quite
17 clearly, Harvey no ability to understand. I mean, there was
18 -- there was testimony throughout this case that Harvey -- he
19 really didn't even have the ability to live alone. He lived
20 with his parents, he lived in a group home, he lived with a
21 personal caregiver, he had a reading level below a
22 kindergarten reading level. I mean, he really was not able to
23 function independently and he required either his parents or
24 Joseph to provide for his needs. So I think it would come by
25 way of the parents.

1 And, you know, like I said, it didn't come out, you
2 know, but the question in my mind and I think in everyone's
3 mind is why even bother giving these people books? I mean,
4 they're dealing with people -- paratransit are dealing with
5 people more than just Harvey who deal with varying levels of
6 disability, mental disabilities. I mean, if they can't read,
7 what's the purpose of even giving them a book?

8 I mean, the assumption to me would be that the
9 person who takes care of them because they're so mentally
10 disabled would assist them in making sure they understood the
11 rules. Because, otherwise, they're just worthless. So that's
12 the reasoning. So, okay, thanks.

13 (Court recessed at 2:07 p.m., until 3:07 p.m.)

14 (Inside the presence of the jury.)

15 THE COURT: Okay. Counsel, please make yourselves
16 comfortable.

17 Welcome back, ladies and gentlemen of the jury.
18 Just one thing. You know, sometimes when we have these breaks
19 that go a little bit longer than we anticipate, and I'm sorry,
20 we never want to waste your time, it's just sometimes the
21 scheduling on a trial is more of an art than a science. So we
22 appreciate your -- well, we appreciate it. I couldn't think
23 of the word I was going to use, but thank you for your
24 patience.

25 So there's been a little bit of change in plans. I

1 think Jason kind of let you know for scheduling. What's going
2 to happen is I'm going to give you the law, okay. These are
3 the jury instructions. You'll have a copy when you go back to
4 the jury room to deliberate. Because of timing issues so that
5 both parties can do all their closings on one day so they'll
6 be fresh in your minds, we're going to come back at 1:00 on
7 Monday and then we'll do everything on Monday and send you guy
8 out to deliberate.

9 (Jury instructions are read.)

10 THE COURT: All right. Ladies and gentlemen of the
11 jury, thank you so much. We'll see you Monday at 1:00. As
12 always, don't read about the case, don't research the case,
13 don't form or express an opinion. Thank you.

14 (Jury recessed at 3:35 p.m.)

15 THE COURT: All right. Thank you everyone. And so
16 I didn't ask you guy before we started. And the verdict form
17 you guys have both gone through and it's acceptable; correct?

18 MR. CLOWARD: Yes.

19 MS. HYSON: Yes.

20 MS. BRASIER: Yes, Your Honor.

21 THE COURT: Perfect. Thank you. Have a wonderful
22 weekend, everybody.

23 MS. SANDERS: You too, Your Honor.

24 MR. CLOWARD: You too, Your Honor.

25 (Pause in the proceedings.)

1 THE COURT: Okay. Just as a housekeeping matter,
2 throughout the case we kept referring to it as the Estate of
3 Harvey Chernikoff. And the reason is this, you guy obviously
4 submitted your stipulation and your captions are correct in
5 your documents. However on our documents it shows the Estate
6 of Harvey Chernikoff. Apparently one of the clerks, when they
7 got your stipulation, didn't go in and change it in the
8 computer system. But you guys, you're -- you're correct. It
9 was just an error in the clerk's department.

10 MR. CLOWARD: Do you need us to do anything, Your
11 Honor?

12 THE COURT: Nope.

13 THE CLERK: No, and I've since went in and removed
14 the Estate of Harvey.

15 THE COURT: Yeah, I just want to make a record
16 because otherwise it's kind of unclear since I've been calling
17 it the estate of, when clearly there is no estate anymore.

18 MR. CLOWARD: No problem. Thank you, Your Honor.

19 MS. SANDERS: Thank you.

20 THE COURT: Thank you.

21 (Court recessed for the evening at 3:38 p.m.)
22
23
24
25

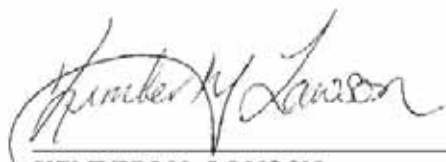
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 26 2016

BY: 
KATHERINE STREUBER, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

Jack Chernikoff and Elaine Chernikoff

Plaintiff(s),

-VS-

First Transit, Inc.

Defendant(s).

CASE NO. A682726

DEPT. NO. XXIII

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL

Attached hereto are the proposed jury instructions which were offered to the Court, but not submitted to the jury in the above entitled action.

DATED: This 26th day of February, 2016.

Steven D. Grierson, Clerk of the Court

By: 

Katherine Streuber, Deputy Clerk

A - 13 - 682726 - C

PINU

Proposed Jury Instructions Not Used At Tri:
 4527452



001616

INSTRUCTION NO. _____

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.

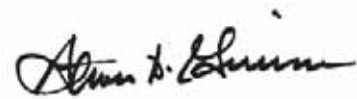
See Sherman v. Southern Pac. Co., 111 P.416 (Nev. 1910); see also Forrester v. Southern Pac. Co., 134 P.753 (Nev. 1913).



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TRAN



CLERK OF THE COURT

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 9

MONDAY, FEBRUARY 29, 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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I N D E X**CLOSING ARGUMENTS:**

By Mr. Cloward 3

By Ms. Sanders 42

REBUTTAL ARGUMENT:

By Mr. Cloward 81

VERDICT: 92

1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 29, 2016, 1:03 P.M.

2 * * * * *

3 (Outside the presence of the jury.)

4 THE COURT: All right. Good afternoon. It's Jack
5 Chernikoff versus First Transit, A682726. The jury is here.
6 Anything we need to address before I bring the jury in?

7 MR. CLOWARD: No, Your Honor.

8 MS. SANDERS: Nothing, Your Honor.

9 (In the presence of the jury.)

10 THE COURT: Welcome back, ladies and gentlemen of
11 the jury. All right. When we left off on Friday we did jury
12 instructions. And the plaintiffs are going to present their
13 closing at this time.

14 MR. CLOWARD: Thank you.

15 THE COURT: Whenever you're ready.

16 MR. CLOWARD: Thank you, Your Honor.

17 PLAINTIFFS' CLOSING ARGUMENT

18 MR. CLOWARD: May it please the Court. Good
19 afternoon, everybody.

20 Are we on, Brian?

21 MR. CLARK: Yeah.

22 MR. CLOWARD: Okay. So now is the opportunity for
23 me to talk about the facts in the case, the things that have
24 been presented and everything that you have heard from the
25 witness stand.

1 A corporate defendant is responsible for all of the
2 harms and losses caused by their negligence. First Transit is
3 responsible for all of the harms and losses caused in this
4 case. Responsibility versus excuses. We started off with six
5 defense excuses, now there are eight.

6 Do remember when in opening statement -- or, excuse
7 me, in voir dire when we talked about defendants coming into
8 court, saying whatever it takes to avoid responsibility,
9 coming up with whatever excuse it takes. And you'll remember
10 when the defense attorney stood up, the first thing that he
11 said, well, let's talk about the excuses that have been
12 advanced in this case.

13 As we know, Excuse No. 1 from opening, page 70 does
14 not apply here in Las Vegas. No. 2, the driver could not see
15 Harvey choking. No. 3, Harvey did not actually have a heart
16 attack. No. 4, it was Harvey's fault for eating on the bus.
17 No. 5, it was his parents' fault for not having a PCA. No. 6,
18 it was his parents' fault for letting him eat on the bus.

19 No. 7, this is a new excuse, even if page 68, 69,
20 and 70 did apply, it wouldn't have mattered. You remember the
21 witness taking the stand, their doctor, Dr. MacQuarrie sitting
22 on that stand, we'll talk about him in a minute. Excuse No.
23 8, the CBA, the ADA, Nevada regs, the RTC, they're all to
24 blame because none of them specifically set out in their
25 policy that this company had to actually keep its word and do

1 what it promised to do.

2 You know, sometimes when we -- when we say things in
3 our head we think about it and we thing, yeah, you know what,
4 that sounds pretty good. That sounds pretty good. And then
5 we actually say it and it's kind of like the cringe factor
6 sets in. It's kind of like, that doesn't really come out the
7 right way. This is really the position that they're taking.
8 This is the position that First Transit is taking, that
9 because we were not told that we had to follow our policy, our
10 own employee handbook, we should be given a free pass.

11 Well, you know what, if it's important, you will
12 find a way. If it's not, you will find an excuse. So let's
13 talk about this policy that, you know what, we weren't told we
14 specifically had to do this. That's literally the excuse that
15 they've come up with is that the federal regs, the ADA, nobody
16 told us we had to do what's in our employee handbook. That is
17 literally the position that this company has come into court
18 to tell you folks. That's what they're saying.

19 So let's actually talk about the labor agreement.
20 And remember, this is the agreement that I had to actually
21 move into evidence when Ms. McKibbins was on the stand. There
22 was testimony about it, but that document wasn't moved in
23 until I started to cross-examine her because I wanted you to
24 all have it. Well, let's take a look at the document itself.
25 And this is something that you'll have back in the jury room.

1 Will you look at these index topics? It's talking
2 about vacations, holidays, court duty, funeral leave. One
3 section about safety and health. Go to the next, talking
4 about seniority, health and dental insurance, drug and alcohol
5 testing, union recognition, leave of absence. It's not
6 telling this company what they have to do.

7 Let's look at the one page that actually deals with
8 safety and the policy and see what it says. Attendance at
9 safety meetings is mandatory unless specifically excused from
10 the company. An employee who does not attend all safety
11 meetings shall be charged with an attendance occurrence.

12 So is the CBA saying to them, hey, you all have a
13 policy in a handbook, you don't have to follow it, it's okay
14 to not follow it? Absolutely not. As a matter of fact,
15 they're saying safety is important. And if you union members
16 don't attend the safety meetings, you're going to get charged
17 with an attendance occurrence. That's what the -- that's what
18 the CBA says.

19 Also, Article 22, all employees will receive a copy
20 of the employee's handbook and any new changes -- changed
21 rules as issued by the company. So, hey, company, you better
22 give our employees a copy of the employee handbook. That's
23 what the CBA says. So does the CBA tell this company, hey,
24 it's okay, you don't have to look at page 70? Absolutely not.

25 What about the RTC? A lot of discussion was about

1 the RTC. Well, you know what, the RTC contract this, the RTC
2 contract that. The first thing I want to point out is that
3 the First Transit corporate designee for safety admitted on
4 the stand, if you remember, she sat right there and said we go
5 above the contract, we choose to go above the contract. What
6 she's saying is it's their choice what to do. It's their
7 choice what to do with regard to safety.

8 So let's take a look at the contract. And this is
9 -- you guys will have this. You can -- please go through it.
10 I know some of you have experience with contracts.

11 Contractors employ, so the training, all employees of the
12 contractor, so all employees, not just, hey, some of them.
13 Not just, hey, if you're going to be riding on a bus -- or
14 driving a bus. All employees of the contractor will have
15 completed the contractor's employee training program.

16 This doesn't say all of the employees for First
17 Transit will come to RTC and we're going to train them.
18 That's not what it says. It says just the opposite.
19 Employees of First Transit will have completed contractor's
20 employee training program as outlined in the contractor's
21 proposal in Exhibit A. Where is Exhibit A? Where is Exhibit
22 A? If they're going to come into this court and they're going
23 to say, you know what, it wasn't negotiated in the contract.
24 At the time we formulated this contract, that's just not
25 something that was negotiated. Well, you better bring in

1 Exhibit A so that we can take a look at it.

2 Again, training, all operators required to complete
3 the contractor's training program. Training programs must
4 contain, very important, at a minimum. So they're not saying,
5 hey, first transit, this is everything that you guys have to
6 do. And you remember that employee handbook, remember how
7 thick it was? You have one, two, three, four, five, six,
8 seven, eight, nine topics. Does the contract between RTC and
9 First Transit really set out everything that this company is
10 supposed to do? No, because it's contained in the missing
11 document that was never provided in this case by anyone.

12 Where is Exhibit A? Well, Ronald Reagan says trust,
13 but verify. When she takes the stand, when she says, well,
14 it's not part of the negotiations, okay, that's fine. If you
15 wanted to come into court and testify to that, why don't you
16 give us the documents so we can verify what you're saying?

17 Another thing, if it's not in the contract specific
18 between RTC and Laidlaw, this one has me real confused, why do
19 you have a form in Jay's employee file that says contract
20 specific other local training, CPR, four hours, first aid,
21 four hours? If it doesn't apply, why have you got the form?
22 I mean, so did First Transit tell this company, hey, First
23 Transit -- or, I mean, did RTC. Sorry, I misspoke. Did RTC
24 tell this company, hey, you know what, you can ignore your
25 company policy? Absolutely not.

1 Well, what about the ADA? Remember the ADA? That
2 was the real thick one that I took out of -- if you remember,
3 I took it out, actually out of the witness stand and I showed
4 it to you. That's into evidence. You can look at it. G88,
5 if somebody wants to write that down. G88. This right there
6 out of that entire manual is all that deals with training,
7 okay. That's all that deals with training.

8 So for them to come into court and say, you know
9 what, the ADA told us specifically what we are to do, when
10 we're to do it, how we're to do it. Read this. See if this
11 talks about turning left safely, things like that. It
12 doesn't. What does the ADA say? It says a well-trained work
13 force is essential.

14 Training must be to proficiency and so that every
15 employee by the transportation provider who is involved with
16 the service to persons with disabilities must have been
17 trained so that he or she knows what needs to be done to
18 provide the service the right way. Every employee at any time
19 the ADA comes and checks has to be trained to know what to do
20 at that moment. That is training to proficiency.

21 And to -- to connect the -- to connect the training
22 to proficiency, when you watch the video, and I don't want to
23 pick on Mr. Farrales, when you watch the video, it's clear he
24 didn't know what to do. He just simply didn't know what to do
25 because he wasn't given the information. He wasn't armed with

1 the information to help him know what to do in that moment.
2 When it comes to providing service to individuals with
3 disability, ignorance is no excuse.

4 If they make the choice to not provide their driver
5 with the information so that he knows what to do in that
6 moment, that is not an excuse for First Transit. An employee
7 who has forgotten what he was told in past training sessions
8 so that he or she does not know what needs to be done to serve
9 individuals with disabilities does not meet the standard of
10 being trained to proficiency. If you have an employee that
11 does not know what to do, they're not qualified. They don't
12 meet the standard.

13 And, you know, this whole -- this whole theory that
14 -- or, this -- you know, this comment that, you know, the
15 federal government, they're looking over us, they're -- you
16 know, they're making us do these things and we only do what
17 we're told because of the federal government. Well, you know
18 what? The federal government doesn't boss people around. It
19 has some guidelines for them to follow, but it doesn't say
20 you've got to do this, you've got to do this, and they're
21 sitting there waiting for them to not do it. That's not how
22 it works. There are thousands and thousands and thousands of
23 corporations in the United States.

24 So they come in here and they tell you, literally,
25 this is the position, again, it's astonishing, none of these

1 regulations said we had to actually follow what's in our
2 employee handbook. So you know what, we want a free pass
3 because we weren't told that we had to specifically do what's
4 on page 70. We weren't told we had to do it. So, please,
5 give us a free pass.

6 Well, what about the promises that were made by this
7 company to our community? Remember this? Safety is our core
8 value and it's considered first in everything we do. Safety
9 is our core value. It's considered everything, first in
10 everything that we do. We treat all of our employees, all of
11 our customers and business partners will be treated with
12 dignity and respect.

13 That's unless you're unfortunate enough to choke to
14 death on one of our buses. Then we're going to come into
15 court -- I don't have a slide there. Then we're going to come
16 into court. And you remember what Dr. MacQuarrie did. Was
17 that very respectful? Was that treating Harvey with dignity
18 and respect?

19 Remember the map here? The other -- the other claim
20 by Ms. McKibbins when she took the stand, you remember she
21 says, well, I can -- I can only think of -- remember, she
22 testified she is the corporate director of safety, okay, over
23 this whole company. That is her position. Over the whole
24 company she is the corporate director of safety.

25 And I asked her, so what cities in the United

1 States, Canada, Puerto Rico or Mexico or the U.S. Virgin
2 Islands are lucky enough to have drivers that actually know
3 what to do if there's a medical event? And then she minimized
4 it. Well, you know what, I think they're all in -- they're
5 all in California. All of them are in California. She
6 couldn't even give us a specific city.

7 Well, here's a question that I've been scratching my
8 head over that I really just cannot figure out. If California
9 is the exception, then why do you put page 70 in your
10 corporate policy and manual that goes to -- that goes to every
11 single one of these places all over? And she's even -- she
12 testified they're now in India. You know, if California is
13 the exception, why do you put it in your whole policy?

14 And, you know, it's the wild wild west. We can do
15 whatever we want here. People in Las Vegas don't matter.
16 People in Las Vegas don't matter. Our neighbors to the west
17 in California, they matter. We're going to teach those folks
18 how to do it. But we're going to make a choice here over 88
19 bucks to not train our drivers.

20 Excuse No. 7, even if pages 68, 69, and 70 would
21 have applied or were followed, it wouldn't have mattered.
22 Again, you remember when Dr. MacQuarrie took the stand. His
23 testimony boiled down to basically there is nothing that could
24 have been done to save Harvey's life. Nothing. Nothing could
25 have been done to save Harvey. So page 70, page 69, page 68,

1 forget about it. They don't matter anyway.

2 Remember in jury selection when Mr. Alverson stood,
3 I believe it was right here, he was talking to the members of
4 the jury who were sitting over here and was asking them have
5 you ever seen somebody choke before? What do they do? Do
6 they go like this, do they move around, do they flail around?
7 And then Dr. MacQuarrie comes in right on que, right on que,
8 and what does he do? You all remember. You all remember what
9 he does. Courtroom theatrics and props.

10 There's a jury instruction that talks about the
11 bias, the motive, the relationship to the parties. You
12 remember who this guy is. He's a long time buddy of Ms.
13 Sanders. 20 years they've been traveling around to courtrooms
14 talking to folks like you, bringing that show into courtrooms.
15 You get to consider that. That's an actual jury instruction
16 that you all get to consider, the relationship between that
17 witness and these parties. But remember, the brutal honesty
18 is he's paid money to save and help avoid responsibility.

19 So did Harvey die of choking or was it some other
20 medical event like a heart attack? And one thing I want to
21 point out, if it was a heart attack, as we know, 360,000
22 people die a year from heart attacks. So wouldn't you think
23 that page 69 would have been important to train, too? Dr.
24 MacQuarrie, did you know that? Did you know, Dr. MacQuarrie,
25 that they also don't teach page 69? You didn't know that, did

1 you?

2 So did he die of choking or some other random
3 medical event? Well, let's see what Dr. Lingamfelter said.
4 Remember who he is? He has zero dog in the fight. Zero dog
5 in the fight. This is the person who was employed, he's now
6 -- he now lives in Colorado doing the same thing for a
7 community up there. He lives here in Las Vegas. He is the
8 Clark County Coroner, okay. That's what he does. He goes out
9 when somebody is dead. He goes out and he determines how did
10 they die. That's what he does all day every day.

11 He doesn't come in the courtroom with a 20-year
12 friend. That's not his job. No, his job is to look and find
13 out how people die. What does he say? Oh, I'm sorry. This
14 is the wrong slide. Let's see. I'll move -- well, I'm going
15 to get back to that, but remember that, what I was talking
16 about because I'm going to go over that testimony in a minute.

17 But the other part of this is that they say -- Dr.
18 MacQuarrie says, well, you know what, this food bolus was so
19 thick there's just no way it could have -- it could have
20 helped to get it out. Well, if you remember, part of it was
21 in the vocal cord, but the other part was in the mouth. How
22 much of it was in the mouth? Three-quarters? Could you have
23 done a finger sweep and gotten out the three-quarters and
24 saved his life then?

25 He was asked, you know, why did you have difficulty

1 removing the food bolus? And he says that it was because he
2 was respectful. He was respectful to the family. It was a
3 little tricky because we were trying to accommodate the
4 family's wishes for no autopsy. The wishes of Jack and Elaine
5 to not have their son desecrated by having him cut from his
6 groin to his neck.

7 Dr. Lingamfelter said that if we had done a full
8 autopsy, we would have just extracted out the neck organ, so
9 you just pull them out. You cut them open, you get it, you
10 remove it. It's that easy. It's that easy. But he was
11 trying to accommodate the family's wishes.

12 You know, it's not enough to let Harvey choke to
13 death on their bus. First Transit also wanted the coroner to
14 desecrate his body. And if that's not enough, then they bring
15 that witness on the stand to do what he did. Don't let them
16 disrespect this family any more.

17 So common sense analysis of 68, 69, and 70, if they
18 had been followed would it have mattered? Well, you know
19 what, it's really kind of like if this was, you know, a
20 lifeguard situation and we had a lifeguard on duty and
21 somebody drowned and the lifeguard comes in afterwards and
22 says, well, you know what, I didn't swim out to save that
23 person. I didn't swim out to save that person because, you
24 know what, it wouldn't have mattered anyway so I let them
25 drown. That's the position that this company is taking. We

1 didn't have to follow pages 68, 69, 70 because it didn't
2 matter, it wouldn't have helped anyway.

3 No. 6, it was his parents' fault for letting him eat
4 on the bus. So basically boiled down Elaine is a bad mom.
5 She's a bad mom for letting him eat on the bus. Well, whose
6 rule is it anyway? Let's talk about the rule. Whose
7 responsibility was it to enforce the no eating and no drinking
8 policy? Remember when -- remember when -- actually, not this
9 yet.

10 Remember when on the first day of trial when I told
11 you in my openings that there was a rule that said no eating,
12 no food, no drinking on the bus and I put Ms. McKibbins as my
13 very first witness and I asked her questions. And I asked her
14 questions. I told you in my opening what she would say. When
15 she took the stand, I asked her the questions, and she
16 answered them. She said there's no eating, no drinking on the
17 bus. Remember that testimony.

18 Remember in opening statement when Ms. Sanders said
19 Mr. Cloward is going to try and take things out of context.
20 He's going to try and, I think she said cobble things
21 together. Well, let's think about this for a minute. This is
22 a case about choking on a bus. Do you think there's really
23 one rule that you've got to know for this whole case?

24 We don't -- we don't really care about, you know,
25 left-hand turns, right-hand turns, how to put the -- the

1 wheelchairs safely on. This is about eating on a bus. This
2 is the corporate spokesperson for the entire company. You
3 think that the rule would be pretty easy to know. What is the
4 rule? And so Ms. Sanders, rather than bring this witness up
5 after I get done on the first day of trial, did she ask any
6 questions to clarify it? No, she waited for a week later.

7 You have to -- you have to wonder about that. Why
8 wait for a week later? Why not clarify it right there on the
9 spot. It is what it is. It is what it is. You don't have to
10 take a full week to figure out how you're going to explain,
11 oh, well, you know what, no eating, but drinking is allowed.
12 Drinking is allowed, it just has to be from -- from an open
13 container.

14 That was the testimony she gave, I believe it was
15 yesterday. That was the change that she made to the policy.
16 Well, if you recall, there was a deposition page that kept
17 getting read over and over and over to Ms. McKibbins. So
18 let's see what she told us in her deposition from that
19 transcript.

20 (Video of Jennifer McKibbins deposition played.)

21 MR. CLOWARD: It's an RTC policy to not allow eating
22 or drinking on the bus. Not this. Not this. But they have
23 to do that. They have to explain that away. And if you
24 remember when I asked her about assisting, she said, well, I
25 think that assisting wasn't handing him the bottle. I thought

1 assisting was getting that bottle and putting it up to his
2 mouth. I was confused. That's her testimony.

3 And she says, you know what, First Transit has a
4 stricter policy than RTC. Remember? RTC's is more relaxed.
5 And she said we have to do what's in the contract. It's the
6 contract that governs. You will have the contract and you
7 will see that it says nothing about eating or drinking. No,
8 what it says is First Transit will do what's in their policy
9 that's been given to us in Exhibit A.

10 And so what is the policy of First Transit? No
11 eating or drinking on buses. No eating or drinking on buses.
12 It's pretty clear what the rule was. It's pretty clear what
13 their job was. But they have to come in here and they have to
14 tell you these things so that they're not held responsible.
15 They have to do that. Actually, it's their choice what they
16 do, and they choose to do that.

17 It was RTC and First Transit's rule to not allow
18 eating or drinking, and First Transit's job was to enforce it.
19 That's what they were hired to do. That's why they were paid
20 the big bucks, the 220 million or whatever it was, and that's
21 in the contract. You can actually read how much they made for
22 this policy in the contract.

23 What about the promises that were made, again,
24 safety is our core value? Safety is our core value unless
25 somebody chokes to death on the bus and we have to create an

1 excuse. And in that situation, then we're going to come in
2 and we're going to tell folks that, you know what, safety is
3 not the most important thing. We can alter it and be flexible
4 on the rules, on the safety rules because we don't want to be
5 responsible for the things that we do.

6 Excuse No. 6, Elaine is a bad mother. You remember
7 the testimony that they -- they kept asking her time and time
8 again? And also Dr. Stein. Well, Dr. Stein, does a police
9 officer -- I'm sorry. I'm on the wrong slide.

10 They kept asking Elaine all of these questions
11 about, well, did you talk to the driver? Did you ask the
12 driver this question or did you ask the driver that question?
13 Did you find out when you would take Harvey and put him on the
14 bus what the rules were? Well, you know what, it's a two-way
15 street here. It's a two-way street. And every time Harvey
16 got on the bus he has this -- this red cooler.

17 And, you know, there's been some things mentioned
18 about the cooler, testimony that was given by Dr. Stein. If
19 you remember when he took the stand Ms. Sanders said, well,
20 hey, was it open or closed? Because he initially testified I
21 think it was open. When he's asked he says, you know what, I
22 could be mistaken, I don't know, instead of taking a hardcore
23 position like Mr. -- Dr. MacQuarrie. You know, he says, I
24 don't -- I may have been mistaken.

25 So where's the evidence of First Transit ever saying

1 one time to Elaine, hey, just want to let you know I see your
2 son has that -- that cooler there, just want to let you know
3 there's a policy against eating and drinking. Any testimony
4 to that? Zero. There's been zero evidence, zero evidence
5 that Jack or Elaine knew that Harvey ate on the bus. None.

6 And you saw, even this witness that was so
7 disrespectful, you saw even he said that this family it was
8 apparent that they loved their son. They did everything for
9 him. Everything possible. They loved and cared for him and
10 did everything possible to help him. Do you think for a
11 second if this had been raised to Elaine that she would have
12 done something about it? Absolutely she would have. But
13 there's zero evidence that she knew.

14 So Excuse No. 5, it's his parents' fault for not
15 having a PCA. In other words, this is literally what this
16 excuse is, hey, we can't be trusted to do our job that we're
17 getting paid a lot of money for. We cannot be trusted to do
18 our job even though we're getting paid, even though we
19 submitted the bid to come in here to Las Vegas to do this job.
20 We're putting ourselves out as professionals, but we can't be
21 trusted so you need to have a PCA to make sure that we do what
22 we promise. You know, you should have had Joseph on the bus
23 to monitor what our drivers do.

24 If you remember, Harvey is not required to have a
25 PCA because as a community we are supposed to be able to have

1 a trust in this company to do what they promised to do. And
2 another thing, remember when Mr. Farrales was on the stand and
3 Ms. Sanders was asking, well, tell us about the manifest, do
4 you know when a passenger has a PCA, do you know when a
5 passenger has a cognitive impairment? And Jay says, yeah,
6 it's right there.

7 This is the -- the manifest for Harvey that day. Do
8 you see a PCA listed? No. So what should a careful driver
9 do? A careful driver should say to themselves, hey, there's no
10 PCA, I need to be extra careful today, I need to be extra
11 careful. But instead they try and use that as a shield -- or,
12 I mean, as a sword. Somehow it's -- it's the parent's fault
13 because there's not a PCA.

14 And remember when you were told that First Transit
15 knows nothing about anyone's disability, you know, we're just
16 in the dark here, we don't know what anybody has or anything
17 like that, you know, well, let's take a look at what the
18 contract says. As a contract, RTC requires vehicle operators
19 training through a community partnerships to better prepare
20 vehicle operators to work with persons who experience a
21 disability. The training should emphasize situations relating
22 to persons experiencing cognitive or psychiatric impairments.

23 But you know what, they want to come into court and
24 say, hey, we weren't told anything, we want to put our head in
25 the sand, we didn't know anything about these folks. Really?

1 Well, let's look at the contract to see what it says because
2 it's right there. And they claim that it's not their fault.
3 Again, the promise is made. Safety is our core value. It's a
4 core value.

5 It's Harvey's fault for eating on the bus. I'm
6 going to spend about one second on this because Jay
7 volunteered to help Harvey violate this rule, okay. This is
8 not an excuse.

9 Let's talk about what Dr. MacQuarrie said. Harvey
10 didn't actually choke. He had a heart attack. So Jury
11 Instruction No. 21 requires that it be proved, one of the
12 elements is causation, duty, breach, causation, and so forth.
13 It says so approximate cause of injury, damage, loss, or harm
14 is a cause in which a natural or continuous sequence produces
15 the injury, damage, loss, or harm, and without which the
16 injury, damage, loss, or harm would not have occurred.

17 Okay. So did Harvey die from choking, or was it
18 some other random event? This is the slide with Dr.
19 Lingamfelter. Remember, Dr. Lingamfelter, his job day in, day
20 out, he gets paid by Clark County, that's what he does, okay.
21 And the questioning -- the questioning when Ms. Sanders -- or,
22 I mean, excuse me, when my partner Allison was standing up
23 here and she was asking me the questions, the way that it went
24 down in the deposition was Ms. Sanders asked the majority of
25 the questions, okay. And so because of that, Ms. Sanders was

1 the one that provided Dr. Lingamfelter with all the
2 information.

3 I know that in -- in her closing she's going to get
4 up here and say, well, why didn't Mr. Cloward provide him with
5 a video? She's the one that set the deposition. She's the
6 one. Remember how there was all the discussion on the depo of
7 attach this, attach this, attach this to the depo? Because
8 she provided him with a bunch of information, okay. So if
9 there's no video given to him by her, it's -- it was her
10 choice not to do that.

11 And then at the very end, page 48, I start asking
12 some questions. And I say, hey, Doctor, and then have you
13 heard of the comment when saying if it walks like a duck,
14 quacks like a duck, it's usually a duck? Answer, yes.
15 Question, okay, is it still your opinion that Mr. Chernikoff
16 died from choking? Answer, yes. Question, all right, is
17 there -- you know, other than the choking, is there any other
18 cause that you believe is more likely to be the cause of Mr.
19 Chernikoff's death? Answer, no.

20 The autopsy report from the Clark County Coroner,
21 public employee, it is my opinion that Harvey Chernikoff, a 51
22 year old white male died as a result of choking. There's his
23 signature. Death certificate, cause of death, choking, choked
24 on food bolus. But they bring in Dr. MacQuarrie to do his
25 thing.

1 Excuse No. 2, you should let us off because our
2 driver couldn't see Harvey. Our driver couldn't see Harvey.
3 That's their excuse, and it's a two-fold excuse. Number one,
4 well, we didn't see Harvey choking, we also didn't see him
5 eating, we also didn't see him dying because we couldn't see
6 him in the mirror. That's literally the position that they're
7 taking. And then the second part is that even if they did
8 look, Harvey wasn't failing around like Dr. MacQuarrie says he
9 should have. Literally jumping around the stand the way that
10 he did.

11 Well, let's talk about the first one. And this is
12 the part where I was, if you remember, Ms. Sanders was asking
13 Elaine, well, you know, do you agree that a police officer can
14 only see -- or they can only catch violations when they see
15 him? And, Dr. Stein, do you agree that a police officer can
16 only give a ticket if he sees somebody breaking the law?
17 Well, you only see what you look at.

18 If you're doing your job, you're actually looking
19 rather than filling out paperwork, rather than worrying about
20 the next stop. So is this really an excuse? It would be like
21 this gentleman on the train track who gets up to heaven and he
22 says to St. Peter, St. Peter, I just didn't see it coming.
23 There's a reason that you didn't see it coming, sir, that's
24 why you're here.

25 Using common sense, does this excuse even make

1 sense? Okay. All of this has to make sense. This is kind of
2 like the driver of this red car here coming into court after
3 he backs into somebody. He comes into court and he says, hey,
4 I didn't see the car in my mirrors, so let me off, please let
5 me off because, you know what, I couldn't see the car when I
6 backed into it in my vehicle. Is that really an excuse?

7 If First Transit backed into a car, would that be an
8 excuse if they came in here and said we didn't see it in our
9 mirror? Absolutely not. It's basic driver's ed. It's the
10 very first thing that you do when you get into the vehicle.
11 You adjust the mirror to make sure that you can see your one
12 single passenger. Your one single passenger that's sitting
13 directly behind you.

14 And then the second part of this. So, hey, even if
15 you could have seen him, Harvey wasn't flailing around. You
16 can use your common sense here, okay. If you remember, Ms.
17 Sanders says to try and build the theme of the case, well,
18 Doctor, I mean, isn't it so instinctive that even babies do
19 this?

20 Use your common sense if you have kids. If you have
21 kids you know that what your kids do, they don't -- they don't
22 go like this. Instead, what they do is their eyes go like
23 this and they panic. You have the story that they come in and
24 choose to tell you, folks, is that even babies grab their
25 throats. So please don't let them disrespect this family any

1 more.

2 We're getting close to the end. Jack, Elaine, Neil,
3 this is what I talked about. Close your eyes and don't open
4 them until I tell you.

5 That's this right here, okay. This right here. I'm
6 going to move on so that they can open -- you guys -- you guys
7 can open your eyes now.

8 This right here, I don't see anything -- and
9 remember the video. When you get back to the jury room and
10 you see the video, you remember that when Jay first found
11 Harvey he was leaning all the way over into the aisle, okay.
12 He was leaning all the way over into the aisle. This is after
13 he had set him up.

14 So when he gets onto the bus, this is the first
15 thing he sees. He sees this passenger slumped all the way
16 over into the aisle. There is nothing blocking that view.
17 Nothing blocking that view. They have no excuse for this
18 right here. None.

19 And then page 68, 69, and 70, this is the first
20 thing that we talked about when we got here. They don't
21 apply. They don't apply here in Las Vegas. Well, one thing
22 that I want to talk about, and I think I may have already, is
23 the heart attacks. Obviously, Dr. MacQuarrie, he doesn't know
24 that they also don't teach page 69. So if you have any
25 medical event on one of their buses, if you have -- if you

1 have any event you're -- because 68 doesn't apply -- or 69,
2 68, none of them.

3 And then remember when we talked about how not --
4 you know, nobody, no person is authorized to make oral
5 exceptions to the handbook. Nobody. And written exceptions
6 are committed only when signed by the president of First
7 Transit. There is zero memo, zero letter, zero email.
8 Nothing from Brad Thomas saying you guys can ignore page 69,
9 page 70, or page 68. Nothing from Brad saying page 70 does
10 not apply. Nothing from him saying page 69 does not apply.
11 Nothing from him saying page 68 does not apply.

12 But what they say is that -- do you remember this
13 question? It's one of the vehicle operator's responsibility
14 or Laidlaw's to ensure all necessary steps are taken to ensure
15 passenger safety. He put both. It's my job and it's their
16 job. He got it wrong. He got it wrong because their position
17 is that only the driver is responsible.

18 Ms. Sanders, she's going to get up here and she's
19 going to say, you know what, this only dealt with a mobility
20 device. It doesn't matter what it's dealing with. The fact
21 that you're saying that your driver is solely responsible,
22 well where does their responsibility come into this? Aren't
23 they responsible to train? Honestly. But they come in here
24 and they even point the finger at their own driver. They say
25 that he is the only one that's responsible.

1 Is it really fair to Jay and the other drivers of
2 these buses to say, you know what, you're required to know
3 everything in this employee handbook, but we're not going to
4 train you? It's just up to you. Maybe you read these things
5 on your day off. Maybe you come in before work and read them.
6 Is that fair? That's the story that they're telling in this
7 courtroom today. Everybody else, everybody else is
8 responsible for this. Everybody, everybody, everybody, except
9 for us.

10 Negligence, let's talk about that for a minute.
11 Jack and Elaine have a certain burden -- a burden to meet.
12 And when we talked about -- when we talked about this,
13 unfortunately I was only able to talk with one juror about the
14 more likely than not.

15 And the standard, this is a jury instruction, it's
16 called a preponderance of the evidence. The preponderance of
17 the evidence means that when you put all of the evidence on
18 the scales, when it comes to rest, the party that is just
19 barely tilted wins. That's the verdict, okay. And that's the
20 preponderance of the evidence.

21 So after all that evidence if you put just one
22 little teeny feather on one side and it barely moves that,
23 that party has met the burden on that issue. And so when you
24 look at all of these issues, you know, if you go back there
25 and you deliberate and there's disagreement, someone says,

1 well, I know Ms. McKibbins said this or I know this person
2 said that, just remember to balance it and whichever party has
3 just that much prevails.

4 So let's talk about also -- I want to talk about the
5 training. And this is -- we're talking -- I'm going to talk
6 about the negligence instructions that that day on that bus
7 you remember what you saw. You saw Harvey sitting here. And
8 I can only imagine as he is slumped over in this seat he's
9 thinking to himself, I know that Jay, I know that you just got
10 back on the bus, why aren't you helping me? Why aren't you
11 helping me, Jay? I like you. You're my friend. Jay, I'm
12 dying. Please, help me. Please help me, Jay.

13 And then Mr. Farrales gets on the bus. A few
14 minutes later when he finally realizes his passenger is in
15 distress, he runs back, he stands here, and he -- he's likely
16 in his mind thinking, Harvey, I want to help you. Like he
17 said on the stand, if I'd had the information, I would have
18 helped you. Harvey, you're my friend, I like you, too.
19 Harvey, I just don't know how to help you because I haven't
20 been trained by my company for \$88.

21 And so I'm going to talk about the negligence
22 between the parties and what we do about that. Because you
23 can tell -- you can tell this was emotional for Jay, and you
24 can tell that it still is emotional for Jay. And your verdict
25 today also helps him get closure. So we're going to talk

1 about how to do that, how to provide justice to this family
2 and closure for Jay. Jay did not know what to do on that bus
3 the moment that Harvey was choking.

4 I want you to remember this for a minute. This
5 scene from Good Will Hunting. Again, remember what their
6 position is. Their position is that it's all his fault. It's
7 all his responsibility. It's the driver's responsibility.
8 They bear no responsibility in this case. That's what they
9 teach their drivers. Don't let them disrespect Jay anymore,
10 either.

11 So let's talk about negligence. Jury Instructions
12 27 and 28. So if somebody wants to write that down if you all
13 want to read those. Instructions 27 and 28 talk about what
14 negligence is. The plaintiffs have certain burdens to meet
15 and the defendants have certain burdens to meet.

16 So Jack and Elaine, this is Instruction 28, have to
17 prove that they sustained damage, that the defendants were
18 negligent, either one of them, and that the negligence was the
19 cause, so basically that Harvey choked to death. The
20 defendant, okay, they have a burden to prove, as well. They
21 have a burden to prove that Jack and Elaine did something
22 wrong. That is their burden, so they have to prove that. And
23 the law treats them differently, okay. You've got
24 instructions on this. We're going to go through it because
25 this is important.

1 But the law treats Jack and Elaine differently than
2 it does First Transit or common -- what we call a common
3 carrier. It's like comparing a peewee league baseball player
4 to a professional, just a regular old starter. This is Brock
5 Holt, he plays for the Red Sox. He's a regular starter. He's
6 not an all-star. He's just a regular starter for the pros.
7 There's a reason why we're talking about Brock and I'm going
8 to talk about somebody else here in a minute.

9 Okay. So the first thing you have to remember, the
10 law treats Jack and Elaine differently than it does First
11 Transit. That's number one. When you look at Jack and
12 Elaine's conduct, you look at Jury Instruction No. 26, okay.
13 So Jury Instruction 26 deals with Jack and Elaine.

14 Their conduct is just as an ordinarily careful and
15 prudent person under the same or similar circumstances. So
16 what would somebody else have done with a mentally disabled
17 child, would they have allowed them to be on the First Transit
18 bus? This is important.

19 It says, and I'm going to read it, you will note
20 that the person whose conduct we set up as a standard is not
21 the ordinarily cautious individual, not the exceptionally
22 skillful one, but a person of reasonable and ordinary
23 prudence. While exceptional skill is to be administered --
24 that's supposed to say admired -- and encouraged, the law does
25 not demand it as a general standard of conduct, okay.

1 So what the law -- the way that the law sees Jack
2 and Elaine, it says ordinary, okay. It says ordinarily
3 careful and prudent. You don't have to be exceptionally
4 skillful. You don't have to be ordinarily careful. The law
5 does not demand it as a general standard. So that's -- when
6 you view their conduct, that's the instruction you look at.

7 Now, again, the law expects more. So the standard
8 that you're going to deal with when you're talking about First
9 Transit, it's a higher standard, all right. So the bar,
10 here's Jack and Elaine, the bar goes up. This is Jury
11 Instruction 32. So when you're talking about their conduct,
12 this is the jury instruction that you read.

13 This is the regular old starter, Brock Holt. Not an
14 all-star, not an MVP, a regular old starter. The law expects
15 more of a common carrier. It says the duty owed by First
16 Transit, and here's the thing, defendant First Transit was a
17 common carrier, there's no question about that, to use the
18 highest degree of care consistent with the mode of conveyance
19 used in a practical operation in its business as a common
20 carrier by a paratransit bus. Its failure to fulfill this
21 duty is negligence.

22 So you've got to use the highest degree of care. So
23 is the highest degree of care making a choice to not provide
24 CPR training? Is the highest degree of care not looking on
25 your passengers when they're sitting there in obvious

1 distress? So now, again, it's a higher standard. Now, this
2 is the -- the most important thing is when you're dealing with
3 a paratransit bus dealing with people with impairments,
4 cognitive impairments and mental disabilities, the standard
5 even goes up more.

6 So now you're not talking about regular old starter
7 Brock Holt here. You're talking about Derek Jeter, one of the
8 greatest, okay. One of the greatest baseball players,
9 all-star game. Now you're talking about Jeter, okay. A lot
10 more is expected of Jeter than it is of Brock Holt. That's
11 why Jeter gets paid the big bucks. That's why this company
12 gets paid the big bucks, okay. So let's talk about that
13 instruction.

14 This is 34. So 34, when a carrier is aware that a
15 passenger is mentally disabled, it is the duty of the carrier
16 to provide that additional care which the circumstances
17 reasonable require. Failure to do that is negligence. So the
18 standard is even higher. It's even higher.

19 And how do you look at Jay? Jay is First Transit.
20 This instruction here is basically that defendant First
21 Transit is legally responsible for the actions of its
22 employee, defendant Jay Farrales. So any conduct that Jay --
23 you know, you feel like Jay did something wrong, any conduct
24 of his, that is First Transit. Jay equals First Transit.

25 So when you analyze this situation, remember, you

1 analyze Jack and Elaine's choice. This is the standard that
2 you use, the pee-wee league baseball. Was it reasonable under
3 the same or similar circumstances for them to allow their son
4 and to trust this company that holds themselves out as
5 professionals in this industry just like the other people at
6 Transition Services was where they heard about First Transit?
7 Is it reasonable for them to have trusted this company?

8 Remember, this is the defendants' burden. They have
9 to prove that Jack and Elaine's decision, like these other
10 parents of these other folks was unreasonable. That's their
11 burden. They have to prove that. There's zero evidence that
12 his parents knew that he ate on the bus. There's zero
13 evidence that they had any reason to believe this company
14 would not come in or would not fulfill their word and keep
15 their word to this community to make safety everything.

16 So when you're -- when you're talking about what the
17 defendant has to -- the burden the defendant has to do, you
18 put the evidence on there and, guess what, there is nothing to
19 put on there. So they don't weight on that issue.

20 What about First Transit, were they negligent?
21 Remember, you're looking at the all-star standard, the Derek
22 Jeter standard, okay. So highest degree of care, additional
23 care for disabled folks. 74 times the five-second rule was
24 violated, never checked on Harvey when he got on the bus,
25 never performed CPR or Heimlich, never taught CPR or Heimlich,

1 never told Harvey not to eat, never told Harvey not to drink,
2 actually assisted Harvey to violate the rule. Is that using
3 the highest degree of care? Is that using additional care for
4 someone with a disability?

5 So on the verdict form, this is the verdict form
6 that you actually all will fill out. This is an actual copy
7 of it. You'll be given a copy. You're asked four questions
8 on the first page. Do you find from a preponderance of the
9 evidence that Defendant Jay Farrales was negligent and that
10 such negligence was a proximate cause of the death of Harvey?
11 The answer is yes.

12 When you get on the bus you have to check your
13 passengers. When you drive off, you have to check you
14 passengers. We're going to talk about how to deal with the
15 fact that he didn't know how to perform Heimlich in a minute.
16 But Jay was negligent. Jay was negligent. And we're going to
17 talk about what we do with that.

18 Do you find from a preponderance of the evidence
19 that defendant First Transit was negligent? Absolutely, yes.
20 And then you move on to 3. Do you find from a preponderance
21 -- so is Jack negligent? Was Jack negligent for trusting his
22 company to fulfill their word? No. Was Elaine negligent for
23 trusting this company? No. So two yeses, two noes on the
24 verdict form.

25 Okay. This is where we deal with the fact that they

1 did not provide Jay with training and the fact that he was
2 helpless on the bus to help Harvey. Assign 1 percent. This
3 is the next page of the verdict form. One percent because you
4 get to determine the percentages, how much is Jay, how much is
5 First Transit, 1 percent. Zero percent for Jack. Zero
6 percent for Elaine. The most important thing is that whatever
7 -- whatever it is, it has to equal 100. That's the most
8 important thing.

9 Now, they're going to try and come up here in a
10 minute and they're going to try and say that Jack and Elaine
11 should have done something differently. They shouldn't have
12 trusted the -- the bus company, okay. That's what they're
13 going to tell -- that's what they're going to tell you. They
14 can still cover, so long as their contributory negligence is
15 not greater than that of First Transit and Jay Farrales.

16 So the very most important thing, if you guys feel
17 like, hey, Jack and Elaine, you shouldn't have trusted this
18 company to keep their word, you were wrong to do that and you
19 want to give them some comparative negligence, if it's more
20 than 50 percent, they lose. So if you feel like they have --
21 you know, you have to give them some, it should be like two or
22 three or five percent at the very most.

23 So how do you -- how do you value human life? Well,
24 you value human life, there's some instructions in there.
25 There's jury instructions about what heirs are entitled to and

1 there's jury instructions about pain and suffering. There's
2 jury instructions about how to -- how to do these things. You
3 know, the only thing that you can't do is have sympathy, okay.
4 You can't have sympathy and passion and emotion and things
5 like that.

6 I want to talk to you guy about the damages in the
7 case and the part of the case that's about justice, okay.
8 Real justice in this case would be if Harvey didn't have to
9 die. That would be real justice. Real justice would be if
10 Harvey could walk through those doors into the loving arms of
11 his mom and dad and Neil if we could somehow do that.

12 But the problem is we don't have the power to do
13 that. There's no way to do that. So instead we come in and
14 we ask for money, their money. Money that they make off of
15 people like Jay who they pay \$11 an hour. We call that money
16 justice. That's the only thing that the law allows us to do.

17 If you remember when I stood here at the first of
18 this case, I told you that I was going to ask for an amount
19 into the tens of millions of dollars. I told you I would be
20 brutally honest and I asked for you to simply let me -- give
21 me the chance, give me the opportunity to prove my case. And
22 I can tell from all of the very thoughtful questions that each
23 of you asked you kept your word. You let me prove my case
24 because you asked questions to the very end.

25 In this case, the amount that we're asking for for

1 Harvey's life, for the loss of companionship, for the loss of
2 love, for the loss of relationship, for the things that they
3 destroyed is \$15 to 25 million. I know that's a huge amount.
4 It is to me. I know it's a huge amount to you. I know that
5 it is. And when we talked about it in -- in voir dire, I knew
6 that the amounts we were talking about were huge and they were
7 enormous.

8 You've given me the opportunity to prove my case. I
9 ask for the opportunity one more time for one more
10 opportunity, and that's to tell you why I came up with this
11 amount of money and why we're asking for this amount of money.
12 Do you want to know that? You want to know that?

13 You see, I remember when I met Jack and Elaine,
14 remember when they came into my conference room with their
15 son, Neil. And they told me about Harvey. They shared their
16 loss. They talked about how their lives had been turned
17 upside down, how their life is now incomplete, how the family
18 is now incomplete. They told me about how First Transit told
19 them that Harvey didn't suffer on the bus, but yet they
20 wouldn't give them the video without a court order. They told
21 me about those things.

22 And I asked them, I said, Jack and Elaine, one of my
23 jobs is going to be to ask these jurors how much money. What
24 is the life, what is the value? Their response to me is we
25 have no clue. You're the pro. You're the expert. We have no

1 idea. So for the last two years I've thought about this
2 question every time I talked to them on the phone, every time
3 I share a meal with them at their home, every time they call
4 me, every time they come into my office.

5 I thought about that when I got the video and I saw
6 that First Transit had not been truthful with them about what
7 actually happened on that bus. And I thought to myself, I
8 have no clue. I've never done a wrongful death case. I don't
9 know. And so I thought, well, you know what, we live in a
10 society where we can Google anything.

11 We can go on Google and we see that this sculpture,
12 this guy, Henri Matisse, sold for \$48 million. A sculpture.
13 We see that this Van Gogh sold last year for \$66 million.
14 This is a canvass. It's a canvass about this big. It's a
15 canvas that has paint on it and it's \$66 million. This isn't
16 even the most valuable Van Gogh. The most valuable Van Gogh
17 to sell was \$250 million.

18 This 1962 Ferrari GTO sold for \$52 million. This is
19 a car. It offers no love, no compassion, no emotion, no
20 relationship, no laughter, no memories. Those are the things
21 that the Chernikoffs have lost. And I said to myself if the
22 value of a hunk of metal is worth 48 million, if the value of
23 a Van Gogh is worth 66, if the value of a car is worth 52,
24 then certainly the value of a human life is worth just as
25 much.

1 Certainly the value of Harvey is worth as much as a
2 painting or a sculpture or a car. But you see, I'm not
3 asking, the family is not asking for 66 million or 52 million
4 or 48 million. Because I remember being told -- I remember
5 being told by jurors that attorneys ask for too much. But I
6 thought to myself certainly the life of this man, of this
7 sweet man, is worth at least half the value of a painting or a
8 car or a sculpture.

9 And if somebody -- I also thought of another thing.
10 I thought that if -- because somebody likely in the jury room
11 will say, well, you know what, these things are one of a kind,
12 that's a one of a kind Ferrari, that's a one of a kind Van
13 Gogh, and that's a one of a kind sculpture so it's not fair to
14 equate the life of a human with a painting or car or
15 sculpture.

16 But the question that I ask each of you to consider
17 is imagine a firefighter pulls up to a burning building and
18 it's a museum. They pull up to the museum, the firefighters
19 get out, they run over to the curator who is nervous there.
20 He's standing there and he says the most valuable painting of
21 our whole collection is in that fire. Please, will you go get
22 it.

23 The firefighter, he has his protective gear and he
24 says absolutely. He runs into the fire and the smoke. He
25 runs in and out of his peripheral vision he sees Harvey. Who

1 is he going to come out of the building with? That's the
2 question that I ask. Who is he going to come out of the
3 building with? Because I -- it's not going to be the
4 painting. It's going to be Harvey.

5 The verdict is also for the pain and suffering that
6 Harvey endured. You remember the five minutes that Harvey say
7 there in pain. The pain and suffering knowing -- literally
8 knowing that you're dying, knowing that the driver gets back
9 on the bus and is doing nothing to help.

10 So when you fill out the verdict form, you will
11 choose a foreperson, and the foreperson needs to sign right
12 here. This is the amount that you enter for pain and
13 suffering, this is the amount that you enter for grief and
14 loss of companionship and the loss of society, for the things
15 that they lost.

16 One other thing that I ask and that I want you to
17 consider when you go back there is imagine if First Transit --
18 if First Transit backed into that Ferrari with one of their
19 First Transit buses. They smashed that car and they crushed
20 that car, would the driver of that car be entitled to come in
21 here and ask for full justice, for the full value of that car?
22 Because First Transit smashed, destroyed, and crushed their
23 relationship with their son over \$88.

24 Thank you. I'll have one more opportunity to talk
25 to you after Ms. Sanders. Thank you.

1 THE COURT: All right. Why don't we just take a ten
2 minute break so you guys can get situated.

3 Again, don't talk about the case, don't research the
4 case, don't form or express an opinion on the case. Come back
5 at 25 after the hour, please.

6 (Court recessed at 2:14 p.m., until 2:28 p.m.)

7 THE COURT: All right. Welcome back, ladies and
8 gentlemen of the jury.

9 Ms. Sanders, whenever you're ready.

10 Counsel, make yourselves comfortable, please.

11 MS. SANDERS: Thank you, Your Honor.

12 DEFENDANTS' CLOSING ARGUMENT

13 MS. SANDERS: 360,000 people die every year of
14 sudden cardiac arrest. Of the people who suffer a cardiac
15 arrest, only 7.9 percent survive. That means that nearly 92
16 percent of those people die, and that's true whether they
17 receive first aid, whether they receive prompt response from
18 paramedics, it's true whether they receive complete medical
19 care in a hospital setting.

20 Dr. MacQuarrie told you that in his view after
21 looking at all of the evidence in this case and after viewing
22 the video it's his opinion that Harvey Chernikoff died as a
23 result of a sudden cardiac arrest. He also told you that in
24 Harvey Chernikoff's case that enormous 50 gram bolus of chewed
25 up peanut butter sandwich that was tightly impacted in the --

1 in the area of the vocal cords -- now, we're not talking about
2 clear up here. We're talking down in the area of the vocal
3 cords made it impossible that Harvey Chernikoff could have
4 been revived.

5 Ladies and gentlemen, the evidence in this case we
6 believe clearly shows that nothing that Jay or First Transit
7 did or did not do would have changed that unfortunate outcome,
8 that unfortunate death for Harvey Chernikoff.

9 At the beginning of this case when you were in jury
10 selection, Mr. Alverson, you may recall, talked about the
11 difference between using our head and using our heart to
12 consider the evidence in this case. And all of you promised
13 at that time that you would use your head in considering the
14 evidence, that you would consider that facts, that you would
15 apply the law, and that you would use your common sense in
16 evaluating the evidence.

17 I'd like to talk about those things in a little --
18 in a little bit of a chronological order here. You've heard a
19 lot more about the facts than you have about the law, so I
20 want to start by talking about the law part of this. In this
21 kind of a case, the plaintiffs they brought the action, so
22 they're the ones that are responsible for proving all of the
23 elements of their claim by a preponderance of the evidence.
24 And Mr. Cloward explained that a little bit.

25 The preponderance of the evidence, if you think

1 about it as a scale, the weight of the evidence has to be
2 stronger on the plaintiff side in order for them to be
3 entitled to a verdict. That's their burden. That's their job
4 in proving a case like this.

5 Now, this is a negligence case. And what that means
6 is that the plaintiffs have to prove three elements to you in
7 order to prove their claim. They have to prove negligence
8 that the defendants did something wrong. We often in law talk
9 about it in terms of duty, a duty that's owed to -- to the --
10 to the plaintiffs, or in this case to their decedent, Harvey
11 Chernikoff, and a breach of that duty. Did -- and the
12 question in this case would be did Jay or First Transit owe
13 some particular duty to Harvey and did they beach that duty,
14 were they negligent, did they do something wrong?

15 They also have to show causation. Causation means
16 that the negligent conduct, if any, has to be the direct cause
17 of the injury that they're claiming. In this case, the death
18 of Harvey Chernikoff. The plaintiffs are claiming that the --
19 the damages that they're claiming are their emotional injury
20 related to the death of Harvey Chernikoff. Now, all three of
21 those things, all three of those elements, have to be proven
22 to you by a preponderance of the evidence in order to give a
23 verdict in their favor.

24 So if, for example, you think maybe Jay did
25 something wrong but it didn't cause the injuries that the

1 plaintiffs are claiming, the plaintiffs don't win. If you
2 think that something that he or First Transit did may have
3 caused Harvey Chernikoff's death but you don't think they did
4 anything wrong, the plaintiffs don't win.

5 And even if you think that the plaintiffs may have
6 suffered some kind of injury, some kind of damages as a result
7 of Harvey Chernikoff's death, but you don't believe that Jay
8 or First Transit did anything wrong to cause that death or
9 their injury, the plaintiffs don't win. They have to prove
10 every single one of these things to you. That's all included
11 in Jury Instruction No. 28. Mr. Cloward did talk about that a
12 little bit when he was up here before.

13 Now, as -- as Mr. Cloward did mention, First Transit
14 is considered to be a common carrier. And so it is subject to
15 a heightened standard of care. It's not a Derek Jeter
16 standard of care, it's a heightened standard of care. And
17 that's a duty that's owed to its passengers because they're
18 not the ones that are in control of the driving.

19 They are riding as passengers, so they give up
20 control themselves to make decisions about driving. They
21 leave that to the driver, and so it's a heightened standard of
22 care for that reason. But that doesn't mean that they're
23 required to guarantee safety to their passengers under every
24 set of circumstances. Reasonableness is still the standard
25 that their conduct is judged by.

1 Now, the law doesn't require perfection of any of
2 us, thankfully, because we're all human. And it doesn't
3 require perfection of a common carrier any more so than it
4 does any one of us, and it doesn't require perfection of a
5 common carrier's employees.

6 Now, Jury Instruction 32 and 34, which Mr. Cloward
7 discussed with you a little bit, are the jury instructions
8 that pertain to the common carrier standard. And it's an
9 important duty and it's one that First Transit and Jay
10 Farrales take and took very seriously.

11 You heard testimony, though, from both Jay and
12 Jennifer McKibbins about the training, the background checks,
13 the medical examinations, the safety meetings, the special
14 quizzes, the speakers that they had come in and talk to them.
15 It wasn't just initial training that they went through. It's
16 ongoing, continuing -- excuse me, continuing training through
17 safety meetings and different things like that.

18 Now, we spent a lot of time talking about that
19 because it's important that you know that this is a very
20 important concept to this company and it's a very important
21 concept to Jay Farrales. They devote a lot of time, a lot of
22 work in evaluating safety and trying to make their drivers as
23 safe as they possibly can be.

24 And it's -- you'll have the employee file, you'll
25 have the training materials, all of that we went through last

1 Friday with Ms. McKibbins. And it's a pretty thick file for
2 Jay. There was a lot of information in it about safety
3 quizzes, the courses, the things that he took. And you also
4 heard from Jay about how committed he was and is to providing
5 the best possible service he can to his passengers.

6 Now, earlier in opening Mr. Cloward characterized
7 the training that Jay and other drivers go through as kind of
8 cramming everything into a few hours of classroom training.
9 And then, I guess, just putting the drivers in a bus, letting
10 them make a few laps around the parking lot with a supervisor
11 and calling it good before they just turn him loose with
12 passengers. But that's not what you heard from the evidence.

13 You heard about all the careful training, initial
14 training, hours of training that they've gone through. And
15 the training is much more extensive and ongoing. You also
16 heard from Matt Daecher who told you that Jay and First
17 Transit complied with all of the applicable federal, state,
18 and local regulations with industry standards pertaining to
19 training.

20 Now, with regard to that common carrier enhanced
21 responsibility, First Transit, in combination with RTC,
22 provided a service for disabled persons that was a door to
23 door service. They weren't required -- passengers weren't
24 required to go to a bus stop, for example, and wait for a bus
25 to come along and get off at another bus stop.

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 03:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable STEFANY A. MILEY, District Judge
District Court Case No. A-13-682726-C

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1 you've taken your eyes off the road for way too long.

2 Q Now, counsel asked you last week about scanning the
3 inside of the bus compartment with the mirrors and you told
4 them that that is something that the drivers do, but you
5 wanted to give more of an explanation and weren't allowed.
6 Would you give the explanation now?

7 A It's most important to understand that when you're
8 driving a vehicle, the primary area where you're going to have
9 hazards is outside of your vehicle. You're driving a
10 15,000-pound vehicle that you're maneuvering in traffic with
11 other cars, with pedestrians, and so your primary focus is
12 what's outside of the vehicle, the hazards that could come up
13 while you're driving. Other cars cutting you off, other cars
14 getting into your lane, encroaching your lane, getting into
15 your -- your -- your driving space, crossing where they're not
16 supposed to cross, crossing even where they are supposed to
17 cross but maybe against the light. That's where your hazards
18 are going to come from. That's where you need to keep your
19 primary focus. Do you need to check on your passengers? Yes.
20 Do you need to scan your mirror, interior mirror? Yes. But
21 where is your primary focus when your vehicle is in motion?
22 Outside.

23 Q And what are they -- what are drivers trained to
24 look for when they're monitoring the inside -- inside part of
25 the bus?

1 A Anything unusual, any unusual activity that could be
2 occurring while you're -- while your passengers are back
3 there.

4 Q And if they see anything unusual, then are they to
5 check on it?

6 A Sure. They need to -- but first and foremost, call
7 out, everything okay? You know, if you know the passenger's
8 name, depending on how many passengers you have on the
9 vehicle, you need to figure out what it is that's going on.
10 Yeah.

11 Q Is there any particular concern if a driver can't
12 see all the passengers at any given moment?

13 A No.

14 Q Is it common for passengers to move around when they
15 are seated in the bus?

16 A Yes.

17 Q Do the mirrors show the same thing that -- the jury
18 has seen the video many times, but do the mirrors show the
19 same thing as the video will show as far as the interior of
20 the bus?

21 A No, it -- what you're seeing on the video is
22 completely different than what the driver's viewpoint would be
23 through -- through the mirrors because they're in different
24 places.

25 Q Now, when we're talking about scanning the mirrors

1 -- scanning the mirrors every five to eight seconds, is that a
2 guideline or is that like a hard and fast rule that the driver
3 has to do every five to eight seconds?

4 A It's a guideline. It's a rule, it's a guideline. I
5 don't know really how to differentiate between the two. When
6 you're driving you can't just look straight ahead. And I put
7 a lot of emphasis on that. I would if I was training. You
8 can't just look straight ahead. You're missing way too much
9 information. You need to scan your mirrors. If you're just
10 looking straight ahead at something, it's very easy for people
11 in general to lose focus. You're looking but you're not
12 seeing when you're just -- just staring straight ahead. If
13 you're moving your eyes, you have constant movement, you can
14 see everything else that's around you and you're taking in all
15 of that information. It's vital that you scan your mirrors.
16 Five to eight seconds, is that a hard and fast it has to be
17 every five seconds? Maybe it's every three seconds, maybe
18 it's every five, maybe it's every six, maybe it's every nine.
19 You need to keep your eyes moving, bottom line.

20 Q But the most important focus is what's going on
21 outside and the traffic conditions?

22 A Yes.

23 Q On the video the -- and I'm not going to ask that it
24 be shown right now, but directly behind the driver there's a
25 panel. Do you know what that is?

1 A Yes, it's a smoky glass kind of a partition that's
2 behind the driver, that separates the driver from that
3 passengers.

4 Q Is that something that's -- that's a required thing
5 to be there?

6 A The RTC actually makes sure that that's there and
7 it's for the -- the driver's safety because passengers on
8 public transit vehicles can become unruly at times and have,
9 in fact, in the past attacked drivers while they were driving.

10 Q Okay. The video also shows what I think you've
11 described as a fare box that's right alongside of that panel.
12 How is that placed? Why is that placed there?

13 A The RTC determines the placement of the fare box to
14 what is most conducive for passengers when they enter the
15 vehicle to be able to deposit their fair. Again, the buses
16 are owned by the RTC, so any RTC owned equipment would have
17 been placed by the RTC.

18 Q Does the fact of that fare box there somewhat
19 obscure the view that the driver would have of somebody who is
20 sitting in that seat, lap, legs, that kind of thing?

21 A It's possible, yes.

22 Q Now, we talked before about the fact that passengers
23 do kind of move around sometimes when they're -- when they're
24 on the bus. Do they sometimes lay down?

25 A Sometimes.

1 Q Is that any cause for concern?

2 A Not necessarily. The RTC rule is that passengers
3 could be on the bus for up to 90 minute or so. So if you're
4 on the bus for 90 minutes and maybe you want to go to sleep.
5 Some people are not good riders. I'm not a good rider. I
6 don't ride well.

7 Q If somebody appears to be napping, is it a rule that
8 you wake them up or do you just let them nap?

9 A You can let them nap. You want to wake them up when
10 you go to drop them off, but different than on fixed route.
11 Fixed route you don't know where their stops are. If you see
12 somebody sleeping, you might want to say, hey, don't miss your
13 stop.

14 Q Now, you've viewed the video of what occurred on the
15 bus. Was there anything that you saw that Jay did or didn't
16 do that you would consider to be a violation of his training?

17 A No.

18 Q Was there anything that you considered him to -- to
19 do that would be a violation of either RTC or First Transit
20 rules?

21 A No.

22 Q I am going to -- I want to show the video.

23 MS. SANDERS: Your Honor, would it maybe be a good
24 time for a break, or do you --

25 THE COURT: Yeah.

1 MS. SANDERS: -- want me to just go into it?

2 THE COURT: I think it's a good time for a break,
3 just ten minutes to stretch and everything else. Come back
4 actually about 15 after the hour. Don't research the case,
5 don't form or express an opinion on the case, and don't talk
6 about the case. See you soon.

7 (Court recessed at 11:02 a.m., until 11:19 a.m.)

8 (In the presence of the jury.)

9 THE COURT: All right. Welcome back.

10 Ms. McKibbins, you are still under oath at this
11 time, ma'am. Thank you.

12 THE WITNESS: Thank you.

13 MS. SANDERS: Your Honor, we will be going to the
14 video now, so if the plaintiffs would like to step out of the
15 courtroom.

16 THE COURT: It's the same video we've seen; right?
17 The one that's already in evidence?

18 MS. SANDERS: It's in evidence, yes.

19 THE COURT: Okay.

20 BY MS. SANDERS:

21 Q Jennifer, before the break we were going to start
22 looking -- we were -- we were talking about passengers moving
23 around on the -- on the bus. And I want to go to the video
24 now and show some examples of the kind of thing that we're
25 talking about.

1 MS. SANDERS: So, Brian, could you pull up 60 --
2 6:59:23, please.

3 BY MS. SANDERS:

4 Q And as we're seeing this, Jennifer, if you can just
5 kind of explain to the jury, I think it should be obvious, but
6 what we're seeing on the video?

7 A Sure.

8 MS. SANDERS: And just -- just by way of
9 explanation, what the jury has been seeing so far of the video
10 is just a straight on camera view. The actual video that
11 you'll have in deliberations has several different views from
12 different angles of the camera. And so you're going to see
13 two different views here of the same -- the same thing.

14 MR. CLARK: Ready?

15 MS. SANDERS: Yes.

16 BY MS. SANDERS:

17 Q Now, I want to focus on the passenger in the back
18 there. Do you see that?

19 A Yes.

20 Q What does it look like he's doing?

21 A Laying down.

22 Q Okay. Would you expect the driver to be able to see
23 him in the entirety laying down like that?

24 A Probably not.

25 Q Also, notice what Harvey is doing here. Is he

1 moving around quite a bit?

2 A He is.

3 Q Okay.

4 MS. SANDERS: Brian, let's go to 7:16:36, if you
5 will.

6 BY MS. SANDERS:

7 Q Do you see the man in the back? What does he look
8 like he's doing here?

9 A The one who's rubbing his head?

10 Q Yes.

11 A He's rubbing his head.

12 Q Anything unusual about somebody rubbing their head?

13 A No.

14 MS. SANDERS: Brian, let's go to 7:19:17.

15 BY MS. SANDERS:

16 Q Look at the woman that is -- is towards the back.
17 What does it look like she's doing there?

18 A She looks like she's kind of falling out of her
19 seat. She's probably asleep or something or -- I'm not really
20 sure what she's doing, but she's got her arms swinging in the
21 -- in the aisle.

22 MS. SANDERS: Let's take a look, then, at 7:19:49,
23 and this time maybe focus on Harvey.

24 BY MS. SANDERS:

25 Q Does it look like he's kind of leaning towards his

1 side?

2 A He is. He's leaning towards the other seat in the
3 bus. Again, he could be sleeping, he could just be leaning.
4 I don't really know what he's doing.

5 MS. SANDERS: How about 7:28:10.

6 BY MS. SANDERS:

7 Q How does it look like Harvey is positioned here?

8 A He's sitting differently now. Now he's got his legs
9 in the aisle and he's -- he's leaning against the back of the
10 seat differently than what he was sitting before.

11 Q Anything of concern there?

12 A No.

13 MS. SANDERS: How about 7:41:51. Maybe first,
14 Brian, I've got these out of sequence a little bit, 7:40:27.

15 BY MS. SANDERS:

16 Q Do you see Harvey rubbing his head there?

17 A Yes.

18 Q Anything unusual about somebody rubbing their head?

19 A No, and he's moving around again.

20 Q Okay.

21 MS. SANDERS: Brian, now let's go to 7:41:51.

22 BY MS. SANDERS:

23 Q Anything unusual about somebody rubbing his face?

24 A No.

25 Q Okay.

1 MS. SANDERS: That -- that's good for now, Brian.

2 BY MS. SANDERS:

3 Q In the case of a regular transport, would a driver
4 have many people that are making all kinds of movements that
5 -- that are occurring on the bus?

6 A Yes.

7 Q Okay. And you testified earlier that the thing that
8 the driver would be monitoring for is anything that would be
9 like out of the ordinary types of things?

10 A Correct.

11 Q Are any of the movements that you saw there things
12 that you would consider to be out of the ordinary?

13 A Doesn't appear to be.

14 Q Dr. Stein was here last week. He testified that
15 Harvey's lunch box was open and beside him with wrappers
16 coming out of it and that Jay should have recognized that. Do
17 you remember that testimony?

18 A I do.

19 Q Okay. And counsel pointed to the open lunch box
20 again when Ms. Jacobs testified, the coroner investigator. Do
21 you recall that?

22 A Yes.

23 Q Okay. Let's see what really happened as far as the
24 lunch box is concerned.

25 MS. SANDERS: Brian, could you pull up 7:59:33.

1 BY MS. SANDERS:

2 Q Look particularly at what Harvey is doing here. You
3 can see it maybe better in the door view. Does it look like
4 he zipped up the lunch box --

5 A Yes.

6 Q -- and put it beside him?

7 A Yes.

8 Q Okay.

9 MS. SANDERS: Let's go to 8:18:07.

10 BY MS. SANDERS:

11 Q Now, this is after the paramedics are on the bus.
12 You see them picking up the lunch box?

13 A Yes.

14 MS. SANDERS: Okay. That's good, Brian.

15 BY MS. SANDERS:

16 Q Does it look like the EMT was the one that picked up
17 the lunch box?

18 A Yes, and it looked closed when he picked it up.

19 Q And did it look closed at the time that -- that Jay
20 was still on the bus?

21 A Prior to that?

22 Q Yes.

23 A I didn't see it open again from when -- it looks
24 like Harvey zipped it, and then when the paramedic picked it
25 up and it was closed.

1 Q Now, Jennifer, where are the cameras mounted in the
2 bus in relationship to the mirrors?

3 A The camera placement is up higher. It's in the --
4 what's known as the bulkhead of the bus, which is up above
5 roughly where that sign is with the bus number and it has the
6 no smoking sign and those other two little signs next to it.
7 Somewhere in that general vicinity would be the camera that
8 shoots straight back. And then the other view that you saw,
9 that should be mounted somewhere above the -- somewhere in the
10 front. It's either going to be, depending on the bus, it's
11 either going to be above the -- the passenger door or
12 somewhere over in that general area, and the other camera that
13 you'll see the view later, but it's the wheelchair securement
14 door and area. So it's mounted up, not quite in the ceiling,
15 but over in that general area, like the top part of the bus
16 near the ceiling that shoots into -- to that door.

17 Q Okay. So the view that the driver would get looking
18 through the mirror, would that be a much more limited view
19 than what you see on the videos?

20 A Yeah, you see better off the view from the video
21 because it's higher, it's a completely different angle than
22 what you would see in a mirror.

23 Q Last week counsel asked you if the drivers are to
24 check on the safety of passengers, and you said yes. Can you
25 explain what you meant by that?

1 A Well, it's such a broad question, and it's --
2 there's -- there's so many different things that you're
3 checking for. Checking on the safety of your passenger before
4 you move the vehicle. Is the passenger sitting? When you go
5 to pick up a passenger, are they still standing? You're not
6 supposed to move the bus if the person is still standing and
7 they haven't gotten to their seat yet. That's just common
8 courtesy. You want to make sure that the passenger is safe
9 and secure.

10 So if you make a stop somewhere, you're out of the
11 bus for 30 seconds, is there an expectation that anything
12 changes in 30 seconds? When you come in do you have to, you
13 know, walk through the back, check all your passengers, check
14 -- no. If you did that at every stop you'd never get
15 anywhere. But, you know, you generally are aware that your
16 passengers are still there in the same spot they were when you
17 walked out of the bus for 30 seconds.

18 Q Okay. Now, as far as your own personal involvement
19 in this particular incident, would you have been the one to
20 investigate incidents that -- that occur with bus drivers?

21 A Yes, I would be responsible for risk management.

22 Q Okay. Now, we know that -- that in spite of best
23 efforts to make things as safe as possible, accidents still
24 occur, don't they?

25 A Unfortunately, yes.

1 Q And do sometimes passengers get injured when
2 accidents occur?

3 A Sometimes.

4 Q Okay. And is there any way that First Transit or
5 anybody that you know of can absolutely guarantee passenger
6 safety in every set of circumstances?

7 A No, just like you can't guarantee your own personal
8 safety every time you get out and drive a car or every time
9 you go walk down the street. Stuff happens, especially when
10 you're dealing with other people.

11 Q Now, in the event that an accident occurs, what are
12 the drivers trained to do?

13 A Contact dispatch, pull over to a safe location out
14 of traffic if you can depending on the situation. If you're
15 involved in a very serious accident, you can't move the
16 vehicle. You need to stay there. That's for a vehicle
17 collision. Even the law states that if you're involved in
18 some type of minor accident, a fender bender type thing where
19 something happens, you have to pull out. You are not allowed
20 to impede traffic. You can get a \$285 ticket for impeding
21 traffic. You need to pull over out of traffic and be in a
22 safe location.

23 Q Okay. So once the driver notifies dispatch, then
24 what does the dispatch do?

25 A Dispatch will send 911 if needed, depending on the

1 situation, what your -- what your specific issue is. In the
2 case where somebody needs medical attention, they'll call 911.
3 They'll call for police, whatever it is that you need
4 depending on the situation.

5 Q Let's talk specifically about the situation with
6 Harvey Chernikoff. How were you notified of this incident?

7 A Dispatch, the way that the policy worked is the
8 driver calls dispatch. Dispatch calls 911 and gets 911
9 rolling. Then they call for a road supervisor that I talked
10 about earlier and sends a road supervisor out to the scene.
11 And then dispatch would call me and let me know that there was
12 an issue that a road supervisor was going out to. The
13 supervisor would also call me sometimes when they were en
14 route depending on what the situation was, sometimes they
15 would wait until they actually got there to apprise me of the
16 situation. It just depended. But always dispatch would call
17 me and let me know that a supervisor was headed out to
18 whatever incident it was.

19 Q And what was the first notification you got with
20 regard to the incident involving Harvey Chernikoff?

21 A From dispatch.

22 Q Okay. And what would you do, then, or what did you
23 do in this particular situation?

24 A I had very limited information. You know, the
25 driver calls in and gives dispatch information and it's an

1 emergent situation. So you don't spend a whole lot of time
2 talking on the phone trying to get information. We only know,
3 again, limited information. So I'm sure she would have given
4 me minimal information that there was a client that was on
5 this particular bus number, this particular route, this
6 particular driver that was unresponsive with no additional
7 information. Called 911, headed out -- send out a road
8 supervisor. So I would wait for additional information from
9 the road supervisor once the road supervisor actually got to
10 the scene of the incident.

11 Q We talked just a minute ago about that cameras. Are
12 the cameras that are mounted in the bus, are they live feed or
13 did they only record?

14 A They record. There's -- there's no -- it's not like
15 -- like something that we can dial into and just watch
16 whenever we so choose. They're recording on the bus, but then
17 we'd have to download that information off of -- it's very
18 technical stuff that I'm not really -- you know, I'm not tech
19 savvy, but you have to download it off of the hard drive
20 that's in the bus.

21 Q As far as this particular incident, did you at some
22 point interview Jay after the -- after he got back to the
23 yard?

24 A Yes.

25 Q Okay. What do you remember about the interview?

1 A Jay was very, very upset. He was crying. He was
2 very -- it was very difficult for him to talk about what
3 happened, to talk about the incident, to even put together
4 cohesive thoughts. It was a very traumatic experience for
5 him. And between myself and the other two managers that spoke
6 to him, we spent quite a bit of time just trying to calm him
7 down and get him to a point where he could go home.

8 Q Did he at some point prepare an incident report as
9 part of your investigation?

10 A Yes, he did.

11 Q Okay.

12 A It's required.

13 Q With regard to the interview process, is there
14 anything that you recall independently that we don't see
15 reflected in the incident report?

16 A It's been a few years. I don't remember anything
17 specific.

18 Q We do now have video. How was it that we came to
19 have the video? Is that something that as part of an
20 investigation you would -- would go and retrieve?

21 A Yes. Any time there was an accident, incident,
22 injury, anything that had to do with risk management, I would
23 request that the video be preserved for whatever reason just
24 so that we had the information available to us, you know, so
25 that we could review it and have it on hand.

1 Q Prior to the time that Jay got back to the office,
2 did you have any other information about what had happened?

3 A No, I only had the information that I was -- that I
4 was given by initially dispatch, then by the road supervisor
5 when he called me when he got to the scene, which, again,
6 limited.

7 Q Okay. How much time did you spend with Jay that
8 day?

9 A I don't know exactly. It was awhile. Awhile is the
10 best I could say. I mean, you know, like I said before, he
11 was really having a tough time and so we needed to make sure
12 that he was okay. And, you know, one of the biggest things
13 that we're concerned about is any time somebody goes through a
14 traumatic experience, how is it going to affect them. And
15 this was traumatic. I mean, somebody -- somebody died on the
16 bus. That is a traumatic experience for an operator and it's
17 difficult to come back from that. And so to be able to
18 reassure him and talk to him and make sure that he was okay,
19 that was our biggest -- our biggest concern at that point.

20 Q Did you see Jay again in the days after -- after
21 Harvey Chernikoff's death?

22 A I'm sure I did.

23 Q Okay. Do you recall anything more about his
24 demeanor then?

25 A He's been, since then, very concerned, you know. I

1 saw him on a number of occasions afterwards, not just in the
2 days following but in the months following. I mean, I was the
3 safety manager at the location, so I had dealings with him.
4 And every time I saw him I was concerned about him and I asked
5 him if he was okay. And I could just see that, you know, it
6 still weighed very heavily on him every time, you know, is
7 everything okay? Yeah, you know, he -- I'm making it, you
8 know.

9 Q If -- well, did you ever have any communication with
10 any of the family members, Mr. and Mrs. Chernikoff or anybody
11 else?

12 A Not to my recollection, no.

13 Q If somebody were to call to try and find out some
14 information about what happened on the bus, would that be
15 directed to you, or do you know?

16 A Well, I was responsible for risk management, so
17 depending on how the -- the person came to get our telephone
18 number, it would depend. If they contacted RTC and
19 specifically requested the telephone number for risk
20 management, yes, it would come to me. If they wanted the
21 telephone number for the general manager, then it wouldn't go
22 to me. It would go to the general manager. So it just kind
23 of depends.

24 Q Now, it's noted in the coroner's investigative
25 report that the video of the event was available for review if

1 they wanted it, and you're telephone number was -- was given.
2 Do you recall that?

3 A Yes.

4 Q Okay. Did you ever get a call from the coroner's
5 office asking that you provide a copy of the video to them?

6 A Not to my recollection.

7 Q Mr. Neil Chernikoff testified that he tried to get a
8 copy of the video and that he was unsuccessful in doing that
9 because he was told he needed a court order. Did you ever
10 talk to, as far as you know, Neil Chernikoff about a video --
11 the video?

12 A No, not that I remember.

13 Q Did you ever learn from any source that he had
14 requested a copy of the video?

15 A No, not that I remember.

16 Q Is that -- when you pulled the video, did it remain
17 in your custody?

18 A I had custody of the video the entire time.

19 Q So if somebody wanted a copy of it, would they need
20 to come to you?

21 A They would have had to ask me for it because I had
22 it.

23 Q Are you allowed to give copies of accident -- or
24 incident videos to just anybody who asks for them?

25 A No.

1 Q Okay. Do you have some kind of a policy for when
2 you would give a video to somebody who requests it?

3 A Yes.

4 Q And what is that policy?

5 A That there needs to be some type of subpoena, court
6 order, or law enforcement official that requests the video,
7 and it has to be in writing. I can't just get a phone call
8 that says I need the video. As a matter of fact, I can give
9 you an example. There was an incident that happened on a bus
10 and the police came looking for -- they wanted a copy of the
11 video. Our policy is it has to be in writing. They had to
12 have their office fax something over. The officer waited.
13 Not a problem. But we had to have it in writing because we
14 have to keep record of that.

15 Q Okay. As far as you know, did you ever get a
16 written request from any of the family members for a copy of
17 the video?

18 A Not to my knowledge.

19 Q Did you ever get a court order for producing it?

20 A Not prior to this action that I'm aware of.

21 Q As far as you know did you ever get contacted by the
22 police department with regard to this incident?

23 A No, not that I recall.

24 Q What about the coroner's office? I asked about
25 whether or not you had ever got a request for the video, but

1 did you ever have any communication with the coroner's office?

2 A Not that I recall, ma'am.

3 Q Now, was Jay disciplined for his conduct with regard
4 to what happened on the bus that day?

5 A No, he was not.

6 Q Why not?

7 A Because he didn't do anything wrong.

8 Q As long as you've worked for the company, have you
9 ever heard of or been involved with any type of similar type
10 of situation?

11 A Similar to this?

12 Q Where somebody dies on the bus of apparent or plain
13 chocking?

14 A No.

15 Q Now, Jay did eventually resume his -- his driving
16 duties; is that right?

17 A Yes.

18 Q Did you feel that he was safe to go back to driving
19 passengers?

20 A Yes.

21 Q Now, earlier in the questioning counsel had asked
22 you if you agreed that a foreseeable result of choking on the
23 bus is death and you agreed with that. But is that also true
24 of any place that somebody might put something in their mouth?

25 A Yes.

1 Q Would it also be true that a foreseeable result of
2 eating in a kitchen could result in death?

3 A Yes.

4 Q A car?

5 A Yes.

6 Q Okay. In fact, with regard to the bus, if a
7 passenger is following the rule against no eating, would there
8 be less likelihood that that passenger would suffer a choking
9 incident?

10 A That's correct.

11 Q Thank you, Jennifer. I have no further questions.

12 THE COURT: Cross.

13 MR. CLOWARD: Yes, Your Honor. Thank you. Your
14 Honor, may I bring the easel out in front of --

15 THE COURT: Whatever you'd like to do.

16 MR. CLOWARD: Thank you.

17 CROSS-EXAMINATION

18 BY MR. CLOWARD:

19 Q Okay. So I'm going to -- Ms. McKibbins, I'm going
20 to kind of start from the questioning yesterday and work my
21 way -- work my way through it, okay? Is that fair?

22 A Sure.

23 Q All right. Remember when you were talking to the
24 jurors about the RTC no eating policy, and then the First
25 Transit no eating policy? Do you remember that?

1 A Was that yesterday?

2 Q Yeah.

3 A Okay. Sure.

4 Q You do remember that?

5 A I think so.

6 Q Okay. So just so I'm clear, you told these folks
7 that RTC has a policy; is that fair?

8 A Yes.

9 Q And just for everyone's benefit, what is that policy
10 again?

11 A The policy is no eating and no drinking from an open
12 container.

13 Q Okay. I just want to make sure I wrote that down
14 right. No eating and no drinking from an open container. Is
15 that fair?

16 A Yes.

17 Q Okay. And just so the jurors understand clearly,
18 what is First Transit's policy?

19 A No eating or drinking.

20 Q Is that fair?

21 A Yes.

22 Q That's your testimony today?

23 A Yes.

24 Q Do you remember being deposed in this incident by
25 Mr. Charles Allen?

1 A I do.

2 Q Okay. I just want to ask you a question about that.

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

4 Thank you.

5 THE CLERK: Uh-huh.

6 BY MR. CLOWARD:

7 Q Please turn to page 55 for me, please.

8 A 55?

9 Q Yeah.

10 MR. CLOWARD: Page 55, Ms. Sanders.

11 BY MR. CLOWARD:

12 Q Just let me know when you're there.

13 A I'm here.

14 Q Okay. I'm going to just read your answer. It's an
15 RTC policy that the passengers not eat or drink on the bus.

16 MS. SANDERS: Your Honor, may we approach?

17 THE COURT: Uh-huh.

18 (Bench conference.)

19 MS. SANDERS: Your Honor, this is the same thing we
20 got into last week where he's trying to get into -- it's based
21 on an incomplete hypothetical. It's the speculation that Your
22 Honor disallowed last week.

23 MR. CLOWARD: No, no, no. The Judge allowed me to
24 read this exact quote three times.

25 THE COURT: May I see it?

1 MS. SANDERS: Where he's trying again.

2 THE COURT: Okay.

3 MR. ALVERSON: What line was that again?

4 MR. CLOWARD: I just read her answer, it's an RTC
5 policy that the passengers not eat or drink on the bus.

6 THE COURT: I thought I allowed that last week.

7 MR. CLOWARD: Yes, you did, Judge. You did.

8 MS. SANDERS: It's based on an incomplete
9 hypothetical.

10 THE COURT: Well, you can follow it up on --

11 MS. SANDERS: All right.

12 THE COURT: -- redirect.

13 MS. SANDERS: Yeah, that's fine.

14 (End of bench conference.)

15 BY MR. CLOWARD:

16 Q Okay. Ms. McKibbins, one more time. At your
17 deposition you swore to tell the truth. Remember that?

18 A Yes.

19 Q Okay. And you were asked a couple questions, and
20 one of your responses was, quote, it's an RTC policy that the
21 passengers not eat or drink on the bus, true?

22 A I did say that. Yes.

23 Q Okay. So you didn't say in your deposition that
24 there's no drinking from an open container; correct?

25 A That is correct. I was mistaken at my deposition.

1 I've re-read the policy since then and the policy is clear.
2 The policy is written in the writer's guide. So I misspoke at
3 my deposition. I did not mean to, but in re-reviewing the
4 policy, the policy is clear in the rider's guide.

5 Q Okay. Another question. Who owns the buses?

6 A The RTC does.

7 Q They own everything on the bus?

8 A They own the equipment on the bus, the fare box, the
9 video system, the securement straps, the seats.

10 Q Do you remember when you were asked about the RTC
11 sign that's on the bus?

12 MR. CLOWARD: Brian, can you pull up the sign.

13 BY MR. CLOWARD:

14 Q And if you'll just turn to page 150 in your
15 deposition where you were shown Exhibit 12, which is this sign
16 here. You were asked by Mr. Allen, and I'm going to quote, do
17 you recognize Exhibit 12? Answer, yes.

18 Question, what is it?

19 Answer, it's not a very good one, but it's a photo
20 of the inside of the bus with the bus number and the warning
21 signs that are right above the bus number.

22 Question, and the warning signs and symbols say
23 what?

24 Answer, no smoking, no eating or drinking, no radio,
25 end quote.

1 Did I read that correctly?

2 A You did.

3 Q Okay. And that was no smoking, no eating or
4 drinking, true?

5 A Yes, that is correct. That is what I said.

6 Q The sign doesn't say anything about from an open
7 container, does it?

8 A The sign shows a container that's open.

9 THE COURT: Counsel, just real quick, and I'm sorry
10 to interrupt. We're just looking at the exhibits. That
11 particular photo was admitted as Joint Exhibit A18.

12 MR. CLOWARD: Thank you. So A18.

13 THE COURT: Yeah. Just so we can keep the record
14 straight.

15 MR. CLOWARD: Thank you, Your Honor. I appreciate
16 it. Thank you.

17 BY MR. CLOWARD:

18 Q So let me move on. Is the CDL training, is that
19 something that's contract specific?

20 A Yes, it was required by contract.

21 Q But is that contract specific for, say, for
22 instance, Las Vegas maybe has a requirement for CDL whereas
23 maybe a different market doesn't?

24 A Example, Chicago Pace does not. That is correct.

25 Q Okay.

1 MR. CLOWARD: Brian, if you could pull up
2 Plaintiffs' 951.

3 MS. SANDERS: What's the number?

4 MR. CLOWARD: Plaintiffs' 951.

5 Blow that up, please, Brian.

6 BY MR. CLOWARD:

7 Q Ms. McKibbins, do you recall telling the jurors that
8 only certain things that are in the specific area are taught,
9 true?

10 A Correct.

11 Q And CDL would be a Las Vegas contract specific
12 training, true?

13 A Well, you're taking it out of context because that
14 CDL training is specific to the training that we would give to
15 a person to be able to pass their permit test, which is
16 different than the CDL training that we were actually doing.
17 We were providing training as part of the behind the wheel
18 training for CDL testing. Two very different topics that you
19 are talking about.

20 Q Okay. Remember you -- you talked to the jurors
21 about how fare box -- there is no need for fare box; right?

22 A Not for the fare box fixture, fare box training.
23 That is correct.

24 Q Certainly. So fare box wouldn't have any hours that
25 needed to be completed because that wasn't something you do

1 here in Las Vegas; right?

2 A Correct.

3 Q Okay.

4 MR. CLOWARD: Now, has the full exhibit been moved
5 in that we're talking about? Has that been moved into
6 evidence?

7 MS. HYSON: You mean No. 14?

8 MR. CLOWARD: Yes.

9 MS. HYSON: No.

10 MR. CLOWARD: So the -- the full employee training
11 hasn't been?

12 MS. SANDERS: We haven't don't that yet.

13 MR. CLOWARD: Okay. We would like to formally, now
14 that we've got the full exhibit that we'd like in, we'd like
15 to move that in.

16 THE CLERK: Is that page 14?

17 MS. SANDERS: Okay. That's fine.

18 THE CLERK: I'm sorry. Which exhibit is it?

19 MR. CLOWARD: It's Exhibit 14.

20 MS. SANDERS: A14.

21 THE CLERK: A14?

22 MR. CLOWARD: A14.

23 (Defendant's Exhibit A14 admitted.)

24 BY MR. CLOWARD:

25 Q Now, do you remember being asked by Ms. Sanders

1 whether Jay had ever been disciplined, whether you had any
2 issues? And I believe that your testimony was something with
3 the lift. I don't really recall.

4 A Yeah, I said I'd have to look through the entire
5 exhibit to know off the top of my head. I don't know.

6 Q All right. Well, now that we have the entire
7 exhibit I'd like to approach and hand you this document. See
8 if this refreshes your recollection about that incident.

9 MS. SANDERS: Can you read the page number, counsel.

10 MR. CLOWARD: Yes. It was one of the ones that Ms.
11 Hyson added back to the exhibit.

12 MS. SANDERS: Is there a page?

13 MR. CLOWARD: It -- because it was pulled it wasn't
14 Bate labeled. So it's Farrales 70 or Safety 74. So you have
15 a copy? Okay.

16 BY MR. CLOWARD:

17 Q Ms. McKibbins, what is that again?

18 A This is a road supervisor incident report.

19 Q What happened there?

20 A Based on the information here the road supervisor
21 wrote up a report that the -- the lift had been left out and
22 hit a pole.

23 Q So as I understand this, Mr. Farrales, he drives the
24 paratransit bus; is that correct?

25 A Yes.

1 Q And on the buses there's a lift that actually
2 lowers, true?

3 A That's correct.

4 Q And on the lift, you know, it's maybe -- you know,
5 it's about maybe three or four time this size, I mean, large
6 enough to fit a large motorized wheelchair?

7 A Standard regulation size, yes.

8 Q And he actually left that down and then drove off
9 and it hit a -- it hit a pole.

10 A No, he didn't leave it down. He left it in the up
11 position, different than down. It wasn't down flush against
12 the -- against the ground. In order for the lift to be -- and
13 it says here the lift was up, so it wasn't stowed. So it
14 wasn't down, deployed on the ground. It was up at bus floor
15 level.

16 Q So it was basically kind of like sticking out like
17 this?

18 A That is correct.

19 Q And he's driving down the road and he runs into a
20 pole?

21 A In a parking lot, not quite down the road, but yes.

22 Q He a pole, though?

23 A Yes.

24 Q Okay.

25 MR. CLOWARD: And, Marshal, I believe -- I believe

1 one of the jurors has a question if you want to get that.

2 THE MARSHAL: We're going to do that at the end.

3 MR. CLOWARD: Okay. Sorry.

4 BY MR. CLOWARD:

5 Q Now, another thing you told these folks, you said
6 that it's not the driver's job to inform the client of the
7 safety rules and the rules on the bus. Is that -- did I hear
8 you right when you said that?

9 A I said that the driver is not to -- it's not their
10 job to every time a passenger comes on the steps of the bus to
11 inform them of every single rule that -- that they need to
12 follow. That's not their job.

13 Q So it's not the driver's job to inform the client of
14 the rules. That's what you -- that's what you're telling
15 these folks?

16 A I said -- you're changing what I said.

17 Q I'm sorry.

18 A I said --

19 Q I don't mean -- I really don't mean to.

20 A -- that --

21 Q I'm sorry.

22 A -- it's not the driver's job to inform every
23 passenger every time they get on the bus of every single rule
24 they need to follow.

25 Q Okay. I'm sorry. I must have written it down

1 wrong. Let me have you turn to page 95 in your deposition if
2 you would, please.

3 A Sure.

4 Q If you want to start on line 19, I'll just read you
5 that question.

6 A Sure.

7 Q And that's -- these rider rules apply to the
8 passengers. And these rider rules, as well, apply to the
9 driver to enforce, true? Answer, it would be First Transit's
10 responsibility to inform the client, you know. RTC has a rule
11 that has to be followed. Did I read that right?

12 A You did.

13 Q Question, and, as well, make sure that the client
14 does it, does follow the rule; right? Answer, to the extent
15 they can, yes. Did I read that right?

16 A You did.

17 Q You testified earlier that RTC -- or, excuse me,
18 First Transit actually does more training than what was --
19 what was required. Do you recall that?

20 A I do.

21 Q And that was First Transit's choice to do more
22 training than what was required in the contract, true?

23 A Yes.

24 Q You could have made the choice to do CPR and
25 Heimlich, true?

1 A I suppose they could have, but it's not something
2 that we readily do in other markets that are similar. So it's
3 not required by the contract, it's not required by federal
4 law, it's not required by state law, it's not required by
5 local law. Therefore, we did not.

6 Q It's a choice you could have made, though, true?

7 A Again, we could have made that choice, but when you
8 compare it to the other markets where we operate paratransit
9 service, and it's not a requirement by any of those things
10 that I just stated, it was not offered.

11 Q Okay. To say, for instance, the federal motor
12 regulations require that you follow the Smith system?

13 A Federal regulations require that we provide
14 defensive driving, an approved defensive driving course for
15 operators. And the only courses that are available are the
16 National Safety Council's, DDC8, which in some jurisdictions
17 they require that we don't teach Smith system, that we teach
18 National Safety Council's DDC8, which is Defensive Driving
19 Course, subsection 8. Or we can teach Smith system, which is
20 what First Transit, that's our default program for most
21 locations.

22 Q And you all had the choice to either do your own
23 training for CPR or bring in a different company to do the
24 training, true?

25 A I don't really understand your question.

1 Q You had the choice to either do your own CPR and
2 first aid training, or to actually bring in a professional
3 company to do that training.

4 MS. SANDERS: Are we talking CPR or CDL? Which --

5 MR. CLOWARD: CPR, Your Honor. I think it was
6 pretty clear. CPR --

7 THE WITNESS: It is. I just want to make sure --

8 MR. CLOWARD: -- and first aid training.

9 THE WITNESS: I just want to make sure I understand.
10 So me, not being trained in CPR, you're asking me if I would
11 have trained somebody in CPR or if I would have to be trained
12 by another place which would then essentially still be a third
13 party because I would be trained by a third party company. So
14 that's why I don't understand your question.

15 BY MR. CLOWARD:

16 Q Okay. You as the corporate director of safety would
17 be unable to even train your own employees on how to do CPR,
18 first aid, and Heimlich, true?

19 A That's correct.

20 MR. CLOWARD: Brian, will you bring up the map,
21 please. This is just a demonstrative. Can you blow that up?

22 BY MR. CLOWARD:

23 Q Okay. Here is a map that represents all of the
24 different markets that First Transit operates, is that fair?

25 A I think it's old, but we'll go with it.

1 Q Okay. So why don't you just come down off the stand
2 here. You're the director of corporate safety over the entire
3 corporation; right?

4 A Yes.

5 Q Okay. So what I want you to do is come down off the
6 stand and I just want you to point to the markets that are
7 lucky enough to have CPR and first aid training, and then I'm
8 going to ask you a few questions about that. And while you
9 come down and do that I'm going to writing them down.

10 A Yeah, I testified earlier that I'm not 100 percent
11 sure on what locations actually have them. It's not many. I
12 can tell you for sure it's not many, but I don't know exactly
13 where they are.

14 Q Okay.

15 A I don't know every single thing about every single
16 location that operates without looking it up. I'm sorry.

17 Q That's your job, though; right? You're the director
18 of corporate safety.

19 A Yes, I understand, but you have to understand we
20 have 240 locations. That's a memory test for the best of
21 them.

22 Q Okay. Well, can you list maybe ten markets that
23 have first aid, CPR, Heimlich training?

24 A There's -- I think -- I think they're all in
25 California.

1 Q Every -- every location?

2 A I'm pretty sure. No, I take that back. There might
3 be one or two in the northwest, but I think most of them are
4 specific to California.

5 Q Okay. Let's just take California. What specific
6 regulation in California says that you have to do CPR, first
7 aid, and Heimlich?

8 A I don't know off the top of my head. I would have
9 to look. I just don't know.

10 Q Do you know of any, any, any regulation or statute
11 in any of the locations that says you guy have to follow your
12 handbook and do CPR, first aid, or Heimlich?

13 A No.

14 Q All right. But you do it in some markets, true?

15 A Absolutely.

16 Q Just not in Las Vegas?

17 A Or Houston or WMATA or Chicago or Florida or
18 anywhere in the Baltimore, D.C., Virginia area.

19 Q You testified earlier, and I wanted to make sure
20 again that I heard this right. I believe that you said that
21 911, calling 911 is, quote, better and safer. It's better and
22 safer to rely on 911 than to train your drivers; is that true?

23 A It is better and it is safer because they are more
24 equipped to handle with emergencies. You have to remember
25 that we're dealing with -- with people who are driving a bus.

1 You're hired, that's your primary responsibility is to drive a
2 bus. You are responsible for maneuvering a 15 -- in
3 paratransit, a 15,000-pound vehicle through traffic around
4 hazards, around people. That's where your focus needs to be.
5 I understand that there are passengers on the bus and I
6 understand that it's important for the passengers to be safe.
7 But if we're out hitting everything that we run into because
8 that's where -- we don't have our focus on that, we're not
9 safe.

10 Q I wasn't talking about the mirrors.

11 A I understand that.

12 Q I was talking about whether you think it's safer,
13 better and safer to rely on 911 than to train your drivers.

14 A It is. We train them on the things that is most
15 relevant to their job. They're driving a bus. That's the
16 part that -- that we keep losing focus of. We're driving a
17 bus and we're maneuvering in traffic. So if we spend our time
18 training our -- our drivers on driving in traffic, that's what
19 they're focus is on. That's what they're focus should be on.

20 Q Okay. So if I understand this, the choice that was
21 made in this case was to rely on 911 rather than provide
22 training; correct?

23 A That is correct.

24 Q And you understand from your doctor who testified
25 from the stand that after four minutes, that's when the brain

1 starts to die.

2 A Yes, I remember that testimony.

3 Q And in this case it took eight minutes, eight
4 minutes for 911 to get to Mr. Chernikoff?

5 A Correct.

6 Q You were asked some questions about the policy and
7 what Neil testified to and whether Neil requested the policy
8 and what -- what he was told by corporate offices and you were
9 asked some questions about that. Do you recall that line of
10 testimony?

11 A I do.

12 MS. SANDERS: Well, I'm going to object. He wasn't
13 -- he wasn't asked -- she wasn't asked about a policy. She
14 was asked about a video.

15 THE COURT: Can you rephrase it.

16 MR. CLOWARD: Sure. Certainly, Your Honor.

17 BY MR. CLOWARD:

18 Q Do you remember the testimony when Neil said, hey,
19 look, I tried to get a copy of the video and I was told that I
20 needed a court order?

21 A Yes, I remember.

22 Q All right. And that's your exact policy; right?

23 A It is.

24 Q So his testimony, what he took the stand and told
25 these jurors actually is exactly the policy that you have?

1 A It is.

2 Q You said you saw Jay in the days after this event?

3 A I did.

4 Q He looked sad and stuff?

5 A Of course.

6 Q You didn't give him any time off?

7 A Well, I don't know how many days it was after I saw
8 him. I think he was off for a couple of days. I don't know
9 exactly how many days, but, I mean, I didn't see him the next
10 day. But I knew he was off for a couple of days, but I don't
11 know how much time.

12 Q Okay. But you saw him in the couple of days after
13 this?

14 A Okay. Couple might be incorrect, but within the
15 next several days, if that's better.

16 Q All right. You were asked about the importance of a
17 choking policy. Do you recall that?

18 A Okay.

19 Q Do you -- I mean --

20 A I remember talking about the choking policy, yes.

21 Q Okay.

22 A As you're calling it policy.

23 Q Sure. And you actually testified in your deposition
24 that you had safety meetings to discuss prevention of choking
25 to death events similar to the one involving Harvey -- Harvey

1 Chernikoff, true?

2 A I don't think that that's exactly what the line of
3 questioning was, but we did talk about it following the
4 incident and reiterated what the policies were. You know,
5 it's important to understand what the policies are. And when
6 there's an incident that occurs, whatever that may be, it's
7 our policy to discuss all of the things that could have led to
8 an incident and discuss how to prevent them. We want to
9 prevent injury on vehicles. We want to prevent injury to
10 passengers to other people out on the road. It's not our
11 intent to injure anybody. So it is important when something
12 happens, whatever that may be, to discuss that following and
13 make sure that people understand what steps can be taken that
14 they can -- they can do to prevent things from happening if
15 possible.

16 Q Okay. And do you recall at the deposition when we
17 asked, you know, why do you look into your -- your rearview
18 and your interior mirrors, one of the reason that you gave is
19 to enforce the rules of the bus, true?

20 A That is true. That's absolutely true.

21 Q Okay.

22 A But you have to understand there's -- there's a lot
23 of different rules. No walking around on the bus is one of
24 the rules. And that may not be written anywhere that people
25 can't stand up and walk around in a bus, but that's common

1 sense. You can't get up and walk around on the bus for the
2 safety of the passenger. That's something that the driver
3 would be looking at. Absolutely.

4 Q And you testified at your deposition that because
5 there are lots of potentially dangerous things that can happen
6 on a bus, that's why the driver must consistently scan and
7 view the back of the bus. Isn't that also true?

8 A That is true. There are many things that could
9 happen at any time in the bus, outside of the bus. There are
10 passengers -- again, we're talking about passengers with
11 disabilities. There are passengers that fight on the bus.
12 There's a brother and sister that fight on the bus. You can't
13 sit them together because if you sit them together the sister
14 is going to beat the you know what out of the brother. You
15 have to keep them apart. So there are things that could
16 happen on a bus.

17 Q Okay. How much does a -- does a driver make when
18 they first start?

19 A Today?

20 Q Back when Mr. Farrales was hired.

21 A Oh, I don't know how much he made when he first
22 started. I mean, I can look at his application or his payroll
23 information and find out, but it had to be somewhere around
24 \$10 or \$11 an hour, I'm guessing.

25 Q Okay. We'll give -- we'll give him the benefit of

1 the doubt and say 11.

2 A Okay.

3 Q How many hours would it have taken to train Mr.
4 Farrales on CPR and Heimlich?

5 A I don't know. I don't know what the training
6 requires. I know what the -- the form said was a suggestion,
7 but I don't know exactly how many hours it takes.

8 Q Like eight.

9 A Okay.

10 Q And because you've testified all about this -- this
11 contract between RTC and First Transit, you agree that First
12 Transit made between \$218 million to \$239 million over the
13 seven years they had it?

14 A That's an unfair assessment of how much they
15 actually made. You have to remember there's operating costs
16 that fall into that. And when you talk about the actual
17 margin of profit that they make on a paratransit contract, the
18 profit margin is between zero and 10 percent industry
19 standard. So that may be how much money First Transit was
20 paid to do the contract, but when you talk about maintaining
21 the vehicles, salaries for the drivers, salaries for all of
22 the employees, all of the costs that it takes to operate an
23 actual company, they did not make that much money profit, no.

24 Q Okay.

25 MR. CLOWARD: Brian, can you pull up A16-44 please.

1 BY MR. CLOWARD:

2 Q I want to talk a little bit about the contract
3 between RTC and First Transit.

4 A Okay.

5 Q Okay.

6 A Sure.

7 Q I'm just going to read this, and see if I read this
8 correct. This is the general requirements for personnel,
9 Section 15, true?

10 A True.

11 Q Subsection B, training, all employees of the
12 contractor will have completed the contractor's employee
13 training program as outlined in the contractor's proposal in
14 Appendix A, true?

15 A True.

16 Q And you've never provided us with what is in
17 Appendix A so that we know what actually was required, true?

18 A You should have what was in Exhibit 1. We went
19 through the training information earlier that said what the
20 Las Vegas required training was for the contract.

21 Q Can you actually look in those binders behind you
22 and take a minute and pull out First Transit's proposal or
23 Laidlaw's proposal in Appendix A? Because I'd like to see it.

24 A I wouldn't --

25 Q Please look for it.

1 A -- have any idea where it would be in here. I only
2 know what we went through earlier, which had that exhibit
3 attached to it with the training material.

4 Q You don't know because it's never been provided, has
5 it?

6 A I don't have any idea.

7 MR. CLOWARD: Brian, can you go to 49, please.

8 BY MR. CLOWARD:

9 Q Training -- see if I read this correctly. All
10 vehicle operators are required to complete the contractor's
11 training program, true?

12 A True.

13 Q And -- and you all are the contractors; right?

14 A We were at the time. That is correct.

15 Q That's not RTC. That's not RTC's training program.
16 That's First Transit or Laidlaw's employee program; right?

17 A As was agreed to in the contract. That is correct.

18 Q Okay. Training programs must contain, at a minimum,
19 and then it lists these different things, importantly (g)
20 safety, defensive driving, and accident procedures, true?

21 A That is correct.

22 Q At a minimum. Did I read that right?

23 A You did. And I testified earlier that we did more
24 than the minimum.

25 Q Sure, you made specific choices on what training to

1 provide in addition to this right here, true?

2 A True.

3 Q That you made the choice. You made the choice.

4 First Transit made the choice to not provide CPR, Heimlich, or
5 first aid training; correct?

6 A As we made the choice in most other markets, that is
7 correct, that are similar to Las Vegas.

8 Q But you put it in your manual that goes out to every
9 single market, true?

10 A As information, as it states in the beginning of the
11 handbook as information.

12 Q Okay.

13 MR. CLOWARD: Brian, can you pull up G88, please.

14 MR. CLARK: G88?

15 MR. CLOWARD: G88

16 MR. CLARK: Is it in yet?

17 MR. CLOWARD: Did you move the ADA in?

18 MS. SANDERS: Give me the -- give me the number
19 again.

20 MR. CLOWARD: It's -- it's the ADA.

21 MS. HYSON: No.

22 MR. CLOWARD: You didn't move that in?

23 MS. HYSON: No.

24 BY MR. CLOWARD:

25 Q Okay. Have you reviewed the entire ADA -- you know,

1 the -- the regulation, the Americans with Disabilities Act?

2 A At some point, yes. Yesterday, no. But at some
3 point I have read it. I was required to know information
4 because we had to comply with ADA regulations.

5 Q Okay. So you've reviewed it and you know that it's
6 a proposed exhibit proposed by your attorneys in this case,
7 true?

8 A I don't know.

9 Q Okay.

10 MR. CLOWARD: Well, Your Honor, if I may approach.

11 THE COURT: Okay.

12 BY MR. CLOWARD:

13 Q I'm just going to sneak behind you here.

14 A All right.

15 Q Sorry.

16 A No problem. Do you have a magnifying glass?

17 Q Do you need some reading glasses?

18 A No. No, just -- I just need to be really close to
19 it.

20 Q Okay. So have you -- have you had a chance to see
21 that?

22 MS. SANDERS: Is there a particular page that you --

23 THE WITNESS: I'm sure I've read it before. Is
24 there --

25 BY MR. CLOWARD:

1 Q 88.

2 A -- a specific section, or this whole thing that you
3 just pointed to.

4 Q The whole thing is just one page. It's --

5 A There's a lot of words on here. It's really small.

6 Q Okay. Well, just to give the jurors an idea here.

7 Can I just take this for one second?

8 A Uh-huh.

9 MR. CLOWARD: All right. There's the whole policy.
10 This is what Ms. McKibbins is being asked to focus on, okay.
11 One page.

12 THE WITNESS: Okay.

13 BY MR. CLOWARD:

14 Q Okay?

15 A Got it.

16 Q I'll reset this here for now and then we'll
17 straighten that up in a minute. I'm just going to read some
18 things from there and let me know if you agree.

19 A Okay.

20 Q The ADA requires paratransit operators to have,
21 quote, well trained work force, true?

22 A Where -- where are you reading that from? Is that
23 on this page?

24 Q Yeah. I certainly wouldn't read you something
25 that's not on there.

1 A Just checking.

2 Q That wouldn't be fair to you. Why don't you just
3 start with me right there.

4 A Okay. Thank you.

5 Q Actually, why don't you just read it to the jurors,
6 that first sentence.

7 A All trained workforce is essential in ensuring that
8 the accessibility related equipment and accommodations
9 required by the ADA actually result in the delivery of good
10 transportation service to the individuals with disabilities.

11 Q Okay. So it's a well trained workforce is important
12 to the ADA; right?

13 A That is correct.

14 Q All right. You can -- you can just keep reading and
15 I'll ask you some questions about it.

16 A The utility of training was recognized by congress,
17 as well. At the same time we believe that training should be
18 conducted in an efficient and effective manner with
19 appropriate flexibility allowed to the organizations that must
20 carry it out.

21 Q Okay. Stop right there. So basically the ADA
22 requires training to be performed in an efficient and
23 effective manner. Did I -- you read that; right?

24 A I did.

25 Q And that flexibility is given regarding training;

1 right?

2 A That is correct.

3 Q Okay. You can keep going.

4 A Each transportation provider is to design a training
5 program which suits the needs of its particular operation.
6 While we are confident of this approach, we are mindful that
7 the apparent lack of training has been a source of complaint
8 to FTA and transit providers. Good training is difficult and
9 it is essential.

10 Q All right. So that says that each transportation
11 provider is to design a training program which suits the needs
12 of its particular operation, true?

13 A That is correct.

14 Q All right. You can keep going.

15 A Several points of this section deserve emphasis.
16 First, the requirements for training apply to private, as well
17 as to public providers of demand responsive, as well as a
18 fixed route service. Training is just as necessary for the
19 driver of a taxi cab, a hotel shuttle, or a tour bus as it is
20 for a driver in an FTA funded city bus system.

21 Q You can keep going.

22 A Second, training must be to proficiency. The
23 department is not requiring a specific course of training or
24 the submission of a training plan for DOT approval. However,
25 every employee of a transportation provider who is involved

1 with service to persons with disabilities must have been
2 trained so that he or she knows what needs to be done to
3 provide the service in the right way.

4 Q Okay. You can stop right there. So essentially, to
5 be trained to proficiency, the individual needs to know what
6 to do, when to do it, true?

7 A That is correct.

8 Q You can keep reading.

9 A When it comes to providing service to individuals
10 with disabilities, ignorance is no excuse for failure. While
11 there is no --

12 Q That's -- that's -- that's good. Thank you for
13 doing that. I appreciate that.

14 A No problem.

15 Q So when it comes to providing service to individuals
16 with disabilities, ignorance is no excuse for failure, true?

17 A That is correct. However --

18 Q I'm just asking if that's what's in the policy.

19 A It is, but this policy is particular to Americans
20 with Disabilities Act as a civil right for a person to ride a
21 public or private service. And they do have a civil right and
22 we, as a transportation provider, have the responsibility of
23 following what is listed in the ADA law as it pertains to
24 civil rights of passengers.

25 Q And -- and when -- when Ms. Sanders is talking about

1 what the ADA requires and how the ADA doesn't require any CPR
2 or any Heimlich or anything like that, the purpose of the ADA
3 is not about safety. You agree with that, true?

4 A I do agree with that. It will tell you specifically
5 that it's not about safety. It's about civil rights.

6 Q Okay.

7 MR. CLOWARD: Pull it up, Brian.

8 BY MR. CLOWARD:

9 Q And you actually teach your drivers that exact
10 thing, true?

11 A We do. Absolutely. Because you cannot violate a
12 person's civil rights and it's important to understand that.

13 MR. CLOWARD: 7, please, Brian.

14 BY MR. CLOWARD:

15 Q The focus of Americans with Disabilities Act is
16 safety and not individual freedom and the response is false.

17 A That's correct, because the ADA focuses on civil
18 rights. Not — it's not about safety. It's about civil
19 rights. You cannot violate the civil rights of a person, just
20 in the same way that you cannot violate the equal employment
21 opportunity policy. You cannot violate those things. These
22 are civil right of a person who has a disability.

23 Q Sure. Sure.

24 MR. CLOWARD: Brian, let's go A9-30, please.

25 MR. CLARK: A9?

1 MR. CLOWARD: The collective bargaining agreement.
2 Oh, well, we need to get that into evidence.

3 BY MR. CLOWARD:

4 Q You've reviewed the collective bargaining agreement,
5 haven't you?

6 A I have.

7 MR. CLOWARD: Well, let's move that into evidence so
8 the jurors have that, too, Your Honor.

9 THE COURT: Any objection?

10 MS. SANDERS: No. Huh-uh.

11 MR. CLOWARD: I believe it's A9, the collective
12 bargaining agreement.

13 MS. SANDERS: Yeah, that's fine.

14 (Defendant's Exhibit A9 admitted.)

15 MR. CLOWARD: Let's go to -- let's go to 30, Brian.
16 Well, actually, let's start with -- let's start with 9 and
17 then we'll go to 30. So let's start with 9. Okay. And,
18 Brian, I'm going to have you -- Section 3, just blow up that
19 first one. Thank you.

20 BY MR. CLOWARD:

21 Q Ms. McKibbins, you would agree that it says
22 attendance and scheduled meetings is mandatory unless
23 specifically excused by the company, true?

24 A That's true.

25 Q Okay.

1 MR. CLOWARD: Now, Brian, if you'll go to 34,
2 please. Section 6, Brian. Highlight that for me.

3 BY MR. CLOWARD:

4 Q All employees will receive a copy of the company's
5 employee handbook and any new changed rules issued by the
6 company from time to time. Did I read that correctly?

7 A You did.

8 Q Okay. Is there anything in the collective
9 bargaining agreement that says, hey, you know what, as a Union
10 member you all don't have to do CPR or Heimlich? Anything in
11 there at all?

12 A No, there's not.

13 Q Okay. I didn't think so. I just wanted to make
14 sure. Can you go -- First Transit has some minimum hiring
15 guidelines, true?

16 A Yes.

17 Q And one of those is that even serious crimes like
18 kidnapping, murder, or a crime against a child or vulnerable
19 adult may only potentially disqualify a person from employment
20 with First Group, true?

21 A Yeah, we're required by law to use that verbiage.
22 There's certain verbiage that under employment law they'll
23 tell you you can and cannot do, but just as an aside to that,
24 now going forward, and this started, I believe it was last
25 year, you are no longer allowed to ask on an employment

1 application if a person has ever been convicted of a felony.
2 You can't even determine that until after you determine --
3 offer them a job of employment and still cannot use that as a
4 disqualification until it's been reviewed.

5 Q What's that specific policy?

6 A What is that specific policy?

7 Q What's that specific rule or regulation?

8 A It's -- I'd have to look it up, but we just did
9 training on it not that long ago through employment law.

10 Q Oh. But you don't know what it is?

11 A Not off the top of my head.

12 Q So we can't verify? We just have to trust your --
13 trust your word for it?

14 A Well, I can look it up for you. It's going to be
15 under 29 CFR because that's how -- what relates to employment.

16 Q Okay. So it's fair to say that First Transit
17 probably has, since this new law, a whole bunch of convicted
18 felons for whatever they might be convicted of?

19 A That's not at all what I said. That's not at all
20 what I said.

21 Q Well, if you can't ask.

22 A Until after you offer them a job. You have to give
23 them a condition offer of employment. You still run a
24 background check.

25 Q I see.

1 A And so you can't be discriminatory.

2 Q So you do the background check after you hire the
3 individual?

4 A Once they are presented with a conditional offer of
5 employment. It doesn't mean that they get to work. It just
6 means that they've been presented a conditional offer of
7 employment.

8 Q And then you go ahead and you can do the search and
9 then you can fire them?

10 A You withdraw the conditional offer of employment.

11 Q Okay.

12 A Same thing we would have done there where it says
13 that it potentially, may potentially disqualify.

14 Q Okay. All right.

15 A So it doesn't say it doesn't or it does. It's
16 potential.

17 Q Okay. Thank you. Appreciate it.

18 MR. CLOWARD: Brian, will you please pull up the
19 employee handbook. I think it's -- you're just going to have
20 to pull it up and then scan down with me. Just scan down with
21 me. I think it's like maybe 6. Oh, actually, go up. Sorry.
22 Yeah, keep -- keep going up. Sorry, Brian. No, no, I mean
23 the other way. Thank you. Okay. Highlight this right here.
24 BY MR. CLOWARD:

25 Q I just want to see if I read this correctly. Safety

1 is our core value and is considered first in everything we do.

2 Did I read that right?

3 A You did.

4 Q All of our employees, customers, and business
5 partners will be treated with dignity and respect. Did I read
6 that right?

7 A Yes.

8 Q We will deliver on our promise of reliability to our
9 customers. Did I read that right?

10 A Yes.

11 Q We will operate in a socially responsible manner,
12 showing care for our environment and the community's. Did I
13 read that right?

14 A Yes.

15 Q And then finally, we will never compromise on our
16 values in any of our dealings with customers, suppliers, or
17 employees. Did I read that right?

18 A Yes.

19 Q Thank you.

20 A You're welcome.

21 MR. CLOWARD: Brian, I'm going to have you, if you
22 will, please, move down I think to maybe a couple more down
23 than that.

24 BY MR. CLOWARD:

25 Q Okay. Here's a letter from Brad Thomas. Do you see

1 that, Ms. McKibbins?

2 A I do.

3 Q And who is Brad Thomas, again?

4 A He is the president of First Transit.

5 MR. CLOWARD: Okay. Keep going down a little bit
6 further. Some more, Brian. Just keep going. Keep going.
7 Keep going. All right. There you go. Notices and
8 limitations. Highlight that very last one for me, please,
9 Brian.

10 BY MR. CLOWARD:

11 Q Just see if I -- if I read this correctly. It says
12 no person is authorized to make any oral exceptions to this
13 handbook and written exceptions are permitted only when signed
14 by the president of First Transit. Did I read that right?

15 A Mostly. You threw in an extra word, but you mostly
16 read it right.

17 Q Well, let's try it one more time and I'll laser
18 focus in on this. No person is authorized to make oral
19 exceptions to this handbook and written exceptions are
20 permitted only when signed by the president of First Transit.
21 Did I read that correctly?

22 A Yes.

23 Q In the handbook -- do you have a copy of the
24 handbook? The handbook is the exhibit that contains page 70;
25 right?

1 A That's correct.

2 Q And so if I understand that, you couldn't even say,
3 hey, when I'm doing my training, Mr. Farrales, it's okay to
4 ignore or not follow certain things in this handbook, true?

5 A I would not say it's okay to ignore anything.

6 Q You're not authorized to make exception to this
7 handbook, are you?

8 A No.

9 Q And Brad Thomas never told you that it was okay to
10 do whatever you wanted here in Vegas, did he?

11 A He did not.

12 Q He never told you it was okay for Las Vegas to
13 ignore pages 68, 69, and 70 of the handbook, true?

14 A The information tips? No, he did not tell us to
15 ignore the information tips that were in the book.

16 Q Brad Thomas never told you that it was okay to not
17 train employees in the CPR and the Heimlich maneuver, true?

18 A That's true.

19 Q RTC never told you it was okay to follow through
20 with the promises that First Transit made to them about what
21 was in the employee handbook, true?

22 A I'm sorry. I don't understand your question.

23 Q RTC never told First Transit it was okay to ignore
24 the promises that were made by First Transit to follow its own
25 employee handbook, true?

1 A No, but, again, those are information tips. That's
2 not a policy.

3 Q Okay.

4 A I know you keep referring to it as a policy, but
5 it's listed in the employee handbook as an informational tip,
6 not a policy.

7 Q Okay. The CBA never told First Transit that it was
8 prohibited from requiring Union members to know and understand
9 CPR and Heimlich, true?

10 A No, they did not.

11 Q In Nevada First Transit chose to ignore the training
12 because of money, isn't that true?

13 A No, that's not true.

14 MR. CLOWARD: No further questions, Your Honor.

15 THE COURT: Redirect.

16 MS. SANDERS: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. SANDERS:

19 Q I thought we had covered this already which is why I
20 didn't go into it with you, but the information on the writing
21 that counsel was making reference to as Brad Thomas, he never
22 -- you're not aware of any kind of writing saying don't read
23 these sections?

24 A No, I'm not.

25 Q And is it your understanding that you were to read

1 the sections, all the entire sections of the employee
2 handbook?

3 A That's what the signature form says, that I will
4 read and understand what's written in the handbook.

5 Q Is reading the handbook and being familiar with the
6 information the same thing as I will be trained in it?

7 A No.

8 Q Counsel went through a whole litany here of
9 information, again, as far as first aid training. First aid
10 training. Based on what you heard from Dr. MacQuarrie a
11 couple of days ago when he was on the stand, would anything --
12 any first aid training that Jay Farrales had --

13 MR. CLOWARD: Your Honor --

14 BY MS. SANDERS:

15 Q -- been given -- been --

16 THE COURT: I'm sorry.

17 MR. CLOWARD: This question is -- she's not a
18 medical expert.

19 MS. SANDERS: I'm asking her if she heard the
20 testimony.

21 MR. CLOWARD: Okay.

22 THE COURT: Okay.

23 BY MS. SANDERS:

24 Q You were here for Dr. MacQuarrie's testimony --

25 A I was.

1 Q -- a couple days ago?

2 A Yes.

3 Q Based on the testimony that he gave, would the --
4 based on that testimony, would any amount of first aid have
5 changed the outcome of Harvey Chernikoff?

6 A No, his testimony was that it would not.

7 MR. CLOWARD: I'm just going to object to foundation
8 of that question.

9 THE COURT: All right.

10 MS. SANDERS: It's just based on what she heard him
11 testify.

12 THE COURT: It's been answered.

13 MR. CLOWARD: It's okay. I'll withdraw. I'm sorry,
14 Your Honor. It's fine.

15 BY MS. SANDERS:

16 Q The incident report that was prepared with regard to
17 this lift issue with -- with Jay --

18 A Yes.

19 Q -- where the lift was left up, did that -- were any
20 passengers injured in that?

21 A Not according to the incident report, no.

22 Q Was he disciplined for that?

23 A According to what I read here, he would have to go
24 through retraining. Again, I would have to look through the
25 file to know if he was actually disciplined. I wasn't the

1 manager at the time of the incident.

2 Q Okay. Counsel asked you about your testimony with
3 regard to, let's see, page -- page 95 of the deposition. When
4 you said it would be First Transit's responsibility to inform
5 the client that, you know, RTC has a rule that has to be
6 followed. Would that be their obligation if you see somebody
7 that is violating the rule?

8 A Yes, as I explained earlier, you can't expect that
9 the driver is going to inform every person that walks up the
10 stairs of the bus, these are all the rules you have to follow.
11 Why would a rule come up as you need to follow this rule?
12 Because they're violating it. If the driver sees it, then
13 they would inform them of what the rule is. Or if somebody
14 asks, what is the rule, can I smoke on the bus? No, you may
15 not. It is a rule that you may not smoke.

16 Q With regard to the contract, did you provide the
17 training that was contracted for with RTC?

18 A Yes.

19 Q Okay. Was first aid something that was contracted
20 for as far as training with RTC?

21 A It was not.

22 MR. CLOWARD: I'm going to object. This is what we
23 covered yesterday. She lacks the foundation for this
24 testimony.

25 MS. SANDERS: She's just testifying as to what's in

1 the contract and he just asked the questions. This is
2 redirect.

3 THE COURT: Overruled.

4 BY MS. SANDERS:

5 Q Counsel also asked you about the personnel
6 requirements and training in the contract. Did you, in fact,
7 provide all of the training that was specified on page 46 of
8 the contract?

9 A The sections that -- that laid out ADA sensitivity,
10 all the things that needed -- yes, we provided all those
11 things.

12 Q Okay. Now, the ADA, and counsel read several
13 sections of that, did you, in fact, provide a well trained
14 work force in compliance with the ADA?

15 A Yes.

16 Q Has First Transit ever been cited for failure to
17 comply with the provisions of the ADA?

18 A Not to my knowledge.

19 Q We talked a little bit about the collective
20 bargaining agreement. And I apologize. I was going to bring
21 that in. Does the collective bargaining agreement provide in
22 any section that first aid training must be provided to
23 employees?

24 A No.

25 Q Counsel went through several of the things in the

1 handbook, talking about safety being the goal and the culture
2 of First Transit. Are those -- are those, in fact, the goals
3 that First Transit has?

4 A Absolutely.

5 Q Do you try to achieve those goals?

6 A Every day.

7 Q Okay. Is it possible to achieve those goals under
8 every set of circumstances?

9 A Every minute of every day under every set of
10 circumstances, no. But we do our best to do whatever we can
11 to operate in the safest manner possible.

12 Q Thank you, ma'am.

13 A You're welcome.

14 MS. SANDERS: No further questions.

15 THE COURT: Is there anything else?

16 MR. CLOWARD: No, Your Honor.

17 THE COURT: All right, ma'am. Thank you for your
18 time. You're free to go.

19 THE WITNESS: Thank you.

20 THE MARSHAL: We have a jury question.

21 THE COURT: Oh, I'm sorry. You're right. I forgot.
22 I'm glad you -- I'm glad you reminded me.

23 Counsel, if you want to come up and look at the
24 questions. I think two you've already looked at.

25 Any other questions, ladies and gentlemen?

1 I think you guys have already seen these.

2 (Bench conference.)

3 MR. CLOWARD: These are the old ones.

4 MS. SANDERS: I think we've answered those.

5 THE COURT: You've seen those. I'll just follow up
6 with her on those. Thank you.

7 MS. SANDERS: Is there a new one?

8 THE COURT: It looks like we have a few more.
9 Thank you.

10 MS. SANDERS: I'm not sure this is relevant.

11 MR. CLOWARD: I think it is. They need to know. We
12 have no objection to any of the questions.

13 THE COURT: Okay. Okay. No objections.

14 MS. SANDERS: The one -- yeah, the one question, out
15 of all of the depositions, she wouldn't know that. She could
16 certainly answer when her deposition was taken.

17 THE COURT: I can let them -- I mean, I think
18 they're just trying to put everything in order and we've been
19 referencing the deposition. I don't see any harm in letting
20 them know. Is there any harm in letting them know?

21 MS. SANDERS: If she knows the answer.

22 THE COURT: No, no, I think we might just have to
23 let them know. Is there any objection?

24 MR. CLOWARD: No.

25 THE COURT: Okay.

1 (End of bench conference.)

2 THE COURT: Okay. The first question, ladies and
3 gentlemen, it's by Denise Hinds, Juror No. 4. When were the
4 depositions taken, dates and years? Are you referring just to
5 Ms. McKibbins deposition?

6 JUROR NO. 4: If it were taken at different times,
7 yes.

8 THE COURT: Well, there's -- we've had a few
9 depositions referenced. Is it just this witness, or all the
10 witnesses?

11 JUROR NO. 4: All of them. But if that's like
12 really long, then just hers.

13 THE COURT: Okay. Counsel when was Ms. McKibbins --

14 JUROR NO. 4: Because I don't know how that works.

15 THE WITNESS: It's on here.

16 THE COURT: It's on the deposition?

17 THE WITNESS: Yeah. It was April 2015.

18 THE COURT: Okay. And then did you also want the
19 one of Mr. Farrales?

20 JUROR NO. 4: Yes.

21 MR. CLARK: May 29, 2014.

22 MR. CLOWARD: What is it?

23 MR. CLARK: May 29, 2014.

24 THE COURT: May 29, 2014?

25 MR. CLOWARD: Yeah.

1 THE COURT: Okay. Did I cover everything, ma'am?

2 JUROR NO. 4: Yes.

3 THE COURT: All right. The next one is from Latesha
4 Brown, Juror No. 10. Jay helped Harvey drink water on the
5 bus. Is that against the rules?

6 THE WITNESS: He didn't help him drink the water.
7 He opened up the bottle. All he did was loosen the cap for
8 him. In my mind that's different than helping. He did not
9 give him the open bottle and help him drink it. He did loosen
10 the cap. It was July. It's -- it's not a violation of the
11 rules.

12 THE COURT: Okay. Next question is Denise Hinds,
13 Juror No. 4. What corporate official signed the contract
14 document with the RTC for First Transit?

15 THE WITNESS: That's a tricky question because the
16 -- the -- it was Laidlaw that actually signed the contract. I
17 would have to look at it to know who signed it, but more
18 likely than not it was the president of the company at the
19 time, the senior vice president of the region that the
20 contract is in because the country is broken out by regions.
21 And more than likely a couple officials from the RTC, probably
22 the -- I don't know. I'd have to look, but it would be the
23 deputy director or somebody from the RTC that would sign.

24 THE COURT: Okay. Next one from Dexter Layola,
25 Juror No. 3. Are -- are there first aid kits located inside

1 First Transit buses?

2 THE WITNESS: There are first aid kits that have
3 band-aids and gauze and things of that nature. That's all
4 that's in the first aid kit. It's a standard first aid kit.

5 THE COURT: Okay. This is from Darrell Shakespear,
6 Juror No. 8. You stated on Friday, last Friday, that there is
7 a difference between a policy and a guideline. What is the
8 difference?

9 THE WITNESS: A guideline is something that is given
10 to you as a reference that you use to determine what it is
11 that you're going to follow. A policy is a policy is a
12 policy. It's a hard and fast, this is a violation. You're
13 not violating a guideline. You have a guideline to use to
14 help form the basis of a policy or something or a rule. A
15 policy is something that you have to abide by. There is a
16 difference.

17 THE COURT: All right. Next one from Mr.
18 Shakespear, as well. In your opinion, is it the driver's
19 responsibility to enforce the rules and drive, or to just
20 drive and let the passengers govern themselves?

21 THE WITNESS: If the driver knows that the passenger
22 is violating the policy or not following the rules, then, yes,
23 the driver should enforce the rules. But the driver cannot be
24 responsible for monitoring just passenger activity and never
25 paying attention to what's going on outside the bus.

1 THE COURT: All right. So does that elicit any
2 follow up by counsel?

3 MR. CLOWARD: It does for me.

4 THE COURT: Okay. And then, Ms. Sanders, if you
5 have follow up, that's fine. Just on the issues presented to
6 the jury just now.

7 MR. CLOWARD: Certainly.

8 RE CROSS-EXAMINATION

9 BY MR. CLOWARD:

10 Q Ms. McKibbins, when you were deposed back in 2015,
11 that was in the capacity of the corporate spokesperson, true?

12 A Yes.

13 Q We actually gave you a notice that was like 13 pages
14 long with all of the topics that we wanted to discuss, true?

15 A Correct.

16 Q Okay.

17 MR. CLOWARD: No further questions.

18 THE COURT: All right. Ms. Sanders.

19 FURTHER REDIRECT EXAMINATION

20 BY MS. SANDERS:

21 Q With regard to Jay helping to loosen the bottle, the
22 RTC policy or rule was that passengers could have a closed
23 container and drink from that. Was that a violation for him
24 to just help Jay to -- or, excuse me, Harvey to loosen the
25 bottle?

1 A No.

2 Q And with regard to the information that's in the
3 handbook pertaining to first aid tips, is that a guideline or
4 is that a policy or just basic information?

5 A It's information. It says right in the front of the
6 handbook if you look at the handbook, it's tips and
7 information. It does not say that it's a policy.

8 Q Thank you.

9 THE COURT: All right. Is that it?

10 All right. Please step down. Thank you.

11 Is that your last witness?

12 MS. SANDERS: Yes.

13 THE COURT: Can we talk real quick on a timing
14 issue?

15 (Bench conference.)

16 THE COURT: Do we have a lot of jury instructions
17 that we need to go through?

18 MS. HYSON: We have a lot of jury instructions. I
19 there are about six that we need to work out.

20 THE COURT: Okay. So do you want to just do them
21 over lunch while the jury eats? What do you want to do?

22 MS. BRASIER: Were we talking about jury
23 instructions?

24 THE COURT: You've got six contested jury
25 instructions is what they said?

1 MS. BRASIER: Yeah.

2 THE COURT: Okay. So why don't we have the jury go
3 out and have lunch and then -- for like an hour or so. My
4 understanding is [indiscernible] lunch [indiscernible].

5 MS. SANDERS: They are.

6 THE COURT: Okay. Let's do that.

7 (End of bench conference.)

8 THE COURT: All right. Ladies and gentlemen of the
9 jury, counsel has been nice enough to provide you guys with
10 lunch today. So it either is here or should be here soon. We
11 estimate that it'll be approximately an hour for lunch. So
12 here's what's going to happen. The plaintiff has presented
13 their case. The defense has presented their case.

14 Ms. Sanders, are you guys resting at this time?

15 MS. SANDERS: Is the one last exhibit in?

16 MS. HYSON: Exhibit 14 was admitted.

17 THE COURT: Are you going to check the exhibits?

18 MS. SANDERS: It was the one that we had to do some
19 checking on. Yeah. Yes, Your Honor, we rest.

20 THE COURT: Okay. And is -- will the plaintiff have
21 a rebuttal?

22 MR. CLOWARD: No.

23 THE COURT: All right. So what's going to happen
24 when you come back from lunch, I'm going to give you the law.
25 Those are the jury instructions. So I'll read those off to

1 you. And when I'm finished, the plaintiff and the defense
2 will have an opportunity to present their closings and then
3 their rebuttal, and then you guys should go back to deliberate
4 sometime later this afternoon, okay.

5 So have a good lunch. And, as always, don't
6 research the case, don't read about the case, don't form or
7 express an opinion on the case, don't talk about the case.
8 See you then.

9 (Jury recessed at 12:51 p.m.)

10 THE COURT: Okay. Let's just -- are you guys ready?
11 Do you have -- make yourself comfortable. Do you have the
12 jury instructions that we need to go through, the six?

13 MS. BRASIER: Yes.

14 MR. CLOWARD: Yeah, Ms. Brasier is going to be doing
15 those, Your Honor.

16 MS. BRASIER: Your Honor, would you like -- would
17 you like for me just to pull out the --

18 THE COURT: I just need the six, yeah.

19 MS. HYSON: I have them separated. I mean, I guess
20 I need to look at them, too. But there's like a group that go
21 together, so we really only need one argument on the set of
22 them.

23 THE COURT: Is it the common carrier one?

24 MS. HYSON: Yeah, there's --

25 MS. BRASIER: Yes.

1 MS. HYSON: -- a set of common carrier ones, and
2 then there's a set of comparative negligence. So it's really
3 just two sets.

4 MS. BRASIER: Kim, were you guys going to agree to
5 the negligent hiring one?

6 MR. CLOWARD: Your Honor, Ms. Brasier is going to
7 handle this. Do you need me to stick around? I'm going to
8 just type up some things on my closing.

9 MS. SANDERS: Yeah, I'd like to do the same thing.

10 THE COURT: Sure. I only -- whoever you want to
11 leave me.

12 (Pause in the proceedings.)

13 THE COURT: Are these the same ones you guys are
14 handing me?

15 MS. BRASIER: These are plaintiffs' contested, and
16 those are defendants' contested.

17 MS. HYSON: I wrote on the last page of one of them,
18 but --

19 THE COURT: It doesn't matter.

20 MS. HYSON: Essentially theirs are the common
21 carrier and ours are all that have to do with comparative
22 negligence.

23 THE COURT: Why don't we start with plaintiffs'.
24 The first one plaintiff has proffered is common carrier means
25 any person or operator who is held out to the public as

1 willing to transport by vehicle from place to place, either
2 upon fixed route or on-call operations, passengers or
3 property, including a common carrier of passengers. Defendant
4 First Transit is a common carrier.

5 MS. BRASIER: Your Honor, that's -- it's straight
6 from the statute. The only modification is that it talked
7 about some taxi cabs and I think some other alternative forms
8 of common carrier, but it's straight from the statute.

9 THE COURT: Okay.

10 MS. HYSON: I guess it's not necessarily that we
11 have a problem with the definition of common carrier.

12 THE COURT: Uh-huh.

13 MS. HYSON: This one can kind of -- we decided once
14 we debate or discuss whether common carrier even applies
15 because that's the bigger contention is whether the common
16 carrier instruction actually applies in this case.

17 MS. BRASIER: Well, and I think this -- this is kind
18 of the precursor to the -- to the next one that talks --

19 MS. HYSON: Right.

20 MS. BRASIER: -- about the duty of the common
21 carrier. So if First Transit is a common carrier, then the
22 jury instruction applies to First Transit.

23 MS. HYSON: Right. So I think it's actually a
24 better use of time to discuss the next one because if the next
25 one applies, then this one will apply.

1 THE COURT: The jury is instructed that the law
2 requires a common carrier of passengers to exercise the
3 highest practicable degree of care that the human judgment and
4 foresight are capable of to make its passengers' journey safe.
5 Whoever engages in the business of a common carrier impliedly
6 promises that its passengers shall have this degree of care.
7 Failure to do so is negligence. And it comes out of Sherman
8 v. Southern Pacific.

9 MS. BRASIER: Your Honor, this is one of the
10 submissions that we submitted a bench brief on. I know there
11 was a lot submitted, but we actually attached the cases that
12 we cited to our bench brief. These are Nevada Supreme Court
13 cases. They date back to 1910 and 1913 and they're still good
14 law. The instruction that we cited is directly from the
15 instruction that was used in the Forester case.

16 THE COURT: There's nothing -- I didn't -- I read
17 the brief, but I didn't Shepardize these. There's nothing
18 more current?

19 MS. BRASIER: This is -- there might be more current
20 cases that discuss it, but this is still good law.

21 THE COURT: Okay. So what is the objection? Why
22 don't you think First Transit is a common carrier?

23 MS. HYSON: So the common carrier standard applies
24 for the transportation of individuals. What's at issue in
25 this case is actually the boarding and alighting of Mr.

1 Chernikoff or the driving skills, the transportation of him.
2 It was the recognizing of a medical event. And that's not
3 what is contemplated in the common carrier instruction. So it
4 would be our contention that for purposes of this case it is
5 not actually the work of a common carrier that's at issue
6 here. And that's why this instruction wouldn't be relevant.

7 If Your Honor determines that the common carrier
8 instruction is, in fact, relevant, it's our contention that
9 the way this instruction is worded isn't actually appropriate.
10 And I can go into that discussion further if Your Honor
11 determines that a common carrier instruction would be relevant
12 in this case.

13 THE COURT: I think that it is relevant. I think
14 that there has been evidence to support the definition of a
15 common carrier. With that being said, what do you propose as
16 a better jury instruction for the duty of care?

17 MS. HYSON: Well, there is a standard Nevada pattern
18 jury instruction.

19 THE COURT: Is it really in the pattern jury book?

20 MS. HYSON: Yes, and I have a copy of it here. It
21 is not the one that's proposed by plaintiffs. It's actually
22 -- I can read it to you. I have a copy of it. It says at the
23 time of the occurrence in question, the defendant was a common
24 carrier.

25 A common carrier has a duty to his passengers to use

1 the highest degree of care consistent with the mode of
2 conveyance used and the practical operation of its business as
3 a common carrier by mode of transportation. It's failure to
4 fulfill this duty is negligence.

5 There is a distinction between this pattern
6 instruction and the one proposed by plaintiffs.

7 THE COURT: Can I see yours just to compare it?

8 MS. HYSON: Sure.

9 MS. BRASIER: And, Your Honor, we -- we also
10 discussed why that pattern instruction is not appropriate, I
11 know we've submitted a lot of bench briefs, but in our other
12 bench brief about the jury instructions.

13 MS. HYSON: And this -- this instruction was
14 actually recognized as an appropriate instruction in the cases
15 that were cited by plaintiffs in their bench brief. I believe
16 it's --

17 THE COURT: This comes out of a newer case, too.

18 MS. HYSON: No, that one actually comes out of the
19 20 -- I'm sorry, the 1910 case that was cited by plaintiffs.

20 THE COURT: The Grooms v. Fox?

21 MS. HYSON: It's also in -- it was also accepted by
22 Grooms v. Fox, but that specific language was also in -- I
23 can't remember now if it was in Sherman or Forrester. It was
24 either the 1910 or the 1913 case.

25 MS. BRASIER: Are you saying that the 1910 or 1913

1 case cited Grooms?

2 MS. HYSON: No. The language. The language in that
3 pattern instruction was ruled to be acceptable language in the
4 1910 or 1913 case. Specifically, actually, I found it here.
5 In Sherman that court talks about the duty of a common carrier
6 and that the highest degree of practical -- practicable care
7 should be exercised that is most consistent with a mode of
8 transportation. And that's the pertinent language in the
9 pattern instruction that we think is important because it
10 gives the jury a benchmark for what the highest degree of care
11 actually means.

12 MS. BRASIER: And, Your Honor, if I may. The
13 pattern instruction that they're citing to, it -- the -- the
14 support for it in the new pattern instruction, which I'm not
15 sure if Your Honor has had the same experience, but we've had
16 the experience that some of the pattern instructions aren't
17 actually supported by the sources that are cited in the new
18 rule book. But the Grooms case never discusses what the
19 appropriate language is. The Grooms case is literally three
20 -- three paragraphs and it never talks about what the
21 appropriate standard is. So I don't know how you could get
22 any information from that.

23 THE COURT: Is that form that really old -- the blue
24 soft-covered one?

25 MS. BRASIER: No, it's --

1 MS. HYSON: I don't know. I didn't get a --

2 MS. BRASIER: These are actually the newer
3 instructions that just came out maybe two years ago that
4 everyone is kind of having issues with.

5 MS. HYSON: But even -- I mean, that is true that it
6 is a very short case, the Grooms case, but that specific
7 language is supported by the Sherman case, which is the very
8 old case back from 1910. So the same case that plaintiffs are
9 relying on from 1910, the language in this pattern instruction
10 does exist in that case, as well. In fact, the California
11 case from 2005 utilizes the same language.

12 THE COURT: I can't even pull this case up it's so
13 old.

14 MS. BRASIER: I have an extra copy of it.

15 THE COURT: I have a book.

16 MS. BRASIER: Would you like a copy?

17 MS. HYSON: Yeah, I think she attached a copy --

18 THE COURT: Yeah.

19 MS. HYSON: -- to her brief. I have a copy, as
20 well.

21 THE COURT: Which is sitting on my desk, which I
22 should go get.

23 THE CLERK: Do you want me to go get it for you?

24 THE COURT: Yeah, will you?

25 THE CLERK: Which one is it?

1 THE COURT: It should be a brief by them on -- it'll
2 say common carrier.

3 MS. BRASIER: Your Honor, I have an extra -- this is
4 an extra copy of the case.

5 THE COURT: Thank you.

6 MS. BRASIER: I just highlighted the part that I was
7 reading to you from.

8 THE CLERK: Do you still want me --

9 THE COURT: No, thank you.

10 Okay. And then this one is also, you said, from the
11 Sherman case?

12 MS. HYSON: Yes, and I can point you to where in the
13 Sherman case --

14 THE COURT: Okay.

15 MS. HYSON: -- if that makes it easier.

16 THE COURT: So where is it?

17 MS. HYSON: These aren't old cases aren't page
18 numbered quite as well as the new ones. I don't know if I can
19 show you on that same page with the version you have, but I
20 can show you here. Let me see if it's printed the same. On
21 the bottom of the page.

22 THE COURT: Yeah, I see. I'm trying to --

23 MS. HYSON: I don't know if they're printed the same
24 way.

25 (Pause in the proceedings.)

1 THE COURT: Do you have it tagged, the one she's
2 citing, as well?

3 MS. HYSON: You mean the --

4 THE COURT: Is it -- I'm sorry.

5 MS. HYSON: -- area that she's --

6 THE COURT: Do you have it marked?

7 MS. HYSON: I don't know if I have her area marked,
8 as well. I think I probably do.

9 THE COURT: I think maybe -- let me see if maybe I
10 can find it. Okay. Your -- your printout is totally
11 different.

12 MS. HYSON: We may have gotten ours from Westlaw
13 versus Lexis.

14 MS. BRASIER: Yeah, just the formatting is
15 different.

16 (Pause in the proceedings.)

17 THE COURT: You guys can make yourselves
18 comfortable.

19 MS. HYSON: Thank you.

20 (Pause in the proceedings.)

21 THE COURT: Actually, I think reading the language
22 in Sherman versus Southern Pacific, I think that the
23 additional language in the instruction proffered by the
24 defense is actually more accurate as to the common carrier
25 because when you look at the language by the Supreme Court, it

1 says the many different forms or expressed using textbooks and
2 by the courts in stating the rule as to the degree of care
3 required of a carrier in conveying passengers all recognize
4 substantially the same test, that is the highest degree of
5 care, prudence, and foresight consistent with a practical
6 operation of its road or as sometimes expressed the utmost
7 skill, diligence, care, and foresight consistent with the
8 business in view of the instrumentalities employed.

9 So I think the one provided by the defense is more
10 applicable because I think the Supreme Court is trying to say
11 that, you know, it has to be with the -- the practical
12 operation of the business. I think this one is actually a
13 better instruction and it's also been approved in the -- the
14 pattern jury instructions.

15 MS. BRASIER: So for clarification, Your Honor --

16 THE COURT: The reason is I think that it is
17 important language, you know, because the Supreme Court goes
18 through a lot of discussion and citing from jurisdictions
19 talking about the mode of conveyance used. So I think that is
20 important language. So I would tend to offer the one -- I
21 would offer the one that the defense is proposing.

22 MS. BRASIER: So just so that I can keep things
23 organized, we'll be using the one the defense has offered.

24 THE COURT: Yeah, so this will be plaintiffs'
25 proposed, but not given.

1 MS. BRASIER: Thank you.

2 THE COURT: That will be a court exhibit. So the
3 one -- the defense that we're going to use is the one taken
4 out of the Nevada pattern jury instructions which is at the
5 time of the occurrence in question, the defendant, name of the
6 carrier, was a common carrier. A common carrier has a duty to
7 its passengers to use the highest grade of care consistent
8 with the mode of conveyance used and the practical operation
9 of its business as a common carrier by whatever the mode of
10 transportation is, its failure to fail this duty is
11 negligence. Yeah. Okay. So we'll use this one. You can
12 this back.

13 MS. HYSON: Thank you, Your Honor.

14 THE COURT: Okay. So the next one that seems to go
15 with these jury instructions is when the carrier is aware that
16 a passenger is mentally disabled so that the hazards of travel
17 are increased as to him and is the duty of the carrier to
18 provide that additional care which the circumstances
19 reasonably require. The failure of the defendant to fulfill
20 this is the studious negligence. And that's off the pattern
21 jury instructions.

22 What is -- I'm sorry. This is plaintiffs' proposed.
23 What is defense's objection?

24 MS. HYSON: Our position is that this heightened
25 instruction doesn't apply in this case. For starters, the

1 case on the bottom of this instruction, American President
2 Lines, is distinguishable for many reasons. For starters,
3 this 1963 case out of the Ninth Circuit applies to an incident
4 that happened on a cruise line and applies to maritime law.

5 Numerous cases that have applied this American
6 President Line case have referred to it as an application of
7 maritime law, including cases out of Florida, the Fifth
8 Circuit, and some other cases. They apply this as a maritime
9 case. This certainly is not a common carrier case that
10 involves maritime law.

11 Secondly, it involves a lady who had physical
12 disabilities, not mental disabilities. So it's
13 distinguishable in that area. More importantly, that case is
14 distinguishable because it relies on a case out of California
15 called McBride versus Atchison, a 1955 case, which held that a
16 common carrier must render the necessary assistance to a
17 person with special needs where a passenger is blind, sick,
18 aged, very young, crippled, or infirm, and his condition is
19 apparent or made known to the carrier. It is -- and in that
20 situation it is bound to render him the necessary assistance
21 in boarding or alighting from its trains or cars.

22 So the distinction made in that case was that this
23 elevated application of a common carrier principle only
24 applied in the boarding or alighting. And it discussed that
25 in a further case that had to do with a passenger that got off

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 03:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable STEFANY A. MILEY, District Judge
District Court Case No. A-13-682726-C

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1 you've taken your eyes off the road for way too long.

2 Q Now, counsel asked you last week about scanning the
3 inside of the bus compartment with the mirrors and you told
4 them that that is something that the drivers do, but you
5 wanted to give more of an explanation and weren't allowed.
6 Would you give the explanation now?

7 A It's most important to understand that when you're
8 driving a vehicle, the primary area where you're going to have
9 hazards is outside of your vehicle. You're driving a
10 15,000-pound vehicle that you're maneuvering in traffic with
11 other cars, with pedestrians, and so your primary focus is
12 what's outside of the vehicle, the hazards that could come up
13 while you're driving. Other cars cutting you off, other cars
14 getting into your lane, encroaching your lane, getting into
15 your -- your -- your driving space, crossing where they're not
16 supposed to cross, crossing even where they are supposed to
17 cross but maybe against the light. That's where your hazards
18 are going to come from. That's where you need to keep your
19 primary focus. Do you need to check on your passengers? Yes.
20 Do you need to scan your mirror, interior mirror? Yes. But
21 where is your primary focus when your vehicle is in motion?
22 Outside.

23 Q And what are they -- what are drivers trained to
24 look for when they're monitoring the inside -- inside part of
25 the bus?

1 A Anything unusual, any unusual activity that could be
2 occurring while you're -- while your passengers are back
3 there.

4 Q And if they see anything unusual, then are they to
5 check on it?

6 A Sure. They need to -- but first and foremost, call
7 out, everything okay? You know, if you know the passenger's
8 name, depending on how many passengers you have on the
9 vehicle, you need to figure out what it is that's going on.
10 Yeah.

11 Q Is there any particular concern if a driver can't
12 see all the passengers at any given moment?

13 A No.

14 Q Is it common for passengers to move around when they
15 are seated in the bus?

16 A Yes.

17 Q Do the mirrors show the same thing that -- the jury
18 has seen the video many times, but do the mirrors show the
19 same thing as the video will show as far as the interior of
20 the bus?

21 A No, it -- what you're seeing on the video is
22 completely different than what the driver's viewpoint would be
23 through -- through the mirrors because they're in different
24 places.

25 Q Now, when we're talking about scanning the mirrors

1 -- scanning the mirrors every five to eight seconds, is that a
2 guideline or is that like a hard and fast rule that the driver
3 has to do every five to eight seconds?

4 A It's a guideline. It's a rule, it's a guideline. I
5 don't know really how to differentiate between the two. When
6 you're driving you can't just look straight ahead. And I put
7 a lot of emphasis on that. I would if I was training. You
8 can't just look straight ahead. You're missing way too much
9 information. You need to scan your mirrors. If you're just
10 looking straight ahead at something, it's very easy for people
11 in general to lose focus. You're looking but you're not
12 seeing when you're just -- just staring straight ahead. If
13 you're moving your eyes, you have constant movement, you can
14 see everything else that's around you and you're taking in all
15 of that information. It's vital that you scan your mirrors.
16 Five to eight seconds, is that a hard and fast it has to be
17 every five seconds? Maybe it's every three seconds, maybe
18 it's every five, maybe it's every six, maybe it's every nine.
19 You need to keep your eyes moving, bottom line.

20 Q But the most important focus is what's going on
21 outside and the traffic conditions?

22 A Yes.

23 Q On the video the -- and I'm not going to ask that it
24 be shown right now, but directly behind the driver there's a
25 panel. Do you know what that is?

1 A Yes, it's a smoky glass kind of a partition that's
2 behind the driver, that separates the driver from that
3 passengers.

4 Q Is that something that's -- that's a required thing
5 to be there?

6 A The RTC actually makes sure that that's there and
7 it's for the -- the driver's safety because passengers on
8 public transit vehicles can become unruly at times and have,
9 in fact, in the past attacked drivers while they were driving.

10 Q Okay. The video also shows what I think you've
11 described as a fare box that's right alongside of that panel.
12 How is that placed? Why is that placed there?

13 A The RTC determines the placement of the fare box to
14 what is most conducive for passengers when they enter the
15 vehicle to be able to deposit their fair. Again, the buses
16 are owned by the RTC, so any RTC owned equipment would have
17 been placed by the RTC.

18 Q Does the fact of that fare box there somewhat
19 obscure the view that the driver would have of somebody who is
20 sitting in that seat, lap, legs, that kind of thing?

21 A It's possible, yes.

22 Q Now, we talked before about the fact that passengers
23 do kind of move around sometimes when they're -- when they're
24 on the bus. Do they sometimes lay down?

25 A Sometimes.

1 Q Is that any cause for concern?

2 A Not necessarily. The RTC rule is that passengers
3 could be on the bus for up to 90 minute or so. So if you're
4 on the bus for 90 minutes and maybe you want to go to sleep.
5 Some people are not good riders. I'm not a good rider. I
6 don't ride well.

7 Q If somebody appears to be napping, is it a rule that
8 you wake them up or do you just let them nap?

9 A You can let them nap. You want to wake them up when
10 you go to drop them off, but different than on fixed route.
11 Fixed route you don't know where their stops are. If you see
12 somebody sleeping, you might want to say, hey, don't miss your
13 stop.

14 Q Now, you've viewed the video of what occurred on the
15 bus. Was there anything that you saw that Jay did or didn't
16 do that you would consider to be a violation of his training?

17 A No.

18 Q Was there anything that you considered him to -- to
19 do that would be a violation of either RTC or First Transit
20 rules?

21 A No.

22 Q I am going to -- I want to show the video.

23 MS. SANDERS: Your Honor, would it maybe be a good
24 time for a break, or do you --

25 THE COURT: Yeah.

1 MS. SANDERS: -- want me to just go into it?

2 THE COURT: I think it's a good time for a break,
3 just ten minutes to stretch and everything else. Come back
4 actually about 15 after the hour. Don't research the case,
5 don't form or express an opinion on the case, and don't talk
6 about the case. See you soon.

7 (Court recessed at 11:02 a.m., until 11:19 a.m.)

8 (In the presence of the jury.)

9 THE COURT: All right. Welcome back.

10 Ms. McKibbins, you are still under oath at this
11 time, ma'am. Thank you.

12 THE WITNESS: Thank you.

13 MS. SANDERS: Your Honor, we will be going to the
14 video now, so if the plaintiffs would like to step out of the
15 courtroom.

16 THE COURT: It's the same video we've seen; right?
17 The one that's already in evidence?

18 MS. SANDERS: It's in evidence, yes.

19 THE COURT: Okay.

20 BY MS. SANDERS:

21 Q Jennifer, before the break we were going to start
22 looking -- we were -- we were talking about passengers moving
23 around on the -- on the bus. And I want to go to the video
24 now and show some examples of the kind of thing that we're
25 talking about.

1 MS. SANDERS: So, Brian, could you pull up 60 --
2 6:59:23, please.

3 BY MS. SANDERS:

4 Q And as we're seeing this, Jennifer, if you can just
5 kind of explain to the jury, I think it should be obvious, but
6 what we're seeing on the video?

7 A Sure.

8 MS. SANDERS: And just -- just by way of
9 explanation, what the jury has been seeing so far of the video
10 is just a straight on camera view. The actual video that
11 you'll have in deliberations has several different views from
12 different angles of the camera. And so you're going to see
13 two different views here of the same -- the same thing.

14 MR. CLARK: Ready?

15 MS. SANDERS: Yes.

16 BY MS. SANDERS:

17 Q Now, I want to focus on the passenger in the back
18 there. Do you see that?

19 A Yes.

20 Q What does it look like he's doing?

21 A Laying down.

22 Q Okay. Would you expect the driver to be able to see
23 him in the entirety laying down like that?

24 A Probably not.

25 Q Also, notice what Harvey is doing here. Is he

1 moving around quite a bit?

2 A He is.

3 Q Okay.

4 MS. SANDERS: Brian, let's go to 7:16:36, if you
5 will.

6 BY MS. SANDERS:

7 Q Do you see the man in the back? What does he look
8 like he's doing here?

9 A The one who's rubbing his head?

10 Q Yes.

11 A He's rubbing his head.

12 Q Anything unusual about somebody rubbing their head?

13 A No.

14 MS. SANDERS: Brian, let's go to 7:19:17.

15 BY MS. SANDERS:

16 Q Look at the woman that is -- is towards the back.
17 What does it look like she's doing there?

18 A She looks like she's kind of falling out of her
19 seat. She's probably asleep or something or -- I'm not really
20 sure what she's doing, but she's got her arms swinging in the
21 -- in the aisle.

22 MS. SANDERS: Let's take a look, then, at 7:19:49,
23 and this time maybe focus on Harvey.

24 BY MS. SANDERS:

25 Q Does it look like he's kind of leaning towards his

1 side?

2 A He is. He's leaning towards the other seat in the
3 bus. Again, he could be sleeping, he could just be leaning.
4 I don't really know what he's doing.

5 MS. SANDERS: How about 7:28:10.

6 BY MS. SANDERS:

7 Q How does it look like Harvey is positioned here?

8 A He's sitting differently now. Now he's got his legs
9 in the aisle and he's -- he's leaning against the back of the
10 seat differently than what he was sitting before.

11 Q Anything of concern there?

12 A No.

13 MS. SANDERS: How about 7:41:51. Maybe first,
14 Brian, I've got these out of sequence a little bit, 7:40:27.

15 BY MS. SANDERS:

16 Q Do you see Harvey rubbing his head there?

17 A Yes.

18 Q Anything unusual about somebody rubbing their head?

19 A No, and he's moving around again.

20 Q Okay.

21 MS. SANDERS: Brian, now let's go to 7:41:51.

22 BY MS. SANDERS:

23 Q Anything unusual about somebody rubbing his face?

24 A No.

25 Q Okay.

1 MS. SANDERS: That -- that's good for now, Brian.

2 BY MS. SANDERS:

3 Q In the case of a regular transport, would a driver
4 have many people that are making all kinds of movements that
5 -- that are occurring on the bus?

6 A Yes.

7 Q Okay. And you testified earlier that the thing that
8 the driver would be monitoring for is anything that would be
9 like out of the ordinary types of things?

10 A Correct.

11 Q Are any of the movements that you saw there things
12 that you would consider to be out of the ordinary?

13 A Doesn't appear to be.

14 Q Dr. Stein was here last week. He testified that
15 Harvey's lunch box was open and beside him with wrappers
16 coming out of it and that Jay should have recognized that. Do
17 you remember that testimony?

18 A I do.

19 Q Okay. And counsel pointed to the open lunch box
20 again when Ms. Jacobs testified, the coroner investigator. Do
21 you recall that?

22 A Yes.

23 Q Okay. Let's see what really happened as far as the
24 lunch box is concerned.

25 MS. SANDERS: Brian, could you pull up 7:59:33.

1 BY MS. SANDERS:

2 Q Look particularly at what Harvey is doing here. You
3 can see it maybe better in the door view. Does it look like
4 he zipped up the lunch box --

5 A Yes.

6 Q -- and put it beside him?

7 A Yes.

8 Q Okay.

9 MS. SANDERS: Let's go to 8:18:07.

10 BY MS. SANDERS:

11 Q Now, this is after the paramedics are on the bus.
12 You see them picking up the lunch box?

13 A Yes.

14 MS. SANDERS: Okay. That's good, Brian.

15 BY MS. SANDERS:

16 Q Does it look like the EMT was the one that picked up
17 the lunch box?

18 A Yes, and it looked closed when he picked it up.

19 Q And did it look closed at the time that -- that Jay
20 was still on the bus?

21 A Prior to that?

22 Q Yes.

23 A I didn't see it open again from when -- it looks
24 like Harvey zipped it, and then when the paramedic picked it
25 up and it was closed.

1 Q Now, Jennifer, where are the cameras mounted in the
2 bus in relationship to the mirrors?

3 A The camera placement is up higher. It's in the --
4 what's known as the bulkhead of the bus, which is up above
5 roughly where that sign is with the bus number and it has the
6 no smoking sign and those other two little signs next to it.
7 Somewhere in that general vicinity would be the camera that
8 shoots straight back. And then the other view that you saw,
9 that should be mounted somewhere above the -- somewhere in the
10 front. It's either going to be, depending on the bus, it's
11 either going to be above the -- the passenger door or
12 somewhere over in that general area, and the other camera that
13 you'll see the view later, but it's the wheelchair securement
14 door and area. So it's mounted up, not quite in the ceiling,
15 but over in that general area, like the top part of the bus
16 near the ceiling that shoots into -- to that door.

17 Q Okay. So the view that the driver would get looking
18 through the mirror, would that be a much more limited view
19 than what you see on the videos?

20 A Yeah, you see better off the view from the video
21 because it's higher, it's a completely different angle than
22 what you would see in a mirror.

23 Q Last week counsel asked you if the drivers are to
24 check on the safety of passengers, and you said yes. Can you
25 explain what you meant by that?

1 A Well, it's such a broad question, and it's --
2 there's -- there's so many different things that you're
3 checking for. Checking on the safety of your passenger before
4 you move the vehicle. Is the passenger sitting? When you go
5 to pick up a passenger, are they still standing? You're not
6 supposed to move the bus if the person is still standing and
7 they haven't gotten to their seat yet. That's just common
8 courtesy. You want to make sure that the passenger is safe
9 and secure.

10 So if you make a stop somewhere, you're out of the
11 bus for 30 seconds, is there an expectation that anything
12 changes in 30 seconds? When you come in do you have to, you
13 know, walk through the back, check all your passengers, check
14 -- no. If you did that at every stop you'd never get
15 anywhere. But, you know, you generally are aware that your
16 passengers are still there in the same spot they were when you
17 walked out of the bus for 30 seconds.

18 Q Okay. Now, as far as your own personal involvement
19 in this particular incident, would you have been the one to
20 investigate incidents that -- that occur with bus drivers?

21 A Yes, I would be responsible for risk management.

22 Q Okay. Now, we know that -- that in spite of best
23 efforts to make things as safe as possible, accidents still
24 occur, don't they?

25 A Unfortunately, yes.

1 Q And do sometimes passengers get injured when
2 accidents occur?

3 A Sometimes.

4 Q Okay. And is there any way that First Transit or
5 anybody that you know of can absolutely guarantee passenger
6 safety in every set of circumstances?

7 A No, just like you can't guarantee your own personal
8 safety every time you get out and drive a car or every time
9 you go walk down the street. Stuff happens, especially when
10 you're dealing with other people.

11 Q Now, in the event that an accident occurs, what are
12 the drivers trained to do?

13 A Contact dispatch, pull over to a safe location out
14 of traffic if you can depending on the situation. If you're
15 involved in a very serious accident, you can't move the
16 vehicle. You need to stay there. That's for a vehicle
17 collision. Even the law states that if you're involved in
18 some type of minor accident, a fender bender type thing where
19 something happens, you have to pull out. You are not allowed
20 to impede traffic. You can get a \$285 ticket for impeding
21 traffic. You need to pull over out of traffic and be in a
22 safe location.

23 Q Okay. So once the driver notifies dispatch, then
24 what does the dispatch do?

25 A Dispatch will send 911 if needed, depending on the

1 situation, what your -- what your specific issue is. In the
2 case where somebody needs medical attention, they'll call 911.
3 They'll call for police, whatever it is that you need
4 depending on the situation.

5 Q Let's talk specifically about the situation with
6 Harvey Chernikoff. How were you notified of this incident?

7 A Dispatch, the way that the policy worked is the
8 driver calls dispatch. Dispatch calls 911 and gets 911
9 rolling. Then they call for a road supervisor that I talked
10 about earlier and sends a road supervisor out to the scene.
11 And then dispatch would call me and let me know that there was
12 an issue that a road supervisor was going out to. The
13 supervisor would also call me sometimes when they were en
14 route depending on what the situation was, sometimes they
15 would wait until they actually got there to apprise me of the
16 situation. It just depended. But always dispatch would call
17 me and let me know that a supervisor was headed out to
18 whatever incident it was.

19 Q And what was the first notification you got with
20 regard to the incident involving Harvey Chernikoff?

21 A From dispatch.

22 Q Okay. And what would you do, then, or what did you
23 do in this particular situation?

24 A I had very limited information. You know, the
25 driver calls in and gives dispatch information and it's an

1 emergent situation. So you don't spend a whole lot of time
2 talking on the phone trying to get information. We only know,
3 again, limited information. So I'm sure she would have given
4 me minimal information that there was a client that was on
5 this particular bus number, this particular route, this
6 particular driver that was unresponsive with no additional
7 information. Called 911, headed out -- send out a road
8 supervisor. So I would wait for additional information from
9 the road supervisor once the road supervisor actually got to
10 the scene of the incident.

11 Q We talked just a minute ago about that cameras. Are
12 the cameras that are mounted in the bus, are they live feed or
13 did they only record?

14 A They record. There's -- there's no -- it's not like
15 -- like something that we can dial into and just watch
16 whenever we so choose. They're recording on the bus, but then
17 we'd have to download that information off of -- it's very
18 technical stuff that I'm not really -- you know, I'm not tech
19 savvy, but you have to download it off of the hard drive
20 that's in the bus.

21 Q As far as this particular incident, did you at some
22 point interview Jay after the -- after he got back to the
23 yard?

24 A Yes.

25 Q Okay. What do you remember about the interview?

1 A Jay was very, very upset. He was crying. He was
2 very -- it was very difficult for him to talk about what
3 happened, to talk about the incident, to even put together
4 cohesive thoughts. It was a very traumatic experience for
5 him. And between myself and the other two managers that spoke
6 to him, we spent quite a bit of time just trying to calm him
7 down and get him to a point where he could go home.

8 Q Did he at some point prepare an incident report as
9 part of your investigation?

10 A Yes, he did.

11 Q Okay.

12 A It's required.

13 Q With regard to the interview process, is there
14 anything that you recall independently that we don't see
15 reflected in the incident report?

16 A It's been a few years. I don't remember anything
17 specific.

18 Q We do now have video. How was it that we came to
19 have the video? Is that something that as part of an
20 investigation you would -- would go and retrieve?

21 A Yes. Any time there was an accident, incident,
22 injury, anything that had to do with risk management, I would
23 request that the video be preserved for whatever reason just
24 so that we had the information available to us, you know, so
25 that we could review it and have it on hand.

1 Q Prior to the time that Jay got back to the office,
2 did you have any other information about what had happened?

3 A No, I only had the information that I was -- that I
4 was given by initially dispatch, then by the road supervisor
5 when he called me when he got to the scene, which, again,
6 limited.

7 Q Okay. How much time did you spend with Jay that
8 day?

9 A I don't know exactly. It was awhile. Awhile is the
10 best I could say. I mean, you know, like I said before, he
11 was really having a tough time and so we needed to make sure
12 that he was okay. And, you know, one of the biggest things
13 that we're concerned about is any time somebody goes through a
14 traumatic experience, how is it going to affect them. And
15 this was traumatic. I mean, somebody -- somebody died on the
16 bus. That is a traumatic experience for an operator and it's
17 difficult to come back from that. And so to be able to
18 reassure him and talk to him and make sure that he was okay,
19 that was our biggest -- our biggest concern at that point.

20 Q Did you see Jay again in the days after -- after
21 Harvey Chernikoff's death?

22 A I'm sure I did.

23 Q Okay. Do you recall anything more about his
24 demeanor then?

25 A He's been, since then, very concerned, you know. I

1 saw him on a number of occasions afterwards, not just in the
2 days following but in the months following. I mean, I was the
3 safety manager at the location, so I had dealings with him.
4 And every time I saw him I was concerned about him and I asked
5 him if he was okay. And I could just see that, you know, it
6 still weighed very heavily on him every time, you know, is
7 everything okay? Yeah, you know, he -- I'm making it, you
8 know.

9 Q If -- well, did you ever have any communication with
10 any of the family members, Mr. and Mrs. Chernikoff or anybody
11 else?

12 A Not to my recollection, no.

13 Q If somebody were to call to try and find out some
14 information about what happened on the bus, would that be
15 directed to you, or do you know?

16 A Well, I was responsible for risk management, so
17 depending on how the -- the person came to get our telephone
18 number, it would depend. If they contacted RTC and
19 specifically requested the telephone number for risk
20 management, yes, it would come to me. If they wanted the
21 telephone number for the general manager, then it wouldn't go
22 to me. It would go to the general manager. So it just kind
23 of depends.

24 Q Now, it's noted in the coroner's investigative
25 report that the video of the event was available for review if

1 they wanted it, and you're telephone number was -- was given.
2 Do you recall that?

3 A Yes.

4 Q Okay. Did you ever get a call from the coroner's
5 office asking that you provide a copy of the video to them?

6 A Not to my recollection.

7 Q Mr. Neil Chernikoff testified that he tried to get a
8 copy of the video and that he was unsuccessful in doing that
9 because he was told he needed a court order. Did you ever
10 talk to, as far as you know, Neil Chernikoff about a video --
11 the video?

12 A No, not that I remember.

13 Q Did you ever learn from any source that he had
14 requested a copy of the video?

15 A No, not that I remember.

16 Q Is that -- when you pulled the video, did it remain
17 in your custody?

18 A I had custody of the video the entire time.

19 Q So if somebody wanted a copy of it, would they need
20 to come to you?

21 A They would have had to ask me for it because I had
22 it.

23 Q Are you allowed to give copies of accident -- or
24 incident videos to just anybody who asks for them?

25 A No.

1 Q Okay. Do you have some kind of a policy for when
2 you would give a video to somebody who requests it?

3 A Yes.

4 Q And what is that policy?

5 A That there needs to be some type of subpoena, court
6 order, or law enforcement official that requests the video,
7 and it has to be in writing. I can't just get a phone call
8 that says I need the video. As a matter of fact, I can give
9 you an example. There was an incident that happened on a bus
10 and the police came looking for -- they wanted a copy of the
11 video. Our policy is it has to be in writing. They had to
12 have their office fax something over. The officer waited.
13 Not a problem. But we had to have it in writing because we
14 have to keep record of that.

15 Q Okay. As far as you know, did you ever get a
16 written request from any of the family members for a copy of
17 the video?

18 A Not to my knowledge.

19 Q Did you ever get a court order for producing it?

20 A Not prior to this action that I'm aware of.

21 Q As far as you know did you ever get contacted by the
22 police department with regard to this incident?

23 A No, not that I recall.

24 Q What about the coroner's office? I asked about
25 whether or not you had ever got a request for the video, but

1 did you ever have any communication with the coroner's office?

2 A Not that I recall, ma'am.

3 Q Now, was Jay disciplined for his conduct with regard
4 to what happened on the bus that day?

5 A No, he was not.

6 Q Why not?

7 A Because he didn't do anything wrong.

8 Q As long as you've worked for the company, have you
9 ever heard of or been involved with any type of similar type
10 of situation?

11 A Similar to this?

12 Q Where somebody dies on the bus of apparent or plain
13 chocking?

14 A No.

15 Q Now, Jay did eventually resume his -- his driving
16 duties; is that right?

17 A Yes.

18 Q Did you feel that he was safe to go back to driving
19 passengers?

20 A Yes.

21 Q Now, earlier in the questioning counsel had asked
22 you if you agreed that a foreseeable result of choking on the
23 bus is death and you agreed with that. But is that also true
24 of any place that somebody might put something in their mouth?

25 A Yes.

1 Q Would it also be true that a foreseeable result of
2 eating in a kitchen could result in death?

3 A Yes.

4 Q A car?

5 A Yes.

6 Q Okay. In fact, with regard to the bus, if a
7 passenger is following the rule against no eating, would there
8 be less likelihood that that passenger would suffer a choking
9 incident?

10 A That's correct.

11 Q Thank you, Jennifer. I have no further questions.

12 THE COURT: Cross.

13 MR. CLOWARD: Yes, Your Honor. Thank you. Your
14 Honor, may I bring the easel out in front of --

15 THE COURT: Whatever you'd like to do.

16 MR. CLOWARD: Thank you.

17 CROSS-EXAMINATION

18 BY MR. CLOWARD:

19 Q Okay. So I'm going to -- Ms. McKibbins, I'm going
20 to kind of start from the questioning yesterday and work my
21 way -- work my way through it, okay? Is that fair?

22 A Sure.

23 Q All right. Remember when you were talking to the
24 jurors about the RTC no eating policy, and then the First
25 Transit no eating policy? Do you remember that?

1 A Was that yesterday?

2 Q Yeah.

3 A Okay. Sure.

4 Q You do remember that?

5 A I think so.

6 Q Okay. So just so I'm clear, you told these folks
7 that RTC has a policy; is that fair?

8 A Yes.

9 Q And just for everyone's benefit, what is that policy
10 again?

11 A The policy is no eating and no drinking from an open
12 container.

13 Q Okay. I just want to make sure I wrote that down
14 right. No eating and no drinking from an open container. Is
15 that fair?

16 A Yes.

17 Q Okay. And just so the jurors understand clearly,
18 what is First Transit's policy?

19 A No eating or drinking.

20 Q Is that fair?

21 A Yes.

22 Q That's your testimony today?

23 A Yes.

24 Q Do you remember being deposed in this incident by
25 Mr. Charles Allen?

1 A I do.

2 Q Okay. I just want to ask you a question about that.

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

4 Thank you.

5 THE CLERK: Uh-huh.

6 BY MR. CLOWARD:

7 Q Please turn to page 55 for me, please.

8 A 55?

9 Q Yeah.

10 MR. CLOWARD: Page 55, Ms. Sanders.

11 BY MR. CLOWARD:

12 Q Just let me know when you're there.

13 A I'm here.

14 Q Okay. I'm going to just read your answer. It's an
15 RTC policy that the passengers not eat or drink on the bus.

16 MS. SANDERS: Your Honor, may we approach?

17 THE COURT: Uh-huh.

18 (Bench conference.)

19 MS. SANDERS: Your Honor, this is the same thing we
20 got into last week where he's trying to get into -- it's based
21 on an incomplete hypothetical. It's the speculation that Your
22 Honor disallowed last week.

23 MR. CLOWARD: No, no, no. The Judge allowed me to
24 read this exact quote three times.

25 THE COURT: May I see it?

1 MS. SANDERS: Where he's trying again.

2 THE COURT: Okay.

3 MR. ALVERSON: What line was that again?

4 MR. CLOWARD: I just read her answer, it's an RTC
5 policy that the passengers not eat or drink on the bus.

6 THE COURT: I thought I allowed that last week.

7 MR. CLOWARD: Yes, you did, Judge. You did.

8 MS. SANDERS: It's based on an incomplete
9 hypothetical.

10 THE COURT: Well, you can follow it up on --

11 MS. SANDERS: All right.

12 THE COURT: -- redirect.

13 MS. SANDERS: Yeah, that's fine.

14 (End of bench conference.)

15 BY MR. CLOWARD:

16 Q Okay. Ms. McKibbins, one more time. At your
17 deposition you swore to tell the truth. Remember that?

18 A Yes.

19 Q Okay. And you were asked a couple questions, and
20 one of your responses was, quote, it's an RTC policy that the
21 passengers not eat or drink on the bus, true?

22 A I did say that. Yes.

23 Q Okay. So you didn't say in your deposition that
24 there's no drinking from an open container; correct?

25 A That is correct. I was mistaken at my deposition.

1 I've re-read the policy since then and the policy is clear.
2 The policy is written in the writer's guide. So I misspoke at
3 my deposition. I did not mean to, but in re-reviewing the
4 policy, the policy is clear in the rider's guide.

5 Q Okay. Another question. Who owns the buses?

6 A The RTC does.

7 Q They own everything on the bus?

8 A They own the equipment on the bus, the fare box, the
9 video system, the securement straps, the seats.

10 Q Do you remember when you were asked about the RTC
11 sign that's on the bus?

12 MR. CLOWARD: Brian, can you pull up the sign.

13 BY MR. CLOWARD:

14 Q And if you'll just turn to page 150 in your
15 deposition where you were shown Exhibit 12, which is this sign
16 here. You were asked by Mr. Allen, and I'm going to quote, do
17 you recognize Exhibit 12? Answer, yes.

18 Question, what is it?

19 Answer, it's not a very good one, but it's a photo
20 of the inside of the bus with the bus number and the warning
21 signs that are right above the bus number.

22 Question, and the warning signs and symbols say
23 what?

24 Answer, no smoking, no eating or drinking, no radio,
25 end quote.

1 Did I read that correctly?

2 A You did.

3 Q Okay. And that was no smoking, no eating or
4 drinking, true?

5 A Yes, that is correct. That is what I said.

6 Q The sign doesn't say anything about from an open
7 container, does it?

8 A The sign shows a container that's open.

9 THE COURT: Counsel, just real quick, and I'm sorry
10 to interrupt. We're just looking at the exhibits. That
11 particular photo was admitted as Joint Exhibit A18.

12 MR. CLOWARD: Thank you. So A18.

13 THE COURT: Yeah. Just so we can keep the record
14 straight.

15 MR. CLOWARD: Thank you, Your Honor. I appreciate
16 it. Thank you.

17 BY MR. CLOWARD:

18 Q So let me move on. Is the CDL training, is that
19 something that's contract specific?

20 A Yes, it was required by contract.

21 Q But is that contract specific for, say, for
22 instance, Las Vegas maybe has a requirement for CDL whereas
23 maybe a different market doesn't?

24 A Example, Chicago Pace does not. That is correct.

25 Q Okay.

1 MR. CLOWARD: Brian, if you could pull up
2 Plaintiffs' 951.

3 MS. SANDERS: What's the number?

4 MR. CLOWARD: Plaintiffs' 951.

5 Blow that up, please, Brian.

6 BY MR. CLOWARD:

7 Q Ms. McKibbins, do you recall telling the jurors that
8 only certain things that are in the specific area are taught,
9 true?

10 A Correct.

11 Q And CDL would be a Las Vegas contract specific
12 training, true?

13 A Well, you're taking it out of context because that
14 CDL training is specific to the training that we would give to
15 a person to be able to pass their permit test, which is
16 different than the CDL training that we were actually doing.
17 We were providing training as part of the behind the wheel
18 training for CDL testing. Two very different topics that you
19 are talking about.

20 Q Okay. Remember you -- you talked to the jurors
21 about how fare box -- there is no need for fare box; right?

22 A Not for the fare box fixture, fare box training.
23 That is correct.

24 Q Certainly. So fare box wouldn't have any hours that
25 needed to be completed because that wasn't something you do

1 here in Las Vegas; right?

2 A Correct.

3 Q Okay.

4 MR. CLOWARD: Now, has the full exhibit been moved
5 in that we're talking about? Has that been moved into
6 evidence?

7 MS. HYSON: You mean No. 14?

8 MR. CLOWARD: Yes.

9 MS. HYSON: No.

10 MR. CLOWARD: So the -- the full employee training
11 hasn't been?

12 MS. SANDERS: We haven't don't that yet.

13 MR. CLOWARD: Okay. We would like to formally, now
14 that we've got the full exhibit that we'd like in, we'd like
15 to move that in.

16 THE CLERK: Is that page 14?

17 MS. SANDERS: Okay. That's fine.

18 THE CLERK: I'm sorry. Which exhibit is it?

19 MR. CLOWARD: It's Exhibit 14.

20 MS. SANDERS: A14.

21 THE CLERK: A14?

22 MR. CLOWARD: A14.

23 (Defendant's Exhibit A14 admitted.)

24 BY MR. CLOWARD:

25 Q Now, do you remember being asked by Ms. Sanders

1 whether Jay had ever been disciplined, whether you had any
2 issues? And I believe that your testimony was something with
3 the lift. I don't really recall.

4 A Yeah, I said I'd have to look through the entire
5 exhibit to know off the top of my head. I don't know.

6 Q All right. Well, now that we have the entire
7 exhibit I'd like to approach and hand you this document. See
8 if this refreshes your recollection about that incident.

9 MS. SANDERS: Can you read the page number, counsel.

10 MR. CLOWARD: Yes. It was one of the ones that Ms.
11 Hyson added back to the exhibit.

12 MS. SANDERS: Is there a page?

13 MR. CLOWARD: It -- because it was pulled it wasn't
14 Bate labeled. So it's Farrales 70 or Safety 74. So you have
15 a copy? Okay.

16 BY MR. CLOWARD:

17 Q Ms. McKibbins, what is that again?

18 A This is a road supervisor incident report.

19 Q What happened there?

20 A Based on the information here the road supervisor
21 wrote up a report that the -- the lift had been left out and
22 hit a pole.

23 Q So as I understand this, Mr. Farrales, he drives the
24 paratransit bus; is that correct?

25 A Yes.

1 Q And on the buses there's a lift that actually
2 lowers, true?

3 A That's correct.

4 Q And on the lift, you know, it's maybe -- you know,
5 it's about maybe three or four time this size, I mean, large
6 enough to fit a large motorized wheelchair?

7 A Standard regulation size, yes.

8 Q And he actually left that down and then drove off
9 and it hit a -- it hit a pole.

10 A No, he didn't leave it down. He left it in the up
11 position, different than down. It wasn't down flush against
12 the -- against the ground. In order for the lift to be -- and
13 it says here the lift was up, so it wasn't stowed. So it
14 wasn't down, deployed on the ground. It was up at bus floor
15 level.

16 Q So it was basically kind of like sticking out like
17 this?

18 A That is correct.

19 Q And he's driving down the road and he runs into a
20 pole?

21 A In a parking lot, not quite down the road, but yes.

22 Q He a pole, though?

23 A Yes.

24 Q Okay.

25 MR. CLOWARD: And, Marshal, I believe -- I believe

1 one of the jurors has a question if you want to get that.

2 THE MARSHAL: We're going to do that at the end.

3 MR. CLOWARD: Okay. Sorry.

4 BY MR. CLOWARD:

5 Q Now, another thing you told these folks, you said
6 that it's not the driver's job to inform the client of the
7 safety rules and the rules on the bus. Is that -- did I hear
8 you right when you said that?

9 A I said that the driver is not to -- it's not their
10 job to every time a passenger comes on the steps of the bus to
11 inform them of every single rule that -- that they need to
12 follow. That's not their job.

13 Q So it's not the driver's job to inform the client of
14 the rules. That's what you -- that's what you're telling
15 these folks?

16 A I said -- you're changing what I said.

17 Q I'm sorry.

18 A I said --

19 Q I don't mean -- I really don't mean to.

20 A -- that --

21 Q I'm sorry.

22 A -- it's not the driver's job to inform every
23 passenger every time they get on the bus of every single rule
24 they need to follow.

25 Q Okay. I'm sorry. I must have written it down

1 wrong. Let me have you turn to page 95 in your deposition if
2 you would, please.

3 A Sure.

4 Q If you want to start on line 19, I'll just read you
5 that question.

6 A Sure.

7 Q And that's -- these rider rules apply to the
8 passengers. And these rider rules, as well, apply to the
9 driver to enforce, true? Answer, it would be First Transit's
10 responsibility to inform the client, you know. RTC has a rule
11 that has to be followed. Did I read that right?

12 A You did.

13 Q Question, and, as well, make sure that the client
14 does it, does follow the rule; right? Answer, to the extent
15 they can, yes. Did I read that right?

16 A You did.

17 Q You testified earlier that RTC -- or, excuse me,
18 First Transit actually does more training than what was --
19 what was required. Do you recall that?

20 A I do.

21 Q And that was First Transit's choice to do more
22 training than what was required in the contract, true?

23 A Yes.

24 Q You could have made the choice to do CPR and
25 Heimlich, true?

1 A I suppose they could have, but it's not something
2 that we readily do in other markets that are similar. So it's
3 not required by the contract, it's not required by federal
4 law, it's not required by state law, it's not required by
5 local law. Therefore, we did not.

6 Q It's a choice you could have made, though, true?

7 A Again, we could have made that choice, but when you
8 compare it to the other markets where we operate paratransit
9 service, and it's not a requirement by any of those things
10 that I just stated, it was not offered.

11 Q Okay. To say, for instance, the federal motor
12 regulations require that you follow the Smith system?

13 A Federal regulations require that we provide
14 defensive driving, an approved defensive driving course for
15 operators. And the only courses that are available are the
16 National Safety Council's, DDC8, which in some jurisdictions
17 they require that we don't teach Smith system, that we teach
18 National Safety Council's DDC8, which is Defensive Driving
19 Course, subsection 8. Or we can teach Smith system, which is
20 what First Transit, that's our default program for most
21 locations.

22 Q And you all had the choice to either do your own
23 training for CPR or bring in a different company to do the
24 training, true?

25 A I don't really understand your question.

1 Q You had the choice to either do your own CPR and
2 first aid training, or to actually bring in a professional
3 company to do that training.

4 MS. SANDERS: Are we talking CPR or CDL? Which --

5 MR. CLOWARD: CPR, Your Honor. I think it was
6 pretty clear. CPR --

7 THE WITNESS: It is. I just want to make sure --

8 MR. CLOWARD: -- and first aid training.

9 THE WITNESS: I just want to make sure I understand.
10 So me, not being trained in CPR, you're asking me if I would
11 have trained somebody in CPR or if I would have to be trained
12 by another place which would then essentially still be a third
13 party because I would be trained by a third party company. So
14 that's why I don't understand your question.

15 BY MR. CLOWARD:

16 Q Okay. You as the corporate director of safety would
17 be unable to even train your own employees on how to do CPR,
18 first aid, and Heimlich, true?

19 A That's correct.

20 MR. CLOWARD: Brian, will you bring up the map,
21 please. This is just a demonstrative. Can you blow that up?

22 BY MR. CLOWARD:

23 Q Okay. Here is a map that represents all of the
24 different markets that First Transit operates, is that fair?

25 A I think it's old, but we'll go with it.

1 Q Okay. So why don't you just come down off the stand
2 here. You're the director of corporate safety over the entire
3 corporation; right?

4 A Yes.

5 Q Okay. So what I want you to do is come down off the
6 stand and I just want you to point to the markets that are
7 lucky enough to have CPR and first aid training, and then I'm
8 going to ask you a few questions about that. And while you
9 come down and do that I'm going to writing them down.

10 A Yeah, I testified earlier that I'm not 100 percent
11 sure on what locations actually have them. It's not many. I
12 can tell you for sure it's not many, but I don't know exactly
13 where they are.

14 Q Okay.

15 A I don't know every single thing about every single
16 location that operates without looking it up. I'm sorry.

17 Q That's your job, though; right? You're the director
18 of corporate safety.

19 A Yes, I understand, but you have to understand we
20 have 240 locations. That's a memory test for the best of
21 them.

22 Q Okay. Well, can you list maybe ten markets that
23 have first aid, CPR, Heimlich training?

24 A There's -- I think -- I think they're all in
25 California.

1 Q Every -- every location?

2 A I'm pretty sure. No, I take that back. There might
3 be one or two in the northwest, but I think most of them are
4 specific to California.

5 Q Okay. Let's just take California. What specific
6 regulation in California says that you have to do CPR, first
7 aid, and Heimlich?

8 A I don't know off the top of my head. I would have
9 to look. I just don't know.

10 Q Do you know of any, any, any regulation or statute
11 in any of the locations that says you guy have to follow your
12 handbook and do CPR, first aid, or Heimlich?

13 A No.

14 Q All right. But you do it in some markets, true?

15 A Absolutely.

16 Q Just not in Las Vegas?

17 A Or Houston or WMATA or Chicago or Florida or
18 anywhere in the Baltimore, D.C., Virginia area.

19 Q You testified earlier, and I wanted to make sure
20 again that I heard this right. I believe that you said that
21 911, calling 911 is, quote, better and safer. It's better and
22 safer to rely on 911 than to train your drivers; is that true?

23 A It is better and it is safer because they are more
24 equipped to handle with emergencies. You have to remember
25 that we're dealing with -- with people who are driving a bus.

1 You're hired, that's your primary responsibility is to drive a
2 bus. You are responsible for maneuvering a 15 -- in
3 paratransit, a 15,000-pound vehicle through traffic around
4 hazards, around people. That's where your focus needs to be.
5 I understand that there are passengers on the bus and I
6 understand that it's important for the passengers to be safe.
7 But if we're out hitting everything that we run into because
8 that's where -- we don't have our focus on that, we're not
9 safe.

10 Q I wasn't talking about the mirrors.

11 A I understand that.

12 Q I was talking about whether you think it's safer,
13 better and safer to rely on 911 than to train your drivers.

14 A It is. We train them on the things that is most
15 relevant to their job. They're driving a bus. That's the
16 part that -- that we keep losing focus of. We're driving a
17 bus and we're maneuvering in traffic. So if we spend our time
18 training our -- our drivers on driving in traffic, that's what
19 they're focus is on. That's what they're focus should be on.

20 Q Okay. So if I understand this, the choice that was
21 made in this case was to rely on 911 rather than provide
22 training; correct?

23 A That is correct.

24 Q And you understand from your doctor who testified
25 from the stand that after four minutes, that's when the brain

1 starts to die.

2 A Yes, I remember that testimony.

3 Q And in this case it took eight minutes, eight
4 minutes for 911 to get to Mr. Chernikoff?

5 A Correct.

6 Q You were asked some questions about the policy and
7 what Neil testified to and whether Neil requested the policy
8 and what -- what he was told by corporate offices and you were
9 asked some questions about that. Do you recall that line of
10 testimony?

11 A I do.

12 MS. SANDERS: Well, I'm going to object. He wasn't
13 -- he wasn't asked -- she wasn't asked about a policy. She
14 was asked about a video.

15 THE COURT: Can you rephrase it.

16 MR. CLOWARD: Sure. Certainly, Your Honor.

17 BY MR. CLOWARD:

18 Q Do you remember the testimony when Neil said, hey,
19 look, I tried to get a copy of the video and I was told that I
20 needed a court order?

21 A Yes, I remember.

22 Q All right. And that's your exact policy; right?

23 A It is.

24 Q So his testimony, what he took the stand and told
25 these jurors actually is exactly the policy that you have?

1 A It is.

2 Q You said you saw Jay in the days after this event?

3 A I did.

4 Q He looked sad and stuff?

5 A Of course.

6 Q You didn't give him any time off?

7 A Well, I don't know how many days it was after I saw
8 him. I think he was off for a couple of days. I don't know
9 exactly how many days, but, I mean, I didn't see him the next
10 day. But I knew he was off for a couple of days, but I don't
11 know how much time.

12 Q Okay. But you saw him in the couple of days after
13 this?

14 A Okay. Couple might be incorrect, but within the
15 next several days, if that's better.

16 Q All right. You were asked about the importance of a
17 choking policy. Do you recall that?

18 A Okay.

19 Q Do you -- I mean --

20 A I remember talking about the choking policy, yes.

21 Q Okay.

22 A As you're calling it policy.

23 Q Sure. And you actually testified in your deposition
24 that you had safety meetings to discuss prevention of choking
25 to death events similar to the one involving Harvey -- Harvey

1 Chernikoff, true?

2 A I don't think that that's exactly what the line of
3 questioning was, but we did talk about it following the
4 incident and reiterated what the policies were. You know,
5 it's important to understand what the policies are. And when
6 there's an incident that occurs, whatever that may be, it's
7 our policy to discuss all of the things that could have led to
8 an incident and discuss how to prevent them. We want to
9 prevent injury on vehicles. We want to prevent injury to
10 passengers to other people out on the road. It's not our
11 intent to injure anybody. So it is important when something
12 happens, whatever that may be, to discuss that following and
13 make sure that people understand what steps can be taken that
14 they can -- they can do to prevent things from happening if
15 possible.

16 Q Okay. And do you recall at the deposition when we
17 asked, you know, why do you look into your -- your rearview
18 and your interior mirrors, one of the reason that you gave is
19 to enforce the rules of the bus, true?

20 A That is true. That's absolutely true.

21 Q Okay.

22 A But you have to understand there's -- there's a lot
23 of different rules. No walking around on the bus is one of
24 the rules. And that may not be written anywhere that people
25 can't stand up and walk around in a bus, but that's common

1 sense. You can't get up and walk around on the bus for the
2 safety of the passenger. That's something that the driver
3 would be looking at. Absolutely.

4 Q And you testified at your deposition that because
5 there are lots of potentially dangerous things that can happen
6 on a bus, that's why the driver must consistently scan and
7 view the back of the bus. Isn't that also true?

8 A That is true. There are many things that could
9 happen at any time in the bus, outside of the bus. There are
10 passengers -- again, we're talking about passengers with
11 disabilities. There are passengers that fight on the bus.
12 There's a brother and sister that fight on the bus. You can't
13 sit them together because if you sit them together the sister
14 is going to beat the you know what out of the brother. You
15 have to keep them apart. So there are things that could
16 happen on a bus.

17 Q Okay. How much does a -- does a driver make when
18 they first start?

19 A Today?

20 Q Back when Mr. Farrales was hired.

21 A Oh, I don't know how much he made when he first
22 started. I mean, I can look at his application or his payroll
23 information and find out, but it had to be somewhere around
24 \$10 or \$11 an hour, I'm guessing.

25 Q Okay. We'll give -- we'll give him the benefit of

1 the doubt and say 11.

2 A Okay.

3 Q How many hours would it have taken to train Mr.
4 Farrales on CPR and Heimlich?

5 A I don't know. I don't know what the training
6 requires. I know what the -- the form said was a suggestion,
7 but I don't know exactly how many hours it takes.

8 Q Like eight.

9 A Okay.

10 Q And because you've testified all about this -- this
11 contract between RTC and First Transit, you agree that First
12 Transit made between \$218 million to \$239 million over the
13 seven years they had it?

14 A That's an unfair assessment of how much they
15 actually made. You have to remember there's operating costs
16 that fall into that. And when you talk about the actual
17 margin of profit that they make on a paratransit contract, the
18 profit margin is between zero and 10 percent industry
19 standard. So that may be how much money First Transit was
20 paid to do the contract, but when you talk about maintaining
21 the vehicles, salaries for the drivers, salaries for all of
22 the employees, all of the costs that it takes to operate an
23 actual company, they did not make that much money profit, no.

24 Q Okay.

25 MR. CLOWARD: Brian, can you pull up A16-44 please.

1 BY MR. CLOWARD:

2 Q I want to talk a little bit about the contract
3 between RTC and First Transit.

4 A Okay.

5 Q Okay.

6 A Sure.

7 Q I'm just going to read this, and see if I read this
8 correct. This is the general requirements for personnel,
9 Section 15, true?

10 A True.

11 Q Subsection B, training, all employees of the
12 contractor will have completed the contractor's employee
13 training program as outlined in the contractor's proposal in
14 Appendix A, true?

15 A True.

16 Q And you've never provided us with what is in
17 Appendix A so that we know what actually was required, true?

18 A You should have what was in Exhibit 1. We went
19 through the training information earlier that said what the
20 Las Vegas required training was for the contract.

21 Q Can you actually look in those binders behind you
22 and take a minute and pull out First Transit's proposal or
23 Laidlaw's proposal in Appendix A? Because I'd like to see it.

24 A I wouldn't --

25 Q Please look for it.

1 A -- have any idea where it would be in here. I only
2 know what we went through earlier, which had that exhibit
3 attached to it with the training material.

4 Q You don't know because it's never been provided, has
5 it?

6 A I don't have any idea.

7 MR. CLOWARD: Brian, can you go to 49, please.

8 BY MR. CLOWARD:

9 Q Training -- see if I read this correctly. All
10 vehicle operators are required to complete the contractor's
11 training program, true?

12 A True.

13 Q And -- and you all are the contractors; right?

14 A We were at the time. That is correct.

15 Q That's not RTC. That's not RTC's training program.
16 That's First Transit or Laidlaw's employee program; right?

17 A As was agreed to in the contract. That is correct.

18 Q Okay. Training programs must contain, at a minimum,
19 and then it lists these different things, importantly (g)
20 safety, defensive driving, and accident procedures, true?

21 A That is correct.

22 Q At a minimum. Did I read that right?

23 A You did. And I testified earlier that we did more
24 than the minimum.

25 Q Sure, you made specific choices on what training to

1 provide in addition to this right here, true?

2 A True.

3 Q That you made the choice. You made the choice.

4 First Transit made the choice to not provide CPR, Heimlich, or
5 first aid training; correct?

6 A As we made the choice in most other markets, that is
7 correct, that are similar to Las Vegas.

8 Q But you put it in your manual that goes out to every
9 single market, true?

10 A As information, as it states in the beginning of the
11 handbook as information.

12 Q Okay.

13 MR. CLOWARD: Brian, can you pull up G88, please.

14 MR. CLARK: G88?

15 MR. CLOWARD: G88

16 MR. CLARK: Is it in yet?

17 MR. CLOWARD: Did you move the ADA in?

18 MS. SANDERS: Give me the -- give me the number
19 again.

20 MR. CLOWARD: It's -- it's the ADA.

21 MS. HYSON: No.

22 MR. CLOWARD: You didn't move that in?

23 MS. HYSON: No.

24 BY MR. CLOWARD:

25 Q Okay. Have you reviewed the entire ADA -- you know,

1 the -- the regulation, the Americans with Disabilities Act?

2 A At some point, yes. Yesterday, no. But at some
3 point I have read it. I was required to know information
4 because we had to comply with ADA regulations.

5 Q Okay. So you've reviewed it and you know that it's
6 a proposed exhibit proposed by your attorneys in this case,
7 true?

8 A I don't know.

9 Q Okay.

10 MR. CLOWARD: Well, Your Honor, if I may approach.

11 THE COURT: Okay.

12 BY MR. CLOWARD:

13 Q I'm just going to sneak behind you here.

14 A All right.

15 Q Sorry.

16 A No problem. Do you have a magnifying glass?

17 Q Do you need some reading glasses?

18 A No. No, just -- I just need to be really close to
19 it.

20 Q Okay. So have you -- have you had a chance to see
21 that?

22 MS. SANDERS: Is there a particular page that you --

23 THE WITNESS: I'm sure I've read it before. Is
24 there --

25 BY MR. CLOWARD:

1 Q 88.

2 A -- a specific section, or this whole thing that you
3 just pointed to.

4 Q The whole thing is just one page. It's --

5 A There's a lot of words on here. It's really small.

6 Q Okay. Well, just to give the jurors an idea here.

7 Can I just take this for one second?

8 A Uh-huh.

9 MR. CLOWARD: All right. There's the whole policy.
10 This is what Ms. McKibbins is being asked to focus on, okay.
11 One page.

12 THE WITNESS: Okay.

13 BY MR. CLOWARD:

14 Q Okay?

15 A Got it.

16 Q I'll reset this here for now and then we'll
17 straighten that up in a minute. I'm just going to read some
18 things from there and let me know if you agree.

19 A Okay.

20 Q The ADA requires paratransit operators to have,
21 quote, well trained work force, true?

22 A Where -- where are you reading that from? Is that
23 on this page?

24 Q Yeah. I certainly wouldn't read you something
25 that's not on there.

1 A Just checking.

2 Q That wouldn't be fair to you. Why don't you just
3 start with me right there.

4 A Okay. Thank you.

5 Q Actually, why don't you just read it to the jurors,
6 that first sentence.

7 A All trained workforce is essential in ensuring that
8 the accessibility related equipment and accommodations
9 required by the ADA actually result in the delivery of good
10 transportation service to the individuals with disabilities.

11 Q Okay. So it's a well trained workforce is important
12 to the ADA; right?

13 A That is correct.

14 Q All right. You can -- you can just keep reading and
15 I'll ask you some questions about it.

16 A The utility of training was recognized by congress,
17 as well. At the same time we believe that training should be
18 conducted in an efficient and effective manner with
19 appropriate flexibility allowed to the organizations that must
20 carry it out.

21 Q Okay. Stop right there. So basically the ADA
22 requires training to be performed in an efficient and
23 effective manner. Did I -- you read that; right?

24 A I did.

25 Q And that flexibility is given regarding training;

1 right?

2 A That is correct.

3 Q Okay. You can keep going.

4 A Each transportation provider is to design a training
5 program which suits the needs of its particular operation.
6 While we are confident of this approach, we are mindful that
7 the apparent lack of training has been a source of complaint
8 to FTA and transit providers. Good training is difficult and
9 it is essential.

10 Q All right. So that says that each transportation
11 provider is to design a training program which suits the needs
12 of its particular operation, true?

13 A That is correct.

14 Q All right. You can keep going.

15 A Several points of this section deserve emphasis.
16 First, the requirements for training apply to private, as well
17 as to public providers of demand responsive, as well as a
18 fixed route service. Training is just as necessary for the
19 driver of a taxi cab, a hotel shuttle, or a tour bus as it is
20 for a driver in an FTA funded city bus system.

21 Q You can keep going.

22 A Second, training must be to proficiency. The
23 department is not requiring a specific course of training or
24 the submission of a training plan for DOT approval. However,
25 every employee of a transportation provider who is involved

1 with service to persons with disabilities must have been
2 trained so that he or she knows what needs to be done to
3 provide the service in the right way.

4 Q Okay. You can stop right there. So essentially, to
5 be trained to proficiency, the individual needs to know what
6 to do, when to do it, true?

7 A That is correct.

8 Q You can keep reading.

9 A When it comes to providing service to individuals
10 with disabilities, ignorance is no excuse for failure. While
11 there is no --

12 Q That's -- that's -- that's good. Thank you for
13 doing that. I appreciate that.

14 A No problem.

15 Q So when it comes to providing service to individuals
16 with disabilities, ignorance is no excuse for failure, true?

17 A That is correct. However --

18 Q I'm just asking if that's what's in the policy.

19 A It is, but this policy is particular to Americans
20 with Disabilities Act as a civil right for a person to ride a
21 public or private service. And they do have a civil right and
22 we, as a transportation provider, have the responsibility of
23 following what is listed in the ADA law as it pertains to
24 civil rights of passengers.

25 Q And -- and when -- when Ms. Sanders is talking about

1 what the ADA requires and how the ADA doesn't require any CPR
2 or any Heimlich or anything like that, the purpose of the ADA
3 is not about safety. You agree with that, true?

4 A I do agree with that. It will tell you specifically
5 that it's not about safety. It's about civil rights.

6 Q Okay.

7 MR. CLOWARD: Pull it up, Brian.

8 BY MR. CLOWARD:

9 Q And you actually teach your drivers that exact
10 thing, true?

11 A We do. Absolutely. Because you cannot violate a
12 person's civil rights and it's important to understand that.

13 MR. CLOWARD: 7, please, Brian.

14 BY MR. CLOWARD:

15 Q The focus of Americans with Disabilities Act is
16 safety and not individual freedom and the response is false.

17 A That's correct, because the ADA focuses on civil
18 rights. Not — it's not about safety. It's about civil
19 rights. You cannot violate the civil rights of a person, just
20 in the same way that you cannot violate the equal employment
21 opportunity policy. You cannot violate those things. These
22 are civil right of a person who has a disability.

23 Q Sure. Sure.

24 MR. CLOWARD: Brian, let's go A9-30, please.

25 MR. CLARK: A9?

1 MR. CLOWARD: The collective bargaining agreement.
2 Oh, well, we need to get that into evidence.

3 BY MR. CLOWARD:

4 Q You've reviewed the collective bargaining agreement,
5 haven't you?

6 A I have.

7 MR. CLOWARD: Well, let's move that into evidence so
8 the jurors have that, too, Your Honor.

9 THE COURT: Any objection?

10 MS. SANDERS: No. Huh-uh.

11 MR. CLOWARD: I believe it's A9, the collective
12 bargaining agreement.

13 MS. SANDERS: Yeah, that's fine.

14 (Defendant's Exhibit A9 admitted.)

15 MR. CLOWARD: Let's go to -- let's go to 30, Brian.
16 Well, actually, let's start with -- let's start with 9 and
17 then we'll go to 30. So let's start with 9. Okay. And,
18 Brian, I'm going to have you -- Section 3, just blow up that
19 first one. Thank you.

20 BY MR. CLOWARD:

21 Q Ms. McKibbins, you would agree that it says
22 attendance and scheduled meetings is mandatory unless
23 specifically excused by the company, true?

24 A That's true.

25 Q Okay.

1 MR. CLOWARD: Now, Brian, if you'll go to 34,
2 please. Section 6, Brian. Highlight that for me.

3 BY MR. CLOWARD:

4 Q All employees will receive a copy of the company's
5 employee handbook and any new changed rules issued by the
6 company from time to time. Did I read that correctly?

7 A You did.

8 Q Okay. Is there anything in the collective
9 bargaining agreement that says, hey, you know what, as a Union
10 member you all don't have to do CPR or Heimlich? Anything in
11 there at all?

12 A No, there's not.

13 Q Okay. I didn't think so. I just wanted to make
14 sure. Can you go -- First Transit has some minimum hiring
15 guidelines, true?

16 A Yes.

17 Q And one of those is that even serious crimes like
18 kidnapping, murder, or a crime against a child or vulnerable
19 adult may only potentially disqualify a person from employment
20 with First Group, true?

21 A Yeah, we're required by law to use that verbiage.
22 There's certain verbiage that under employment law they'll
23 tell you you can and cannot do, but just as an aside to that,
24 now going forward, and this started, I believe it was last
25 year, you are no longer allowed to ask on an employment

1 application if a person has ever been convicted of a felony.
2 You can't even determine that until after you determine --
3 offer them a job of employment and still cannot use that as a
4 disqualification until it's been reviewed.

5 Q What's that specific policy?

6 A What is that specific policy?

7 Q What's that specific rule or regulation?

8 A It's -- I'd have to look it up, but we just did
9 training on it not that long ago through employment law.

10 Q Oh. But you don't know what it is?

11 A Not off the top of my head.

12 Q So we can't verify? We just have to trust your --
13 trust your word for it?

14 A Well, I can look it up for you. It's going to be
15 under 29 CFR because that's how -- what relates to employment.

16 Q Okay. So it's fair to say that First Transit
17 probably has, since this new law, a whole bunch of convicted
18 felons for whatever they might be convicted of?

19 A That's not at all what I said. That's not at all
20 what I said.

21 Q Well, if you can't ask.

22 A Until after you offer them a job. You have to give
23 them a condition offer of employment. You still run a
24 background check.

25 Q I see.

1 A And so you can't be discriminatory.

2 Q So you do the background check after you hire the
3 individual?

4 A Once they are presented with a conditional offer of
5 employment. It doesn't mean that they get to work. It just
6 means that they've been presented a conditional offer of
7 employment.

8 Q And then you go ahead and you can do the search and
9 then you can fire them?

10 A You withdraw the conditional offer of employment.

11 Q Okay.

12 A Same thing we would have done there where it says
13 that it potentially, may potentially disqualify.

14 Q Okay. All right.

15 A So it doesn't say it doesn't or it does. It's
16 potential.

17 Q Okay. Thank you. Appreciate it.

18 MR. CLOWARD: Brian, will you please pull up the
19 employee handbook. I think it's -- you're just going to have
20 to pull it up and then scan down with me. Just scan down with
21 me. I think it's like maybe 6. Oh, actually, go up. Sorry.
22 Yeah, keep -- keep going up. Sorry, Brian. No, no, I mean
23 the other way. Thank you. Okay. Highlight this right here.
24 BY MR. CLOWARD:

25 Q I just want to see if I read this correctly. Safety

1 is our core value and is considered first in everything we do.
2 Did I read that right?

3 A You did.

4 Q All of our employees, customers, and business
5 partners will be treated with dignity and respect. Did I read
6 that right?

7 A Yes.

8 Q We will deliver on our promise of reliability to our
9 customers. Did I read that right?

10 A Yes.

11 Q We will operate in a socially responsible manner,
12 showing care for our environment and the community's. Did I
13 read that right?

14 A Yes.

15 Q And then finally, we will never compromise on our
16 values in any of our dealings with customers, suppliers, or
17 employees. Did I read that right?

18 A Yes.

19 Q Thank you.

20 A You're welcome.

21 MR. CLOWARD: Brian, I'm going to have you, if you
22 will, please, move down I think to maybe a couple more down
23 than that.

24 BY MR. CLOWARD:

25 Q Okay. Here's a letter from Brad Thomas. Do you see

1 that, Ms. McKibbins?

2 A I do.

3 Q And who is Brad Thomas, again?

4 A He is the president of First Transit.

5 MR. CLOWARD: Okay. Keep going down a little bit
6 further. Some more, Brian. Just keep going. Keep going.
7 Keep going. All right. There you go. Notices and
8 limitations. Highlight that very last one for me, please,
9 Brian.

10 BY MR. CLOWARD:

11 Q Just see if I -- if I read this correctly. It says
12 no person is authorized to make any oral exceptions to this
13 handbook and written exceptions are permitted only when signed
14 by the president of First Transit. Did I read that right?

15 A Mostly. You threw in an extra word, but you mostly
16 read it right.

17 Q Well, let's try it one more time and I'll laser
18 focus in on this. No person is authorized to make oral
19 exceptions to this handbook and written exceptions are
20 permitted only when signed by the president of First Transit.
21 Did I read that correctly?

22 A Yes.

23 Q In the handbook -- do you have a copy of the
24 handbook? The handbook is the exhibit that contains page 70;
25 right?

1 A That's correct.

2 Q And so if I understand that, you couldn't even say,
3 hey, when I'm doing my training, Mr. Farrales, it's okay to
4 ignore or not follow certain things in this handbook, true?

5 A I would not say it's okay to ignore anything.

6 Q You're not authorized to make exception to this
7 handbook, are you?

8 A No.

9 Q And Brad Thomas never told you that it was okay to
10 do whatever you wanted here in Vegas, did he?

11 A He did not.

12 Q He never told you it was okay for Las Vegas to
13 ignore pages 68, 69, and 70 of the handbook, true?

14 A The information tips? No, he did not tell us to
15 ignore the information tips that were in the book.

16 Q Brad Thomas never told you that it was okay to not
17 train employees in the CPR and the Heimlich maneuver, true?

18 A That's true.

19 Q RTC never told you it was okay to follow through
20 with the promises that First Transit made to them about what
21 was in the employee handbook, true?

22 A I'm sorry. I don't understand your question.

23 Q RTC never told First Transit it was okay to ignore
24 the promises that were made by First Transit to follow its own
25 employee handbook, true?

1 A No, but, again, those are information tips. That's
2 not a policy.

3 Q Okay.

4 A I know you keep referring to it as a policy, but
5 it's listed in the employee handbook as an informational tip,
6 not a policy.

7 Q Okay. The CBA never told First Transit that it was
8 prohibited from requiring Union members to know and understand
9 CPR and Heimlich, true?

10 A No, they did not.

11 Q In Nevada First Transit chose to ignore the training
12 because of money, isn't that true?

13 A No, that's not true.

14 MR. CLOWARD: No further questions, Your Honor.

15 THE COURT: Redirect.

16 MS. SANDERS: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MS. SANDERS:

19 Q I thought we had covered this already which is why I
20 didn't go into it with you, but the information on the writing
21 that counsel was making reference to as Brad Thomas, he never
22 -- you're not aware of any kind of writing saying don't read
23 these sections?

24 A No, I'm not.

25 Q And is it your understanding that you were to read

1 the sections, all the entire sections of the employee
2 handbook?

3 A That's what the signature form says, that I will
4 read and understand what's written in the handbook.

5 Q Is reading the handbook and being familiar with the
6 information the same thing as I will be trained in it?

7 A No.

8 Q Counsel went through a whole litany here of
9 information, again, as far as first aid training. First aid
10 training. Based on what you heard from Dr. MacQuarrie a
11 couple of days ago when he was on the stand, would anything --
12 any first aid training that Jay Farrales had --

13 MR. CLOWARD: Your Honor --

14 BY MS. SANDERS:

15 Q -- been given -- been --

16 THE COURT: I'm sorry.

17 MR. CLOWARD: This question is -- she's not a
18 medical expert.

19 MS. SANDERS: I'm asking her if she heard the
20 testimony.

21 MR. CLOWARD: Okay.

22 THE COURT: Okay.

23 BY MS. SANDERS:

24 Q You were here for Dr. MacQuarrie's testimony --

25 A I was.

1 Q -- a couple days ago?

2 A Yes.

3 Q Based on the testimony that he gave, would the --
4 based on that testimony, would any amount of first aid have
5 changed the outcome of Harvey Chernikoff?

6 A No, his testimony was that it would not.

7 MR. CLOWARD: I'm just going to object to foundation
8 of that question.

9 THE COURT: All right.

10 MS. SANDERS: It's just based on what she heard him
11 testify.

12 THE COURT: It's been answered.

13 MR. CLOWARD: It's okay. I'll withdraw. I'm sorry,
14 Your Honor. It's fine.

15 BY MS. SANDERS:

16 Q The incident report that was prepared with regard to
17 this lift issue with -- with Jay --

18 A Yes.

19 Q -- where the lift was left up, did that -- were any
20 passengers injured in that?

21 A Not according to the incident report, no.

22 Q Was he disciplined for that?

23 A According to what I read here, he would have to go
24 through retraining. Again, I would have to look through the
25 file to know if he was actually disciplined. I wasn't the

1 manager at the time of the incident.

2 Q Okay. Counsel asked you about your testimony with
3 regard to, let's see, page -- page 95 of the deposition. When
4 you said it would be First Transit's responsibility to inform
5 the client that, you know, RTC has a rule that has to be
6 followed. Would that be their obligation if you see somebody
7 that is violating the rule?

8 A Yes, as I explained earlier, you can't expect that
9 the driver is going to inform every person that walks up the
10 stairs of the bus, these are all the rules you have to follow.
11 Why would a rule come up as you need to follow this rule?
12 Because they're violating it. If the driver sees it, then
13 they would inform them of what the rule is. Or if somebody
14 asks, what is the rule, can I smoke on the bus? No, you may
15 not. It is a rule that you may not smoke.

16 Q With regard to the contract, did you provide the
17 training that was contracted for with RTC?

18 A Yes.

19 Q Okay. Was first aid something that was contracted
20 for as far as training with RTC?

21 A It was not.

22 MR. CLOWARD: I'm going to object. This is what we
23 covered yesterday. She lacks the foundation for this
24 testimony.

25 MS. SANDERS: She's just testifying as to what's in

1 the contract and he just asked the questions. This is
2 redirect.

3 THE COURT: Overruled.

4 BY MS. SANDERS:

5 Q Counsel also asked you about the personnel
6 requirements and training in the contract. Did you, in fact,
7 provide all of the training that was specified on page 46 of
8 the contract?

9 A The sections that -- that laid out ADA sensitivity,
10 all the things that needed -- yes, we provided all those
11 things.

12 Q Okay. Now, the ADA, and counsel read several
13 sections of that, did you, in fact, provide a well trained
14 work force in compliance with the ADA?

15 A Yes.

16 Q Has First Transit ever been cited for failure to
17 comply with the provisions of the ADA?

18 A Not to my knowledge.

19 Q We talked a little bit about the collective
20 bargaining agreement. And I apologize. I was going to bring
21 that in. Does the collective bargaining agreement provide in
22 any section that first aid training must be provided to
23 employees?

24 A No.

25 Q Counsel went through several of the things in the

1 handbook, talking about safety being the goal and the culture
2 of First Transit. Are those -- are those, in fact, the goals
3 that First Transit has?

4 A Absolutely.

5 Q Do you try to achieve those goals?

6 A Every day.

7 Q Okay. Is it possible to achieve those goals under
8 every set of circumstances?

9 A Every minute of every day under every set of
10 circumstances, no. But we do our best to do whatever we can
11 to operate in the safest manner possible.

12 Q Thank you, ma'am.

13 A You're welcome.

14 MS. SANDERS: No further questions.

15 THE COURT: Is there anything else?

16 MR. CLOWARD: No, Your Honor.

17 THE COURT: All right, ma'am. Thank you for your
18 time. You're free to go.

19 THE WITNESS: Thank you.

20 THE MARSHAL: We have a jury question.

21 THE COURT: Oh, I'm sorry. You're right. I forgot.
22 I'm glad you -- I'm glad you reminded me.

23 Counsel, if you want to come up and look at the
24 questions. I think two you've already looked at.

25 Any other questions, ladies and gentlemen?

1 I think you guys have already seen these.

2 (Bench conference.)

3 MR. CLOWARD: These are the old ones.

4 MS. SANDERS: I think we've answered those.

5 THE COURT: You've seen those. I'll just follow up
6 with her on those. Thank you.

7 MS. SANDERS: Is there a new one?

8 THE COURT: It looks like we have a few more.
9 Thank you.

10 MS. SANDERS: I'm not sure this is relevant.

11 MR. CLOWARD: I think it is. They need to know. We
12 have no objection to any of the questions.

13 THE COURT: Okay. Okay. No objections.

14 MS. SANDERS: The one -- yeah, the one question, out
15 of all of the depositions, she wouldn't know that. She could
16 certainly answer when her deposition was taken.

17 THE COURT: I can let them -- I mean, I think
18 they're just trying to put everything in order and we've been
19 referencing the deposition. I don't see any harm in letting
20 them know. Is there any harm in letting them know?

21 MS. SANDERS: If she knows the answer.

22 THE COURT: No, no, I think we might just have to
23 let them know. Is there any objection?

24 MR. CLOWARD: No.

25 THE COURT: Okay.

1 (End of bench conference.)

2 THE COURT: Okay. The first question, ladies and
3 gentlemen, it's by Denise Hinds, Juror No. 4. When were the
4 depositions taken, dates and years? Are you referring just to
5 Ms. McKibbins deposition?

6 JUROR NO. 4: If it were taken at different times,
7 yes.

8 THE COURT: Well, there's -- we've had a few
9 depositions referenced. Is it just this witness, or all the
10 witnesses?

11 JUROR NO. 4: All of them. But if that's like
12 really long, then just hers.

13 THE COURT: Okay. Counsel when was Ms. McKibbins --

14 JUROR NO. 4: Because I don't know how that works.

15 THE WITNESS: It's on here.

16 THE COURT: It's on the deposition?

17 THE WITNESS: Yeah. It was April 2015.

18 THE COURT: Okay. And then did you also want the
19 one of Mr. Farrales?

20 JUROR NO. 4: Yes.

21 MR. CLARK: May 29, 2014.

22 MR. CLOWARD: What is it?

23 MR. CLARK: May 29, 2014.

24 THE COURT: May 29, 2014?

25 MR. CLOWARD: Yeah.

1 THE COURT: Okay. Did I cover everything, ma'am?

2 JUROR NO. 4: Yes.

3 THE COURT: All right. The next one is from Latesha
4 Brown, Juror No. 10. Jay helped Harvey drink water on the
5 bus. Is that against the rules?

6 THE WITNESS: He didn't help him drink the water.
7 He opened up the bottle. All he did was loosen the cap for
8 him. In my mind that's different than helping. He did not
9 give him the open bottle and help him drink it. He did loosen
10 the cap. It was July. It's -- it's not a violation of the
11 rules.

12 THE COURT: Okay. Next question is Denise Hinds,
13 Juror No. 4. What corporate official signed the contract
14 document with the RTC for First Transit?

15 THE WITNESS: That's a tricky question because the
16 -- the -- it was Laidlaw that actually signed the contract. I
17 would have to look at it to know who signed it, but more
18 likely than not it was the president of the company at the
19 time, the senior vice president of the region that the
20 contract is in because the country is broken out by regions.
21 And more than likely a couple officials from the RTC, probably
22 the -- I don't know. I'd have to look, but it would be the
23 deputy director or somebody from the RTC that would sign.

24 THE COURT: Okay. Next one from Dexter Layola,
25 Juror No. 3. Are -- are there first aid kits located inside

1 First Transit buses?

2 THE WITNESS: There are first aid kits that have
3 band-aids and gauze and things of that nature. That's all
4 that's in the first aid kit. It's a standard first aid kit.

5 THE COURT: Okay. This is from Darrell Shakespear,
6 Juror No. 8. You stated on Friday, last Friday, that there is
7 a difference between a policy and a guideline. What is the
8 difference?

9 THE WITNESS: A guideline is something that is given
10 to you as a reference that you use to determine what it is
11 that you're going to follow. A policy is a policy is a
12 policy. It's a hard and fast, this is a violation. You're
13 not violating a guideline. You have a guideline to use to
14 help form the basis of a policy or something or a rule. A
15 policy is something that you have to abide by. There is a
16 difference.

17 THE COURT: All right. Next one from Mr.
18 Shakespear, as well. In your opinion, is it the driver's
19 responsibility to enforce the rules and drive, or to just
20 drive and let the passengers govern themselves?

21 THE WITNESS: If the driver knows that the passenger
22 is violating the policy or not following the rules, then, yes,
23 the driver should enforce the rules. But the driver cannot be
24 responsible for monitoring just passenger activity and never
25 paying attention to what's going on outside the bus.

1 THE COURT: All right. So does that elicit any
2 follow up by counsel?

3 MR. CLOWARD: It does for me.

4 THE COURT: Okay. And then, Ms. Sanders, if you
5 have follow up, that's fine. Just on the issues presented to
6 the jury just now.

7 MR. CLOWARD: Certainly.

8 RE CROSS-EXAMINATION

9 BY MR. CLOWARD:

10 Q Ms. McKibbins, when you were deposed back in 2015,
11 that was in the capacity of the corporate spokesperson, true?

12 A Yes.

13 Q We actually gave you a notice that was like 13 pages
14 long with all of the topics that we wanted to discuss, true?

15 A Correct.

16 Q Okay.

17 MR. CLOWARD: No further questions.

18 THE COURT: All right. Ms. Sanders.

19 FURTHER REDIRECT EXAMINATION

20 BY MS. SANDERS:

21 Q With regard to Jay helping to loosen the bottle, the
22 RTC policy or rule was that passengers could have a closed
23 container and drink from that. Was that a violation for him
24 to just help Jay to -- or, excuse me, Harvey to loosen the
25 bottle?

1 A No.

2 Q And with regard to the information that's in the
3 handbook pertaining to first aid tips, is that a guideline or
4 is that a policy or just basic information?

5 A It's information. It says right in the front of the
6 handbook if you look at the handbook, it's tips and
7 information. It does not say that it's a policy.

8 Q Thank you.

9 THE COURT: All right. Is that it?

10 All right. Please step down. Thank you.

11 Is that your last witness?

12 MS. SANDERS: Yes.

13 THE COURT: Can we talk real quick on a timing
14 issue?

15 (Bench conference.)

16 THE COURT: Do we have a lot of jury instructions
17 that we need to go through?

18 MS. HYSON: We have a lot of jury instructions. I
19 there are about six that we need to work out.

20 THE COURT: Okay. So do you want to just do them
21 over lunch while the jury eats? What do you want to do?

22 MS. BRASIER: Were we talking about jury
23 instructions?

24 THE COURT: You've got six contested jury
25 instructions is what they said?

1 MS. BRASIER: Yeah.

2 THE COURT: Okay. So why don't we have the jury go
3 out and have lunch and then -- for like an hour or so. My
4 understanding is [indiscernible] lunch [indiscernible].

5 MS. SANDERS: They are.

6 THE COURT: Okay. Let's do that.

7 (End of bench conference.)

8 THE COURT: All right. Ladies and gentlemen of the
9 jury, counsel has been nice enough to provide you guys with
10 lunch today. So it either is here or should be here soon. We
11 estimate that it'll be approximately an hour for lunch. So
12 here's what's going to happen. The plaintiff has presented
13 their case. The defense has presented their case.

14 Ms. Sanders, are you guys resting at this time?

15 MS. SANDERS: Is the one last exhibit in?

16 MS. HYSON: Exhibit 14 was admitted.

17 THE COURT: Are you going to check the exhibits?

18 MS. SANDERS: It was the one that we had to do some
19 checking on. Yeah. Yes, Your Honor, we rest.

20 THE COURT: Okay. And is -- will the plaintiff have
21 a rebuttal?

22 MR. CLOWARD: No.

23 THE COURT: All right. So what's going to happen
24 when you come back from lunch, I'm going to give you the law.
25 Those are the jury instructions. So I'll read those off to

1 you. And when I'm finished, the plaintiff and the defense
2 will have an opportunity to present their closings and then
3 their rebuttal, and then you guys should go back to deliberate
4 sometime later this afternoon, okay.

5 So have a good lunch. And, as always, don't
6 research the case, don't read about the case, don't form or
7 express an opinion on the case, don't talk about the case.
8 See you then.

9 (Jury recessed at 12:51 p.m.)

10 THE COURT: Okay. Let's just -- are you guys ready?
11 Do you have -- make yourself comfortable. Do you have the
12 jury instructions that we need to go through, the six?

13 MS. BRASIER: Yes.

14 MR. CLOWARD: Yeah, Ms. Brasier is going to be doing
15 those, Your Honor.

16 MS. BRASIER: Your Honor, would you like -- would
17 you like for me just to pull out the --

18 THE COURT: I just need the six, yeah.

19 MS. HYSON: I have them separated. I mean, I guess
20 I need to look at them, too. But there's like a group that go
21 together, so we really only need one argument on the set of
22 them.

23 THE COURT: Is it the common carrier one?

24 MS. HYSON: Yeah, there's --

25 MS. BRASIER: Yes.

1 MS. HYSON: -- a set of common carrier ones, and
2 then there's a set of comparative negligence. So it's really
3 just two sets.

4 MS. BRASIER: Kim, were you guys going to agree to
5 the negligent hiring one?

6 MR. CLOWARD: Your Honor, Ms. Brasier is going to
7 handle this. Do you need me to stick around? I'm going to
8 just type up some things on my closing.

9 MS. SANDERS: Yeah, I'd like to do the same thing.

10 THE COURT: Sure. I only -- whoever you want to
11 leave me.

12 (Pause in the proceedings.)

13 THE COURT: Are these the same ones you guys are
14 handing me?

15 MS. BRASIER: These are plaintiffs' contested, and
16 those are defendants' contested.

17 MS. HYSON: I wrote on the last page of one of them,
18 but --

19 THE COURT: It doesn't matter.

20 MS. HYSON: Essentially theirs are the common
21 carrier and ours are all that have to do with comparative
22 negligence.

23 THE COURT: Why don't we start with plaintiffs'.
24 The first one plaintiff has proffered is common carrier means
25 any person or operator who is held out to the public as

1 willing to transport by vehicle from place to place, either
2 upon fixed route or on-call operations, passengers or
3 property, including a common carrier of passengers. Defendant
4 First Transit is a common carrier.

5 MS. BRASIER: Your Honor, that's -- it's straight
6 from the statute. The only modification is that it talked
7 about some taxi cabs and I think some other alternative forms
8 of common carrier, but it's straight from the statute.

9 THE COURT: Okay.

10 MS. HYSON: I guess it's not necessarily that we
11 have a problem with the definition of common carrier.

12 THE COURT: Uh-huh.

13 MS. HYSON: This one can kind of -- we decided once
14 we debate or discuss whether common carrier even applies
15 because that's the bigger contention is whether the common
16 carrier instruction actually applies in this case.

17 MS. BRASIER: Well, and I think this -- this is kind
18 of the precursor to the -- to the next one that talks --

19 MS. HYSON: Right.

20 MS. BRASIER: -- about the duty of the common
21 carrier. So if First Transit is a common carrier, then the
22 jury instruction applies to First Transit.

23 MS. HYSON: Right. So I think it's actually a
24 better use of time to discuss the next one because if the next
25 one applies, then this one will apply.

1 THE COURT: The jury is instructed that the law
2 requires a common carrier of passengers to exercise the
3 highest practicable degree of care that the human judgment and
4 foresight are capable of to make its passengers' journey safe.
5 Whoever engages in the business of a common carrier impliedly
6 promises that its passengers shall have this degree of care.
7 Failure to do so is negligence. And it comes out of Sherman
8 v. Southern Pacific.

9 MS. BRASIER: Your Honor, this is one of the
10 submissions that we submitted a bench brief on. I know there
11 was a lot submitted, but we actually attached the cases that
12 we cited to our bench brief. These are Nevada Supreme Court
13 cases. They date back to 1910 and 1913 and they're still good
14 law. The instruction that we cited is directly from the
15 instruction that was used in the Forester case.

16 THE COURT: There's nothing -- I didn't -- I read
17 the brief, but I didn't Shepardize these. There's nothing
18 more current?

19 MS. BRASIER: This is -- there might be more current
20 cases that discuss it, but this is still good law.

21 THE COURT: Okay. So what is the objection? Why
22 don't you think First Transit is a common carrier?

23 MS. HYSON: So the common carrier standard applies
24 for the transportation of individuals. What's at issue in
25 this case is actually the boarding and alighting of Mr.

1 Chernikoff or the driving skills, the transportation of him.
2 It was the recognizing of a medical event. And that's not
3 what is contemplated in the common carrier instruction. So it
4 would be our contention that for purposes of this case it is
5 not actually the work of a common carrier that's at issue
6 here. And that's why this instruction wouldn't be relevant.

7 If Your Honor determines that the common carrier
8 instruction is, in fact, relevant, it's our contention that
9 the way this instruction is worded isn't actually appropriate.
10 And I can go into that discussion further if Your Honor
11 determines that a common carrier instruction would be relevant
12 in this case.

13 THE COURT: I think that it is relevant. I think
14 that there has been evidence to support the definition of a
15 common carrier. With that being said, what do you propose as
16 a better jury instruction for the duty of care?

17 MS. HYSON: Well, there is a standard Nevada pattern
18 jury instruction.

19 THE COURT: Is it really in the pattern jury book?

20 MS. HYSON: Yes, and I have a copy of it here. It
21 is not the one that's proposed by plaintiffs. It's actually
22 -- I can read it to you. I have a copy of it. It says at the
23 time of the occurrence in question, the defendant was a common
24 carrier.

25 A common carrier has a duty to his passengers to use

1 the highest degree of care consistent with the mode of
2 conveyance used and the practical operation of its business as
3 a common carrier by mode of transportation. It's failure to
4 fulfill this duty is negligence.

5 There is a distinction between this pattern
6 instruction and the one proposed by plaintiffs.

7 THE COURT: Can I see yours just to compare it?

8 MS. HYSON: Sure.

9 MS. BRASIER: And, Your Honor, we -- we also
10 discussed why that pattern instruction is not appropriate, I
11 know we've submitted a lot of bench briefs, but in our other
12 bench brief about the jury instructions.

13 MS. HYSON: And this -- this instruction was
14 actually recognized as an appropriate instruction in the cases
15 that were cited by plaintiffs in their bench brief. I believe
16 it's --

17 THE COURT: This comes out of a newer case, too.

18 MS. HYSON: No, that one actually comes out of the
19 20 -- I'm sorry, the 1910 case that was cited by plaintiffs.

20 THE COURT: The Grooms v. Fox?

21 MS. HYSON: It's also in -- it was also accepted by
22 Grooms v. Fox, but that specific language was also in -- I
23 can't remember now if it was in Sherman or Forrester. It was
24 either the 1910 or the 1913 case.

25 MS. BRASIER: Are you saying that the 1910 or 1913

1 case cited Grooms?

2 MS. HYSON: No. The language. The language in that
3 pattern instruction was ruled to be acceptable language in the
4 1910 or 1913 case. Specifically, actually, I found it here.
5 In Sherman that court talks about the duty of a common carrier
6 and that the highest degree of practical -- practicable care
7 should be exercised that is most consistent with a mode of
8 transportation. And that's the pertinent language in the
9 pattern instruction that we think is important because it
10 gives the jury a benchmark for what the highest degree of care
11 actually means.

12 MS. BRASIER: And, Your Honor, if I may. The
13 pattern instruction that they're citing to, it -- the -- the
14 support for it in the new pattern instruction, which I'm not
15 sure if Your Honor has had the same experience, but we've had
16 the experience that some of the pattern instructions aren't
17 actually supported by the sources that are cited in the new
18 rule book. But the Grooms case never discusses what the
19 appropriate language is. The Grooms case is literally three
20 -- three paragraphs and it never talks about what the
21 appropriate standard is. So I don't know how you could get
22 any information from that.

23 THE COURT: Is that form that really old -- the blue
24 soft-covered one?

25 MS. BRASIER: No, it's --

1 MS. HYSON: I don't know. I didn't get a --

2 MS. BRASIER: These are actually the newer
3 instructions that just came out maybe two years ago that
4 everyone is kind of having issues with.

5 MS. HYSON: But even -- I mean, that is true that it
6 is a very short case, the Grooms case, but that specific
7 language is supported by the Sherman case, which is the very
8 old case back from 1910. So the same case that plaintiffs are
9 relying on from 1910, the language in this pattern instruction
10 does exist in that case, as well. In fact, the California
11 case from 2005 utilizes the same language.

12 THE COURT: I can't even pull this case up it's so
13 old.

14 MS. BRASIER: I have an extra copy of it.

15 THE COURT: I have a book.

16 MS. BRASIER: Would you like a copy?

17 MS. HYSON: Yeah, I think she attached a copy --

18 THE COURT: Yeah.

19 MS. HYSON: -- to her brief. I have a copy, as
20 well.

21 THE COURT: Which is sitting on my desk, which I
22 should go get.

23 THE CLERK: Do you want me to go get it for you?

24 THE COURT: Yeah, will you?

25 THE CLERK: Which one is it?

1 THE COURT: It should be a brief by them on -- it'll
2 say common carrier.

3 MS. BRASIER: Your Honor, I have an extra -- this is
4 an extra copy of the case.

5 THE COURT: Thank you.

6 MS. BRASIER: I just highlighted the part that I was
7 reading to you from.

8 THE CLERK: Do you still want me --

9 THE COURT: No, thank you.

10 Okay. And then this one is also, you said, from the
11 Sherman case?

12 MS. HYSON: Yes, and I can point you to where in the
13 Sherman case --

14 THE COURT: Okay.

15 MS. HYSON: -- if that makes it easier.

16 THE COURT: So where is it?

17 MS. HYSON: These aren't old cases aren't page
18 numbered quite as well as the new ones. I don't know if I can
19 show you on that same page with the version you have, but I
20 can show you here. Let me see if it's printed the same. On
21 the bottom of the page.

22 THE COURT: Yeah, I see. I'm trying to --

23 MS. HYSON: I don't know if they're printed the same
24 way.

25 (Pause in the proceedings.)

1 THE COURT: Do you have it tagged, the one she's
2 citing, as well?

3 MS. HYSON: You mean the --

4 THE COURT: Is it -- I'm sorry.

5 MS. HYSON: -- area that she's --

6 THE COURT: Do you have it marked?

7 MS. HYSON: I don't know if I have her area marked,
8 as well. I think I probably do.

9 THE COURT: I think maybe -- let me see if maybe I
10 can find it. Okay. Your -- your printout is totally
11 different.

12 MS. HYSON: We may have gotten ours from Westlaw
13 versus Lexis.

14 MS. BRASIER: Yeah, just the formatting is
15 different.

16 (Pause in the proceedings.)

17 THE COURT: You guys can make yourselves
18 comfortable.

19 MS. HYSON: Thank you.

20 (Pause in the proceedings.)

21 THE COURT: Actually, I think reading the language
22 in Sherman versus Southern Pacific, I think that the
23 additional language in the instruction proffered by the
24 defense is actually more accurate as to the common carrier
25 because when you look at the language by the Supreme Court, it

1 says the many different forms or expressed using textbooks and
2 by the courts in stating the rule as to the degree of care
3 required of a carrier in conveying passengers all recognize
4 substantially the same test, that is the highest degree of
5 care, prudence, and foresight consistent with a practical
6 operation of its road or as sometimes expressed the utmost
7 skill, diligence, care, and foresight consistent with the
8 business in view of the instrumentalities employed.

9 So I think the one provided by the defense is more
10 applicable because I think the Supreme Court is trying to say
11 that, you know, it has to be with the -- the practical
12 operation of the business. I think this one is actually a
13 better instruction and it's also been approved in the -- the
14 pattern jury instructions.

15 MS. BRASIER: So for clarification, Your Honor --

16 THE COURT: The reason is I think that it is
17 important language, you know, because the Supreme Court goes
18 through a lot of discussion and citing from jurisdictions
19 talking about the mode of conveyance used. So I think that is
20 important language. So I would tend to offer the one -- I
21 would offer the one that the defense is proposing.

22 MS. BRASIER: So just so that I can keep things
23 organized, we'll be using the one the defense has offered.

24 THE COURT: Yeah, so this will be plaintiffs'
25 proposed, but not given.

1 MS. BRASIER: Thank you.

2 THE COURT: That will be a court exhibit. So the
3 one -- the defense that we're going to use is the one taken
4 out of the Nevada pattern jury instructions which is at the
5 time of the occurrence in question, the defendant, name of the
6 carrier, was a common carrier. A common carrier has a duty to
7 its passengers to use the highest grade of care consistent
8 with the mode of conveyance used and the practical operation
9 of its business as a common carrier by whatever the mode of
10 transportation is, its failure to fail this duty is
11 negligence. Yeah. Okay. So we'll use this one. You can
12 this back.

13 MS. HYSON: Thank you, Your Honor.

14 THE COURT: Okay. So the next one that seems to go
15 with these jury instructions is when the carrier is aware that
16 a passenger is mentally disabled so that the hazards of travel
17 are increased as to him and is the duty of the carrier to
18 provide that additional care which the circumstances
19 reasonably require. The failure of the defendant to fulfill
20 this is the studious negligence. And that's off the pattern
21 jury instructions.

22 What is -- I'm sorry. This is plaintiffs' proposed.
23 What is defense's objection?

24 MS. HYSON: Our position is that this heightened
25 instruction doesn't apply in this case. For starters, the

1 case on the bottom of this instruction, American President
2 Lines, is distinguishable for many reasons. For starters,
3 this 1963 case out of the Ninth Circuit applies to an incident
4 that happened on a cruise line and applies to maritime law.

5 Numerous cases that have applied this American
6 President Line case have referred to it as an application of
7 maritime law, including cases out of Florida, the Fifth
8 Circuit, and some other cases. They apply this as a maritime
9 case. This certainly is not a common carrier case that
10 involves maritime law.

11 Secondly, it involves a lady who had physical
12 disabilities, not mental disabilities. So it's
13 distinguishable in that area. More importantly, that case is
14 distinguishable because it relies on a case out of California
15 called McBride versus Atchison, a 1955 case, which held that a
16 common carrier must render the necessary assistance to a
17 person with special needs where a passenger is blind, sick,
18 aged, very young, crippled, or infirm, and his condition is
19 apparent or made known to the carrier. It is -- and in that
20 situation it is bound to render him the necessary assistance
21 in boarding or alighting from its trains or cars.

22 So the distinction made in that case was that this
23 elevated application of a common carrier principle only
24 applied in the boarding or alighting. And it discussed that
25 in a further case that had to do with a passenger that got off