long it would be until there would be no chance of survival or survival with significant injury or without significant injury.

Q Isn't it true that deprivation of oxygen for a period as little as four minutes can lead to brain death or brain damage?

A You know, it's interesting. It can. But, then again, we have people who have had prolonged periods of cardiac arrest and code who end up coming back and -- because I spend the majority of my time now in the intensive care unit and who come back with little brain damage. So there's a large range. A lot of it also depends on the pre -- the condition of the lungs, the oxygenation beforehand, the vasculature going to the brain, the effectiveness of CPR, but the longer you go without oxygen the higher risk of brain injury. That's why it's important to try and get emergency medical help as soon as possible.

Q Okay. And as soon as Mr. Farrales identified that there was a serious problem going on with Harvey, he contacted his dispatcher to have paramedics called, didn't he?

A And it was hard for me to tell because I couldn't see exactly what was happening with his

hand and repositioning Harvey. If the dispatcher called him first or if he called the dispatcher, I couldn't quite sort that part out.

Q I think I can make the representation correctly, and Ben will correct me if he thinks I'm wrong about this, but they have -- on the bus they have a direct line button that they can push, the driver can push as an emergency to contact the dispatcher.

A Okay.

Q Which is what Mr. Farrales did initially. And then the dispatcher called him back.

A Okay. I wasn't sure. All I know is the first I heard was the dispatcher talking.

Q Okay. He made the attempt to contact the dispatcher and then requested an ambulance, correct?

A Correct.

Q Does he have any control over how long it takes the ambulance to get there?

A The only thing I can say is that apparently, on a previous occasion, he stated that he had called 911 himself when a passenger had had a seizure. That's why it would be interesting to see what the time frame is on the sheets from the 911

call from when he called dispatch, dispatch called 911, 911 got the phone call to EMS, and EMS sent someone else, as to whether there was time lost there. And that would be in the records. I don't know exactly what that would show.

Q Well, my question was: Does he have any control over how quickly the EMS or the ambulance gets there once -- once they're called?

A Once they are -- once they are notified, he does not. The only question was whether or not it would have been faster for him to call 911 himself.

Q Do you know whether or not, as a driver, there was any training that he had received as to whether it was appropriate for him to contact 911 himself as opposed to going through dispatch?

A It was described in his deposition. The deposition will say specifically what it says. I don't remember the specifics but I think he said he was supposed to call dispatch, but there was also in the deposition where he said that he had previously called 911 on another patient.

Q In any of the materials that you reviewed, did you see any kind of discussion about the way that a driver is supposed to handle that

type of a situation?

A If it was in there, I don't remember the specifics.

Q As I understand it, you don't intend to express any opinions one way or the other about the training that the drivers receive and whether that's appropriate or not, correct?

A Correct.

Q Okay. So if he was trained that his job as a driver was to contact the dispatcher and have the dispatcher contact the emergency services, you don't have a criticism one way or the other as far as that procedure is concerned?

A Correct.

Q Are you aware if statistics would indicate if CPR is used on a patient in the field and that is initiated at, say, four minutes after there's been some type of an arrest, are you aware of any statistics as far as revivability for that particular patient?

A There are statistics. I don't have all those at my fingertips.

Q Okay. Do you know -- same kind of question I had with the other -- whether or not the likelihood of revival without neurologic or other

sequelae increases after a four minute time frame even if CPR is capable of surviving somebody in the field?

A There was a time point after which the incidence of brain injury increases. I don't remember exactly if the cutoff was four minutes, five minutes, six minutes.

Q When CPR is used in the field and is successful in establishing -- re-establishing respirations, heartbeat, are you aware of statistics about whether -- any kind of statistics about the return of spontaneous respirations as a result only of CPR that's performed in the field?

A And that would depend on a lot of what the primary cause was and what the primary rhythm is. If the initial rhythm is asystole, if your initial rhythm is sinus bradycardia or sinus tachycardia, and the initial problem was from the respiratory arrest if it was from an occluded airway, so you need to really break it out under the separate categories and having -- if you break it out into a patient that has a food bolus occluding their airway that has respiratory arrest and then cardiac arrest, I don't know those exact statistics and, once again, at what point do you intervene? Is

the heart still beating? Is the heart not still beating when you intervene? So I think it would be more appropriate to look at those statistics rather than for me to hazard to guess.

Q You're not aware of anything as you sit here?

A No, I'm sure there's information out there looking at all these various things. I don't have that information at my fingertips.

Q Do you have an opinion about where along this timeline the cardiac arrest occurred?

A Before the paramedics got there, exactly where on that timeline, I don't know exactly.

Q Are there timelines for how long after a respiratory arrest occurs that you might expect a cardiac arrest to occur if there's not any kind of intervention? Or did that vary widely as well?

A I would need to look at those. I wasn't asked to look at those statistics before coming here today. Once again, that would depend a lot on the patient's underlying health problems and I don't remember offhand the exact time frame of what that would be. At some point, if it's appropriate, if we can just take a brief break.

MS. SANDERS: Let's do it now. Ben, we're

going to take a short break.

MR. CLOWARD: Good enough. Sounds good. Thank you.

(Break taken.)

Q (By Ms. Sanders) According to your timeline, Mr. Farrales was pulled over and at Harvey's side at 8:04:15, so a little over four minutes after what you indicated as the first indication of acute distress. You'd agree with me, though, that at that point he still had no reason to know what was going on with Harvey? He just knew that he was -- something was going on with him?

A He knew something was going on at the time that he went over there, correct.

Q We talked a little bit before about this food that was in Harvey's mouth that was identified by the police and then also by the coroner, but you didn't observe anything on the video of Harvey that would indicate that he had obvious evidence of food coming out of his mouth, at least according to the video, correct?

A I couldn't zoom in enough to see that, no.

Q So you didn't see anything?

A Correct.

Q And based on at least Mr. Farrales's deposition testimony, we know that he was not aware that Harvey had been eating at any point on the bus, correct?

A Correct.

Q Was there anything that you saw in Mr. Farrales' deposition testimony that would give you any indication that he ever himself observed any evidence of food coming out of Harvey's mouth at any time?

A No.

Q So, is it fair to say that we don't really know when this evidence of food coming out of Harvey's mouth was first identified?

A Correct.

Q And the only place we see it is in the coroner's report who obviously made an examination of the -- at least external part of the body, correct?

A Correct.

Q And then that's also identified in the police report?

A Correct. As I said, I've not seen an EMS run sheet at all.

Q Okay. And you're not aware of any other

information in the case that there was any identifying evidence of food coming out of Harvey's mouth prior to the time the coroner and EMTs got there?

A Correct.

Q So when I asked you about the basis for your own opinion about cause of death being related to choking, as being related on the coroner's report, that was based on everything after the fact, his examination, correct?

A Correct.

Q And the information came out of the police report about the food bolus, correct?

A Correct.

Q And the information identified by -- I don't know if it was the police or EMTs about the open lunch box and things that were in his lap or on the floor in his lunch box.

A Correct. And the video.

Q And the video indicating, at some point -- when in the video did you think that -- well, strike that. You did indicate that the video gave you some reason or some basis to believe that this was a choking death. But what exactly was it in the video?

A It was -- he was eating a sandwich. Appeared to be eating a sandwich fairly quickly. And very shortly thereafter showing signs of distress. The colloquial term was he was wolfing down his sandwich.

Q All of which was not observed by Mr. Farrales, the driver, correct?

A As far as we know, correct.

Q Well, you say as far as we know; that's his testimony?

A We have no evidence of it.

Q And you have no reason to disbelieve his testimony, do you?

A No, I don't.

Q Anything else that we haven't talked about?

A No.

Q You also indicate in the report if the driver had noticed anything in what you call a timely manner, that things might have turned out differently. Timely manner is kind of nebulous. Tell me what you mean by that.

A As we described, the sooner an airway obstruction is found and dealt with, a better a patient will do. If he had recognized it right

away, at the -- you know, as soon as he had realized something was wrong at 8:04:15 and called, that would improve things. The best would have been when he came back on the bus and there was only one passenger on the bus. If he had observed that that one passenger was slumped over towards the right side and immediately evaluated and called 911 at that time, would have been the best opportunity to save Mr. Chernikoff's life.

Q You're not critical of him for not looking that direction as opposed to going right into the driver's seat, are you?

A That goes to the requirements of drivers' safety and what they are and are not supposed to do and that's not what I was asked to testify to.

Q So you are not going to express an opinion about that particular aspect?

A Correct.

Q Best case scenario, if he had observed something when he got back on the bus about Harvey and checked him out at that point, whether he identified choking or not, in your opinion, if he had contacted the dispatcher and the dispatcher had called the EMS at that point, would that have made a

difference or are you thinking that he had to have done something personally to intervene?

A The best would have been if it was a combination of the two. If he had just called EMS at that point and EMS had come, that would have been enough to have saved Harvey.

Q Any idea about how long it would have taken for EMS to get there?

A Exact times I cannot say. It would be reasonable to say that it would have been about the same amount of time from when they were contacted until they eventually did get there, especially if they were given the information that it was a cardiac or, excuse me, a respiratory arrest. Is it possible that it might have been a little bit sooner or a little bit -- that's possible. That would need to be checked on what EMS records runs were, where ambulances were at that particular time, so I would not know that information.

Q When you say it may have made a difference as far as the outcome if it was roughly the same amount of time, can you say whether or not there would have been any neurologic or other kind of sequelae after that much time had elapsed for the paramedics to get there?

A That would be possible. Exactly how much is hard to say. Once again, depends on when it went from partial respiratory difficulty to full respiratory arrest or cardiac arrest. And I would not be able to give that exact information.

Q Okay. You can't speculate about that, correct?

A As to exactly how much, no. Once again, it would come down to looking at the statistics and then figuring out minutes and then looking at what published statistics are out there.

Q And that's not something you did for purposes of the report?

A That's not something I have done for the report. If a case goes to trial and I'm asked to look at that further information, I'd be pleased to look it up.

Q Do you know what kind of reference books you would refer to?

A I'm not sure if it would be the American Heart Association. That would be one of the first places I would do it. But I'm not exactly sure where. I'd have to look and see what various information was out there.

Q So, okay. Let's -- let's take it the

next time frame. If we're not going to say that it was something that Jay -- Jay Farrales should have looked this direction versus this direction when he got back on the bus and he didn't identify any issue until when he did, what's the time difference there? Now -- well, I'm sorry, I'm kind of -- strike that. Let me start over. That's the best case scenario if he had looked this direction, identified something when he first gets on the bus and called the dispatcher. When's the next time that you think that he could have done something different than he did? When you're talking about in a timely manner, that's where I'm try to go with this.

A The sooner you get there, the better it is. He gets back on the bus at 37 seconds after 8:00. Another three minutes and three seconds goes until he tends to talk to the client -- the decedent, I guess, would be the proper term. Any time between that time that he had started earlier, once again, you know, time is brain. The sooner you're able to find the problem, the sooner you're able to try and deal with it. As to exactly what his responsibilities were and when he should have, that part comes up more to someone in the safety field as what the bus driver's responsibilities are,

how often you should be looking at that. But the sooner it was recognized, the better a chance for a good outcome.

Q Okay. Let's assume that there really isn't an opportunity or that there's not a criticism as far as when the bus driver gets back on the bus, takes his seat, and drives on. When you say "in a timely manner" in your report, is there any time frame between when he gets back on the bus and when he actually does identify that something is going on with Harvey that you think would fall within this whole -- I'm trying to understand what you're using the terminology for.

A The sooner -- and I'll just kind of keep going around in circles. The sooner it's recognized, the better it is. If he'd recognized that one minute earlier, two minutes earlier, that would give some percent chance a better outcome than from when eventually he was recognized.

Q I'm not sure if I asked this question before. I've asked a similar question. Are you aware of any statistics or that would indicate how long a person could go with an obstructed airway before he or she would suffer some type of neurological brain damage?

A Once again, I would have to look at statistics. I don't have that at my fingertips.

Q Can you give me a range?

A I feel it would be better for me not to speculate. I'd rather have the information in front of me.

Q Okay. If you suspect or believe that somebody has had a choking incident, is there any kind of time frame that you would associate between the time that the obstruction occurs and when the person was -- would lose consciousness?

A That, once again, depends on whether it was a partial or a full respiratory obstruction. It would be within a few minutes and, once again, I don't have that exact information in front of me. It would also depend on, you know, what the person's underlying health was like, if you have someone who's normally running at 90 percent oxygen saturation versus someone who normally runs 100 percent saturation, they have normal arteries going to the brain, so it's in the few minute range. I don't have the exact.

Q Would that be true whether it's a partial or a full obstruction?

A It depends on what degree of partial.

You know, are you getting 95 percent obstruction of the airway? Are you getting 20 percent obstruction of the airway? So they're all -- all different possibilities that would need to be considered.

Q Let's say you have a near complete obstruction of the airway. Would there still be a -- up to a couple minute time frame between the obstruction occurring, cutting off the airway, and the person losing consciousness?

A In this case, when was it that he started? So at 30 seconds after 7:59 is when he finished eating his sandwich. About 20 seconds later, it looks like there's some sort of difficulty. And then it appears when he started having difficulty that was about 50 seconds afterwards that he was already slumped over towards the right side. So, I can't say exactly how long it would take. In this case it would appear that was about 50 seconds until he passed out and, once again, I would need to look at those statistics to see how long it would take for someone to lose consciousness after their airway was obstructed to be certain.

Q You cited to a couple websites in performing the Heimlich maneuver in your report.

Any particular reason why you did that?

A I believe that counsel had asked if I could show some examples or give some examples that might be helpful.

Q Are those websites that you referenced yourself or have used or did you just look them up?

A I just looked them up to try and find something appropriate. One of which I tried to look at yesterday. And it's not on line any more, on the Youtube videos.

Q Another question about statistics. If a person has an unwitnessed cardiac arrest in the field, are you aware of any statistics as far as the survivability of that type of situation?

A Once again, if it comes down to you know what the initial rhythm was when they're found, what the underlying precipitating causes are for it and time from when they were last seen normal. And I think it would be most appropriate for those statistics to look those up. They are out there. I don't know all the exacts and, once again, depends on the precipitating circumstances.

Q Can you give me a range about at what point the person might be irretrievable in that kind of situation?

A The longer -- you know, it's funny, many years ago my thoughts when they were retrievable would be five or ten minutes. But then you have people down for a fair bit longer and you don't know when they're found down as to when they went down, so if they haven't been seen for an hour and they're found in a cardiac arrest, you don't know if they had a cardiac arrest, you know, one minute before you found them or 59 minutes before you found them. So the question comes when the actual time of arrest is. The longer it is until we call it ROSC, R-O-S-C, return of spontaneous circulation, the worse it is. And definitely would be once you get past, you know, 15 minutes of someone being down without a pulse until circulation is started, there will be an increased risk of significant damage. As to exactly what time you get to the point where they're irretrievable, once again, I think it would be better for me not to speculate but to look at the data.

Q There are statistics like that out there?

A I'm sure there would be. And a lot of it, once again, comes to when did the, you know, when they were found and when the actual arrest

started. You know, if someone's found in their sleep and they're in cardiac arrest, like when you're working with a stroke, you don't know when the exact time of onset is. It's a lot easier if someone's walking and then they collapse and you can kind of figure out what time it was that they fell or something of that sort.

Q Okay. Based on your observation of the video in this case, were you able to pinpoint a time when you believe that Harvey actually died?

A No, I can say when he went unresponsive. I can't say exactly what time his heart stopped.

Q Well, we know he was unresponsive when the driver called his name and he didn't respond. But do you believe --

A Correct.

Q -- that his unresponsiveness occurred sometime earlier than that?

A Well, he, quote, slumped over at 37 seconds after eight. As to whether or not he had some response at that time, I can't say exactly. There was some shaking going on in his arm. So there was some neurologic activity going on at the point that that happened. And I don't remember exactly what time it was when that stopped.

Q In any event, by the time that the paramedics got there, they didn't attempt any type of resuscitative efforts, did they?

A Correct.

Q Are you critical of the EMTs for not doing more than they did?

A I'm sure surprised they didn't attempt. Especially when they seen it wasn't someone that was down for an extremely long period of time. And there was someone who had seen him in a reasonable amount of time when he'd gone unresponsive, so he was in the bus, he had been seen a few minutes prior, so I was a little bit surprised that they didn't attempt to resuscitate at all.

Q Do you believe that if they had tried something even when they got there that there might have been a different outcome?

A The patient was asystole. He was cold at that time, would have been a much lower chance than if they'd come earlier, but would there have been some possible chance that they might have been able to resuscitate him? Possible. Once you're out about 15 minutes from apnea, there would be a much higher risk of neurologic injury -- yeah, 8:15:42, so that would have been about 16 minutes after he'd

slumped over or when he was first showing distress.

Q Have you watched the entirety of the videos that you've cited on from these websites that you referenced?

A They were short little ones, yeah.

Q Did you look at any of the responses and replies and that kind of thing?

A From the list down below, no.

Q I asked you before if you know whether or not the Heimlich maneuver is still being taught in first aid classes and I think you said you weren't aware.

A I'm not certain.

Q Are you aware of the criticisms that are circulating now about the use of the Heimlich maneuver?

A I'm heard some. I'm not familiar with a lot of them.

Q In your experience, is the Heimlich maneuver 100 percent effective in relieving all choking incidences?

A No.

Q What is the percentage of effectiveness?

A I am not certain.

Q Are you aware that the American Red

Cross is no longer recommending the Heimlich maneuver as a first aid measure to be used for choking incidences?

A I'm not aware of that.

Q The things I've read about the Heimlich maneuver talk about its use on the patient that's conscious. Is there an indication for use of the Heimlich maneuver on a patient who's -- who's unconscious?

A Once they're unconscious, you're supposed to go ahead and see if they're breathing. If they're breathing, you're supposed to try and establish an airway, if you can, reposition their mouth. I believe they're not recommending blind sweeps any more. If you do see food you can go after it, but that you should, if they lose a pulse, go ahead and initiate chest compressions.

Q So with an unconscious patient you'd go to CPR rather than attempting the Heimlich?

A If it's unconscious and pulseless, yes.

Q What if they're not pulseless, then would you try the Heimlich or where's the differentiating point?

A So if they -- it depends on if they're checking it first. First you see if you can get air

into them. If you're not able to get air into them, then you can go ahead and turn them over on the side. I believe it's -- you can try the back slap, see if you see something in the mouth. And I forget exactly where Heimlich comes into there. If they still have a pulse or if they're unresponsive, first you see if they're able to have an airway or not and if they're breathing. And, once again, if food is visible in the mouth, you can go ahead and pull it out and don't necessarily need to do the Heimlich maneuver. So if you think about a McDonald's quarter pounder, which is a quarter pound before they cook, that would be four ounces, they're talking about the bolus of food being 60 grams, which is a little bit more than two ounces. So we're talking about a little bit more than half the size of a hamburger patty on a quarter pounder before it's cooked.

Q Again, with statistics, the patient -- let's assume who is having a choking incident but is unconscious -- are you aware of any statistics of the revivability of that patient in the field as opposed to one who's conscious and the Heimlich maneuver is being used on?

A Someone is unconscious?

Q Unconscious.

A I'm sure when it's unconscious, it would be somewhat worse than when they were conscious. I don't know the exact statistics.

Q The list of cases that you've reviewed that you gave us --

A Yes.

Q Yeah. Only goes up to 2013. Do you have a list for 2014?

A I actually just completed it last night.

Q Okay. Is that something that you could provide to Ben so we can get that?

A If Ben reminds me and asks me to do so, yes.

Q Can you estimate about how many cases you've reviewed from end of 2013 through today?

A Should be reviewed or testified?

Q Well, both. I'm going to break it down.

A Okay. How many I've reviewed since then until now might be about 80. How many I've testified in, be it trial or deposition, it would be somewhere around 15 to 20 as a guesstimate.

Q Okay. You've actually testified in trial in 2014 and up through today in 2015?

A Yes.

Q Okay. How many times did you say?
A I think four. I think four trial testimonies between then and now.
Q Okay. None of those in Nevada?
A Correct.
Q None of those in cases involving allegations of choking?
A Correct.
Q As far as you know, have you ever been -- has your testimony ever been excluded?
A Not that I'm aware of.
Q You told me before that you have now, after doing your report, reviewed the report of Dr. MacQuerri?
A Correct.
Q Was there something in particular, anything in particular that you disagreed with?
A Yeah.
Q Okay. Tell me about that.
A So, in Dr. MacQuarri's report, he states that the patient showed no outward medical indications of choking and that there were no signs of distress and he was not making noise. My comments, which I put in my notes, it did appear evident on the video that Harvey -- I said Harvey

because but my voice recognition doesn't recognize Chernikoff -- was showing signs of distress and, hence, I disagreed with the defense expert's interpretation. In addition, if a patient has a totally occluded airway and may not make any sounds while choking, as -- it says no wears, but it should be no air can come out of the vocal cords, especially if it's a large bolus of peanut butter containing sandwich. Dr. MacQuarri states it will be impossible for a physician to state to a reasonable degree of medical probability that Harvey's death was caused by choking. I totally disagree with that as we've already discussed.

Q Can I just stop you there? I know you're reading from that. I just want to ask a couple questions about that. We talked before about what you considered to be acute distress that you identified on the video. But you agreed with me that that acute distress was not necessarily indicative of a choking incident, correct?

A There was something going on, given the scenario that he just wolfed down a sandwich and what was later found within a reasonable degree of medical certainty, it was from choking. But he wasn't grabbing his throat right then to be able to

vocalize it more.

Q Okay. So what you saw on the video indicated to you that there was distress, but you needed to put together the other pieces of it to say that it was a choking death or choking incident that you were talking about there, because there weren't any of the things that you would normally associate with symptoms or signs of choking, correct?

A Correct.

Q Okay. You also said that you disagreed with his position that -- that this absolutely has -- well, you said that this absolutely has to be a choking death and he had thought that it was more likely --

A I did not say absolutely has to be. I said within all reasonable medical probability.

Q Okay. Understanding that you could not rule out other things without an autopsy, is that right?

A Correct.

Q But based on the physical evidence and the video, your conclusion was that the most likely thing was that it was a choking death?

A Correct.

Q Okay. What else?

A Dr. MacQuerri also states that an individual trained in first aid or even as a Level I emergency medical technician would not have had the necessary training to save Harvey if his airway was, in fact, blocked. My comment, I strongly disagree. As it was noted on the police evaluation there was food present in the patient's mouth. And then I give the following quote; that the patient had food coming out of his mouth and a lunch pail was by his side. It would not be difficult to clear the airway. You would just need to get that food out of there, which might have been as simple as reaching into the mouth with fingers and pulling it out, which would have been able to re-establish the airway. He didn't say that there were multiple other things that were present in the mouth. It was one large glob of food.

Q That was not identified until after the coroner and the police got there, though, correct?

A Correct.

Q We've already talked about the fact --

A I don't know what the EMS was doing, because I don't have their report.

Q We've already talked about the fact that that was not something that was obvious or observed

by the driver at a time when -- when he first observing Harvey?

A We cannot be certain as to how obvious it was. We can say that he did not recognize it.

Q Okay. And you didn't see anything in your own review of the video to indicate that there was food coming out of Harvey's mouth or anything that would indicate up to that point that he had -- that he had any kind of choking incident going on?

A Correct.

Q Okay. So, Doctor, would you agree with me that the -- at least putting yourself back into the situation that occurred, and I know it's kind of heart to divorce yourself from all the information that you know came afterwards, we know that there was not any audible evidence of choking, correct?

A Um-hmm.

Q We know that there was not anything that was visually observable that would indicate that Harvey was choking at the time that you believe he started to have some signs of distress, correct?

A Correct.

Q We know that the driver was not aware of Harvey eating anything on the bus prior to this incident, correct?

A Correct.

Q Okay. And there wasn't anything that indicated that the driver, when he went back to check on Harvey, identified any evidence of food or anything like that, either in his mouth or coming out of his mouth, correct?

A Correct.

Q Okay. So there wasn't anything for this driver to think, immediately, this is a choking situation, I better check his mouth and airway, correct?

A Unless he looked and saw the lunch box, which it does not appear that he did.

Q Okay. A lunch box in and of itself doesn't indicate that he's got a choking situation on his hands, does it?

A May raise his suspicion but it doesn't say that that's definitely it.

Q Okay. Is there something else on your list?

A No, that was it.

Q Okay. You said, too, that you had reviewed Jay Farrales's deposition, any other depositions that you reviewed?

A The parents.

Q Anything in those depositions that you want to comment on or that impact on your opinions at all?

A The parents were of the thought that the bus company, bus driver, should make sure that the people aren't eating if it was noted that the people were eating, that she would have put some sort of lock on the lunch box for people to take off. The bus driver stated that although he knew that it was a rule that they're not supposed to eat on the bus, I believe he said that he did not tell people not to eat on the bus.

Q You think that that's in his deposition somewhere?

A I believe there was something about that in his deposition.

Q Do you recall him saying whether or not he had ever seen Harvey eat on the bus before?

A It was somewhere around Page 23. There is prohibition of smoking and drinking on the bus. He did not tell passengers and, once again, this was one of those weird stuff that comes up with voice dictation, not to eat on the bus. I don't remember him saying specifically about Harvey.

Q Okay. Anything -- anything else from

your review of those depositions or any of the other things that you looked at that you -- that you want to comment on that impacts on your opinions at all?

A No.

Q Is there anything else that you have asked Mr. Cloward to provide you with? You mentioned the EMT.

A The EMS run sheet. And if they could find a time or a timing of or recording of the 911 phone call.

Q Is there anything else?

A No, I believe that's it.

Q Is there anything else that Mr. Cloward has asked you to review or comment on or be prepared to comment on at the time of trial?

A Not that I can think of, no.

Q Other than the things that we've talked about today and the things that are included in your report that you prepared, are there any other areas that you intend to testify about at the time of trial?

A Not that I can think of at this time.

Q Give me two minutes and I think I'm done here.

MS. SANDERS: Ben, do you have any

questions?

MR. CLOWARD: Yes, I do.

MS. SANDERS: Why don't you go ahead and ask him while I'm going through this.

EXAMINATION

BY MR. CLOWARD:

Q Okay. The first question is, Doctor, you were asked whether there were any visible signs of choking and you were asked to comment on what Mr. Farrales would have seen when he boarded the bus and then there was some discussion about Harvey gradually slumping. I wanted to clarify the record regarding the time it took for Harvey to be slumping to the point of where his hand was actually touching the ground. Do you have any reason to disagree that the video would show Mr. Farrales boarding the bus at approximately 8 with 37 to 39 seconds?

MS. SANDERS: Are you referring to something in his report, Ben, or asking him just to go by memory?

MR. CLOWARD: Just to go by memory. I believe he referenced --

A Yeah.

MR. CLOWARD: -- in his report that Mr. Farrales boarded around that time.

A Yeah, 37 seconds after 8:00 is what time I wrote as the bus driver coming back on the bus.

Q (By Mr. Cloward) Okay. And then do you have any reason to dispute that at 8 and 44 seconds, so just seven seconds later, Harvey was slumped to the point where his hand was actually touching the ground?

A I have no reason to disagree with that.

Q And then do you have any reason to disagree that it was approximately 30 seconds later, at 8:01 with 15 seconds, when the driver actually began to pull away?

MS. SANDERS: I'm just going to object to the extent that I don't see this in the report and so, you know, we're kind of just taking your representations here. Unless the doctor has something that's written down somewhere else.

A I'll say that the videos will show what they show. That does not seem an unreasonable time frame from what you described. But, once again, it would need be to be confirmed with the videos.

Q (By Mr. Cloward) Okay. And I know that you have not been asked, you know, to give standards of care regarding the bus driver, but would you agree with the general safety rule that a driver

should not begin to drive away until they are sure that their passengers are in a safe position?

MS. SANDERS: I'm going to object to that. Because he already has testified that he is not going to be expressing any opinions about what the driver should or shouldn't be doing.

A As far as the driver of a bus of handicapped patients, I would leave that to what the contract states and what people who are more familiar with that would know of what the bus driver should or should not do. If it was my child on the bus and they were the only one and they were in this situation, I would hope they would look there but I don't know what their responsibilities and what the standard is.

Q (By Mr. Cloward) Okay. Fair enough. Doctor, if Harvey was slumping to the point that he's actually -- his hand is touching the ground, would that be something that would be alerting to the driver that you would expect the driver would investigate that further?

MS. SANDERS: Objection. Calls for speculation.

A If the driver had seen that, I would expect the driver to observe -- to evaluate that.

Q (By Mr. Cloward) Okay. And if the driver did attempt to evaluate a passenger that was slumped over to the point that his hand was actually touching the ground, can you tell me how easy it would have been or how hard it would have been to make a basic assessment of whether or not there was something in his mouth?

MS. SANDERS: Objection. Calls for speculation.

A How hard would it have been to do that? It would not have been hard to do.

Q (By Mr. Cloward) Would somebody need special training, like a certificate, a medical degree, a license, anything at all to make that determination, or is that something that can be done by a lay person?

A That's something that could be done by a lay person.

Q And my understanding is that your practice entails practicing emergency medicine, is that correct?

A Emergency medicine and critical care medicine, yes, sir.

Q Okay. Do you often have experiences where patients will come into the emergency room and

either the patient themselves or the family members will indicate that they were assisted with basic life savings functions by 911?

A Yes.

Q I mean, is it uncommon for 911 to help folks who are calling?

A And just -- my apologies for interrupting, when you say 911, we're talking about not about the responders who come there but the people on the phone?

Q Correct.

A Okay. Go ahead, sir.

Q Sorry, I've got a bunch of other people calling. Okay. So it's not unusual for the operators who control or who answer the 911 calls to give advice regarding care that could be provided in an emergency situation?

MS. SANDERS: Objection. Calls for speculation. Beyond the scope and you're definitely leading the witness.

A Correct. That is something that does occur that EMS -- the person answering the phone for 911 will give some recommendations.

Q (By Mr. Cloward) Okay. And had -- had Mr. Farrales, when he boarded the bus, just glanced

to his left and he saw Harvey slumping into the aisleway with his hands touching the ground, had he called 911 at that time, what are things that you would anticipate based on your experience that 911 would have told him?

MS. SANDERS: Objection. It's beyond the scope.

A They could ask if he's responding. They would ask if he's breathing. They would tell him to take him off of the seat, lie him down on the floor in a rescue position, to see whether or not he was breathing, and then to -- would give recommendations as far as what could be done to try and help resuscitate the patient at that point.

Q Okay. And you have been asked a lot of questions about the Heimlich maneuver. And my question is: Is sometimes it enough to reposition a patient to re-establish an airway? Is that sometimes all that is needed?

A Yes.

Q Okay. And so, hypothetically, had Mr. Farrales, when he boarded the bus, had he just glanced to his left and saw Harvey leaning over into the aisleway with his hand touching the ground and had he barely repositioned Harvey, it's possible

that his airway would have been established -- re-established?

MS. SANDERS: Objection. It's an incomplete hypothetical. States facts not in evidence. Calls for speculation.

A That is possible.

MR. CLOWARD: Okay. Let me just check my notes here real fast. Okay. Doctor, I think those are all the questions that I have at this time.

EXAMINATION

BY MS. SANDERS:

Q Doctor, with regard to the last question that Mr. Cloward asked you, the hypothetical question, you don't have any actual evidence in this case that would allow you to say that simply repositioning Mr. Chernikoff would have made a difference as far as the outcome in this case, do you?

A It's possible. I cannot say for certain that it would have.

Q Okay. You certainly can't state it to a reasonable degree of medical probability, can you?

A That is correct.

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

EXAMINATION

BY MR. CLOWARD:

Q Doctor, I just wanted to -- I just wanted to make sure that I understood. You are, however, giving testimony and it is your position that the driver engaged in a combination of calling 911 and assisting Mr. Chernikoff in some manner, that that would have saved his life to a reasonable degree of medical probability on a more likely than not basis, correct?

A If at the time when he first walked on the bus he had noticed that, repositioned the patient, called 911, at that time, within a reasonable degree of medical certainty, that such time and such situation he would have been able to save his life.

MR. CLOWARD: Okay. No further questions. Thank you.

MS. SANDERS: Ben, she's asking about signature. My preference is that the doctor be given the opportunity to read and sign.

MR. CLOWARD: Okay. Just on the record, Doctor, in Nevada, the deponent has a right to review the transcript and sign. Both of the parties actually have a right as well to require or

request that the deponent read and sign. As far as your, you know, your option to do that, that's within your, you know, discretion. I usually just say to waive that, but if Ms. Sanders would like you to read and sign, that's, you know, between -- that's a right that she can request.

THE WITNESS: I -- if I am asked to -- by you, to read and sign, I will read and sign. I will charge for my time for reading and signing. So I will leave the decision up to you.

MS. SANDERS: Why don't you get his address and wherever you would want this to be sent to you.

MR. CLOWARD: I guess, LeAnn, I would just say if you're the one that's requesting him to do that, I would ask that you would pay his rate to review and sign. He personally chooses not to review and sign.

MS. SANDERS: Well, if he doesn't want to review and sign it, usually that's something that's beneficial to you, if he doesn't want to do it, I won't insist on it.

MR. CLOWARD: Okay. I mean, that's fine. I usually recommend that the client don't do that because the court reporters usually do a fine job and do a great job at what they do. So I don't

normally ask for that. So if you're okay with him waiving, then he can do that.

MS. SANDERS: Okay.

THE REPORTER: Just to reiterate you want an e-trans?

MR. CLOWARD: I'll take a mini with index, too.

(Ending time of the deposition: 4:36 p.m.)

STATE OF MISSOURI)
)SS
CITY OF ST. LOUIS)

I, Rebecca Brewer, Registered Professional Reporter, Certified Real-time Reporter, and Notary Public in and for the State of Missouri do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of the said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

RPR, MO-CCR,
Notary Public within and for the State of Missouri

My Commission expires April 7, 2017

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF, ELAINE CHERNIKOFF, Plaintiff, vs. FIRST TRANSIT INC., Defendant.	CASE NO A-13-682726 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 1

WEDNESDAY, FEBRUARY 17, 2016

APPEARANCES:

For the Plaintiff: BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants: LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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MR. CLOWARD: Ms. Smith, 137.
PROSPECTIVE JUROR NO. 137: Yes, it's telling your own opinion, regardless --
MR. CLOWARD: Okay.
PROSPECTIVE JUROR NO. 137 -- of how anyone feels about it.
MR. CLOWARD: Regardless of --
THE COURT RECORDER: I can't hear her.
THE COURT: Yes, we need to pass the microphone.
MR. CLOWARD: I'm sorry.
PROSPECTIVE JUROR NO. 137: It's telling your opinion regardless of how anyone feels about it.
MR. CLOWARD: Okay. Thank you. Regardless of whether it might hurt my feelings, regardless of whether it might hurt the other attorneys' feelings, regardless of whether it might hurt my clients' feelings, can you agree that's what was brutal honesty means?
PROSPECTIVE JUROR NO. 137: Correct.
MR. CLOWARD: I was taught when you're little, if you want something, you ask for it. So I'm going to ask everybody here to be brutally honest with me so that I can do my job for my clients. Will you all do that for me?
PROSPECTIVE JURORS: Yes.
MR. CLOWARD: Okay. Now I'm going to tell you something. I'm going to be asking at the end of this for an

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amount into the tens of millions of dollars, okay. I want to know how y'all are feeling about me even saying that, what feelings are stirred up inside when I say that?

PROSPECTIVE JUROR NO. 198: (Unintelligible.)

THE COURT: We need your name and badge number, please.

PROSPECTIVE JUROR NO. 198: Darrell Rivera.

THE COURT: Badge number?

PROSPECTIVE JUROR NO. 198: 198.

THE COURT: Thank you.

MR. CLOWARD: Say more, please.

PROSPECTIVE JUROR NO. 198: I don't know, I mean, that's just how it is nowadays. Like, you slip and fall somewhere, and then you find out you can make out that money, you're going to sue. It happens all the time. I see it.

MR. CLOWARD: Thank you for being brutally honest. Say more about how you feel.

PROSPECTIVE JUROR NO. 198: I mean, that's pretty much it. I mean, I'm not saying it's bad or good. I'm just saying it's how it is.

MR. CLOWARD: Sure.

Sir, Mr. Shakespear, 204 -- Your Honor, would you like us to pass the microphone each time, or --

THE COURT: I think it would be easier for Maria.

MR. CLOWARD: Let's -- let's do that.

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CERTIFICATION

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

AFFIRMATION

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

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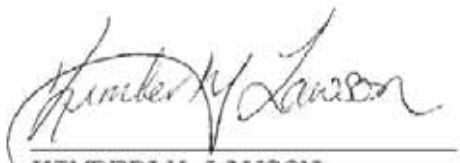

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CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF, ELAINE CHERNIKOFF, Plaintiff, vs. FIRST TRANSIT INC., Defendant.	CASE NO A-13-682726 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 3

FRIDAY, FEBRUARY 19, 2016

APPEARANCES:

For the Plaintiff: BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants: LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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

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

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

JACK CHERNIKOFF, PLAINTIFF'S WITNESS, SWORN

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

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

MR. ALLEN: Please the Court.

DIRECT EXAMINATION

BY MR. ALLEN:

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

A Yes.

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

A Sure.

Q Is that okay?

A Sure.

Q Tell us, how old are you?

A Seventy-nine.

Q And how old were you when Harvey was born?

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

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

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A Yes.
Q And you had another child?
A Yes. Neil.
Q And how did he -- how many years after that?
A Five.
Q And so Harvey's the oldest, Neil's the youngest?
A Yes.
Q And this is Neil in the corner?
A Yes.
Q And the jury will get to meet Neil on Monday. And this is your wife, Elaine?
A Fifty-seven years.
Q And this is Harvey's mom?
A Yes.
Q Is that right, 57 years?
A Yes.
Q Any other children?
A No.
Q Before we talk about Harvey, just tell us what you did for a living to support your family.
A After I was married, my uncle gave me a chance to go from Washington D -- I'd never been -- we were born and raised in Washington, D.C., and I had never gone any further than Washington, D.C. to New York City. And my uncle said to me that I could take a five week trip in his -- in his place. I

take -- to do what? What was the decision for Harvey to live?

A We -- the reason we came, I guess I should back up just a little bit. The reason that we moved for one year to Santa Monica, California, and it ended up 47 years on the West Coast, was that they were teaching what they called the Sullivan Method in Santa Monica schools. They had nothing in the Washington, Maryland immediate area for him.

So they were mainstreaming children like him into the school system, and he was in a special ed class in the normal school facilities. So that's why we moved to -- to help Harvey and to see how much, you know, we could -- for his education.

Q Now, was Harvey around 13 or so when you moved out there?

A Yes. He was just about 13.

Q So he got -- he got about five years in mainstream schools?

A Yes, he did. Five to six years. It was -- he was a little -- a little late, you know, in a special graduation.

Q Yes, sir. And he did graduate a special --

A Yes. Yes, he did, with a diploma.

Q And what was it? What do you mean by special graduation?

A Well, what I'm saying is, is that it shouldn't be, I guess, that way. He was in a special ed class, but he did

graduate with the other high school children.

Q All right. And so after he graduated high school, where did he -- you said he left the home, your house?

A Yes.

Q Where did he go?

A We -- we then found a place, I think it was first in the Santa Barbara area. There was a more of a dependent living, self-dependent, and the residents lived in individual apartments, maybe two or four people in an apartment, and he went every day to a workshop.

Q And if I may just to sort of summarize, because we'll hear from your wife, do you think she's a little better historian than you on the dates and times?

A Much better.

Q Okay. All right.

A Not a little.

Q So as I understand, if I could, he lived in sort of an apartment setting for a while?

A Yes.

Q And then he lived in a group home setting for a while?

A At Casa Carmen.

Q And that was fewer people living together?

A No. That was 100 and some people that were living together.

Q Okay. Then he had that 100-something people living together, then he went to a smaller one?

A Yes.

Q With like six people?

A Correct. Six beds.

Q And then he went to another one with about six people?

A Correct.

Q And then the jury will hear on Monday, but there was a decision to bring Harvey to Las Vegas; is that correct?

A Yes, that's correct.

Q And then Harvey -- and that was about a year and a half before Harvey passed away?

A Yes, it was.

Q And at that time, and you'll hear more on this on Monday, but Harvey then had a house that you rented for him; is that correct?

A In Las Vegas.

Q Yes, sir.

A Yes. We leased a house.

Q And you had a person which -- a personal care attendant, the jury's heard that story, his name was Joseph.

A Correct.

Q And Joseph actually came from California; is that correct?

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF, ELAINE CHERNIKOFF, Plaintiff, vs. FIRST TRANSIT INC., Defendant.	CASE NO A-13-682726 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 4

MONDAY, FEBRUARY 22, 2016

APPEARANCES:

For the Plaintiff: BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants: LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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A I did not. I didn't know that he was eating or doing --

Q The question is --

A -- so how could I enforce it?

Q -- did you -- have you enforced the rule --

A Yes, sir.

Q -- of no eating on the bus before --

A Before, yes.

Q -- to other passengers?

A To other passengers. And not only eating, other kind of things that would came up, like a lot of things that our passengers are doing that are inappropriate or they're not supposed to be doing, yes.

Q And the jury saw the video, I'm not going to show it right now, that started at approximately 7:59 a.m. and lasted for about 45 seconds when you got -- walked off the bus and you helped the passenger by the name of Kincaid on and off the bus.

A Yes, sir.

Q And when you came back on the bus, you did not look, when you got back on the bus, at Harvey, true?

A That's true, sir, I did not look.

Q And when you leave the bus and come back on the bus, you're supposed to look. It's your job.

A Say it again, sir.

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exit the bus, did you look at Harvey to see whether he's eating or acting appropriately?" Your answer was, No.

A No.

Q Did I read that correctly?

A Yeah. You did, sir.

Q Okay. Now, the next question --

A I'm just trying to understand what was in this part of it where why were you -- the way it was really going where I exit the bus, when was the time I was -- I was doing this. I'm just trying to remember and recall what you were trying to --

Q And that's why I took your deposition two years ago, to ask you those questions. Would you turn to the next page.

A One, oh, five?

Q Yes, sir. 105, line 4. Okay. Are you with me, 105, line 4?

A Yes, sir.

Q Okay. "Okay. And if you would have looked at him this time with the bus stopped and thought he needed help, would you have gone over and tried to help him before starting the bus?" Your answer, "I would."

A Yes.

Q Did I read that correct?

A [No audible response.]

Q Yes?

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shock to me.

But socially, as I think I mentioned, Harvey communicated very well and they said socially he was above average for his age group. So we contacted the school and told them what the findings were, and I believe Johns Hopkins sent the principal a letter. And so Harvey was put in another school for people with mental disabilities. It was separate from the regular normal so called elementary school, and it was about a half an hour from our house.

And Harvey was in the special ed program and remained in the special ed there for several years. He was -- his IQ was probably in the 60s, maybe low to middle 60s, and 70 is what they call normal. So he was sort of higher functioning, I would say, than most of the other students at that school. And Jack had an opportunity for his job to move to California, and I went --

Q You slowed down a little.

A Pardon? Did I --

Q Are you okay?

A Am I --

Q Take a break. Deep breath. All right. There you go. Tell us, you're living in the D.C. Baltimore area.

A We were living right outside of Washington, D.C. --

Q All right. And so --

A -- in a small city called Bowie, Maryland.

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

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

Q How long was he in the program?

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

Q Let's move you on.

A Okay.

Q Where did he go next?

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

Q How long was he there?

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

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

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

Q He liked junk food?

A Oh, yeah. So anyway --

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

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

Q So this happened for about 23 years?

A Yes.

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

A Yeah. Yeah.

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

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

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

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

A I have it.

Q You have it?

A Actually, this wasn't Transition Services.

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

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

A Oh, I'm sorry.

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

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

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

A Did, oh, yeah.

Q -- is that true?

And you helped him study for it?

A I most certainly did.

Q And you drive a car?

A Yes.

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

A We -- yeah. I --

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

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

A Oh, yes.

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

A That's correct.

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

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

Q But he did drive with you, correct?

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

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BY MS. SANDERS:

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

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

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

A Yeah. Please do.

Q Right --

A Oh, okay.

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

A Yes.

Q Were you told about that at the time?

A No.

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

A No.

Q You told us a little earlier that Harvey was in

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

A Much better, yes.

Q Are you -- and his primary care physician at the time was Dr. Reddy; isn't that right?

A Yes.

Q Were you aware that just a week and a half or so before he died Harvey had gone to Dr. Reddy because he was having complaints of balance problems?

A Yes.

Q Do you know whether or not he ever got that balance evaluation done that Dr. Reddy recommended?

A No. They did make an appointment, but he never got there because he died on the bus. He choked.

Q Now, other than short periods of time, Harvey didn't live with you as an adult from the time that he was 18; isn't that right?

A Yeah, except for maybe a month here or a couple months in between the different facilities he lived in.

Q As I understand it, you and your husband were on the East Coast when you learned of Harvey's death, correct?

A Yes.

Q And you had plans and spent summers in Maryland, I think; isn't that true?

A Yes, from the time we moved to Las Vegas until

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Harvey passed away.

Q And after the funeral you and Jack went back to -- to the East Coast, correct, for the rest of the summer?

A Several weeks later. We had left all of our clothes. We had to close up the apartment we were renting. So yes, we had to go back.

Q We talked about this a little bit earlier, but there is a history of heart disease in your family; isn't that true?

A Yes. I have no problems and my son Neil doesn't have a problem. Jack has had. When he was in his 70s, he had a triple bypass.

Q And your mother actually died of a heart attack, didn't she?

A Yes, she did.

Q Harvey didn't provide any financial support to you, did he?

A I'm sorry?

Q Harvey didn't provide any financial support to you, did he?

A No. I mean, he earned anywhere from 50 cents for two weeks up to $12 and 80-some cents was probably the most he ever earned a week.

Q Now, you've told us that -- that Harvey was buried just on a Monday. You and your husband did not want an autopsy done, correct?

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CERTIFICATION

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

AFFIRMATION

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

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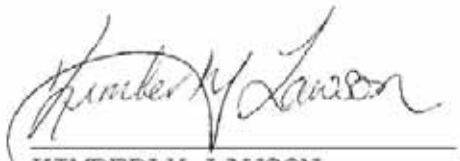
Aurora, Colorado



KIMBERLY LAWSON

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EXHIBIT H

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EXHIBIT H

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF, ELAINE CHERNIKOFF, Plaintiff, vs. FIRST TRANSIT INC., Defendant.	CASE NO A-13-682726 DEPT NO. XXIII **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 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.

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

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

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

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

And I asked her, so what cities in the United

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

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

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

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

forget about it. They don't matter anyway.

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

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

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

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you?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So where's the evidence of First Transit ever saying

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

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

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

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

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

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

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

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

To be considered for subscription service, a person must demonstrate a pattern of no excessive cancellations or no-shows. Requests may be made by contacting a RTC Customer Service Representative.

The RTC offers subscription services as an optional component of service. Subscription services are allowed under the Americans with Disabilities Act (ADA) of 1990 but not mandated. Your request may be placed on a waiting list. When a space becomes available, the individual will be notified. Requests are maintained for four months, after which, you may re-apply.

Arrivals & Late Arrivals

Passengers should be ready to depart when the vehicle arrives. The drivers are instructed to wait no longer than five minutes after the scheduled time. If your vehicle has not arrived within the 25 minute late window, you may then elect to cancel/decline the ride with no cancellation points penalty. Please remember to call and cancel the late ride and/or any return rides you may have scheduled. Vehicles arriving within five minutes before or 25 minutes after the scheduled pick-up time are considered within the window for service. While the RTC strives to provide on-time service, many factors may result in a delayed pick-up. If your vehicle has not arrived within the window for service, please call the Inquiry Office, open 24 hours a day, seven days a week at (702) 228-4800 and press 3 at the voice prompt or (702) 676-1834 (TDD). Please refer to page 13 for the points policy.

Gated Communities

If a pick-up location is within a gated community, it is the customer's responsibility to arrange entry for the vehicle. When you schedule a trip, please confirm the gate code. Any changes should be reported to RTC ADA Paratransit Services at (702) 228-4800 or (702) 676-1834 (TDD). If a vehicle is unable to enter the pick-up area or the customer fails to meet the vehicle outside of the community, the customer's trip will be designated as a NO SHOW. Please note that some gated communities may have designated pick-up/drop-off location(s). Please check with customer service when you are scheduling a ride.

RTC Paratransit Same-Day-Service

A new pilot program offering same-day-service requests will become available to RTC Paratransit riders in January 2010. This pilot program will offer ADA certified riders an option for non-emergency, unplanned medical needs and is made possible through Federal "New Freedom" funds. Using the same-day-service request program, RTC Paratransit riders can schedule non-life threatening medical trips only. Trips can be for any medical reason, for example, pharmacy, therapy, etc. The same-day-service is provided to ADA certified riders within the ADA service area. There is no additional charge for a same-day-service ride; the fare is the same as ADA Paratransit service. Same-day-service ride hours are Monday through Friday, 8 a.m. to midnight. No weekends or holidays. To schedule a same-day-service request, call 228-4800 and select "Same-Day-Service Request" to schedule your ride. Reservations can be made Monday through Friday from 7 a.m. to 8 p.m.

Contacting Customer Service

RTC uses an automated phone system to assist in efficiently routing customers' calls. The service is available 24 hours a day, 7 days a week.

When you call **228-4800**, you will hear the following prompts.

Interactive Voice Response (IVR)
(702) 228-4800

1 Confirm or cancel a ride
2 Schedule a ride
3 Inquire on a current ride or schedule a same day medical trip
4 Certification or eligibility
5 Verify customer information
6 General information
7 System Comments
0 Speak to a representative
* Repeat menu choices

 # Customers can confirm or cancel their rides for the next three days without having to speak to a customer service representative. Please contact Customer Service for your access code required to use the automated system.

Ride Check

Paratransit users now have the ability to check the status or cancel a previously scheduled Paratransit ride. Log onto the RTC's Web site, **rtcsnv.com** for step-by-step instructions. Or you can call our Paratransit Customer Service office at (702) 228-4800.

Shared Rides

RTC ADA Paratransit Services is a public transportation service. Whenever possible, the RTC will schedule rides with multiple passengers. This means you will be sharing rides with other persons with disabilities. Please be a courteous rider. Riders who require medication or oxygen at regular intervals should be advised that their travel time could be approximately 90 minutes depending on the distance traveled.

Destinations

A destination may not be changed after 6 p.m. the day before your trip is scheduled. Travel arrangements with more than one destination will be treated as separate trips and must be scheduled and cancelled separately.

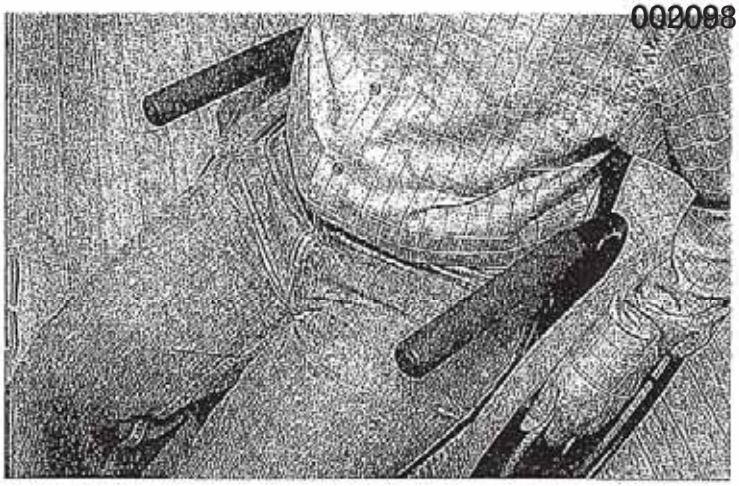
Vehicles

RTC ADA Paratransit Services may contract with other providers for transportation service. The Customer Service Representative is unable to tell you what type of vehicle will be used for your trip.

All vehicles used through this service are required to display a RTC sign on their vehicle. If you do not see the sign, ask the operator to show it to you.

Cancellations & No Shows

To cancel a scheduled trip, call Paratransit Reservations at (702) 228-4800 or (702) 676-1834 (TDD). Trips must be canceled no later than 6 p.m. the day prior to the scheduled pick-up to ensure no points are assessed. This call can be made 24 hours a day using the IVR phone system.



The following point system is used to determine penalties for recurring ***NO SHOWS***.

RTC NO SHOW Categories

Limited Notice - any ride canceled between the hours of 6 p.m. and 7 p.m. the day prior to the scheduled pick-up. ***ONE***

Early Notice - any ride canceled after 7 p.m. the day prior to the scheduled pick-up until four hours prior to the pick-up time. ***TWO***

Late Notice - any ride canceled from within four hours to 30 minutes prior to the beginning of the pick-up window [five minutes before the pick-up time]. ***THREE***

Notice at Door - any ride canceled by notice from the customer to the driver within the 30 minute pick-up window [five minutes before to 25 minutes after the pick-up time]. ***FIVE***

No Notice - any ride canceled by telephone from 30 minutes prior to the beginning of the pick-up window [five minutes before the pick-up time]. ***FIVE***

No Show - any ride for which an authorized paratransit service vehicle arrives at the designated pick-up location, waits the prescribed five minute period from the scheduled time, and the passenger is not present to board the vehicle. ***FIVE***

In the event you are a NO SHOW for a ride, the return ride or any additional ride(s) scheduled for that day will not be automatically canceled. Please call (702) 228-4800 or (702) 676-1834 (TDD) and select option 1 to cancel any return/ additional rides you had scheduled that will no longer be needed.

The NO SHOW category points will accumulate and are used to determine suspension of service. Riders are notified by mail when they cause a NO SHOW that qualifies for points being assessed. Suspension of service may result from points accumulated as follows:

No Show Point Value	Within Period of	Suspension Period
18	30 Days	15 Days
36	60 Days	30 Days
54	120 Days	90 Days
90	180 Days	6 Months

Right of Appeal

Anyone affected by this policy is entitled to request an appeal.

The RTC complies with the Americans with Disabilities Act of 1990, available for review at fta.dot.gov.

Contact the RTC comment team at (702) 228-4800, option 7 if you need further assistance. The comment team is available 7 a.m. to 6 p.m., seven (7) days a week.

Rider Rules

The RTC's goal is to provide a safe, comfortable commute for individuals traveling on RTC vehicles. To assure a pleasant commute for all, please observe the following rules:

- Seatbelts are required by passengers on vehicles.
- No eating is allowed on the vehicle, and drinks must be in spill-proof covered containers.
- Smoking is prohibited on the vehicle.
- Proper attire, including shirts and shoes or appropriate foot coverings, is required on the vehicle.
- Personal musical devices are allowed with head phones as long as the sound is not audible to others.
- Please do not distract the driver while the vehicle is in motion.
- Medication(s) and other personal belongings are the responsibility of the rider to plan for when riding paratransit.

Wheelchairs & Mobility Devices

All vehicles used for service in the RTC system are 100 percent ADA accessible.

Vehicle operators will assist customers in boarding and deboarding the Paratransit vehicle as needed.

All mobility devices such as wheelchairs, scooters and three-wheel carts must be secured in the vehicle and conform to the ADA definition of a "common wheelchair." A "common wheelchair" is such device that does not exceed 30 inches in width and 48 inches in length, measured two inches above the ground, and does not weigh more than 600 pounds when occupied. The RTC offers mobility device users a free and voluntary program designed to identify securement locations to assist drivers in quickly and safely securing the equipment on the bus. Please contact 676-1815 or TDD 676-1834 for more information and reference the S.A.F.E. program.

If your condition changes in a manner that requires you to use an assistive mobility device or change the type of mobility device used during your initial functional assessment, it must be reported to the RTC Certification Office at (702) 228-4800 or 676-1815 within 15 days. Due to this change in your condition, you may be required to undergo an additional functional assessment to determine what effect this change may have on your functional ability. Your current eligibility status may be altered as a result of your new functional assessment.

Service Animals

- Service animals are welcome and ride free-of-charge.
- A disruptive service animal will be treated according to the Illegal and Disruptive Behavior Policy. (pg. 19)
- Service animals must sit on the floor or on the passenger's lap. They may not occupy a passenger seat. All other animals must be in a secure cage in order to board the Paratransit vehicle.

Children

- Children under six years old must be accompanied by a responsible party.
- Children under six years old or who weigh less than 60 pounds must be secured in an approved child safety seat provided by the customer.
- Strollers must be collapsed to fit between the seat and the customer. Non-collapsible strollers are prohibited.
- For safety reasons, children capable of sitting on their own must sit in a seat and not on an adult's lap.

Personal Care Attendants & Companions

A Personal Care Attendant (PCA) may ride free-of-charge when accompanying an individual certified by the RTC Certification Office as requiring a PCA. The need for a PCA will be determined during your evaluation appointment.

One companion may also accompany an eligible rider. A companion will be charged the same fare as the eligible rider. Let the Customer Service Representative know at the time the reservation is made if you will be traveling with a companion, a PCA or both.

Unattended Passenger Policy

Customers determined as unable to be left unattended (based on age, cognitive limitations or special request of the responsible party) may schedule rides and ride unattended; however, arrangements must be made to have a responsible party meet the Paratransit vehicle at each location.

The "unattended passenger" form must be completed and on file. Please contact the RTC Certification Office at 228-4800 or 676-1815 if this service is required.

The driver will only wait five minutes for the responsible party to meet the Paratransit vehicle. If no one arrives, the driver will notify the RTC and continue on his/her route. The RTC will attempt to reach the designated emergency contact person. If the customer is not met by the end of the route, he/she will be returned to the bus yard. The responsible party will be required to pick up the customer at the bus yard and must show proper identification. The customer will not be left unattended, and the police will be notified to assist in locating a responsible party.

Failure to have a responsible party meet the vehicle is a violation of RTC's Disruptive Behavior Policy, and customers are subjected to suspension and/or a fine may be assessed for expenses incurred by the RTC for violation of this policy.

Carry-on Bag Policy

Customers are permitted to carry on only the number of bags that they are able to manage independently without the assistance of the driver. Due to space limitations and the time it takes to board the vehicle, the number of shopping bags is restricted to those that can be easily handled by the customer and carried aboard without delaying the vehicle. The carry-on items must fit within a certain space either on your lap or in front of your area. If a customer brings more than he/she is able to manage independently, it will be the customer's choice on whether to board with a manageable amount of items and find alternative transportation to carry the remaining packages, or decline the trip.

Shopping Cart Policy

Shopping carts or any type of equipment used to assist with transporting packages, groceries, clothing or other items are allowed on a limited basis. When space is limited, priority must be given to RTC ADA Paratransit wheelchair passengers. Carts can be no larger than 28.5" high by 12" deep by 15.5" wide. The customer must bring a securement device (for example a bungee cord) to secure his/her cart. It will cost an additional $.50 cents for each ride with a cart. Rides with carts are on a standby basis and will be notified between 6 p.m. and 8 p.m. on the evening prior to service if space is available for the cart trip. The trip must be reserved and approved with the cart, or the driver will be unable to transport the customer with his/her shopping cart.

If your cart is declined due to space availability you may cancel the ride with no cancellation penalty.

Illegal & Disruptive Behavior Policy

The RTC established an Illegal and Disruptive Behavior Policy to address the safety and well-being of customers, passengers, and staff of the RTC and its contractors. The policy defines categories of illegal and disruptive behavior and the consequences for such behavior. It's in effect in and around vehicles and facilities owned and/or operated by or on behalf of the RTC, including all RTC fixed route service, the Metropolitan Area Express (MAX) service, the Deuce service, ACE, ACExpress, RTC ADA Paratransit Services, CAT STAR specialized service, Silver STAR senior transportation service, FDR, and other services.

The RTC recognizes that an individual's disability or medical condition may cause a passenger to unknowingly and/or unintentionally violate the Illegal and Disruptive Behavior Policy. For this reason, the RTC looks at each violation individually.

Driver Services

Drivers will assist passengers who are unable to maneuver themselves from their door or designated pick-up location to the vehicle, provided it is safe for them to do so.

Drivers are Allowed to:

Maneuver your manual wheelchair if you need assistance from outside your door to the vehicle

Lend a steady arm if you need assistance

Provide directions or act as a sighted guide to/from vehicle if you are visually impaired. If you feel you need this type of assistance, please notify the driver.

Drivers are Not Allowed/ Required to:

Operate or push your electric mobility device (for example, electric wheelchair or scooter)

Operate or push your equipment or shopping cart up or down stairs or steep inclines

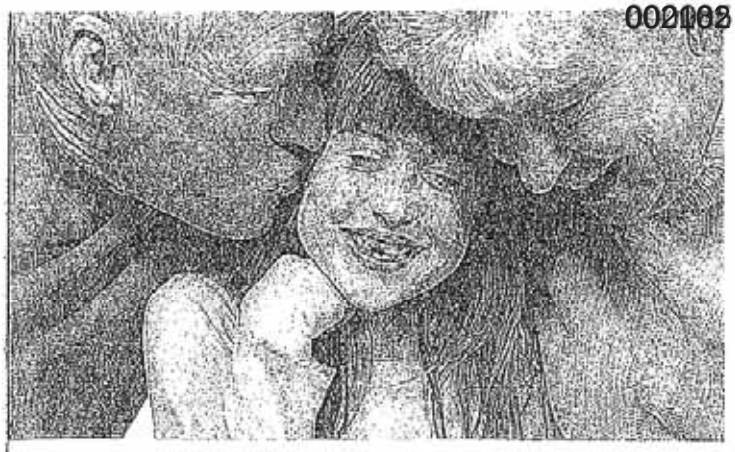
Cross residential thresholds

Lift or carry riders

Carry packages or other items

Drivers are trained not to perform these activities. Please do not make these requests of your driver.

Please keep your information current and notify the RTC of any change of address, phone number, emergency contact information, etc.



Door-to-Door

RTC ADA Paratransit Services provides "door-to-door" service. The driver will come to your door to let you know the bus has arrived. Please attempt to keep an eye out for the vehicle. However, there will be some locations and/or situations where the driver cannot leave the vehicle. When picking-up or dropping off on private property, there are often designated areas where a driver is permitted to stop. In order for us to serve you, it is necessary for you to wait for the vehicle at the marked stop.

Questions & Comments

We want to hear from you. Please contact Customer Service at (702) 228-4800 option 7 or (702) 676-1834 (TDD) to ask a question or leave us your comments, complaints, suggestions or recommendations. Or if you prefer, you can write to:

RTC Paratransit Services,
600 S. Grand Central Pkwy., Ste. 350
Las Vegas, NV 89106
Attn: Customer Service or
e-mail us through our Web site at rtcsnv.com.

When making a comment, please try to provide as much detail as possible so we can properly address your concern. For example, if you're reporting a situation involving a Paratransit vehicle, the exact date is necessary.

Important Numbers

RTC ADA Paratransit Customer Service

Scheduling
(702) 228-4800 option 2 or
TDD (702) 676-1834
7 Days a week 7 a.m. to 6 p.m.

Same Day Reservations
(702) 228-4800 option 3 or
TDD (702) 676-1834
Mon. – Fri. 7 a.m. to 8 p.m.

Inquiry/Same Day Cancellations
(702) 228-4800 option 3 or
TDD (702) 676-1834
7 Days a week 24 hours a day

Certification Office/Lost I.D. Cards
(702) 676-1815 or
TDD (702) 676-1834
Mon. – Fri. 8 a.m. – 4:30 p.m.

Comments
(702) 228-4800 option 7 or
TDD (702) 676-1834
7 Days a week 7 a.m. to 6 p.m.

RTC Administrative Offices
(702) 676-1500 or TDD (702) 676-1834
Mon. – Thurs. 7 a.m. to 6 p.m.

RTC Fixed Route Customer Service
(702) 228-7433 or
TDD 676-1834
7 Days a week 7 a.m. to 7 p.m.
Holidays 7 a.m. to 6 p.m.
Closed Christmas and Thanksgiving

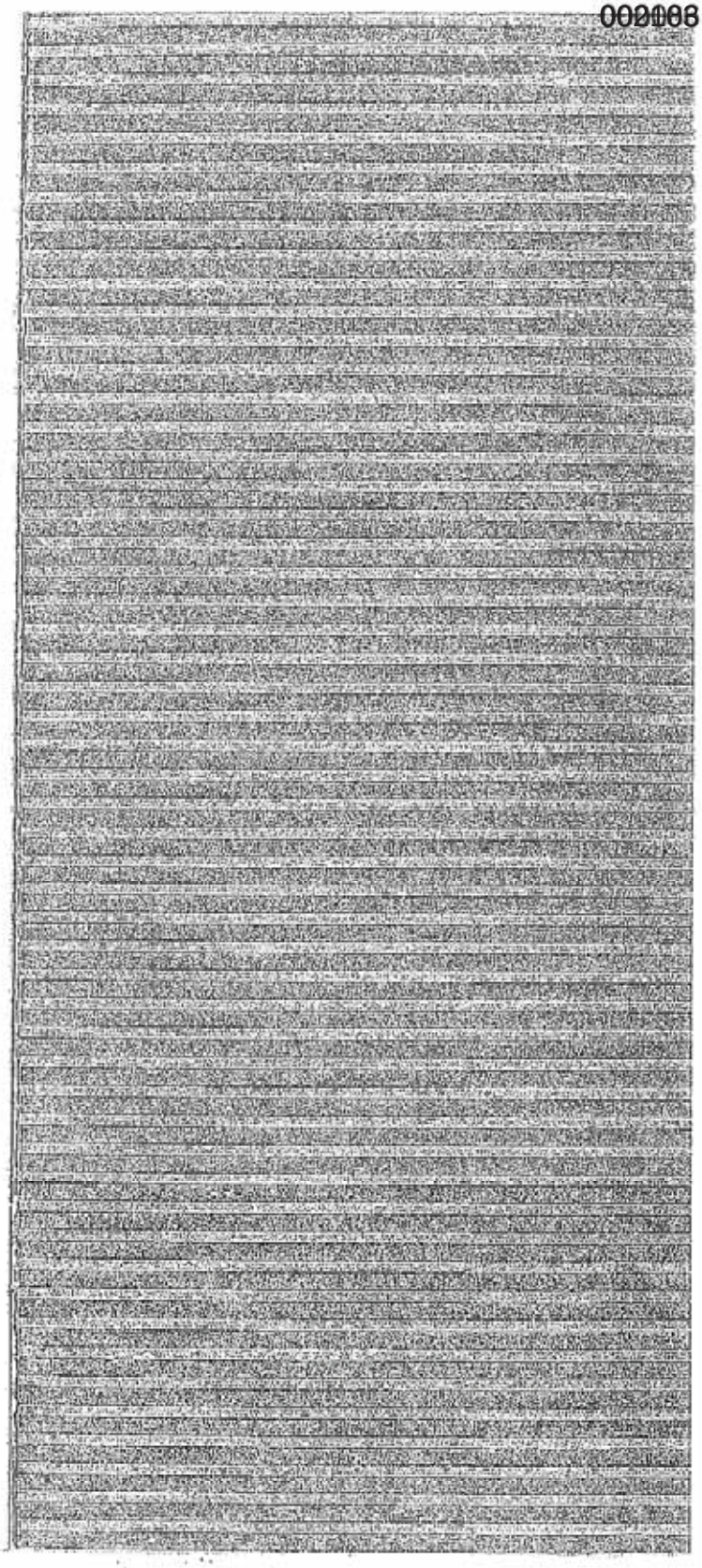


EXHIBIT C

002104

EXHIBIT C

Report concerning death of Harvey Chernikoff
From the desk of: Kenneth A Stein, M.D.

I, Kenneth A Stein, M.D. am a physician licensed to practice medicine in the State of Missouri since 1991. I am Board Certified in Internal Medicine by the American Board of Internal Medicine. I am Board Certified in Emergency Medicine by the American Board of Physician Specialties. I have subspecialty certification in Neurocritical Care by the United Council of Neurologic Subspecialties. I practice emergency medicine and critical care medicine. Please see my CV for further details.

In preparing this report I have reviewed the following:
Medical records concerning Mr. Harvey
Depositions of: Jack & Elaine Chernikoff
Autopsy report
Incident / death report

Mr. Chernikoff was a 51 y.o. male at the time of his death on July 29, 2011.
He had a medical history notable for diabetes mellitus, Hypertension and elevated cholesterol. In addition he had a diagnosis of mental retardation and schizophrenia. Mr. Chernikoff was considered disabled. As he was unable to live independently, he lived with a caregiver. Mr. Chernikoff's family had made arrangements with Regional Transportation Center / First Transit to provide supervised bus transportation for Mr. Chernikoff to bring him from his home to work and back.

On July 29, 2011, Mr. Chernikoff was picked up at his home by the CAT bus. He was in no acute distress at this time. On the bus Mr. Chernikoff was seen on video to be sitting in the row of seats directly behind the bus driver. At 7:57:43 a.m. Mr. Chernikoff was seen to start eating a sandwich. He was eating very quickly. He completed eating this sandwich at 7:59:27 A.M. (1 minute 34 seconds later). At 7:59:47 A.M. It was apparent that Mr. Chernikoff was in acute distress.

Within a reasonable degree of medical certainty the reason for Mr. Chernikoff's distress was that he was choking on the sandwich he had been eating, some of which remained in his mouth. Mr. Chernikoff was unable to stand up as he was wearing a seatbelt and was unable to remove the seatbelt. Mr. Chernikoff began to slump over / leaning to his right side, eventually hanging over in to the aisle of the bus still restrained by his seat belt.

At 7:59:59 A.M. The bus driver had stopped the bus and now exited the bus to assist a female passenger off of the bus. The bus driver reentered the bus at 8:00:37 A.M. At the time the bus driver re- entered the bus it can be seen on the video that Mr. Chernikoff was slumped over towards his right side. The bus driver did not notice Mr. Chernikoff's condition and he started to drive the bus again. At 8:03:40 A.M. the bus driver said "Harvey" and when Mr. Chernikoff did not respond the bus driver shook his arm. At 8:04:15 the bus driver went to Mr. Chernikoff's side. He was unable to get any response from Mr. Chernikoff. At 8:06:00 there was a call to the bus driver from a person,

Report concerning death of Harvey Chernikoff
From the desk of: Kenneth A Stein, M.D.

presumed to be a dispatcher from First Transit. The bus driver informed them that there was an emergency and that he needed for them to contact 911.

Emergency Medical Service providers arrived on the bus at 8:15:42 A.M. and found that Mr. Chernikoff was without signs of life. A cardiac monitor showed that Mr. Chernikoff's heart had stopped (asystole). No resuscitative efforts were attempted and he was pronounced dead. At no time prior to the arrival of EMS providers did the bus driver attempt to perform a Heimlich maneuver, nor did he attempt to clear the food from Mr. Chernikoff's mouth, nor did he attempt to perform CPR (Cardiopulmonary Resuscitation).

A limited autopsy was performed. The external examination showed that there was a 50 gram object in Mr. Chernikoff's mouth. Based upon the appearance of the object as well as the odor and the history the medical examiner felt that this object was part of a sandwich that contained peanut butter. The cause of death was listed as : "Choking". No internal examination was done at autopsy. Lab studies were obtained from blood and vitreous fluid.

Discussion:
Within a reasonable degree of medical certainty Mr. Chernikoff died from asphyxiation (e.g he "Choked to death"). The cause of this was a peanut butter containing sandwich that was in his mouth and blocked his airway. Within a reasonable degree of medical certainty, had the bus driver noticed Mr. Chernikoff's condition in a timely manner and attempted the Heimlich maneuver and/or CPR in a timely manner; or if he had contacted 911 emergently Mr. Chernikoff would have survived this incident and would not have died on this date.

The Heimlich maneuver is a fairly simple maneuver that non-medical professionals can learn and use to rescue people who are choking on an object.

The following website is a training video teaching the Heimlich maneuver:

https://www.youtube.com/watch?v=DE45ks9mIlw

The following websites have videos that show people who are not medical professionals successfully using the Heimlich maneuver.

https://www.youtube.com/watch?v=N_Zle2zJjS4

https://www.youtube.com/watch?v=l0BQuxu39-w

Report concerning death of Harvey Chernikoff
From the desk of: Kenneth A Stein, M.D.

Likewise CPR is widely taught to persons who are not medical professionals.

I reserve the right to modify my opinions as expressed above based upon additional material that may become available to me. In addition at time of deposition or trial if questions are asked of me that are not covered in this above report I may or may not have opinions that are not addressed in this report.

Kenneth A. Stein, M.D.

Kenneth A Stein, M.D.
June 24th, 2014

EXHIBIT D

002108

002108

EXHIBIT D

DISTRICT COURT

CLARK COUNTY, NEVADA

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

DEPOSITION OF KENNETH A. STEIN, M.D.

TAKEN ON BEHALF OF THE DEFENDANT

MARCH 25, 2015

(Starting time of the deposition: 2:12 p.m.)

JOB NO.: 237443

I N D E X

E X H I B I T S

EXHIBIT	DESCRIPTION	PAGE

(No exhibits marked.)

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Deposition of KENNETH A. STEIN, M.D., produced, sworn and examined on the 25th Day of March, 2015 between the hours of 2:00 p.m. and 5:00 p.m. at the offices of St. Louis Corporate Center, 1033 Corporate Square, in the County of St. Louis, State of Missouri, before Rebecca Brewer, Registered Professional Reporter, Certified Realtime Reporter, Missouri Certified Shorthand Reporter, and Notary Public within and for the State of Missouri.

A P P E A R A N C E S

FOR THE PLAINTIFF:

Mr. Benjamin Cloward (via telephone)

Cloward Hicks & Brasier

721 S. Sixth Street

Las Vegas, Nevada, 89101

(702) 960-4188

FOR THE DEFENDANT:

Ms. LeAnn Sanders

Alverson, Taylor, Mortensen & Sanders

7401 West Charleston Boulevard

Las Vegas, Nevada, 89117

(702) 384-7000

Court Reporter:

Ms. Rebecca Brewer, RPR, CSR, CRR

IT IS HEREBY STIPULATED AND AGREED by and between counsel for Plaintiff and counsel for the Defendant that this deposition may be taken in shorthand by Rebecca Brewer, RPR, CRR, CSR, Certified Court Reporter, and Notary Public, and afterwards transcribed into typewriting; and the signature of the witness is waived.

* * * * *

KENNETH A. STEIN, M.D.,

Of lawful age, produced, sworn and examined on behalf of the defendant, deposes and says:

EXAMINATION

QUESTIONS BY MS. SANDERS:

Q Would you state your full name, please?

A Kenneth Adam Stein, M.D.

Q I introduced myself before the deposition started. But for purposes of the record, my name is LeAnn Sanders. I represent First Transit and Jay Farrales in this case. You've got a couple of things in front you. What did you bring with you to the deposition today?

A One is an e-mail that just lists the address of the deposition. And one are notes on

reading the records, watching the videos, reading the depositions, and various other materials related to the case, such as the incident report. And the other is a copy of my report in the case.

Q Okay. You've had your deposition taken before, I know, from --

A Yes.

Q From looking at your CV, do you feel comfortable to just jump right in or do you want me to go through any admonitions?

A Yes.

Q When were you first contacted to potentially be involved in reviewing this case?

A Sometimes in the first half of 2014, I believe.

Q And who was it that contacted you?

A It was either Mr. Cloward or someone from Mr. Cloward's office.

Q Do you know how it was that Mr. Cloward's office got in touch with you?

A I don't remember if the initial was phone call or e-mail.

Q Do you know how they got your name?

A No.

Q Had you ever worked with Mr. Cloward on

any cases previously?

A Not that I specifically remember.

Q He has -- Mr. Cloward has a co-counsel by the name of Charles Allen. Is that a familiar name to you?

A Just from this case.

Q Okay. Have you ever spoken with Mr. Allen about this case?

A I don't specifically remembering speaking with him. I remember speaking with Mr. Cloward. I don't remember speaking with Mr. Allen.

Q When is the first time you remember speaking with Mr. Cloward?

A It was sometime shortly after the initial contact. Usually what will happen is I'll usually be contacted by phone or by e-mail and then generally the attorney will want to speak before sending records over just to make sure I'm a good fit. And I want to make sure I'm a proper fit for reviewing the case.

Q Other than e-mails, did you ever receive any like written communications, letters, anything like that?

A I think there was some CDs or records

that were sent and there might have been a letter that was included with that.

Q Do you still have a copy of those or that original letter and information that you were originally sent?

A I would need to check back in my file and see if I did.

Q A few months ago we had requested a copy of your entire file. And other than copies of the records, which we already have, the only thing that we received was a couple of more recent e-mails. Would you still have copies of e-mails that you had from Mr. Cloward originally and during the course of this case up through -- I think the first ones we received would have been in December.

A Yeah. And, generally, all those would entail would be, hi, here are these records, there's usually not much detail other than, here, please review this and let's talk.

Q Okay. My question, though, was: Would you still be able to retrieve any earlier e-mails?

A I believe I would be.

Q What about billing information? The only thing that we've received is that -- and we hadn't even received a copy of an invoice. It would

have been, I think, just information that you were paid a $2,000 retainer but there hasn't been any additional information we've received as far as how or when you've been paid for your review in this case.

A The best billing records would most likely be to ask them to send copies of checks. There was a three-hour preparation time for today's deposition, which I received a check today.

Q Okay. And did you speak with Mr. Cloward in preparation for the deposition today?

A Yes.

Q When did you speak with him?

A Yesterday and today.

Q Okay. Tell me just generally what your -- the substance was of your conversation with Mr. Cloward in preparation for the deposition.

A Running over the facts in the case. A lot of that depends on the attorneys. Some attorneys feel okay describing more detail. Some attorneys say that's work product and not to be discussed, but basically it was what happened in the case, the timing of things, what my position is of the case, that sort of thing.

Q Okay. Was there anything that you

discussed with Mr. Cloward, either yesterday or today, that varies in any significant way from what we see summarized in the report that you prepared?

A The main thing is since then I did -- when I first wrote the report, I did not have the deposition testimony of the driver. Apparently there was some other materials that were obtained from First Transit considering -- concerning training, what training there was or what wasn't. And then there was the defendant's expert's report, which I did not have when I initially prepared my report.

Q Let's kind of go back to the beginning. If you can recall what information you received initially, like in the first grouping of information that you received from Mr. Cloward.

A What I think -- what I remember receiving initially was the -- I guess it was the incident report and the autopsy and some of those related papers. And then there were the videos that were taken on the bus. And I'm trying to remember what else there was initially. At some point I got the parents' deposition. I don't remember exactly -- I think those came afterwards but I don't remember exactly.

Q Okay. And then you said you received some additional information after you got that first group of information. What did you receive -- well, let me back up. How many times have you received groupings of information pertaining to the case?

A There were a few over the months. I don't remember the exact dates. But there was the defense experts. I'm not sure I'm pronouncing -- MacQuarri?

Q Dr. MacQuarri?

A Saw the report and then there was the deposition of the bus driver.

Q Okay.

A And somewhere along there there were also the incident reports, the letter that was -- I'm not sure if you would call it an affidavit that was -- or incident report that was written by the bus driver. There was the police incident report. I have not seen and would be nice to see if there was an actual ambulance run sheet or if there was a timing of a 911 phone call as to what time 911 actually received a phone call.

Q Have you been provided with copies of any of Harvey's prior medical records?

A Oh, yes. Thank you very much. And I

did have prior medical records. I don't remember the exact names of the facilities but there were several medical records and those would have been provided to you. I know there was Cedar Sinai and several others.

Q The first time you spoke with either Mr. Cloward or somebody from his office, tell me generally what were you told about the case.

A A lot of it would have been summarized in the initial cover letter that was sent to me either by e-mail or along with the records. Basically about someone who was on a bus and had passed away and I don't remember specifically if it said the word that there was a question of choking or not at that time. But, once again, that would be in the cover letter.

Q Okay. Would you have -- do you have a file of the communications that you've had with Mr. Cloward's office?

A Just if I do, look on my e-mail.

Q Okay. You said that there would have been like a letter, initial communication, would that have been a paper letter or would that have been an e-mail, too, do you think?

A I actually have to check.

Q Okay. Would you do that for me and check to see if you can find whatever it was that you received initially and then provide it to Mr. Cloward?

A Sure. What I generally state is I'll be pleased to provide those things if someone will remind me afterwards and as long as retaining counsel doesn't have objections to my providing those things.

Q Yeah, it's discoverable in Nevada. And we're working under Nevada rules in this case.

A Okay.

Q Have you ever met Mr. Cloward personally or just talked to him on the phone?

A No, just on the phone.

Q Can you estimate for me about how many times you've spoken with him on the phone?

A Five or six, I would guess.

Q And, as far as you recall, you have not spoken with Mr. Allen or anybody in his office?

A I don't remember if there might have been one of the calls where Mr. Allen might have on it. I don't specifically have a memory of it.

Q Do you know any of the medical care providers who -- whose names you saw in any of

Harvey Chernikoff's medical records?

A No.

Q Have you made an attempt to contact the coroner who did the coroner's report?

A No.

Q Do you know or have you ever met the plaintiffs in this case, Mr. and Mrs. Chernikoff?

A No.

Q You didn't know Harvey before he died, did you?

A No.

Q Other than the one report that you have prepared, have you been asked to do any other, either supplemental or additional reports, or to look at any additional documents?

A I mean, only those documents that I mentioned that came afterwards.

Q Okay. You have reviewed those documents?

A Yes, so I reviewed the bus driver's deposition. I reviewed defendant's expert's report.

Q Okay. You -- I believe that you -- well, strike that. As a result of any of the additional documents that you've reviewed, has it changed any of the opinions that you had expressed

previously in your report?

A No, not really. I was kind of surprised by defense expert's report of his opinions.

Q These are the notes that you --

A Yes, ma'am. I will say that those are done with Dragon Dictate Voice Recognition Transcription Software so sometimes there's some weird word substitutions and such.

Q Is this a copy that I can have?

A Yes.

Q I don't want to take the time now to review it. I did get a copy of what appears to be just the first page on the notes that you have here. But you've got additional notes here for the deposition of Mr. Farrales and Dr. MacQuarri's report and the deposition of the mother. This is the extent of the notes that you have?

A Yes.

Q When was it that you prepared the last two pages of the notes?

A Yesterday and today in preparation for today.

Q Okay.

A Actually, I can just keep those up here with me just in case I need to refer to those.

You're more than welcome to have them afterwards.

Q All right. I do have a copy of your CV, but can you estimate for me about how many times you've been retained as an expert to review litigated cases?

A I don't have a total listing. I would ball park guesstimate, it's a broad guesstimate, but somewhere around 400 cases.

Q And over how many period of years?

A Since 2002, I believe. So that would be, boy, getting old, 13 years.

Q Okay. Can you give me a rough percentage of how many times you've been retained on behalf of the patient or the plaintiff in a case as opposed to the defendant who's being sued?

A If you take over the whole time all the cases, it works out about 90, 95 percent plaintiff, 5 percent defense. I'm more than willing to do both. I'm actually happy to get additional new defense cases. I'm listed with a defense research institute's database of experts. But just what comes across my desk is about 95 percent plaintiff, a lot of which will be pre-suit. And then after I review them, may not actually go on to be filed.

Q Do you still maintain a clinical

practice?

A Yes.

Q Can you estimate for me about how much time you spend in clinical practice versus the expert work that you do?

A Clinical practice, I'm full-time practicing critical care medicine, part-time practicing emergency medicine. Average hours per week, if you do it on a monthly basis, would be somewhere about -- I'd guesstimate somewhere around 42, 44 hours a week clinical work. If you take everything together, the medicolegal reviewing as far as my medical clinical practice, it would be about 85 percent of the time would be clinical practice, 15 percent of the time, ball park, would be medicolegal.

Q Have you ever participated in a case as an expert for a case that's going on in Nevada?

A That's currently? I think I have four I've reviewed. That was several years ago. There's not another one that I can remember that's currently going on in Nevada.

Q Do you recall anything about the other cases, besides this one, that have been venued in Nevada?

A I guess I vaguely remember talking to an attorney from Nevada and that was about five or six years ago. I don't even remember the name of the attorney or the specifics of the case.

Q Did any of the four or five, or however many cases you've had in Nevada, go to either deposition or trial?

A I do not believe so.

Q Other than this one?

A Correct.

Q How many times have you testified in trial?

A In trial, whether it be at -- physically present or, if my terminology's correct, evidentiary testimony, if that's correct, if you show it at trial, or am I getting my terms mixed up? The one where they'll show up at trial if you --

Q There may be a videotaped deposition for purposes of trial. Do you think you've done some of that?

A I've done some of those and I've also been physically present, total testimony given for trial, I believe, about 26 times.

Q In any of the cases that you've reviewed, has there been an issue of alleged choking

other than this case?

A And this is going from, you know, the best of my recollection. I don't specifically remember that being an allegation in the cases.

Q You are -- I think you said you have some websites or you have signed up with some expert groups or something like that?

A Well, I do have that, yes.

Q Okay. How long have you been offering your services as an expert through some type of expert service?

A I believe it was either 2005 or 2006.

Q Do you know if that's how Mr. Cloward got your name? Or I asked you that question, you don't recall?

A Yeah. I don't specifically remember.

Q Okay. As far as your own practice is concerned, can you estimate for me about how many times you have performed the Heimlich maneuver yourself in an emergency situation?

A I'm trying to remember if I actually have. Usually by the time I get there, those sort of things have already been done and attempted and I'm there doing the advanced cardiac life support.

Q That was going to be my next question.

It's usually something that's done in the field as an emergency measure?

A It's done in the field or if it's a nurse at the bedside and she does it and then, you know, if the person doesn't respond, they may have to call a code. That's when I respond. I'd have to think about it, but I don't specifically remember if I've actually personally had the occasion to perform a Heimlich.

Q Okay. Your role would be more after somebody has had an experience with choking someplace else and that maneuver has either been attempted or not attempted but you get the person that's now been transferred to the hospital, is that a more likely case where you would be involved?

A Correct. Or in the hospital. There was once a nursing home patient who was having respiratory cardiac arrest and I went in to intubate and there was a big piece of broccoli stuck between the vocal cords, so some of it actually has been with patients in the hospital.

Q But not something you've done yourself?

A As far as the Heimlich, no, not that I can remember anyway.

Q Would you agree with me that performing

the Heimlich maneuver is something that can cause additional injuries if it's not done correctly?

A It's possible that it can. But there is also an expression that you can't hurt a dead person.

Q If a person is not actually choking and you perform a Heimlich maneuver on that person, that would be contraindicated, wouldn't it?

A It depends on whether you thought the person was choking. If you had a clinical suspicion that the person was choking or had choked and you cannot -- if you attempt to do rescue breathing and you're not able to get air into the person, and you have suspicion that there's something obstructing the airway, it would be reasonable to do.

Q You'd have to have a suspicion or some reason to believe that the person had something obstructing the airway in order to -- in order for it to be reasonable for a Heimlich maneuver to be attempted, correct?

A Correct.

Q I know that you've got some experience with teaching medical students. Is the Heimlich maneuver something that you have ever taught yourself?

A So I have CPR training, basic cardiac life support. I have advanced cardiac life support. I've taught advanced trauma life support. I don't know -- I don't believe we've actually taught that -- I mean, as far as an official class, I can't remember. I mean, there will be times when things come up when you're doing bedside teaching, teaching the medical students and residents in the emergency room what may have been taught, but I don't remember teaching it as a specific part of a class.

Q Do you know if the Heimlich maneuver is something that is still taught in basic first aid classes?

A If it's basic first aid, I'm not sure if it's in CPR, yes, basic cardiac life support.

Q Can you refer me to the references or sources for --

A I would have to check. I just recently recertified in basic cardiac and advanced cardiac. I don't remember all the specifics because when you do it kind of year after year, every two years after every two years, you kind of forget the specifics of what might have come up and been changed.

Q Okay. You're talking about from your own experience?

A Correct.

Q Okay. My question was more basic. As far as a basic first aid class is concerned, do you know whether or not the Heimlich maneuver is something that is still taught in a basic first aid class?

A In basic first aid class, I don't teach that, so I'm not sure.

Q Okay. Have you done any kind of research to know one way or the other whether or not that's still something that's advocated or recommended?

A No, what I do remember, though, from reading the deposition of the bus driver, is that on Page 69 of the deposition it refers to Page 71 of the employee handbook, comma, first aid, comma, choking and Heimlich maneuver. And it describes that if -- about performing the Heimlich maneuver, if the patient becomes unresponsive and the airway's not clear, call 911. If the patient is unconscious, begin CPR.

Q Okay. My question was a little different. Well, since you talked about the bus driver, you recall that his testimony was that he was not trained in the Heimlich maneuver, correct?

A I believe he said he was not trained in CPR. I don't remember specifically about the Heimlich maneuver. Apparently he did receive that booklet, which he was supposed to sign off on as having read.

Q Okay. And so your understanding is that -- that he did or did not receive first aid training or any training in the Heimlich maneuver?

A I don't specifically remember the Heimlich, if he was trained. I do remember that he had that booklet that he was supposed to sign off on as having either been read. I don't remember -- and the deposition testimony will say what it says, whether it was that it was taught to them or that he read it. I do remember him saying that he did not specifically have CPR training.

Q Okay. Would you expect that performing the Heimlich maneuver would have any positive effect on a person who's having a heart attack?

A Now, it depends on how you define heart attack. If we define heart attack as meaning that someone has an acute occlusion of a coronary artery, which has then caused them to be unresponsive and apneic and that there was no obstruction of the airway caused by food that might have been vomited

up or that was in the mouth and was choked upon secondary to that, if the main problem was an occlusion to coronary artery, performing the Heimlich maneuver would not help. If the person had a cardiac arrest or respiratory arrest which happened secondary to the heart attack, so they're eating, they have a heart attack, they go into cardiac arrest and a piece of food gets stuck in their mouth, doing the Heimlich maneuver would be part of the -- may be part of the necessary resuscitative efforts.

Q It would not be something that you would use as a first line first aid for somebody who you suspect is having a heart attack, is it?

A No.

Q Can performance of Heimlich maneuver cause additional injury to somebody who's having a heart attack?

A Once again, it depends if they're pulseless or not. If they're pulseless and they have no airway, you're not able to exchange air into them, the relative risk of performing the Heimlich maneuver would be very, very low. Is it possible that if there was no obstruction of the airway and you did the Heimlich maneuver that you could cause

injury? It's possible.

Q If you are suspicious that somebody is having a seizure, is a Heimlich maneuver something that you would utilize as a first aid tactic?

A If they have an airway and they're able to exchange air and there's no evidence of an airway obstruction, no.

Q I didn't ask you about this before. Had you ever met Ned Einstein who was the plaintiff's traffic or transportation safety expert?

A No.

Q Had you ever reviewed a report prepared by Mr. Einstein?

A No.

Q Okay. Have you ever reviewed a report or been told about an expert by the name of David Berkowitz?

A No.

Q Do you know whether or not you've ever reviewed a report prepared by him?

A I have not.

Q Okay. Other than Dr. MacQuarri, have you been provided with any of the other defense reports?

A No.

Q Defense expert reports. Do you have any training yourself in transportation safety?

A Just tell my kids that they have to have their seat belt on.

Q Is that a no?

A That's a no, I do not.

Q Have you done any research on it for this case?

A Specifically in transportation safety, no.

Q Do you know whether or not the ADA has any requirement that paratransit service providers train their drivers in first aid?

A And which ADA are you referring to?

Q The American with Disabilities Act.

A Okay. I was thinking of the American Diabetic Association.

Q Okay. Sorry.

A I'm not aware.

Q Do you know or have you done any research to try and find out what the state of Nevada requires as far as paratransit driver training?

A No, my understanding that was -- that I was going to be more of a causation expert as

opposed to a standard of care expert.

Q And I'm just trying to get to that point.

A No problem.

Q Okay. So you haven't done any research or haven't been asked to provide any opinions about the training of the driver or anything that is or is not required by the state of Nevada or by the local transportation service in Las Vegas, correct?

A No, I have not done any of that. I have not been asked to.

Q Have you been provided with a contract between the Regional Transportation Center in Clark County and First Transit?

A No.

Q And do you know anything about the requirements or the contractual agreements between those parties?

A Not at all.

Q Have you been provided with any photographs of the interior of the bus?

A Just the videos.

Q Do you recall, from looking at the video or from being told anything by Mr. Cloward or anybody else in his office, that the paratransit bus

is -- includes signage telling passengers not to be eating or drinking on the bus?

A I remember that that was discussed in the depositions. As to whether it was the mother's or bus driver's and what Mr. Chernikoff's reading level was as to what signs he could or could not understand.

Q Okay. You are aware now, though, that there were signs in the bus informing passengers not to eat on the bus?

A Yes.

Q Okay. Are you aware of any kind of statistics about the places where choking incidents would most likely occur?

A No. I mean, as a restaurant versus home or drinking or --

Q Sure. Would you expect that more choking incidences would occur in a restaurant, for example, than on a paratransit bus?

A Yes.

Q Are you aware of any requirements by the state of Nevada or any state that would require restaurant workers to be trained in first aid?

A I am un -- I am not aware of that, one way or the other.

Q And just to kind of carry it through, you've told me that you're not aware of driver training and that kind of thing with regard to first aid for paratransit service. Are you aware of any type of long haul buses, taxi drivers, any type of driving services that require their drivers to be trained in first aid?

A No, I am not aware one way or the other.

Q Would you agree with me that the Heimlich maneuver is something that somebody who -- only somebody who's trained to do it should be attempting?

A I'm not sure I would agree with that. If there's someone who you see who's choking and sometimes people have kind of like seen or heard about it and you have someone who's choking and arresting, losing their airway and dying, there would be people who would be reasonable for them to try it. If they've not had official training, then the options are sitting there and watching someone die or attempting to do that. The one thing is that Heimlich maneuver was not the only option in this case. Apparently there was -- I'm trying to remember how it was termed in the incident report -- evidence at the scene. Harvey was eating food and

had food coming out of his mouth and his lunch pail was by his side so it might have been possible to remove food from the patient's mouth. I keep saying patient -- that's the kind of the world I live in -- from Mr. Harvey's mouth. And it may or may not have actually been necessary to do the Heimlich maneuver, to clear the airway.

Q Okay. I'm missing the point that you're trying to make.

A Because it seemed that a lot of your questions are aimed specifically at the Heimlich maneuver. If the airway is occluded by what was, I think, they said a 50- or 60-gram bolus of what was a peanut butter containing sandwich and it was in the mouth, it might have been just possible to remove that from the mouth to clear the airway without necessarily having to do the Heimlich maneuver to clear his airway.

Q I focus on the Heimlich maneuver because it's something that you mention in your report along with the CPR and I haven't gotten to the CPR part yet, but do you know whether or not the food that was eventually identified by the coroner was visible to the driver or anybody else at a time when removing the food could have -- could have done

something?

A All I can say is the Metropolitan Police Department report talks about evidence at the scene. And in their report they say eating food and food coming out of his mouth and his lunch pail was by his side.

Q Okay. You read the deposition of Mr. Farrales, correct?

A Yes.

Q And do you recall his testimony that at no time while he was driving the bus did he see Harvey eating?

A Correct.

Q Okay. So, if he didn't see him eating, then he would not have been even looking for food coming out of his mouth, correct?

A Well, it's a question of whether he looked. It's a question of whether you, one, even before we get to the whole Heimlich maneuver and CPR, someone's unresponsive, you go for the rescue position and get him out of the seat belt, lie him down, turn him over to the left side, see if they're able to breathe. And that was never done. So I didn't see that he actually -- watching the video, didn't see that he actually ever looked at the mouth

to see if there was food coming out of the mouth.

Q Did the EMTs make any kind of sweep of the mouth when they got to the scene?

A When they got to the scene, basically seems like they saw that the patient was cold and dead and they did not attempt to resuscitate and I don't remember specifically -- I looked at the video before, at that part, I did not go back and look at that today, what they did when they got there.

Q How many times did you look at the video?

A I looked at it several times. Mostly it was looking at the time from when he was eating, the fairly overweight woman was getting off the bus and it appeared that Harvey was kind of trying to reach up and reach towards her at that point and then was going unresponsive. Appeared to be in distress, was kind of like rubbing towards his head, appeared to be uncomfortable. And then by the time the bus driver had gotten back on the bus -- let me look at my report for the exact timing of things. So at the time the bus driver re-entered the bus it can be seen on the video that Mr. Chernikoff was slumped over toward the right side. And, I'm sorry, I lost track of exactly what the question was.

Q I was asking about how many times you had looked at the video.

A I have looked at it several times. I don't remember exact number of several times. Both when I initially looked at it when I wrote the report and then looking at it again today getting ready for the deposition.

Q Okay.

A And most of it was in that initial time frame. Once or twice. I looked through all the way till when EMS came.

Q Okay. But you did review the video again in preparation for the deposition?

A Yes, but when I was reviewing it again in preparation for the deposition, it was up until the time was that initial time frame. I didn't watch it all the way through to the very end today as far as when EMS arrived.

Q Okay. So you don't recall, as you sit here today, whether or not the EMS even checked the airway when they arrived on the scene?

A Right now, I do not. The video will show what it shows. I don't remember specifically what that part shows right now.

Q Okay. Are there certain signs or

symptoms that you would associate with somebody who is choking?

A Their usual signs and symptoms and, once again, these are usual signs and symptoms for a person who has a normal level of intellect, in a 50-year-old patient with mental retardation, his reading level is estimated at kindergarten or first grade. I can't necessarily say those would be the standard ones. But usually the universal sign for choking is that people put their hand up towards their neck. Doesn't mean that everyone does that, but that's one of the most common ones.

Q Any sounds that you would expect to hear from somebody that's choking?

A Depends on whether or not they can exchange any air. If you can't get any air coming out from the vocal cords, you can't make any sounds.

Q Anything other than the hands around the neck that you would associate with visible signs of somebody that's choking?

A Generally people try to kind of change their position. If someone's sitting down and choking, they might attempt to get up. Some of the videos that I attached to my deposition kind of show like someone in a restaurant sitting down trying to

stand up, trying to cough, trying to change their position. The main one that comes to my mind is, you know, the grabbing of the throat.

Q You would agree that there wasn't any evidence of Harvey grabbing for his throat at any point in the video?

A No. Likewise, people who have bad chest pain will often clutch their chest -- and there was no evidence of that -- if they're having a heart attack.

Q And there wasn't any evidence on the video of anything audible that would give anybody an indication that Harvey was choking, was there?

A Not that I could hear.

Q I think we talked a little bit about Mr. Farrales's deposition. But did you see from the deposition that he denied having any kind of first aid training?

A I believe so. Other than that part that was in the training pamphlet that he signed off on.

Q And he had not had any training in the Heimlich maneuver, do you recall seeing that?

A Not that I remember him stating.

Q And same thing for CPR; no CPR training?

A Correct.

Q As far as somebody who hasn't had any training in either the Heimlich maneuver or the CPR, I don't want to put words in your mouth, but I thought that I understood you to say earlier that you wouldn't necessarily agree that you would not want somebody who's untrained in the Heimlich maneuver to attempt something close to the Heimlich maneuver if they suspected somebody is choking, am I way off?

A If you suspect someone -- I would expect a lay person who has suspicion that a person is choking from food, who would have heard about the Heimlich maneuver, would attempt something to try and clear that. And that the Heimlich maneuver is well enough known. And I understand the bus driver had been in the states for a while and I have no idea what it's like in the Philippines but had been in the states for long enough that it would have been good probability they would have heard of or seen someone performing the Heimlich maneuver or seen it on TV or something.

Q Are you speculating about that or do you know one way or the other whether or not Mr. Farrales had any of that kind of experience in his background?

A It would need to be asked of him. I can't say specifically if he did or did not.

Q And you do know that -- I think we did cover this, that at least, according to his deposition testimony, Mr. Farrales indicated that he was not aware or he didn't observe Harvey eating on the bus, correct?

A Correct.

Q Well, okay. We talked about the Heimlich maneuver. You would not expect somebody --

A And then, once again, the pamphlet that he signed off, that training material did mention the Heimlich maneuver.

Q You're right. There's a section in the -- in the handbook that talks about the Heimlich maneuver, but the driver himself had not been trained in the Heimlich maneuver, correct?

A I believe he states he had not specifically had someone instruct him on how to do it. He'd signed off on reading something that had that described.

Q We talked about the Heimlich maneuver. Now, with regard to the CPR, would your answer be the same or different with regard to somebody that is not trained in CPR? Would you still advocate

that somebody who is not trained in performing CPR correctly would attempt to do so?

A I would expect them to call 911 immediately and get supervision from 911. A number of people -- we have family members who come in and they say, well, you know, seen it on TV and I tried it and I did what I could. As to what a general lay person would do if they've not been instructed at all would be hard to say. The proper thing to do would be to call 911 and have 911 instruct you and say, hey, do this, do that, so on.

Q You would not advocate somebody who is untrained in CPR to try and attempt something like that themselves, correct?

A Would I specifically advocate it? I don't know if I would say that. I can say there's a fair number of families that we've had who've come in that have not had CPR training but have said we tried to do CPR and been trained in CPR, no, but my loved one was there dying and we tried, we had to do something.

Q My question is a little different, Doctor. I'm not trying to ask what a family member would try themselves. As a trained professional, is that something that you advocate doing?

A As a trained professional, I would advocate that people get trained in power training if they're not trained, most likely would be a reason for me not to advocate for doing that.

Q Would you agree with me in this particular situation that given that Mr. Farrales was not aware that Harvey had been eating earlier on the bus, and given the lack of any kind of outward sign of choking, audibly or visibly, that there was not a reason for him to suspect that Harvey was choking?

A I don't remember the exact description of the lunch box. The lunch box, I think, was down by his leg. I don't remember if it was open or not. Once again, that would come down to whether or not he was able to establish an airway. If he was able to talk to 911 and say, hey, is he breathing, is he not breathing.

Q No, let me stop you right there, because I don't think that -- maybe I didn't ask a very good question. But I want to focus on the right question. At the time that whatever with Harvey happened with Harvey, there was no -- I think we've established, there was no audible sounds that you were able to detect on the video, correct, that

would associate with choking, true?

A Correct.

Q And there was no visible signs of, you know, his hands on his throat, no grabbing, no indications one way or the other that he was choking, correct?

A There was signs that he was in distress. There was no grabbing of the throat that would make you -- that would say specifically that he was choking.

Q Okay. What is it, then, that you believe Mr. Farrales should have seen that would indicate to him that Harvey has a choking problem?

A The main question is not so much of whether he's having a choking problem, was that he was in distress and that he needed help and needed to have 911 called if he did not specifically know himself what to do.

Q Okay. So you're not saying that Mr. Farrales had evidence available to him of a specific choking problem with Harvey, correct?

A If he had done the proper thing, had contacted 911, if -- and I have not read the specifics of the First Aid Screening Manual, you know, taken him out from the seat, lied him down,

put in the rescue position, and seeing if there was an airway, it appears that there was a strong likelihood that food would have been evident in the mouth that would have suggested that the patient was choking. As to did he recognize while the patient was sitting up in the chair? Does not appear that he recognized that the patient was choking. As he said in his deposition, his first thought was that he was having a heart attack.

Q Well, didn't he first say that he thought he was sleeping?

A I believe so, yes. But then when he could not get him to rouse --

Q You don't have any reason to believe that Mr. Farrales observed something and purposely ignored something that he was seeing, do you?

A No.

Q You don't have any reason to believe that he intended to cause some kind of harm to Harvey?

A That's correct.

Q In fact, didn't he say that he really liked Harvey and enjoyed communicating with him on the bus ride?

A I believe so.

Q In any of the materials that you reviewed, was there information about what the driver's primary responsibility was?

A There might have been. I don't remember if it was specifically mentioned in his deposition. I don't remember the specifics.

Q Would you expect that the primary responsibility of somebody who's hired to drive a vehicle would be to transport and drive safely from one place to the other?

A Correct. Although, this was a bus specifically for people who had challenges and there was some special extra criteria for those bus drivers, I would expect. But, once again, that would be in the contracts.

Q Okay. Are you aware of anything in particular from anything that you've reviewed that would say what those drivers are or are not supposed to know or expected to know about the people that they're transporting?

A I know the driver knew that Harvey has, quote, cognitive problems. I don't know all the specifics of the contracts, what they are supposed to know.

Q Well, do you have any understanding,

other than a general way, about what paratransit service is and what it does provide?

A Just the general understanding.

Q That it's what? What is your general understanding?

A It's a specialized transport service that's scheduled and contracted for people that have some physical or mental disabilities.

Q You would not expect drivers to -- well, strike that.

A Well, actually, you were asking about if I -- I think previously if I'd had other cases dealing with choking.

Q Uh-huh.

A I think there were one or two other cases that I had which related to choking which also, I believe, were people with handicaps.

Q How long ago?

A Within the past few years.

Q Anything that is listed on your list of --

A Nothing that's come to testimony yet.

Q Okay. Can you give me a venue? Can you give me a case name for any of those cases?

A One is in Idaho and I'm trying to

remember the locale of the other one. One was in Idaho and it was also something related to someone who had a disability. I don't remember exactly what the disability was, but there was a problem with the airway and I'm trying to remember if it was a tracheostomy problem or it was a food related problem, but it was a choking airway related problem. One of them was, I believe, in transportation.

Q Is it one that you have been retained on behalf of the patient or the plaintiff?

A Correct.

Q And are you providing testimony, assuming it gets that far, against a transportation company?

A I believe so, yes.

Q Okay. Do you recall the names of any of the parties in that case?

A I just remember it was in Idaho.

Q But your deposition has not been scheduled yet?

A Not taken yet.

Q Have you given an opinion on that case yet or are you still in the review process?

A I believe we're still in the review

process.

Q Is that something that you could locate when you go back to your office?

A If retaining counsel asked me to do so, I'd be pleased to ask.

Q Well, I'm going to ask and ask that you give that to him. But I'll remind him afterwards. And you said there were maybe a couple. Is there something else that -- I think the other one might have been more of a tracheostomy issue.

MR. CLOWARD: LeAnn, I won't object of providing the names pursuant to the federal rules of the Nevada rules requiring the disclosure. However, I don't think it would be appropriate. I'm just saving my objection or making my objection. I don't think it would be appropriate based on HIPAA and privacy and things like that for him to provide those reports.

MS. SANDERS: If it's a litigated case, then I'm just going to be asking for the names and can go a different direction on it.

MR. CLOWARD: Fair enough.

Q (By Ms. Sanders) The other one you think might be a tracheostomy case?

A I think so.

Q On the one in Idaho, do you remember the name of the transport company?

A No, I don't.

Q In looking at your report, it appears that you agreed with the coroner's report that the likely cause of death was related to choking, correct?

A Yes.

Q Other than information that you got from the coroner's report, is there any other basis that you have for your own conclusion that Harvey's death was related to choking?

A What you can see on the video is that Harvey was eating and it appeared that he was eating fairly fast or quickly and was showing signs of distress very, very shortly after that. And then was found to have a peanut butter -- what was apparently a peanut butter containing sandwich remnant in his mouth. It was approximately two ounces in size.

Q Is it possible to rule out other possible causes of death without having an autopsy performed?

A Within a reasonable degree of medical certainty, you can say that other causes of death

would be very unlikely.

Q Would it be possible for you to rule out a possible myocardial infarction without an autopsy being performed?

A To, with 100 percent accuracy, exclude that, it would not be possible. To say it was well below the level of medical certainty, I can say within a reasonable degree of medical certainty, which is even higher than a reasonable degree of medical probability, it was not a myocardial infarction.

Q Why do you say that?

A One of the patients, although they were diabetic, had no prior history of heart disease, had no prior complaints of heart problems, and everything was, timewise, related to eating of a sandwich and being found to have a large amount of food bolus in the mouth, in the pharynx.

Q You did note in your report that Mr. Chernikoff had a history of diabetes and hypertension and high cholesterol. Do you know whether or not he was on any kind of medications for those conditions?

A I don't specifically remember what the medications were, no.

Q Would you agree that each of those conditions would create risk factors for heart attack?

A Yes.

Q Is a person who has a heart attack and dies as a result of it always somebody who has some kind of prior history of heart disease?

A No.

Q People do die of heart attacks with -- without any kind of warning at all, correct?

A True. Generally, they'll have some symptoms beforehand unless they go into, you know, ventricular fibrillation, you know, cardiac arrest immediately with the onset of their heart attack.

Q You didn't review Ned Einstein's report, you told me?

A No.

Q Would you agree with an opinion that in an emergency situation, it's ever appropriate for somebody, rather than calling for an ambulance and waiting for an ambulance, to go in search of an ambulance himself? Would that ever be an appropriate course of action?

A Only if you're right next to an EMS house would that even be possible. Otherwise, you

don't just go out and look for anyone.

Q As far as your report is concerned, I didn't see that it was identified in the report that you had reviewed the video beforehand. But you clearly had, correct? It's not one of the things that you had mentioned.

A No, I mean, I mentioned all the times in the videos but I did not specifically mention that. But I have reviewed it beforehand and those timings that I put down there are my timings from my having reviewed it.

Q That was going to be my next question.

A That was not provided to me.

Q That was something that you looked at, you put the times down from your own review of the video?

A Correct.

Q Okay. Is that something that you had discussed with Mr. Cloward or anybody else prior to doing the report?

A Correct. Or in the process of doing the report.

Q Okay. But with regard to Mr. Farrales's deposition, you reviewed that after you had done the report, correct?

A Yes.

Q You mentioned in the report that according to what you're telling me now is your own observation at 7:59:47, you noted that Harvey was in acute distress?

A Um-hmm.

Q What do you consider to be acute distress as of that time?

A I would -- in order to say exactly for any time frame would be best to do while showing the video which can always happen at trial.

Q Based on your recollection?

A Based on my recollection, he was -- it appeared that he was attempting to kind of sit up and reach out toward the overweight woman who was getting off. He then appeared to kind of be moving around and seated in an uncomfortable way and I remember at one point he was kind of like rubbing his head. His bodily movements -- his bodily movements clearly show that he was in some sort of distress, slash, discomfort and, once again, the videos at those times will show what they show.

Q Was there anything overt about those movements that -- without the benefit of 20/20 hindsight, which we all have now, would indicate

other -- anything other than him just moving around in his seat to change position?

A Yeah. It was very different from how he was moving previously and, once again, you would need to have a video show five seconds and kind of show this is what he's doing at this specific time.

Q I'm just trying to focus on --

A It was different than someone who was just trying to change his position in a chair.

Q I'm trying to focus in on why you called it acute distress at that point as opposed to something else.

A Because when you look at it, he looked distressed. It looked like the type of movements you would expect from someone who is in distress.

Q Again, there was no audible indication of distress, correct?

A Correct.

Q And, again, we talked about this before, but nothing that would indicate a choking problem?

A I don't -- I -- once again, the video will show what it shows. I don't remember specifically something that would make me say specifically that it was choking.

Q Okay. And, again, I think you've even

admitted this, there wasn't any indication that the driver observed any of these movements that you interpret as acute distress in Harvey, correct?

A Correct. By the time the driver noticed, Harvey was unresponsive and leaning far off to the right side.

Q At the time that you identified what you call this acute distress, do you recall whether or not the driver was still driving at that time or was that occurring at some point after he was helping the lady off? And, I'm sorry, I did bring the video but I couldn't figure out a way to load it up.

A So, at 7:59:47 he was in distress. 12 seconds later is when the bus driver stopped the bus to assist the other person off.

Q Okay. Was there any indication from the video that you saw that the other passenger noticed anything that was amiss with Harvey?

A No, it kind of appeared that as the other patient -- other passenger, excuse me, was getting off the bus, that Harvey kind of was attempting to reach out towards that other woman after she had passed by.

Q But she didn't make any kind of reaction, did she?

A I believe she was already in front of him at that point and did not make any reaction.

Q As was Jay Farrales, correct?

A Yes.

Q So you would not expect either one of them to have observed that particular movement, correct?

A Correct.

Q Now, you recall the driver's testimony that when he got back on the bus he did not notice anything unusual about Harvey's condition, demeanor, anything like that, after assisting the other passenger off?

A He didn't look. I mean, when you look at the video, you can see he kind of came up and went right back to his seat, did not actually observe Harvey at that point.

Q You've been specific in the report about the times when there were particular things going on. As of the time that the driver got back up on to -- into the driver's seat and started driving again, was there any other movement that you identified with Harvey that you think the driver could have or should have observed?

A Well, wouldn't be my position to say

whether he should have. There was a little bit of a shaking of Harvey's right arm but I believe that that had already stopped by the time the bus driver started driving.

Q So other than this kind of listing into the -- into the aisleway, leaning towards the aisleway --

A All the way over into the aisleway, so it was more than a little lean, it was kind of like flopped over toward the right side.

Q That was a gradual thing. It wasn't something like that just had this episode and then immediately fell over? That was a gradual thing once the driver got back and started driving?

A I would have to look at the exact timings.

Q It was gradual, though? Would you agree with that much?

A Yes.

Q So there wasn't really anything other than this leaning into the aisleway that would tip anybody off that there was maybe something going on with Harvey, correct?

A At that point, no. I would agree with what you said with the caveat of what we've already

discussed.

Q I think we talked about the fact, too, that Mr. Farrales initially thought that Harvey was just napping, something that he had done before on the bus, do you recall that?

A Yes.

Q And you had observed the -- when you looked at the video, did you look at the entire thing so that you saw that earlier on the trip Harvey had also been napping and kind of listing a little bit?

A I believe so. Then I think he got off to go pee at one point.

Q Right. And even that time when he was napping, his body kind of leaned to the side a little bit, correct?

A Um-hmm.

Q Yes?

A Yes, I'm sorry.

Q According to your own timeline, the first notice by the driver of something going on with Harvey was at 8:03:40 according to the report?

A Correct.

Q Okay. So, from the time that you --

A That's when he first called -- he called

Harvey's name and when he didn't respond, he tried to shake him, so it was right around that time, yes.

Q Okay. Now, he was still in traffic at that time, wasn't he, driving?

A Correct.

Q You wouldn't expect him to just stop in the middle of the road and go run back to Harvey's side right away, would you, without taking the bus to a safer spot?

A I would agree he would have to get the bus in a safe position.

Q Okay. So you're not critical of him for moving the bus off to the side and taking whatever time it took to do that, before he went back to doing a more thorough check on Harvey, correct?

A Correct.

Q So by the time he gets back to Harvey and identifies there there's something more seriously going on than just him napping, we're talking about almost four minutes gone by by the time that you say he initially had this acute distress to the time that the driver pulls over and goes back to investigate? Would you --

A Correct. Approximately four minutes.

Q Are you aware of any statistical

information about patients being successfully resuscitated after they've been down for four minutes?

A The sooner you are able to try and resuscitate, the better your chances for resuscitating. As to exactly chance of resuscitation per minute, I don't have those exact statistics at my fingertips.

Q Is there any medical literature that you can refer me to to get any kind of information about that?

A I would need to check. It also is a question of whether we're talking respiratory arrest as opposed to when it's a cardiac arrest. Because your heart doesn't stop at the same moment your breathing does, generally.

Q Let's say that he had a respiratory arrest at the time that you say he was in acute distress, so at 8:03:40 -- no, that's the driver's notes.

A No, it would either be three things. It would be respiratory arrest, meaning when he wasn't able to exchange air, there would be loss of consciousness, and then after that would be cardiac arrest when the heart would stop, and those would be

three separate times.

Q Okay. Let's be sure that we're talking about the same thing here. As far as when you say -- do you have some belief about when it was that Harvey suffered a respiratory arrest, when in this whole timeline?

A In there, he was having difficulties with choking. If he was able to move some air or when he was not able to move any air, I can't say exactly during the time after he was eating he was having some distress. He either had partial and at some point total occlusion of his airway so that he wasn't able to breathe. Then, at some point after that, lost consciousness. That would be -- would appear to be when he kind of slumped over. And then at some point after his, quote, slumping over, is when the heart stopped. I don't know exactly what time the heart stopped in this process.

Q Okay. Just so that I understand your thought processes here, when in this timeline from when you identified what you call acute distress is that when you say that he had or you believe he probably had a respiratory arrest?

A That's when he was having respiratory difficulty. I don't know exactly at what point it

went from being respiratory difficulty to respiratory arrest.

Q Okay. Let's say that it was respiratory arrest at that point, at that 7:59 and seconds.

A Correct.

Q If that's when he had the respiratory arrest, by the time that Mr. Farrales identified that there was something going on with Harvey, pulled over to the side, do you have any opinion about whether or not he was revivable at that point?

A Within a reasonable degree of certainty, he would have been revivable, as far as I'll leave it at that at this point.

Q I think you're anticipating my next question. If revivable, would he have been revivable with sustained spontaneous respirations himself? Would he have suffered some type of neurologic or some other type of damage as a result of being in respiratory arrest for that time period?

A Those are all possibilities. We don't know because he was never given the opportunity. We don't know if a simple repositioning would have re-established the airway before the cardiac arrest had occurred. And I would need to look and see the specifics of once the respiratory arrest occurs, how

been channeled instead through the equitable indemnity doctrine. (Cf. *Bielski v. Schulze* (1962) 16 Wis.2d 1, 114 N.W.2d 105, 107–112; *Packard v. Whitten* (Me.1971) 274 A.2d 169, 179–180.)

Although early common law decisions established the broad rule that a tortfeasor was never entitled to contribution, it was not long before situations arose in which the obvious injustice of requiring one tortfeasor to bear an entire loss while another more culpable tortfeasor escaped with impunity led common law courts to develop an equitable exception to the no contribution rule. (See generally Leflar, *Contribution and Indemnity Between Tortfeasors* (1932) 81 U.Pa.L.Rev. 140, 146–158.) As Chief Justice Gibson observed in *Peters v. City & County of San Francisco* (1953) 41 Cal.2d 439, 431, 260 P.2d 55, 62: "[T]he rule against contribution between joint tort-feasors admits of some exceptions, and a right of indemnification may arise as a result of contract *or equitable considerations* and is not restricted to situations involving a wholly vicarious liability, such as where a master has paid a judgment for damages resulting from the voluntary act of his servant." (Emphasis added.)

Our court first applied the equitable indemnity doctrine in *City & County of S.F. v. Ho Sing* (1958) 51 Cal.2d 127, 330 P.2d 802. In *Ho Sing*, a property owner, with the city's permission, had replaced part of the sidewalk in front of his building with a sidewalk-level skylight to provide more light for his basement. After a number of years, a crack developed in the skylight and a pedestrian tripped over the crack and sustained serious injuries. Prior cases of our court had recognized that in such a situation both the city, which had a general duty to inspect and maintain the sidewalk, and the property owner who had altered the sidewalk for his own benefit, were jointly and severally liable for resulting damages; the injured pedestrian accordingly sued both the city and the property owner and recovered a joint judgment against both. After the city had paid a substantial part of the judgment, it brought its own action against Ho Sing, the property owner, seeking indemnification.

Although carefully emphasizing that the city's liability to the injured pedestrian was not "merely dependent or derivative" but was "joint and direct," the *Ho Sing* court nonetheless permitted the city to obtain indemnification from the negligent property owner. Pointing out that a majority of common law jurisdictions permitted equitable indemnity in such a situation, the *Ho Sing* court relied heavily on, and quoted at some length from, the United States Supreme Court decision of *Washington Gaslight Co. v. Dist. of Columbia* (1896) 161 U.S. 316, 16 S.Ct. 564, 40 L.Ed. 712. In *Washington Gaslight*, the Supreme Court explained: "The principle [of equitable indemnity] qualifies and restrains within just limits the rigor of the rule which forbids recourse between wrongdoers . . . 'Our law . . . does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis*. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers.'" (161 U.S. at pp. 327–328, 16 S.Ct. at p. 568.)

As this passage clearly reveals, the equitable indemnity doctrine originated in the common sense proposition that when two individuals are responsible for a loss, but one of the two is more culpable than the other, it is only fair that the more culpable party should bear a greater share of the loss. Of course, at the time the doctrine developed, common law precepts precluded any attempt to ascertain comparative fault; as a consequence, equitable indemnity, like

the contributory negligence doctrine, developed as an all-or-nothing proposition.

[11a] Because of the all-or-nothing nature of the equitable indemnity rule, courts were, from the beginning, understandably reluctant to shift the entire loss to a party who was simply slightly more culpable than another. As a consequence, throughout the long history of the equitable indemnity doctrine courts have struggled to find some linguistic formulation that would provide an appropriate test for determining when the relative culpability of the parties is sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other.

A review of the numerous California cases in this area reveals that the struggle has largely been a futile one. (Compare and contrast, e. g., *Gardner v. Murphy* (1975) 54 Cal.App.3d 164, 168-171, 126 Cal.Rptr. 302; *Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 237-240, 116 Cal.Rptr. 733; *Kerr Chemicals, Inc. v. Crown Cork & Seal Co.* (1971) 21 Cal.App.3d 1010, 1014-1017, 199 Cal.Rptr. 162; *Pearson Ford Co. v. Ford Motor Co.* (1969) 273 Cal.App.2d 269, 271-278, 78 Cal.Rptr. 279, *Aerojet General Corp. v. D. Zelinsky & Sons* (1967) 249 Cal.App.2d 604, 607-612, 57 Cal.Rptr. 701, *Herrero v. Atkinson* (1964) 227 Cal.App.2d 69, 73-78, 38 Cal.Rptr. 490; *Cahill Bros. v. Clementina Co.* (1962) 208 Cal.App.2d 367, 375-384, 25 Cal.Rptr. 301; *Alisal Sanitary Dist. v. Kennedy*, *supra*, 180 Cal.App.2d 69, 74-82, 4 Cal.Rptr. 379. See generally Note, *Products Liability, Comparative Negligence and the Allocation of Damages Among Multiple Defendants* (1976) 50 So.Cal.L.Rev. 73, 82-83; Comment, *The Allocation of Loss Among Joint Tortfeasors* (1968) 41 So.Cal.L.Rev. 725, 737-743.)

As one Court of Appeal has charitably stated: "The cases are not always helpful in determining whether equitable indemnity lies. The test[s] utilized in applying the doctrine are vague. Some authorities characterize the negligence of the indemnitor as 'active,' 'primary,' or 'positive,' and the negligence of the indemnitee as 'passive,' 'secondary,' or 'negative.' [Citations.] Other authorities indicate that the application of the doctrine depends on whether the claimant's liability is 'primary,' 'secondary,' 'constructive,' or 'derivative.' [Citations.] These formulations have been criticized as being artificial and as lacking the objective criteria desirable for predictability in the law. [Citations.]" (*Atchison, T. & S.F. Ry. Co. v. Franco*, *supra*, 267 Cal.App.2d 851, 856, 73 Cal.Rptr. 660, 664.)

Indeed, some courts, as well as some prominent commentators,[4] after reviewing the welter of inconsistent standards utilized in the equitable indemnity realm, have candidly eschewed any pretense of an objectively definable equitable indemnity test. In *Herrero v. Atkinson*, *supra*, 227 Cal.App.2d 69, 74, 38 Cal.Rptr. 490, 493, for example, the court ultimately concluded that "[t]he duty to indemnify may arise and indemnity may be allowed in those fact situations *where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought*. The right depends upon the principle that everyone is responsi-

4. Dean Prosser was at a loss in attempting to state the applicable standard. "Out of all this, it is extremely difficult to state any general rule or principle as to when indemnity will be allowed and when it will not. It has been said that it is permitted only where the indemnitor has owed a duty of his own to the indemnitee; that it is based on a 'great difference' in the gravity of the fault of the two tortfeasors; or that it rests upon a disproportion or difference in character of the duties owed by the two to the injured plaintiff. Probably none of these is the complete answer, and, as is so often the case in the law of torts, no one explanation can be found which will cover all the cases. Indemnity is a shifting of responsibility from the shoulders of one person to another, and the duty to indemnify will be recognized in cases where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed, or it may be because of a significant difference in the kind or quality of their conduct." (Fns. omitted.) (Prosser, Law of Torts, *supra*, § 52, p. 313.)

ble for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not indemnity should be allowed must of necessity depend upon the facts of each case." (Emphasis added.)

If the fundamental problem with the equitable indemnity doctrine as it has developed in this state were simply a matter of an unduly vague or imprecise linguistic standard, the remedy would be simply to attempt to devise a more definite verbal formulation. In our view, however, the principal difficulty with the current equitable indemnity doctrine rests not simply on a question of terminology, but lies instead in the all-or-nothing nature of the doctrine itself. Although California cases have steadfastly maintained that the doctrine is founded upon "equitable considerations" (*Peters v. City & County of San Francisco*, *supra*, 41 Cal.2d 419, 431, 260 P.2d 55) and "is based on inherent injustice" (*Atchison, T. & S.F. Ry. Co. v. Franco*, *supra*, 267 Cal.App.2d 881, 886, 73 Cal.Rptr. 660), the all-or-nothing aspect of the doctrine has precluded courts from reaching a just solution in the great majority of cases in which equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability, rather than the imposition of the entire loss upon one or the other tortfeasor.

The case of *Ford Motor Co. v. Poeschl, Inc.* (1971) 21 Cal.App.3d 694, 98 Cal.Rptr. 702 (hereafter "*Poeschl*") illuminates the problem. In *Poeschl*, the Ford Motor Company had sent a recall notice to its dealers requesting the recall of designated 1964 Thunderbird automobiles for servicing of the cars' rear brake lights. A dealer and leasing agency had failed to recall one such car which had been leased to a customer and shortly thereafter the defect in the rear brake light caused an accident. The injured customer sued Ford, the dealer and the leasing agency, and Ford settled the customer's claim for $72,000; when the other defendants refused to reimburse it for any part of the settlement, Ford brought an action for indemnification.

Analyzing Ford's claim in terms of the elusive "active-passive," "primary-secondary," "direct-indirect" standards utilized by prior decisions, the *Poeschl* court determined that Ford was not entitled to obtain total indemnification. The court reasoned: "Ford's production of the defective car, coupled with its failure to attempt direct notice to the customer, breached a direct obligation it owed to the latter. Ford had a 'last clear chance' to avert injury and failed to use it. Its fault is primary, not secondary, and not imputed to it as a consequence of the dealer's or leasing agency's fault. Under the pleaded circumstances, the latter are not liable for indemnification of the manufacturer." (21 Cal.App.3d at p. 699, 98 Cal.Rptr. at p. 705.)

After finding that total indemnification of the manufacturer was inappropriate, the *Poeschl* court revealed its misgivings with the existing equitable indemnity doctrine which sanctioned the inequitable result of permitting the dealer and leasing agency to escape all liability whatsoever. The court observed: "The dealer and the leasing agency shared Ford's ability to reach the customer before an accident occurred. The complaint does not disclose whether these firms were stirred by the recall notice. On the assumption that they did nothing, their escape from financial responsibility is troublesome. Judicially favored objectives of deterrence and accident prevention would be promoted by imposing some liability on a dealer who knew of danger and did nothing. To shift the entire loss to him would not serve these objectives, for then the manufacturer would escape scot-free. *A wise rule of law—one designed to stimulate responsibility throughout the merchandising chain—would require both parties to share the loss. A rule of contribution or partial indemnification would permit that result.* In California the common law rule against contribution among tortfeasors has been modified to the extent of permitting contribution only after a joint judgment against them. (Code Civ.Proc., §§ 875–879.) *Under California law to date, indemnification*

is an all-or-nothing proposition. Thus, the law leaves these parties where it finds them, denying any indemnity to the originator of the accident-producing factors." (Emphasis added.) (21 Cal.App.3d at p. 699, 98 Cal.Rptr. at p. 705.)

In noting that "under California law *in date*, indemnification is an all-or-nothing proposition," the *Poeschl* court recognized that by virtue of its developmental character, the common law was capable of evolving the equitable indemnity doctrine into a rule which would permit the equitable *sharing* of loss between multiple tortfeasors. The proof of the *Poeschl* court's prescience was not long in coming.

Just one year after the *Poeschl* decision, the New York Court of Appeals, in the celebrated decision of *Dole v. Dow Chemical Co.*, *supra*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, modified that state's traditional all-or-nothing indemnity doctrine to permit a tortfeasor to obtain "partial indemnification" from another tortfeasor on the basis of comparative fault. The *Dole* court, after noting that the previously existing "active-passive" indemnification test "has in practice proven elusive and difficult of fair application," went on to observe: "But the policy problem involves more than terminology. If indemnification is allowed at all among joint-tortfeasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would in fairness warrant what [the named defendant] here seeks—passing on to [a concurrent tortfeasor] all responsibility that may be imposed on [the named defendant] for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification." (331 N.Y.S.2d at p. 386, 282 N.E.2d at p. 291.)

Concluding that the all-or-nothing common law indemnity doctrine did not, in many situations, produce the equitable allocation of loss to which it aimed, the *Dole* court proceeded to modify the doctrine, holding that the "[r]ight to apportionment of liability or to full indemnity, as among parties involved together in causing damage by negligence, should rest on relative responsibility . . . ." (331 N.Y.S.2d at pp. 391–392, 282 N.E.2d at p. 295.) The *Dole* court was undeterred from undertaking this modification of the prior common law indemnity doctrine either by the existence of a contribution statute which, like that currently in force in California, provided joint tortfeasors with a right of pro rata contribution in limited circumstances, or by the fact that at that time New York still adhered to the all-or-nothing contributory negligence doctrine.[1]

[1] Two and one-half months after the rendition of *Dole*, the New York Court of Appeals, in *Kelly v. Long Island Lighting Co.*, *supra*, 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241, emphatically reaffirmed the *Dole* decision and explained the effect of its holding. The *Kelly* court stated: "Prior to our recent decision in *Dole* v. *Dow Chem. Co.*, it had been held to be the rule that a defendant found guilty of 'active' negligence could not recover over against another guilty of 'active' tort negligence. The rule as stated in *Dole* now permits apportionment of damages among joint or concurrent tortfeasors regardless of the degree or nature of the concurring fault. We believe the new rule of apportionment to be pragmatically sound, as well as realistically fair. To require a joint tortfeasor who is, for instance, 10% causally negligent to pay the same amount as a co-tortfeasor who is 90% causally negligent seems inequitable and unjust. The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault." (334 N.Y.S.2d at p. 854, 286 N.E.2d at p. 243.)

The considerations embodied in the *Dole* and *Kelly* opinions mirror precisely the principles enunciated by our own court two years ago in *Li*. In *Li*, after concluding "that logic, practical experience and funda-

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As we explain, we reject the contention on a number of grounds.

[1a] [1] First, as we have already noted, the New York Court of Appeals adopted a similar partial indemnity rule in *Dole v. Dow Chemical Co.*, *supra*, 331 N.Y.S.2d 382, 282 N.E.2d 288 despite the existence of a closely comparable statutory contribution scheme.[5] Like the current California legislation, the New York contribution statute in force at the time of *Dole* afforded a right of contribution only between joint judgment debtors, and provided that contribution should [1b] be determined on a "pro rata" rather than a comparative fault basis, thus, as is the case in California, under the New York statute a concurrent tortfeasor could obtain contribution only from those tortfeasors whom the plaintiff chose to sue in the same action, and could require such cotortfeasors to pay only a pro rata share of the judgment no matter what the relative culpability of the tortfeasors. The *Dole* court, viewing the statute as simply a partial legislative modification of the harsh common law "no contribution" rule, found nothing in the New York statutory scheme to indicate that the Legislature had intended to preclude judicial extension of the statutory apportionment concept through the adoption of a common law partial indemnification doctrine. (See 331 N.Y.S.2d at pp. 386, 391, 282 N.E.2d 288.)

* the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater, and

"(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."

Section 877.5.

"(a) Where an agreement or covenant is made which provides for a sliding scale recovery agreement between one or more but not all, alleged defendant tortfeasors and the plaintiff or plaintiffs

"(1) The parties entering into any such agreement or covenant shall promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions, and

"(2) If the action is tried before a jury, and a defendant party to the agreement is a witness the court shall, upon motion of a party disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

"The jury disclosure herein required shall be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.

"(b) As used in this section a 'sliding scale recovery agreement' means an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes, but is not limited to, agreements within the scope of Section 877, and agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant."

Section 878.

"Judgment for contribution may be entered by one tortfeasor judgment debtor against other tortfeasor judgment debtors by motion upon notice. Notice of such motion shall be given to all parties in the action, including the plaintiff or plaintiffs, at least 10 days before the hearing thereon. Such notice shall be accompanied by an affidavit setting forth any information which the moving party may have as to the assets of defendants available for satisfaction of the judgment or claim for contribution."

Section 879.

"If any provision of this title or the application thereof to any person is held invalid, such invalidity shall not affect other provisions or applications of the title which can be given effect without the invalid provision or application and to this end the provisions of this title are declared to be severable."

6. At the time of the *Dole* decision, the New York contribution statute provided: "Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share: provided, however that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action." (N.Y.C.P.L.R. former § 1401, repealed N.Y.L.1974, ch. 742, § 1.)

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mental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery" (13 Cal.3d at pp. 812–813, 119 Cal.Rptr. at p. 864, 532 P.2d at p. 1232), we made clear our conviction that the discarded doctrine "should be replaced in this state *by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.*" (Emphasis added.) (*Id.*, at p. 813, 119 Cal.Rptr. at p. 864, 532 P.2d at p. 1232.)

[7] In order to attain such a system, in which liability for an indivisible injury caused by concurrent tortfeasors will be borne by each individual tortfeasor "in direct proportion to [his] respective fault," we conclude that the current equitable indemnity rule should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis. In reaching this conclusion, we point out that in recent years a great number of courts, particularly in jurisdictions which follow the comparative negligence rule, have for similar reasons adopted, as a matter of common law, comparable rules providing for comparative contribution or comparative indemnity. (See, e. g., *United States v. Reliable Transfer Co.* (1975) 421 U.S. 397, 405–411, 95 S.Ct. 1708, 44 L.Ed.2d 251; *Kohr v. Allegheny Airlines, Inc.* (7th Cir. 1974) 504 F.2d 489, 495; *Gomes v. Brodhurst* (3d Cir. 1967) 394 F.2d 465, 467–470; *Packard v. Whitten, supra*, 274 A.2d 169, 179–180; *Bielski v. Schulze, supra*, 114 N.W.2d 105, 107–114; *cf. Lincenberg v. Issen* (Fla.1975) 318 So.2d 386, 389–391. See also U.Comp. Fault Act, § 4, subd. (a).)

4. *California's contribution statutes do not preclude this court from adopting comparative partial indemnity as a modification of the common law equitable indemnity doctrine.*

[8] None of the parties to the instant proceeding, and none of the numerous amici who have filed briefs, seriously takes issue with our conclusion that a rule of comparative partial indemnity is more consistent with the principles underlying *Li* than the prior "all-or-nothing" indemnity doctrine. The principal argument raised in opposition to the recognition of a common law comparative indemnity rule is the claim that California's existing contribution statutes, section 875 et seq. of the Code of Civil Procedure,[5] preclude such a judicial development.

5. Sections 875 to 879 provide in full

"(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

"(b) Such right of contribution shall be administered in accordance with the principles of equity.

"(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

"(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

"(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

"(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

"(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor."

Section 876

"(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

"(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them."

Section 877

"Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort—

"(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release,

[9] We believe that a similar conclusion must be reached with respect to the pertinent California legislation. The legislative history of the 1957 contribution statute quite clearly demonstrates that the purpose of the legislation was simply "to lessen the harshness" of the then prevailing common law no contribution rule.[7] Nothing in the legislative history suggests that the Legislature intended by the enactment to preempt the field or to foreclose future judicial developments which further the act's principal purpose of ameliorating the harshness and inequity of the old no contribution rule. Under these circumstances, we see no reason to interpret the legislation as establishing a bar to judicial innovation.

The case of *Green v. Superior Court* (1974) 10 Cal.3d 616, 629–631, 111 Cal.Rptr. 704, 517 P.2d 1168, provides an apt analogy. At early common law a landlord owed a tenant no duty to maintain leased residential premises in habitable condition throughout the duration of the lease, and in *Green* the landlord argued that because the Legislature had enacted a series of statutes affording tenants a limited "repair and deduct" remedy (Civ.Code, § 1941 et seq.), California courts were not free to evolve a broader, more comprehensive common law warranty of habitability. In *Green* we emphatically rejected the landlord's contention, declaring that "the statutory framework . . . has never been viewed as a curtailment of the growth of the common law in this field." (10 Cal.3d at p. 630, 111 Cal.Rptr. at p. 713, 517 P.2d at p. 1177.) In like manner we conclude, as did the New York court in *Dole*, that the contribution statutes were not intended to preclude all common law development in this field.

Indeed, there are several specific provisions of the California legislation—not present in the pertinent New York statute—which confirm our conclusion that the legislation should not be interpreted to preclude the recognition of a common law right of comparative indemnity. First, and most significantly, unlike the New York statute, the California contribution provisions specifically preserve the right of indemnity and indeed, provide that the right of contribution shall be subordinate to such right of indemnity. (Code Civ.Proc., § 875, subd. (f) (quoted in fn. 5, *ante*).) As we have seen, at the time the legislation was enacted, California case law had clearly established that "a right of indemnification may arise as a result of contract *or equitable considerations*" (*Peters v. City & County of S.F.*, *supra*, 41 Cal.2d 419, 431, 260 P.2d 55, 62 (emphasis added)); consequently, we can only conclude that the Legislature was aware of the equitable indemnity doctrine and desired, by enacting section 875, subdivision (f), to negate any possible inference that the contribution statutes were intended to eliminate such common law indemnity rights. Although the Legislature could obviously not foresee in 1957 that 20 years hence, after the advent of comparative negligence, our court would conclude that equitable considerations justify the adoption of a comparative indemnity rule, this section of the act clearly indicates

7. The 1957 legislation was drafted by the State bar and was initially introduced in 1955 as Senate Bill No. 412. The State Bar explanation accompanying the bill, which was adopted by the Senate Judiciary Committee, read in pertinent part:

"Under the common law there is no contribution between joint tortfeasors. One of several joint tortfeasors may be forced to pay the whole claim for the damages caused by them yet he may not recover from the others their pro rata share of the claim. California follows this rule. [Citations.] *The purpose of this bill is to lessen the harshness of that doctrine.*

"The ancient basis of the rigid rule against contribution in this type of case is the policy that the law should deny assistance to tortfeasors in adjusting losses among themselves because they are wrongdoers and the law should not aid wrongdoers. But this over emphasizes the supposed penal character of liability in tort, it ignores the general aim of the law for equal distribution of common burdens and of the right of recovery of contribution in various situations, e. g., among co-sureties. It ignores also the fact that most tort liability results from inadvertently caused damage and leads to the punishment of one wrongdoer by permitting another wrongdoer to profit at his expense." (Emphasis added.) (Third Progress Rep. to the Legis. by the Sen. Interim Jud. Com., 2 Appendix to Sen.J. (1955 Reg.Sess.) p. 52.)

that the Legislature had no intention of completely withdrawing the allocation of loss issue from judicial purview.

Second, California's contribution statute—again unlike New York's—contains a specific provision which explicitly mandates that the "right of contribution shall be administered in accordance with the principles of equity." (Code Civ.Proc., § 875, subd. (b) (quoted in fn. 5, ante).) We need not decide whether this provision would permit our court to interpret the contribution statute itself as providing for comparative rather than per capita contribution (cf. *Lincenberg v. Issen*, *supra*, 318 So.2d 386, 394 (Boyd, J., concurring)), for we think that, at least, this provision demonstrates that the Legislature did not conceive of its contribution legislation as a complete and inflexible system for the allocation of loss between multiple tortfeasors. (See, e. g., *Ramirez v. Redevelopment Agency* (1970) 4 Cal.App.3d 397, 400–401, 84 Cal.Rptr. 356; *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 993, 103 Cal.Rptr. 498; *Rollins v. State of California* (1971) 14 Cal.App.3d 160, 165, fn. 8, 92 Cal.Rptr. 251.) By emphasizing that the statutory contribution right is to be administered in accordance with the "principles of equity," principles which the Legislature obviously intended the judiciary to elaborate, the act itself refutes the argument that the Legislature intended to curtail judicial discretion in apportioning damages among multiple tortfeasors.

In sum, in enacting the 1957 contribution legislation the Legislature did not intend to prevent the judiciary from expanding the common law equitable indemnity doctrine in the manner described above. As already noted, since 1957 the equitable indemnity doctrine has undergone considerable judicial development in this state, and yet it has never been thought that such growth in the common law was barred by the contribution statute. (Cf. *Green v. Superior Court*, *supra*, 10 Cal.3d 616, 629–631, 111 Cal.Rptr. 704, 517 P.2d 1168.)

Several amici argue alternatively that even if the contribution statute was not intended to preclude the development of a common law comparative indemnity doctrine, our court should decline to adopt such a doctrine because it would assertedly undermine the strong public policy in favor of encouraging settlement of litigation embodied in section 877 of the Code of Civil Procedure, one of the provisions of the current statutory contribution scheme. (Quoted in fn. 3, ante.) As amici point out, section 877 creates significant incentives for both tortfeasors and injured plaintiffs to settle lawsuits: the tortfeasor who enters into a good faith settlement is discharged from any liability for contribution to any other tortfeasor, and the plaintiff's ultimate award against any other tortfeasor is diminished only by the actual amount of the settlement rather than by the settling tortfeasor's pro rata share of the judgment. Amici suggest that these incentives will be lost by the recognition of a partial indemnity doctrine.

[10] Although section 877 reflects a strong public policy in favor of settlement, this statutory policy does not in any way conflict with the recognition of a common law partial indemnity doctrine but rather can, and should, be preserved as an integral part of the partial indemnity doctrine that we adopt today. Thus, while we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a "good faith" settlement (see *River Garden Farms, Inc. v. Superior Court*, *supra*, 26 Cal.App.3d 986, 103 Cal.Rptr. 498) with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor. As the Court of Appeal noted recently in *Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 235, 132 Cal.Rptr. 843, 846: "Few things would be better calculated to frustrate [section 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would lead to further litigation with one's joint tort-

feasors, and perhaps further liability." This observation is as applicable in a partial indemnity framework as in the contribution context. Moreover, to preserve the incentive to settle which section 877 provides to injured plaintiffs, we conclude that a plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury. (See Fleming, *Foreword: Comparative Negligence At Last—By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 258–259.)

Accordingly, we conclude that Code of Civil Procedure section 875 et seq. do not preclude the development of new common law principles in this area, and we hold that under the common law of this state a concurrent tortfeasor may seek partial indemnity from another concurrent tortfeasor on a comparative fault basis.

5. *Under the allegations of the cross-complaint, AMA may be entitled to obtain partial indemnification from Glen's parents, and thus the trial court, pursuant to Code of Civil Procedure section 428.10 et seq., should have granted AMA leave to file the cross-complaint*

Having concluded that a concurrent tortfeasor enjoys a common law right to obtain partial indemnification from other concurrent tortfeasors on a comparative fault basis, we must finally determine whether, in the instant case, AMA may properly assert that right by cross-complaint against Glen's parents, who were not named as codefendants in Glen's amended complaint. As we explain, the governing provisions of the Code of Civil Procedure clearly authorize AMA to seek indemnification from a previously unnamed party through such a cross-complaint. Accordingly, we conclude that the trial court erred in denying AMA leave to file its pleading

1 As early as 1962, our court concluded that under the then governing provisions of the Code of Civil Procedure, a defendant could file a cross-complaint against a previously unnamed party when the defendant properly alleged that he would be entitled to indemnity from such party should the plaintiff prevail on the original complaint. (*Roylance v. Doelper* (1962) 57 Cal.2d 255, 19 Cal.Rptr. 7, 368 P.2d 535.) Although one commentator has suggested that our *Roylance* decision extended the then existing cross-complaint provision beyond its legislatively intended scope (see Friedenthal, *Joinder of Claims, Counterclaims and Cross-Complaints: Suggested Revision of the California Provisions* (1970) 23 Stan.L.Rev. 1, 31–32), when the cross-complaint statutes were completely revised in 1972, the Legislature specifically codified the *Roylance* rule in section 428.10 et seq. of the Code of Civil Procedure.

Section 428.10 provides in relevant part: "A party against whom a cause of action has been asserted . . . may file a cross-complaint setting forth . . . (b) Any cause of action he has against a person alleged to be liable thereon, *whether or not such person is already a party to the action*, if the cause of action asserted in his cross-complaint (1) arises out of the same transaction [or] occurrence . . . as the cause brought against him or (2) asserts a claim, right or interest in the . . . controversy which is the subject of the cause brought against him." (Emphasis added.)

Section 428.20 reiterates the propriety of filing such a cross-complaint against a previously unnamed party, and section 428.70 explicitly confirms the fact that a cross-complaint may be founded on a claim of total or partial indemnity by defining a "third-party plaintiff" as one who files a cross-complaint claiming "the right to recover all *or part* of any amount for which he may be held liable" on the original complaint. (Emphasis added.)[8] The history of

8. Section 428.20 provides in full: "When a person files a cross-complaint as authorized by Section 428.10, he may join any person as a cross-complainant or cross-defendant, whether or not such person is already a party to the action, if, had the cross-complaint been filed as

the legislation leaves no doubt but that [1aa] these provisions authorize a defendant to file a cross-complaint against a person, not named in the original complaint, from whom he claims he is entitled to indemnity (See Recommendation and Study Relating to Counterclaims and Cross Complaints, Joinder of Causes of Action and Related Provisions (1970) 10 Cal.Law Revision Com. Rep. pp. 551–555.)

[11] Although real parties in interest claim that the effect of permitting a defendant to bring in parties whom the plaintiff has declined to join will have the undesirable effect of greatly complicating personal injury litigation and will deprive the plaintiff of the asserted "right" to control the size and scope of the proceeding (see, e. g., *Thornton v. Luce* (1962) 209 Cal.App.2d 542, 551–552), as our court observed in *Rayfance*, 57 Cal.2d at pp. 261–262, 19 Cal.Rptr. 7, 368 P.2d 535, to the extent that such claims are legitimate the problem may be partially obviated by the trial court's judicious use of the authority afforded by Code of Civil Procedure section 1048. Section 1048, subdivision (b) currently provides: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, *including a cause of action asserted in a cross-complaint*, or of any separate issue or any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States."

In this context, of course, a trial court, in determining whether to sever a comparative indemnity claim, will have to take into consideration the fact that when the plaintiff is alleged to have been partially at fault for the injury, each of the third party defendants will have the right to litigate the question of the plaintiff's proportionate fault for the accident; as a consequence, we recognize that in this context severance may at times not be an attractive alternative. Nonetheless, having already noted that under the comparative negligence doctrine a plaintiff's recovery should be diminished only by that proportion which the plaintiff's negligence bears to that of all tortfeasors (see fn. 2, *ante*), we think it only fair that a defendant who may be jointly and severally liable for all of the plaintiff's damages be permitted to bring other concurrent tortfeasors into the suit. Thus, we conclude that the interaction of the partial indemnity doctrine with California's existing cross-complaint procedures works no undue prejudice to the rights of plaintiffs.

[12] Accordingly, we conclude that un- [1ab] der the governing statutory provisions a defendant is generally authorized to file a cross-complaint against a concurrent tortfeasor for partial indemnity on a comparative fault basis, even when such concurrent tortfeasor has not been named a defendant in the original complaint.[9] In the instant

an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties."

Section 425.70 provides in full:

"(a) As used in this section:

"(1) 'Third-party plaintiff' means a person against whom a cause of action has been asserted in a complaint or cross-complaint, who claims the right to recover all or part of any amounts for which he may be held liable on such cause of action from a third person, and who files a cross-complaint stating such claim as a cause of action against the third person.

"(2) 'Third-party defendant' means the person who is alleged in a cross-complaint filed by a third-party plaintiff to be liable to the third-party plaintiff if the third-party plaintiff is held liable on the claim against him.

"(b) In addition to the other rights and duties a third-party defendant has under this article, he may, at the time he files his answer to the cross-complaint, file as a separate document a special answer alleging against the third-party plaintiff any defenses which the third-party plaintiff has to such cause of action. The special answer shall be served on the third-party plaintiff and on the person who asserted the cause of action against the third-party plaintiff."

9. There are, of course, a number of significant exceptions to this general rule. For example, when an employee is injured in the scope of his employment, Labor Code section 3864 would normally preclude a third party tortfeasor from obtaining indemnification from the employer, even if the employer's negligence was a concur-

case, the allegations of AMA's cross-complaint are sufficient to suggest that Glen's parents' negligence may possibly have been a concurrent cause of Glen's injuries. While we, of course, intimate absolutely no opinion as to the merits of the claim, if it is established that the parents were indeed negligent in supervising their son and that such negligence was a proximate cause of injury, under the governing California common law rule Glen's parents could be held liable for the resulting damages. (See, e. g., *Gibson v. Gibson* (1971) 3 Cal.3d 914, 92 Cal.Rptr 288, 479 P.2d 648.) Thus, we believe that AMA's cross-complaint states a cause of action for comparative indemnity and that the trial court should have permitted its filing.

6. *Conclusion.*

In *Li v. Yellow Cab Co., supra*, this court examined and abandoned the time-worn contributory negligence rule which completely exonerated a negligent defendant whenever an injured plaintiff was partially at fault for the accident, recognizing with Dean Prosser the indefensibility of a doctrine which "'places upon one party the entire burden of a loss for which two are, by hypothesis, responsible.'" (13 Cal.3d at p. 810, fn. 3, 119 Cal.Rptr. at p. 862, 532 P.2d at 1230 (quoting Prosser, Law of Torts, *supra*, § 67, p. 433).)

In the instant case we have concluded that the force of *Li*'s rationale applies equally to the allocation of responsibility between two or more negligent defendants and requires a modification of this state's traditional all-or-nothing common law equitable indemnity doctrine. Again, we concur with Dean Prosser's observation in a related context that "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were unintentionally responsible, to be shouldered onto one alone, . . . while the latter goes scot free." (Prosser, Law of Torts, *supra*, § 50, p. 307.) From the crude all-or-nothing rule of traditional indemnity doctrine, and the similarly inflexible per capita division of the narrowly circumscribed contribution statute, we have progressed to the more refined stage of permitting the jury to apportion liability in accordance with the tortfeasors' comparative fault.

Accordingly, we hold that under the common law equitable indemnity doctrine a concurrent tortfeasor may obtain partial indemnity from cotortfeasors on a comparative fault basis.

Let a peremptory writ of mandate issue directing the trial court (1) to vacate its order denying AMA leave to file its proposed cross-complaint, and (2) to proceed in accordance with the views expressed in this opinion. Each party shall bear its own costs.

BIRD, C. J., and MOSK, RICHARDSON, MANUEL and SULLIVAN (Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council), JJ., concur.

CLARK, Justice, dissenting.

I

Repudiating the existing contributory negligence system and adopting a system of comparative negligence, this court in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, repeatedly—like the tolling bell—enunciated the principle that the extent of liability must be governed by the extent of fault. Thus, the court stated, "the extent of fault should govern the extent of liability" (*id.*, at p. 811,

rent cause of the injury. (See *E. B. Wills Co. v. Superior Court* (1976) 56 Cal.App.3d 650, 653–655, 128 Cal.Rptr. 541; cf. *Mize v. Atchison, T. & S.F. Ry. Co.* (1975) 46 Cal.App.3d 436, 458–460, 120 Cal.Rptr. 787.)

Similarly, as we have noted above such a partial indemnification claim cannot properly be brought against a concurrent tortfeasor who has entered a good faith settlement with the plaintiff, because permitting such a cross-complaint would obviously undermine the explicit statutory policy to encourage settlements reflected by the provisions of section 877 of the Code of Civil Procedure. (See p. 198 of 146 Cal.Rptr., p. 915, of 578 P.2d ante.)

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119 Cal.Rptr. at p. 863, 532 P.2d at p. 1231), "liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault" (*Id.*, at p. 813, 119 Cal.Rptr. at p. 864, 532 P.2d at p. 1232), and "the fundamental purpose of [the rule of pure comparative negligence] shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties" (*Id.*, at p. 829, 119 Cal.Rptr. at p. 875, 532 P.2d at p. 1243). And in a cacophony of emphasis this court explained that the "basic objection to the doctrine [of contributory negligence]—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness." (*Id.*, at p. 811, 119 Cal.Rptr. at p. 863, 532 P.2d at p. 1231.)

[1a] Now, only three years later, the majority of my colleagues conclude that the *Li* principle is not irresistible after all. Today, in the first decision of this court since *Li* explaining the operation of the *Li* principle, they reject it for almost all cases involving multiple parties.

The majority reject the *Li* principle in two ways. First, they reject it by adopting joint and several liability holding that each defendant—including the marginally negligent one—will be responsible for the loss attributable to his codefendant's negligence. To illustrate, if we assume that the plaintiff is found 30 percent at fault, the first defendant 60 percent, and a second defendant 10 percent, the plaintiff under the majority's decision is entitled to a judgment for 70 percent of the loss against each defendant, and the defendant found only 10 percent at fault may have to pay 70 percent of the loss if his codefendant is unable to respond in damages.

The second way in which the majority reject *Li*'s irresistible principle is by its settlement rules. Under the majority opinion, a good faith settlement releases the settling tortfeasor from further liability, and the "plaintiff's recovery from nonsettling tortfeasors should be diminished only by the amount that the plaintiff has actually recovered in a good faith settlement, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury." (*Ante*, p. 199 of 146 Cal.Rptr., p. 916 of 578 P.2d.)[1] The settlement rules announced today may turn *Li*'s principle upside down—the extent of dollar liability may end up in inverse relation to fault.

Whereas the joint and several liability rules violate the *Li* principle when one or more defendants are absent or unable to respond in damages, the settlement rules will ordinarily preclude effecting the majority's principle in cases when all defendants are involved in the litigation and are solvent. To return to my 30–60–10 illustration and further assuming both defendants are solvent, the plaintiff is ordinarily eager to settle quickly to avoid the long delay incident to trial. Further, he will be willing to settle with either defendant because under the majority's suggested rules, he may then pursue the remaining defendant for the balance of the recoverable loss (70 percent) irrespective whether the remaining defendant was 10 percent at fault or 60 percent at fault. The defendants' settlement postures will differ substantially. Re-

1. Although one of the most important matters determined by today's decision, the issue of pro rata reduction or dollar amount reduction was barely mentioned and the relative merits of the two systems were not briefed or argued by the parties or by any of the numerous amici. The overwhelming weight of authority—contrary to the majority—is for pro rata reduction rather than settlement amount reduction. (Ark.Stats.Ann., § 34-1005; Hawaii Rev.Laws § 663-15; *Nehben v. Kosmalski* (1976) 307 Minn. 211, 239 N.W.2d 234, 236; *Theobald v. Angelos* (1965) 44 N.J. 228, 208 A.2d 129, 131; *Rogers v. Spady* (1977) 147 N.J.Super. 274, 371 A.2d 255, 287; N.Y.Gen.Obl.Law, § 15-108; R.I.Gen.Laws (1956) § 10-6-8; S.D.Ch.Laws 15-6-18; Tex.Rev.Civ.Stat., art. 2212a, § 2(e); Utah Code 78-27-43; *Gomes v. Bradhurst* (3d Cir. 1967) 394 F.2d 465; *Pierringer v. Hoger* (1962) 21 Wis.2d 182, 124 N.W.2d 106; Wyo.Stat.Ann., § 1-7.8, but cf. Fla.Stat.Ann., § 768.31; Mass.Laws Ann., ch. § 231B § 4.) Although I believe it is improper for the court to reach such an important issue without the aid of counsel, I am compelled to discuss the problem because the majority has determined it.

sizing the plaintiff is eager for quick recovery and is capable of pursuing the codefendant, the defendant 60 percent liable for the loss will be prompted to offer a sum substantially below his share of fault, probably paying 20 to 40 percent of the loss. The defendant only 10 percent at fault will be opposed to such settlement, wishing to limit his liability. To compete with his codefendant in settlement offers he will be required to offer substantially in excess of his 10 percent share of the loss, again frustrating the *Li* principle that the extent of liability should be governed by the extent of fault. Should he fail to settle, the 10 percent at fault defendant runs the risk that his codefendant will settle early for perhaps half of his own liability, while the lesser negligent person must eventually pay the remainder, not only frustrating the *Li* principle but turning it upside down. In any event, it is extremely unlikely he can settle for his 10 percent share.[2]

[11] The foregoing demonstrates that under the majority's joint and several liability and settlement rules, only rarely will the *Li* principle be carried out in multi-party litigation. The principle will be frustrated if one or more defendants are unavailable, insolvent, or have settled. Prior to *Li*, the overwhelming majority of accident cases were settled in whole or in part, and assuming this practice continues, the *Li* principle will not be realized in those cases. In a substantial number of the remaining cases it can be expected that one of the tortfeasors will not be able to respond in damages, again frustrating the *Li* principle. In sum, although the majority devote approximately half of their opinion to asserted maintenance of the *Li* principle (pts. 3, 4, and 5), in only a very small number of multiple party cases will the loss be shared in accordance with that principle.

Attempting to justify their repudiation of the *Li* principle in favor of joint and several liability, the majority suggest three rationales. First, we are told that the feasibility of apportioning fault on a comparative basis does not "render an indivisible injury 'divisible.'" each defendant's negligence remaining a proximate cause of the entire indivisible injury. (*Ante*, p. 188 of 146 Cal. Rptr., p. 505 of 576 P.2d) The argument proves too much. Plaintiff negligence is also a proximate cause of the entire indivisible injury, and the argument, if meritorious, would warrant repudiation of *Li* not only in the multiple party case but in all cases.

The second rationale of the majority lies in two parts. First, we are told that after *Li* there is no reason to assume that plaintiffs will "invariably" be guilty of negli-

2. In addition, the policy in favor of settlement will be frustrated by the majority's rule that the plaintiff's recovery against nonsettling tortfeasors should be diminished only by the amount recovered in a good faith settlement rather than by settling tortfeasor's proportionate responsibility. (*Ante*, p. 604.) As the majority recognize: "'Few things would be better calculated to frustrate [section 877's] policy, and to discourage settlement of disputed tort claims, than knowledge that such a settlement locked finality and would lead to further litigation with one's joint tortfeasors, and perhaps further liability.'" (*Id.*) Settlement by one tortfeasor is not going to compel the other tortfeasor to withdraw his cross-complaint for total or partial indemnity. Rather there will be a claim of bad faith because if the jury awards the plaintiff all of the damages sought and concludes that the settling tortfeasor should bear the lion's share of the responsibility for the laws, the settling tortfeasor would have escaped for a small fraction of his actual liability. This alone, although not determinative, would indicate bad faith. (*River Garden Farms, Inc. v. Superior Court* (1973) 26 Cal.App.3d 986, 997, 103 Cal.Rptr. 498 ("price is the immediate signal for the inquiry into good faith").)

Obviously, in most cases the jury will not award plaintiff all of the damages sought and will not conclude the settling tortfeasor should have borne the lion's share. But because prior to trial these matters are necessarily uncertain and the possibility of establishing bad faith exists, the nonsettling tortfeasor's counsel must continue to maintain his cross-complaint for total and partial indemnity. (Cf. *Smith v. Lewis* (1975) 13 Cal.3d 349, 360, 118 Cal.Rptr. 621, 530 P.2d 589 (failure to pursue arguable claims may constitute malpractice).) Aware that his settlement will not ordinarily prevent his participating in the litigation of the issues of damages and relative fault and that he might be held liable for further damages, a defendant contemplating settlement will rarely do so alone.

gence. (*Ante*, p. 188 of 146 Cal.Rptr., p. 905 of 578 P.2d) Obviously this is true. The basis of joint and several liability prior to *Li* was that between an innocent plaintiff and two or more negligent defendants it was proper to hold the defendants jointly and severally liable. The innocent plaintiff should not suffer as against a wrongdoing defendant. (*Ante*, p. 188 of 146 Cal.Rptr., p. 905 of 578 P.2d) (*Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 423, 218 P.2d 17.) Accordingly, it is not unreasonable to reject the *Li* principle when we are comparing the plaintiff's innocence and defendants' negligence. But the issue presented by this case is whether joint and several liability shall be extended to *Li* cases, cases where the plaintiff *by definition* is negligent. While we cannot know whether a plaintiff will be found negligent until trial, we also cannot know whether any given defendant will be found at fault until trial. Since liability is not to be determined until after trial, there is no reason not to deal with the real issue before us whether joint and several liability should be applied in cases where the plaintiff is found negligent—i. e., cases where by definition the plaintiff is "invariably" found negligent.

As a second part of the second rationale for joint and several liability we are told that a plaintiff's culpability is not equivalent to that of a defendant. This is obviously true—this is what *Li* is all about. The plaintiff may have been driving 50 miles in excess of the speed limit while the defendants may have been driving 10 miles in excess. The converse may also be true. But the differences warrant departure from the *Li* principle in toto or not at all.

The majority's third rationale for rejecting the *Li* principle is an asserted public policy for fully compensating accident victims. The majority state that joint and several liability "recognizes that fairness dictates that the 'wronged party should not be deprived of his right to redress,' but that '[t]he wrongdoers should be left to work out between themselves any apportionment.' (*Summers v. Tice* (1948) 33 Cal.2d 80, 88.)" (*Ante*, p. 189 of 146 Cal.Rptr., p. 906 of 578 P.2d) The quoted language is not helpful to the majority when the plaintiff is also negligent because he is himself a wrongdoer.

Until today neither policy nor law called for fully compensating the negligent plaintiff. Prior to *Li*, the negligent plaintiff was denied all recovery under the contributory negligence doctrine—the policy reflected being directly contrary to that asserted today. *Li*, of course, repudiated that doctrine replacing it with a policy permitting compensation of the negligent accident victim but only on the basis of comparative fault. Moreover, *Li* cannot be twisted to establish a public policy requiring rejection of its own irresistible principle. In sum, the majority are establishing a new policy both contrary to that existing prior to *Li* and going further than that reflected by the comparative principle enunciated in *Li*.

Conceivably, such a new public policy departing from intelligent notions of fairness may be warranted but, if so, its establishment should be left for the Legislature. Before going beyond *Li*'s principle "irresistible to reason and all intelligent notions of fairness" (13 Cal.3d at p. 811, 119 Cal. Rptr. at p. 863, 532 P.2d at p. 1231), a full evaluation should be made of society's compensation to accident victims through our tort system in comparison to all other means used by society to compensate victims. A study should include such matters as the relative workings of the liability insurance system in providing benefits, disability insurance and employer benefits, medical insurance, workers' compensation, insurance against uninsured defendants, Medicare, Medi-Cal and the welfare system. Reconsideration of the collateral source rule would also be required before adoption of a public policy going beyond intelligent notions of fairness. The evidence gathering and hearings necessary for the requisite study are within the capabilities of the Legislature; this court is institutionally incapable of undertaking it.

The majority rely on decisions from Mississippi, New York, Wisconsin, and Georgia

for the proposition that courts have retained joint and several liability under comparative negligence. (*Ante*, p. 189 of 146 Cal.Rptr., p. 906 of 578 P.2d) In the cases cited from the first two jurisdictions, it does not appear that the plaintiff was negligent under the facts or that the court in adhering to joint and several liability was considering cases where the plaintiff was negligent. Thus, those cases stand for nothing more than application of joint and several liability when a plaintiff is innocent and the defendants are guilty, the traditional common law application. The third jurisdiction, Wisconsin, is not a pure comparative negligence jurisdiction. Rather, the negligent plaintiff can recover only if his "'negligence was not as great as the negligence of the person against whom recovery is sought'" (*Chille v. Howell* (1967), 34 Wis.2d 491, 499, 149 N.W.2d 600, 604.) Because of the limitation on recovery by negligent plaintiffs in Wisconsin, it may be justifiable to apply joint and several liability by analogy to the common law principle that as between an innocent plaintiff and any negligent defendant, the entire loss shall fall on the negligent actor. Obviously, such justification is not available in a pure comparative jurisdiction like California. Only the Georgia case is in point.

In any event as pointed out by Justice Thompson in the opinion and chart prepared in the Court of Appeal in this case, several jurisdictions adopting comparative fault have abolished joint and several liability.[3]

In my view the majority's effort to resist the irresistible fails. They have furnished no substantial reason for refusing to apply the *Li* principle to multi-party litigation

II

Adherence to the *Li* principle that the extent of liability is governed by the extent of fault requires that only a limited form of joint and several liability be retained in cases where the plaintiff is negligent.[4] The issue of joint and several liability presents the problem whether the plaintiff or the solvent defendants should bear the portion of the loss attributable to unknown defendants or defendants who will not respond in damages due to lack of funds.

Consistent with the *Li* principle—the extent of liability is governed by the extent of fault—the loss attributable to the inability of one defendant to respond in damages should be apportioned between the negligent plaintiff and the solvent negligent defendant in relation to their fault. (Fleming, *Foreword: Comparative Negligence At Last—By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 251–252, 257–258.) Returning to my 30–60–10 illustration, if the 60 percent at fault defendant is unable to respond, the 30 percent at fault plaintiff should be permitted to recover 25 percent of the entire loss *from* the 10 percent at fault solvent defendant based on the 3 to 1 ratio of fault between them. (The solvent defendant would have added to his 10 percent liability one-fourth of the 60 percent or 15 percent to reach the 25 percent figure.) To the extent that anything is recovered from the 60 percent at fault defendant, the money should be apportioned on the basis of the 3 to 1 ratio. The system is based on simple mechanical calculations from the jury findings

3. It has been suggested that statutes repudiating joint and several liability in comparative negligence cases are entitled to little, if any, weight in comparison to judicial opinions on the issue. However, in a democracy the laws enacted by the people's elected representatives are entitled to great weight

4. When the plaintiff is free of fault he is entitled to a joint and several judgment against each defendant in accordance with common law rule. The *Li* principle is inapplicable because there is simply no plaintiff fault for comparing with defendants' fault.

In addition, when one defendant is held liable for the acts of another on the basis of principles of vicarious liability, there should be no apportionment of liability because by definition one is liable for the acts of the other. (*Ante*, p. 187 of 146 Cal.Rptr., p. 904 of 578 P.2d.) Apportionment between defendants should be denied even if the plaintiff is negligent, and in determining relative fault of plaintiff and defendants, the single negligent act for which both defendants are responsible should not be counted twice

Placing the entire loss attributable to the insolvent defendant solely on the negligent plaintiff or solely on the solvent negligent defendant is not only contrary to the *Li* principle, but also undermines the entire system of comparative fault. If the portion attributable to the insolvent defendant is placed upon the negligent plaintiff, the solvent defendant will attempt to reduce his liability by magnifying the fault of the insolvent defendant. Should the insolvent's portion be placed solely upon the solvent defendant—as done by the majority's application of joint and several liability - the plaintiff will have an incentive to magnify the fault of the insolvent defendant.[5] Because the insolvent—and therefore disinterested—defendant will usually not be present at trial to defend himself, any semblance to comparative fault will be destroyed.

Similarly, settlement rules should also reflect the *Li* principle. When a defendant settles, he should be deemed to have settled his share of the total liability and the pleadings and releases should so reflect. The nonsettling defendant should be liable only for the portion of the loss attributable to him—deducting from the total loss the amount attributable to the plaintiff's negligence[6] and the amount attributable to the settling defendant's negligence. This rule adopted by Wisconsin (*Pierringer v. Hoger* (1963) 21 Wis.2d 182, 124 N.W.2d 106, 111-112), would force a plaintiff to demand settlements reasonably commensurate to the fault of the settling defendant because he will no longer be able to settle quickly and cheaply, then holding the remaining defendants for part of his codefendant's share of the loss. Granted, the nonsettling defendant will have an incentive to magnify the fault of the settling defendant, but it is not unfair to place the burden of defending the settling defendant upon the plaintiff for three reasons. He is the one who chose to settle, the settlement has eliminated any right of contribution or partial indemnity of the nonsettling defendant, and the plaintiff in obtaining his settlement may secure the cooperation of the settling defendant for the later trial.

III

"[I]rresistible to reason and all intelligent notions of fairness" (13 Cal.3d 804, 811, 119 Cal.Rptr. 858, 863, 532 P.2d 1226, 1231), this court created a policy three years ago the majority today cavalierly reject without real explanation. Their attempted rationale for rejection of the *Li* principle insofar as it is based on a newly discovered public policy is entitled to little weight. The public has no such policy and any attack on the principle based on logic or abstract notions of fairness fail. The principle is transparently irresistible in the abstract.

If not applied across the board the *Li* principle should be abandoned. The reason for abandonment applies not only to multiparty cases but also to two-party cases, warranting total repudiation of the principle, not merely the majority's partial rejection.

While logically reasonable and fair in the abstract, the *Li* principle is generally unworkable, producing unpredictable and inconsistent results. Implementation of the principle requires judgment beyond the ability of human judges and juries. The point is easily illustrated. If the first party to an accident drove 10 miles in excess of the speed limit, the second 50 miles in excess, it is clear that the second should suffer the lion's share of the loss. But should he pay 55 percent of the loss, 95 percent or something in between? That question cannot be answered with any precision, and human beings will not answer it consistently. Yet that is the easiest question presented in comparing fault because we are dealing only with apples. When we add or-

5. To illustrate, if plaintiff and the solvent defendant are equally at fault, the amount to be recovered will depend on the extent of fault of the insolvent defendant. If the insolvent defendant is 50 percent at fault, plaintiff will recover 90 percent of his loss but if the insolvent is only 10 percent at fault, recovery will be limited to 55 percent of the loss.

6. Existing rules should be continued as to nonnegligent plaintiffs.

angles to the comparison, there are no guidelines. If the first driver also was driving under the influence of Jack Daniels, reasonable judges and juries will disagree as to who shall bear the lion's share of the loss, much less the percentages. Finally, when the case is pure apples and oranges—one party speeds, the other runs a stop signal—there is no guide post, much less guidelines, and acting in furtherance of the *Li* principle, reasonable judges and juries can be expected to come up with radically different evaluations.[7]

In short, the pure comparative fault system adopted by *Li* not only invites but demands arbitrary determinations by judges and juries, turning them free to allocate the loss as their sympathies direct. We may expect that allocation of the loss will be based upon the parties' appearance and personality and the abilities of their respective counsel. The system is a nonlaw system. Furthermore, prior to *Li* our tort system of liability was condemned because it was so inefficient in transferring the liability insurance premium to the accident victim (e. g., Conrad et al., Automobile Accident Costs and Payments (1964) pp. 58-61). The complexities and unpredictability of the *Li* system can only make the system even more inefficient.

I do not suggest return to the old contributory negligence system. The true criticism of that system remains valid: one party should not be required to bear a loss which by definition two have caused. However, in departing from the old system of contributory negligence numerous approaches are open, but the Legislature rather than this court is the proper institution in a democratic society to choose the course. To accommodate the true criticism, for example, it might be proper to take the position that a negligent plaintiff forfeits part—but not all—of his recovery in a percentage fixed by the Legislature. A fixed percentage approach would eliminate the impossible task of comparing apples and oranges placed upon the trier of fact by *Li* and would provide the consistency, certainty and predictability which foster compromise and settlement. Although the percentage would be arbitrary, the allocation of loss as demonstrated above is necessarily arbitrary under the present system.

In my dissenting opinion in *Li* I pointed out: "[T]he Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of negligence. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best. (See Schwartz, Comparative Negligence (1974) appen. A, pp. 367-369 and § 21.3, fn. 46, pp. 341-342, and authorities cited therein.) This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration *all but two* of the many competing proposals—including models adopted by some of our sister states." (Fn. omitted; 13 Cal.3d at pp. 833-834, 119 Cal.Rptr. at p. 879, 532 P.2d at p. 1247.)

Again, it must be urged that this is a subject to which the Legislature should address itself. Not only are there a number of different approaches to plaintiff negligence in our sister states but recent years have spawned numerous studies of the problem from the societal point of view. (E. g., Cal. Citizens Com. on Tort Reform, Righting the Liability Balance (Sept. 1977).) The two most modern trends of compensat-

7. In the instant case, plaintiff alleges defendants negligently conducted a motorcycle race. Defendant American Motorcycle Association alleges that plaintiff was negligent in causing the accident and that plaintiff's parents negligently failed to supervise their minor child. Assuming that both plaintiff and defendant are successful in proving their allegations, the division of the loss between plaintiff, defendant, and the parents will require arbitrary allocation.

EXHIBIT A

ing accident victims run in directly contrary approaches—the nonfault approach where negligence may be ignored and the comparative fault approach where the quantum of negligence is to be meticulously divided among the parties. No area of the law calls out more for a clear policy established by democratically elected representatives.

Rehearing denied; CLARK, J., dissenting

578 P.2d 945
21 Cal.3d 268

Susan GARFINKLE et al., Petitioners

The SUPERIOR [illegible] OF CONTRA COSTA C[illegible] ondent;

WELLS [illegible] Real

[illegible]nc 15, 1978.

[illegible]f mandate was fil[illegible]
[illegible]tionality of proceedu[illegible]
[illegible]reclosure of deeds of tru[illegible]
[illegible]rty. The Supreme Cou[illegible]
[illegible]held that: (1) judicial forec[illegible]
[illegible]dure did not constitute "state a[illegible]
[illegible]d was therefore immune from pr[illegible]
[illegible]al due process requirement of Fou[illegible]
[illegible]nth Amendment, and (2) nonjudici[illegible]
[illegible]oreclosure of deed of trust constitut[illegible]
"private action" authorized by contract a[illegible]
did not come within scope of due proc[illegible]
clause of State Constitution.

Alternative writ discharged and pe[illegible]
emptory writ denied.

1. Constitutional Law ⇐213(4)

Fourteenth Amendment erects [illegible] shield against merely private conduct, how[illegible]ever discriminatory or wrongful. U.S.C.[illegible]
Const. Amend. 14.

2. Mortgages ⇐329

Unlike mechanics' lien or stop not[illegible] which are authorized by statute and not [illegible] contract of parties, power of sale exercis[illegible] by trustee on behalf of lender-creditor [illegible] nonjudicial foreclosures is right authoriz[illegible] solely by contract between lender and tru[illegible]tor as embodied in deed of trust.

3. Constitutional Law ⇐254(5)
Mortgages ⇐330

Nonjudicial foreclosure statutes do n[illegible] authorize or compel inclusion of power [illegible] sale in deed of trust or provide for su[illegible]

578 P.2d [illegible]
MERCURY CASU[illegible]

Sup[illegible]

[illegible]aring DE-

NI[illegible]

The [illegible]ns is directed not to publish [illegible] Reports the opinion in the above e[illegible] appeal filed March 10, 1978 and appears [illegible]n 78 Cal.App.3d 525, 142 Cal.Rptr. 221. (Cal.Const., Art., VI, section 14; Rule 976, Cal.Rules of Court.)

Bird, C. J., and Clark, J., are of the view that the opinion should remain published.

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ATTACHMENT "B"

STATEMENT IN SUPPORT OF ASSEMBLY

BILL NO. 333

Nevada's comparative negligence statute, N.R.S. 41.141, in its present form, fails to deal with the frequent situation in which there are multiple tortfeasors, but, because one or more tortfeasors are impecunious or for some other reason, not all tortfeasors are named as defendants in the plaintiff's action. In addition, N.R.S. 41.141(3)(a) provides for several liability of the named defendants to the plaintiff, not joint and several liability. This means that, if one defendant is impecunious, the injured plaintiff must bear the loss of that defendant's share of the defendants' liability.

Finally, N.R.S. 41.141(3)(b) is not compatible with provisions of the Uniform Contribution Among Tortfeasors Act (N.R.S. 17.215, et seq.) with respect to tortfeasors who are named defendants. Specifically, N.R.S. 17.295(1) provides that in determining the pro rata shares of tortfeasors in the entire liability, their relative degrees of fault shall not be considered, whereas N.R.S. 41.141(3)(b) now provides that each defendant's liability shall be in proportion to his negligence, and recoverable damages shall be apportioned among the defendants in accordance with the negligence determined.

There are several reasons why it is vitally important that each tortfeasor whose negligence is a proximate cause of an indivisible injury should be individually liable for all compensable damages attributable to that injury.

EXHIBIT B

First, in many instances, the negligence of each of several concurrent tortfeasors may be sufficient, in itself to cause the entire injury, while in other instances, it is simply impossible to determine whether or not a particular concurrent tortfeasor's negligence, acting along, would have caused the same injury. Under both circumstances, the defendant has no equitable claim vis-a-vis an injured plaintiff to be relieved of liability for damages he has proximately caused, simply because some other tortfeasor's negligence may also have caused the same harm.

Second, under the present statute, a completely faultless plaintiff, rather than a wrongdoing defendant, is forced to bear a portion of the loss if one of the defendants should prove financially unable to satisfy his proportioned share of the damages. And even if the plaintiff is partially at fault, he would be forced to bear a more than proportionate share of his damages under such circumstances, since he would have to bear not only his own proportionate reduction in damages, but also the proportional share of any impecunious defendant from whom recovery was not possible.

For these reasons, the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine. The simple truth is that abandonment of joint and several liability works a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation

EXHIBIT B

for their injuries, when one or more the responsible parties do not have the financial resources to cover their liability.

Assembly Bill No. 333 rectifies these errors.

First, it extends comparative negligence to wrongful death actions, with the result that the comparative negligence statute and the Uniform Contribution Among Tortfeasors Act would be co-extensive.

Second, it provides that in determining issues of negligence and comparative negligence, the jury shall not weigh or consider the negligence of any persons or entities who are not parties to the litigation. This preserves the traditional right of injured plaintiffs to sue all or less than all multiple tortfeasors, as their interests and financial resources may dictate, without fear of being penalized by the corporative negligence statute if all multiple tortfeasors are not named as defendants.

Third, the bill provides that where recovery is allowed against more than one defendant in such an action, the defendants are jointly and severally liable to the plaintiff. This restores the principle of joint and several liability of multiple defendants to the plaintiff, thus frequently permitting an injured person to obtain full recovery for all injuries which are proximately caused by the negligence of the defendants, regardless of the financial resources of any one particular defendant.

For these reasons, Assembly Bill No. 333 should be enacted.

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Mr. Gianatti's main objection was the placement of an affirmative responsibility on the part of the ski operator.

Senator Dodge stated that in order to pass this bill, there should be such an affirmative responsibility.
He felt that if the operator's did not want a bill in this form, it would be best to have no bill at all.

Senator Dodge moved to indefinitely postpone AB 763.

Seconded by Senator Raggio.

Motion carried unanimously.

AB 333 Consolidates, clarifies and amends certain provisions relating to comparative negligence.

For testimony and further discussion on this measure, see the minutes of the meeting for May 23, 1979.

Richard Garrod, Farmer's Insurance Group, testified in opposition to this measure. He stated that there had been a comment made in yesterday's meeting that insurance monies are all placed in one pot. By legislative procedure, classes of insurance have been established; commercial, fire, casualty. Those monies cannot be spent on automobile insurance and vice versa.
He further stated that if Nevada goes to the equitable situation, each determination will have to be settled by a court or jury and insurance rates will increase tremendously.

Senator Sloan stated that Nevada has had, with the exception of the last 3 or 4 years, joint and several liability since the inception of common law. He asked Mr. Garrod if he was saying that when comparative negligence was passed, that the insurance companies reduced their rates to reflect that there was then only several liability.
He stated that if that was the case, then the insurance companies missed him and he wanted his money.
Senator Sloan further stated that every time the legislature does anything, the insurance companies come in and testify that the rates are going to go up.
He did not see how it was fair to come in and say that the rates are going to skyrocket, when it is the same system that Nevada has had since its inception.

5/24

Senator Close stated that when this was passed in 1973, they realized that they were passing both comparative negligence and contribution. It was not a mistake. Their intention was to permit the situation where the plaintiff is also liable and the jury or the court determine the liability percentages among all the parties.
He felt that they could retain the present law, but amend to make that intention more clear.

Senator Dodge moved to indefinitely postpone AB 333.

Seconded by Senator Hernstadt.

Motion lost. The vote was as follows:

AYE:	Senator Close	NAY:	Senator Ashworth
	Senator Dodge		Senator Ford
	Senator Hernstadt		Senator Raggio
			Senator Sloan

The committee began a section by section review of the measure.

002082

SECTION 1: Senator Close stated that the first decision was whether to go with pro rata or equitable.

002082

Senator Sloan stated that the Attorney General has suggested equitable.

Senator Ashworth stated that he believed that, as a practical matter, the carriers would take the equitable route on their own.

It was the consensus of the committee to go with equitable.

SECTION 2: Senator Ford stated that an amendment was needed on Page 2, between lines 3 and 4. A pro rata was retained when the bill was being redrafted.

SECTION 3: Senator Close stated that "not" should be deleted with regard to the relative degrees of fault being considered, inasmuch as the committee had decided to go with equitable.

SECTION 4: No discussion.

SECTION 5: Senator Ashworth asked what was meant by "the plaintiff or his decedent".

Senator Sloan stated that there are only two people who can bring this action; the estate or one of the survivors. In a wrongful death or survival action, the plaintiff is someone who files on behalf of the decedent.

Senator Close stated that it was his recollection that lines 48 through 50 were being deleted.

Senator Raggio stated that it was his understanding that the Assembly insisted that be included.

Senator Close responded that they would have to go to conference committee on that because the term "substantial" is an undefined element.
He further stated that on page 3, line 1, "or his decedent" should be included after "plaintiff".

Senator Ashworth moved to report AB 333 out of committee with an "amend and do pass" recommendation.

Seconded by Senator Sloan.

Motion carried. The vote was as follows:

AYE:	Senator Ashworth	NAY:	Senator Close
	Senator Ford		Senator Hernstadt
	Senator Raggio		
	Senator Sloan	ABSENT:	Senator Dodge

AB 691 Requires certain notice to general contractor before mechanic's lien is perfected.

John Medole, representing the Associated General Contractors, testified in support of this measure. He stated that on a large job, sometimes it is difficult for the general contractor to know whether or not a second or third tier subcontractor or material supplier is even on the job. This would give them a little bit better notice.

Senator Raggio moved to report AB 691 out of committee with a "do pass" recommendation.

Seconded by Senator Sloan.

Motion carried unanimously. Senator Ford was absent from the vote.

Assembly Bill No. 673 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Bill No. 773.

Bill read third time.

Remarks by Senators Ford and Gibson.

Senator Gibson moved that Assembly Bill No. 773 be taken from the General File and be placed on the Secretary's desk.

Motion carried.

Assembly Bill No. 745.

Bill read third time.

Remarks by Senator Lamb.

Senator Lamb moved that Assembly Bill No. 745 be taken from the General File and be placed on the Secretary's desk.

Motion carried.

Assembly Bill No. 848.

Bill read third time.

Remarks by Senators McCorkle and Lamb.

Senator McCorkle moved that Assembly Bill No. 848 be taken from the General File and be placed on the Secretary's desk.

Motion carried.

Assembly Bill No. 825.

Bill read third time.

Remarks by Senators Ford and Gibson.

Senator Gibson moved that Assembly Bill No. 825 be taken from the General File and be placed on the Secretary's desk.

Motion carried.

Assembly Joint Resolution No. 38.

Resolution read third time.

Remarks by Senator Blakemore.

Roll call on Assembly Joint Resolution No. 38:

YEAS—18.

NAYS—None.

Absent—Keith Ashworth, Raggio—2.

Assembly Joint Resolution No. 38 having received a constitutional majority, Mr. President declared it passed, as amended.

There being no objections, Mr. President declared the Preamble adopted.

Resolution ordered transmitted to the Assembly.

Assembly Bill No. 333.

Bill read third time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1365.

Amend the bill as a whole by inserting a new section, designated section 3, following section 2, to read as follows:

"Sec. 3. NRS 17.275 is hereby amended to read as follows:

17.275 A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's [pro rata] *equitable* share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.".

Amend the bill as a whole by renumbering sections 3 through 6 as sections 4 through 7.

Amend section 5, page 2, line 38, by deleting the open bracket.

Amend section 5, page 2, line 39, by inserting open bracket before "(d)".

Amend section 5, page 2, line 41, by deleting "the plaintiff.".

Amend section 5, pages 2 and 3, by deleting lines 47 through 50 on page 2 and line 1 on page 3 and inserting:

"tiff [.] , *except that a defendant whose negligence is less than that of the plaintiff or his decedent is*".

Senator Close moved the adoption of the amendment.

Amendment adopted.

Senator Close moved that rules be suspended, that the reprinting of Assembly Bill No. 333 be dispensed with, and that the Secretary be authorized to insert the amendment adopted by the Senate.

Motion carried unanimously.

Remarks by Senators Dodge, Don Ashworth, Wilson, Close, Hernstadt, Sloan and Neal.

Senators Gibson, Lamb and Jacobsen moved the previous question.

Motion carried.

The question being on the passage of Assembly Bill No. 333.

Roll call on Assembly Bill No. 333:

YEAS—11.

NAYS—Close, Dodge, Gibson, Hernstadt, Jacobsen, Lamb, McCorkle—7.

Absent—Keith Ashworth, Raggio—2.

Assembly Bill No. 333 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered reprinted, re-engrossed and transmitted to the Assembly.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Finance, to which was referred Senate Bill No. 582, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended

FLOYD R. LAMB, *Chairman*

Mr. President.

Your Committee on Finance, to which was referred Assembly Bill No. 849, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

FLOYD R. LAMB, *Chairman*

Mr. President:

Your Committee on Finance, to which was referred Senate Bill No. 590, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

FLOYD R. LAMB, *Chairman*

(REPRINTED WITH ADOPTED AMENDMENTS)
FOURTH REPRINT **A. B. 333**

ASSEMBLY BILL NO. 333—COMMITTEE ON JUDICIARY

FEBRUARY 7, 1979

Referred to Committee on Judiciary

SUMMARY—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; changing a provision for contribution among tortfeasors; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 17.225 is hereby amended to read as follows:

17.225 1. Except as otherwise provided in [NRS 17.215 to 17.325,] *this section and NRS 17.235 to 17.305*, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his [pro rata] *equitable* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his [pro rata] *equitable* share. No tortfeasor is compelled to make contribution beyond his own [pro rata] *equitable* share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

SEC. 2. NRS 17.265 is hereby amended to read as follows:

17.265 NRS [17.215 to 17.325,] *17.225 to 17.305*, inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity

obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

SEC. 3. NRS 17.275 is hereby amended to read as follows:

17.275 A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's [pro rata] *equitable* share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

SEC. 4. NRS 17.295 is hereby amended to read as follows:

17.295 In determining the [pro rata] *equitable* shares of tortfeasors in the entire liability:

1. [Their relative degrees of fault shall not be considered;

2.] If equity requires, the collective liability of some as a group [shall constitute] *constitutes* a single share; and

[3.] *2.* Principles of equity applicable to contribution generally [shall] apply.

SEC. 5. NRS 17.305 is hereby amended to read as follows:

17.305 NRS [17.215 to 17.325,] *17.225 to 17.305*, inclusive, do not apply to breaches of trust or of other fiduciary obligation.

SEC. 6. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [,] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by]:

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return a]

(2) A special verdict indicating the percentage of negligence attributable to each party.

[(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.]

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

3. Where recovery is allowed against more than one defendant in such an action [:

(a) The] *, the* defendants are *jointly and* severally liable to the plaintiff [.] *, except that a defendant whose negligence is less than that of the plaintiff or his decedent is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.*

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]

SEC. 7. NRS 17.215, 17.315, 17.325 and 698.310 are hereby repealed.

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hearing officer or the commission may award as costs the amount of all such expenses to the prevailing party.

SEC. 6. NRS 284.377 is hereby repealed.

Assembly Bill No. 325—Committee on Ways and Means

CHAPTER 628

AN ACT making an appropriation from the state general fund to the department of highways for replacement of obsolete road maintenance equipment and vehicles; and providing other matters properly relating thereto.

[Approved June 2, 1979]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. There is hereby appropriated from the state general fund to the department of highways the sum of $5,000,000 for the purpose of replacing obsolete road maintenance equipment and vehicles.

SEC. 2. After June 30, 1981, the unencumbered balance of the appropriation made in section 1 of this act may not be encumbered and must revert to the state general fund.

SEC. 3. This act shall become effective upon passage and approval.

Assembly Bill No. 333—Committee on Judiciary

CHAPTER 629

AN ACT relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; changing a provision for contribution among tortfeasors; and providing other matters properly relating thereto.

[Approved June 2, 1979]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 17.225 is hereby amended to read as follows:

17.225 1. Except as otherwise provided in [NRS 17.215 to 17.325,] *this section and NRS 17.235 to 17.305,* inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his [pro rata] *equitable* share of the common liability, and his total recovery is limited to the amount paid by him in

excess of his [pro rata] *equitable* share. No tortfeasor is compelled to make contribution beyond his own [pro rata] *equitable* share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

SEC. 2. NRS 17.265 is hereby amended to read as follows:

17.265 NRS [17.215 to 17.325,] *17.225 to 17.305,* inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

SEC. 3. NRS 17.275 is hereby amended to read as follows:

17.275 A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's [pro rata] *equitable* share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

SEC. 4. NRS 17.295 is hereby amended to read as follows:

17.295 In determining the [pro rata] *equitable* shares of tortfeasors in the entire liability:

1. [Their relative degrees of fault shall not be considered;

2.] If equity requires, the collective liability of some as a group [shall constitute] *constitutes* a single share; and

[3.] *2.* Principles of equity applicable to contribution generally [shall] apply.

SEC. 5. NRS 17.305 is hereby amended to read as follows:

17.305 NRS [17.215 to 17.325,] *17.225 to 17.305,* inclusive, do not apply to breaches of trust or of other fiduciary obligation.

SEC. 6. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [.] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by] *:*

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return a]

(2) A special verdict indicating the percentage of negligence attributable to each party.

[(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.]

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

3. Where recovery is allowed against more than one defendant in such an action [:

(a) The] , *the* defendants are *jointly and* severally liable to the plaintiff [.] , *except that a defendant whose negligence is less than that of the plaintiff or his decedent is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.*

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]

SEC. 7. NRS 17.215, 17.315, 17.325 and 698.310 are hereby repealed.

Assembly Bill No. 348—Assemblymen Robinson and Mello

CHAPTER 630

AN ACT relating to administrative regulations; permitting the legislative commission to appoint a committee to examine adopted regulations; and providing other matters properly relating thereto.

[Approved June 2, 1979]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 233B.067 is hereby amended to read as follows:

233B.067 1. After its hearing on a proposed regulation, the agency shall submit an original and four copies of each regulation adopted, except an emergency regulation or a temporary regulation, to the director of the legislative counsel bureau for review by the legislative commission, *which may refer it to a joint interim committee,* to determine whether the regulation conforms to the statutory authority under which it was adopted and whether the regulation carries out the intent of the legislature in granting that authority. The director shall cause to be indorsed on the original and duplicate copies of each adopted regulation the [time and] date of their [filing] *receipt* and shall maintain one copy of the regulation in a file and available for public inspection for [a period of] 2 years.

EXHIBIT B

002091

002091

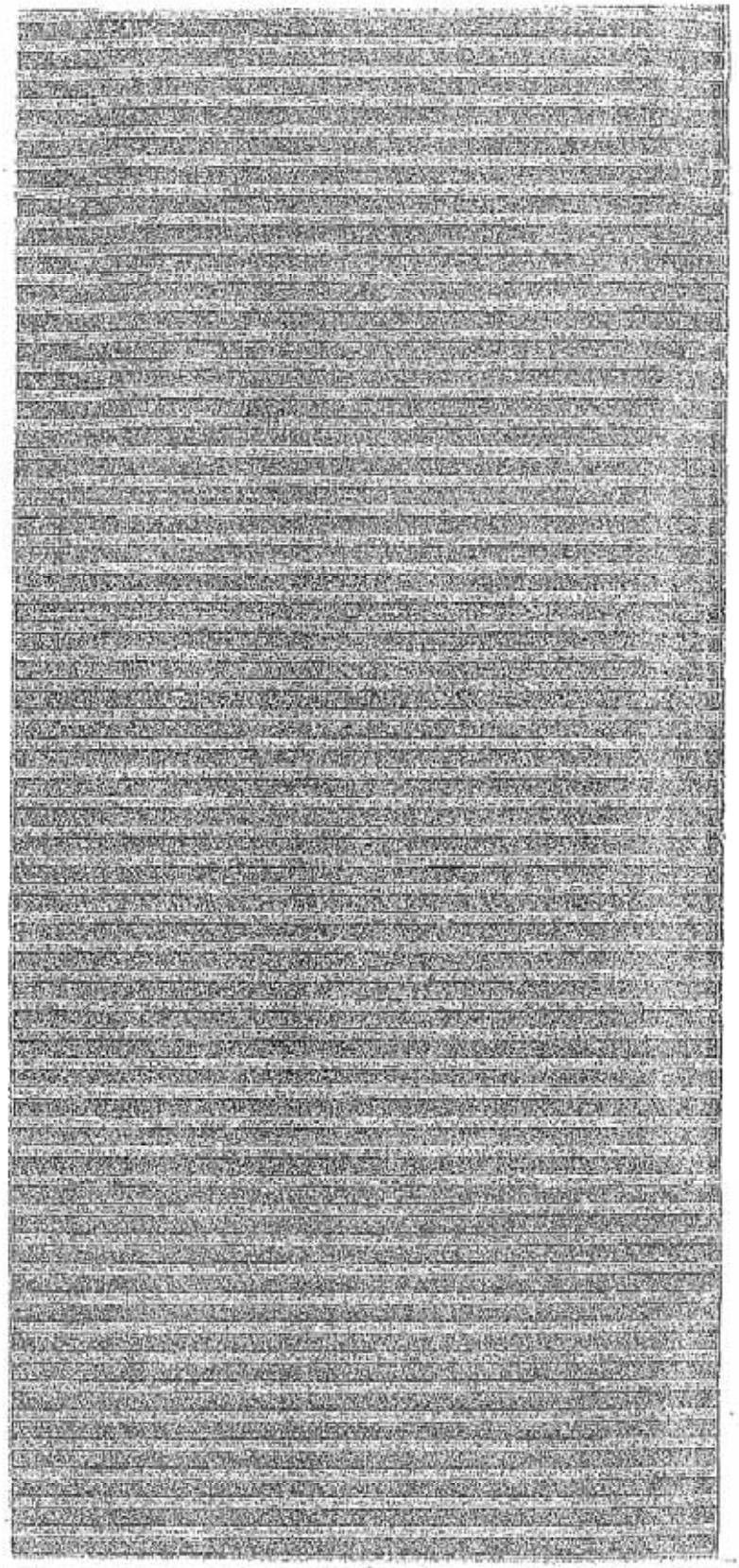
EXHIBIT B

Regional Transportation Commission
600 S. Grand Central Pkwy., Ste. 350
Las Vegas, NV 89106
(702) 228-4800
rtcsnv.com

RTC

Paratransit Guide

RTC



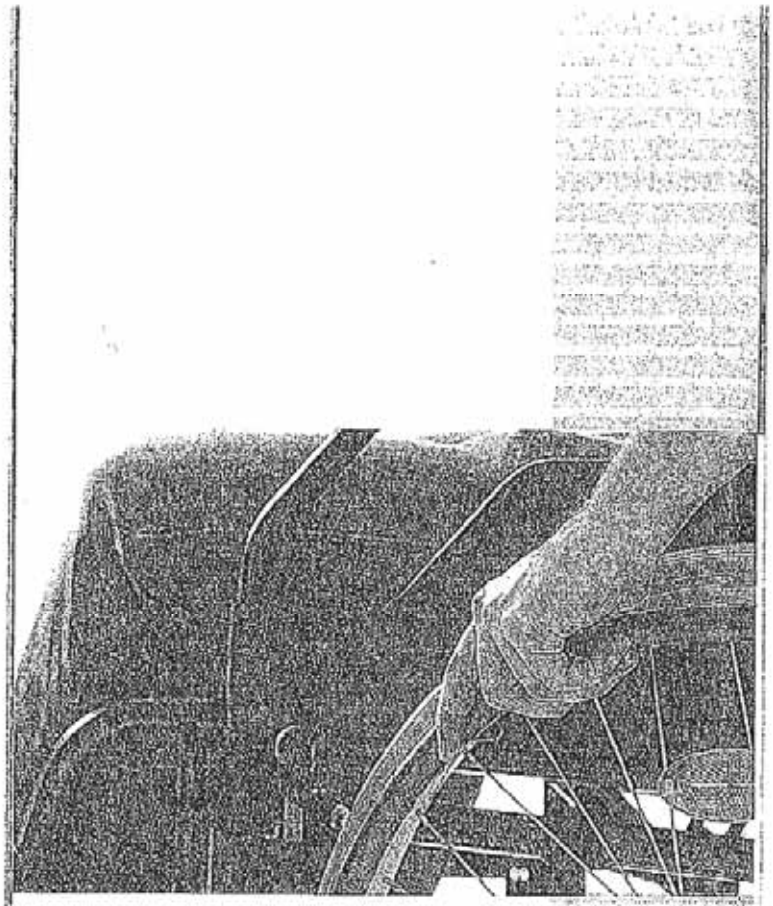
Welcome to
RTC ADA Paratransit Services

Americans with Disabilities Act of 1990 (ADA) Paratransit Services is a shared-ride, public transportation service for people with disabilities, as required by federal law, who are functionally unable to independently use the RTC fixed route services.

The RTC strives to provide safe and reliable service for all members of the community, and is committed to providing commuters with the most up-to-date information available.

You will find within this guide information you will need to use the RTC ADA Paratransit Services.

Please review this information carefully. If you have any questions, please feel free to call Customer Service at (702) 228-4800 or for the hearing impaired (702) 676-1834 (TDD).



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Hours of Operation and Service Area

RTC ADA Paratransit Services operates 24 hours a day, 365 days per year.

The system operates within the urbanized area of Clark County as required under the ADA. Areas that are not serviced by RTC fixed route services may not have service through RTC ADA Paratransit Services.

A supplemental service zone exists outside of the service area required by the ADA. The supplemental service area is determined by the current RTC fixed route bus system. Special fares and reservation policies apply to travel within, into or out of this area. You were informed as to whether you live in the supplemental service area when your eligibility was determined.

Nellis Air Force Base permits drop off and pick up at designated areas only. Please ask the Customer Service Representative when you are scheduling your reservation where you may be dropped off at the base. Customers must have a valid military identification card in their possession.

Call Before You Move

The RTC's goal is to provide the best customer service possible. As a suggestion to help serve its riders, the RTC would like to remind customers to call RTC before changing residences to verify that public transportation is available where they are moving. This preventative step is similar in concept to the Public Utility agencies wanting people to call before they dig. The RTC understands that transportation and mobility are critical to our special services clients, and that it is just as important to others on our fixed route service. Don't leave yourself without a ride. One call is all it takes to RTC Customer Service at 228-4800.

Fares

RTC ADA Paratransit Services fare is broken down into various categories. The following outlines the rate schedule for a one-way trip.

RTC ADA Paratransit Fares Effective January 10, 2010

Amount	Type
$2.75	Base cash (one-way)
$3	Peak period (6 a.m. - 9 a.m. & 1 p.m. - 4 p.m.) Mon. - Fri.
$6.00	Strip zone
$4.00*	Supplemental fare zone
$80	Unlimited RTC ADA Paratransit monthly pass (expires at end of calendar month)
$150	Supplemental zone pass (expires at end of calendar month)
$.50*	Shopping carts (one-way)
Free	Personal care attendant
$5.50	Pre-paid punch card (10 fifty-cent and two (2) twenty-five denomination spots) No expiration date
$16.50	Pre-paid punch card (30 fifty-cent and six (6) twenty-five denomination spots) No expiration date

NOTE: *Passengers are responsible for paying their fare at the time of boarding.* ***Failure to do so may result in the customer not being transported.***

Companions are charged at the same fare amount as the ADA passenger.

Please have the exact fare ready. Drivers do not make change, or accept checks or credit cards.

* Plus fare

Paperless Fare

Paper passes are no longer issued to clients when they purchase a monthly pass. The RTC will make a notation in the client's file that a monthly pass was purchased, and all drivers will be notified that the client is eligible to ride for that paid month. If omissions occur, please pay the fare and then immediately contact Customer Service at 228-4800. Please note that the fare will be updated to the client file the day after the purchase is processed. No payment will be required for each ride scheduled during this month. Please remember that it will take at least one day for the clients file to be updated after processing the purchase. Please allow 5-7 days for all mail and internet sales, and one day for purchases made at one of the transit terminals or administrative building.

A Paratransit monthly pass and pre-pay card can be purchased on the Internet at:

rtcsnv.com

or by mailing a check or money order to:

RTC ADA Paratransit Services
600 S. Grand Central Pkwy., Ste. 350
Las Vegas, NV 89106

If you have any questions regarding fare sales, please call Customer Service at (702) 228-4800.

Sorry, we cannot accept out-of-state checks or third-party checks. Checks must be pre-printed with the rider's name, phone number and I.D. number.

Fares must be paid at the time of boarding a vehicle.

Reservations

Reservations can be made seven days a week between the hours of 7 a.m. and 6 p.m., by calling Customer Service at (702) 228-4800 or (702) 676-1834 (TDD) for hearing impaired. Reservations may be made from one day to three days in advance of the day of travel. Please note - there are special reservation policies for travel, including travel within the supplemental service zone and for non-ADA eligible customers.

Please Have the Following Available:

- Your name
- The day and date of your trip
- The exact street address, building or facility name, including the apartment, building, or suite numbers, for both pick-up and drop-off locations, and if you have it, a phone number for your destination and gate code
- The type of mobility aide(s) you will be using*
- The number of people traveling - will you be taking a companion or Personal Care Attendant?
- The time you wish to be picked up, or in the case of a work, school or medical appointment, the time you need to be at your destination

** Passengers cannot travel using a mobility device unless it has been approved and your file is updated*

Please note:

- Trips may originate from any location within the ADA Paratransit service area. Rides may be one-way, round trip or multiple rides.
- Once a ride has been scheduled, additional people cannot be added.
- No changes can be made to any trips on the day of your scheduled ride.

The RTC's Customer Service Representatives will do their best to accommodate the times you desire; however, alternate times may be offered. The RTC may negotiate the times of your trip by one hour. For example, if you would like to be picked up at 10 a.m. and that time is not available, we may offer you a trip as early as 9 a.m. or as late as 11 a.m.

The interval between pick-up times on the same day is recommended to be at least two hours. For example, if your scheduled pick-up time is 10 a.m., it is recommended that you do not schedule your next ride until 12 p.m. This will help to ensure you have arrived at your first destination with enough time to travel on your second or return ride.

Subscription Service

Subscription service is available for trips that are considered as being consistent and repetitive where continuation will extend over a period of at least 90 days. Once subscription service goes into effect, there is no need for additional reservation calls.

There are three categories of subscription requests, each with different criteria:

1. Weekly trips - will occur at least three (3) times over a seven day period
2. Weekday trips - will occur at least two (2) times, Monday through Friday
3. Weekend trips - will occur at least one (1) time on Saturday and/or Sunday

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 03:04 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

APPELLANTS' APPENDIX
VOLUME 9
PAGES 2001–2250

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21	Third Order Re-Setting Civil Jury Trial and Calendar Call	06/29/15	1	133–134
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VI. THE JURY DID NOT DISREGARD THE COURT'S INSTRUCTIONS

In it their Argument IV, Defendants recast and reiterate the same legal arguments in order to bring them under NRCP 59(a)(5), manifest disregard of the jury instructions. Notably, Defendants do no point out that the standard under this portion of Rule 59 is stringent. The movant must demonstrate that, had the jurors followed the instructions, it would have been impossible for them to return the challenged verdict. *Weaver Bros. v. Misskelley*, 98 Nev. 232, 645 P.2d 438 (1982). We have already addressed these arguments and they gain no additional traction by Defendants' effort to retool them as disregard of the Court's instructions.

VII. DEFENDANTS ARE NOT ENTITLED TO REMITTITUR

Because the awards of damages are not "clearly excessive," as Defendants contend (motion, pp. 27-28), a reduction by way or remittitur is unwarranted and the Defendants' alternative motion for remittitur should be denied.

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CONCLUSION

For all the foregoing reasons, it is respectfully submitted that Defendants' motion for a new trial, or in the alternative, for remittitur, should be denied in its entirety.

DATED THIS 11th day of April, 2016

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
4101 Meadows Lane, Suite 210
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

002001

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 11 day of April 2016, I caused the foregoing OPPOSITION TO MOTION FOR NEW TRIAL; REQUEST TO SUPPLEMENT OPPOSITION WHEN TRANSCRIPTS ARE COMPLETE to be served as follows:

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

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

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

to the attorneys listed below:

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An employee of the CLOWARD HICKS & BRASIER, PLLC

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

NOTICE OF ENTRY OF "ORDER GRANTING 'MOTION FOR STAY' AND 'MOTION FOR LEAVE TO SUPPLEMENT POST-TRIAL MOTIONS UPON RECEIPT OF TRIAL TRANSCRIPT'"

Please take notice that on the 21st day of April, 2016, an "Order Granting 'Motion for Stay' and 'Motion for Leave to Supplement Post-Trial Motions Upon Receipt of Trial Transcript'" was entered in this case. A copy of the order is attached.

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Dated this 22nd day of April, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: */s/ Daniel F. Polsenberg*

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Attorneys for Defendants
First Transit, Inc. and Jay Farrales

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, *vs.* FIRST TRANSIT, INC.; JAY FARRALES; DOES 1-10; and ROES 1-10, inclusive, Defendants.	Case No. A-13-682726-C Dept. No. XXIII Hearing Date: April 5, 2016 Hearing Time: 9:30 a.m.

ORDER GRANTING "MOTION FOR STAY" AND "MOTION FOR LEAVE TO SUPPLEMENT POST-TRIAL MOTIONS UPON RECEIPT OF TRIAL TRANSCRIPT"

It is hereby ORDERED that:

1. Defendants' "Motion for Stay" is GRANTED; and

2. Defendants' "Motion for Leave to Supplement Post-Trial Motions Upon Receipt of Trial Transcript" is GRANTED. If the trial transcripts are completed the first week of June 2016, defendants' supplements to their post-

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trial motions are due 10 judicial days after the delivery of the transcripts. If the trial transcripts are completed sometime other than the first week of June 2016, the parties shall attempt to agree upon a reasonable time frame for defendants' supplements to their post-trial motions. If the parties are unable to stipulate, they shall request guidance from the Court to establish such time frame.

DATED this 19 day of April, 2016.

STEFANY MILEY
DISTRICT COURT JUDGE – DEPT. XXIII

JUDGE STEFANY A. MILEY

RESPECTFULLY SUBMITTED BY:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: _____

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APPROVED AS TO FORM AND CONTENT:

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By: _____

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Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April, 2016, I caused a true and correct copy of the foregoing "Notice of Entry of 'Order Granting 'Motion for Stay' and 'Motion for Leave to Supplement Post-Trial Motions Upon Receipt of Trial Transcript'" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

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

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CLERK OF THE COURT

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Attorneys for Defendants
First Transit, Inc. and Jay Farrales

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, *vs.* FIRST TRANSIT, INC.; JAY FARRALES; DOES 1-10; and ROES 1-10, inclusive, Defendants.	Case No. A-13-682726-C Dept. No. XXIII Hearing Date: August 2, 2016 Hearing Time: 9:30 a.m.

NOTICE OF ENTRY OF "STIPULATION AND ORDER SETTING BRIEFING SCHEDULE AND CONTINUING HEARING DATE ON POST-JUDGMENT MOTIONS"

Please take notice that on the 19th day of May, 2016, a "Stipulation and Order Setting Briefing Schedule and Continuing Hearing Date on Post-Judgment Motions" was entered in this case. A copy of the stipulation and order is attached.

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Dated this 19th day of May, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: */s/ Daniel F. Polsenberg*

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Attorneys for Defendants
First Transit, Inc. and Jay Farrales

HEARING REQUIRED
DATE: 8-2-16
TIME: 9:30 am

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF,

Plaintiffs,

vs.

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

Defendants.

Case No. A-13-682726-C
Dept. No. XXIII

STIPULATION AND ORDER SETTING BRIEFING SCHEDULE AND CONTINUING HEARING DATE ON POST-JUDGMENT MOTIONS

The parties STIPULATE to the following schedule for supplemental briefing on defendants' "Motion for New Trial" and "Motion to Alter or Amend the Judgment:"

1. Defendants' supplemental briefing will be filed and served on or before May 25, 2016;

2. Plaintiffs' supplement briefing will be filed and served on or before June 30, 2016; and

3. Defendants' replies will be filed and served 5 judicial days before the hearing, pursuant to EDCR 2.20(h).

It is FURTHER STIPULATED that the hearing on all motions, presently set for May 31, 2016, is continued to August 2, 2016 at 9:30 a.m. ~~9:00~~ a.m. CA/DC23

It is FURTHER STIPULATED that the hearing on defendant "Jay Farrales' Motion for Costs and Attorney's Fees" and defendants' "Motion to Strike Plaintiffs' Amended Memorandum of Costs and Disbursements, and for Sanctions," presently set for June 7, 2016, is continued to August 2, 2016 at 9:30 a.m. ~~9:00~~ a.m. CA/DC23

Dated May 6, 2016.

CLOWARD HICKS & BRASIER, PLLC

By: _____
BENJAMIN P. CLOWARD (SBN 11.087)
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Attorneys for Plaintiffs

Dated May 9th, 2016.

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Attorneys for Defendants

ORDER

Based upon stipulation of the parties, it is hereby ORDERED that the following schedule for supplemental briefing on defendants' "Motion for New Trial" and "Motion to Alter or Amend the Judgment" will apply:

1. Defendants' supplemental briefing will be filed and served on or before May 25, 2016;

Lewis Roca ROTHGERBER CHRISTIE

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2. Plaintiffs' supplement briefing will be filed and served on or before June 30. 2016; and

3. Defendants' replies will be filed and served 5 judicial days before the hearing, pursuant to EDCR 2.20(h).

It is FURTHER ORDERED that the hearing on all motions, presently set for May 31, 2016, is continued to August 2, 2016 at 9:30 a.m. ca/DC23

It is FURTHER ORDERED that the hearing on defendant "Jay Farrales' Motion for Costs and Attorney's Fees" and defendants' "Motion to Strike Plaintiffs' Amended Memorandum of Costs and Disbursements, and for Sanctions," presently set for June 7, 2016, is continued to August 2, 2016 at 9:30 a.m. ca/DC23

DATED this 17 day of May, 2016.

STEFANY MILEY
DISTRICT COURT JUDGE – DEPT. XXIII

RESPECTFULLY SUBMITTED BY:
LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: _____

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Attorneys for Defendants First Transit, Inc. and Jay Farrales

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May, 2016, I caused a true and correct copy of the foregoing "Notice of Entry of 'Stipulation and Order Setting Briefing Schedule and Continuing Hearing Date on Post-Judgment Motions" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

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/s/ Jessie M. Helm
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DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF,

Plaintiffs,

vs.

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

Defendants.

Case No. A-13-682726-C
Dept. No. XXIII

APPENDIX OF EXHIBITS TO: SUPPLEMENTED MOTION FOR NEW TRIAL

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F	February 19, 2016 Excerpts of Trial Transcript, Day 3	198-204
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H	February 29, 2016 Excerpts of Trial Transcript, Day 9	218-245

Dated this 25th day of May, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: */s/Abraham G. Smith*

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EXHIBIT A

002016

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EXHIBIT A

LA79-39

A. B. 331—Committee on Ways and Means, Feb. 7.

Summary—Makes appropriation for automated text processing in legislative department. (BDR S-1443) Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: Contains Appropriation.
Feb. 7—Read first time. Referred to Committee on Ways and Means. To printer.
Feb. 8—From printer. To committee.
Apr. 3—From committee: Do pass.
Apr. 4—Read second time. To engrossment. Engrossed.
Apr. 5—Read third time. Passed. Title approved. To Senate.
Apr. 6—In Senate. Read first time. Referred to Committee on Finance. To committee.
Apr. 17—From committee: Do pass.
Apr. 18—Read second time.
Apr. 19—Read third time. Passed. Title approved. To Assembly.
Apr. 20—In Assembly. To enrollment.
Apr. 23—Enrolled and delivered to Governor.
Apr. 24—Approved by the Governor. Chapter No. 190.
Effective July 1, 1979.

A. B. 332—Committee on Judiciary, Feb. 7.

Summary—Eliminates requirement of endorsement of names on information. (BDR 14-801) Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.
Feb. 7—Read first time. Referred to Committee on Judiciary. To printer.
Feb. 8—From printer. To committee.

A. B. 333—Committee on Judiciary, Feb. 7.

Summary—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896) Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.
Feb. 7—Read first time. Referred to Committee on Judiciary. To printer.
Feb. 8—From printer. To committee.
Apr. 27—From committee: Amend, and do pass as amended.
Apr. 30—Read second time. Amended. To printer.
May 1—From printer. To engrossment. Engrossed. First reprint. Re-referred to Committee on Government Affairs. To committee.
May 7—From committee: Without recommendation.
May 8—Taken from General File. Placed on Chief Clerk's desk.
May 10—Taken from Chief Clerk's desk. Placed on General File. Read third time. Amended. To printer.
May 11—From printer. To re-engrossment. Re-engrossed. Second reprint.
May 14—Taken from General File. Placed on Chief Clerk's desk.
May 16—Taken from Chief Clerk's desk. Placed on General File. Read third time. Amended. To printer.
May 17—From printer. To re-engrossment. Re-engrossed. Third reprint.
May 18—Read third time. Passed, as amended. Title approved, as amended. Notice of reconsideration on next legislative day. Notice of reconsideration withdrawn. To Senate.
May 19—In Senate. Read first time. Referred to Committee on Judiciary. To committee.
May 26—From committee: Amend, and do pass as amended. Declared an emergency measure under the Constitution. Read third time. Amended. Reprinting dispensed with. Passed, as amended. Title approved. Ordered reprinted. To printer.

May 27—From printer. To re-engrossment. Re-engrossed. Fourth reprint. To Assembly. In Assembly. Senate amendment concurred in. To enrollment. A. B

May 31—Enrolled and delivered to Governor.

June 2—Approved by the Governor. Chapter No. 629.

Effective July 1, 1979.

A. B. 334—Committee on Judiciary, Feb. 7.

Summary—Extends jurisdiction of district courts in divorce cases to adjudication of rights in property held in joint tenancy. (BDR 11-1022) Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No. A. B

Feb. 7—Read first time. Referred to Committee on Judiciary. To printer.

Feb. 8—From printer. To committee.

Feb. 21—From committee: Do pass.

Feb. 22—Read second time. Taken from Second Reading File. Placed on Chief Clerk's desk. A. B

Apr. 23—Taken from Chief Clerk's desk. Placed on Second Reading File. Read second time. Amended. To printer.

Apr. 24—From printer. To engrossment. Engrossed. First reprint.

Apr. 25—Read third time. Passed, as amended. Title approved, as amended. Notice of reconsideration on next legislative day.

Apr. 26—To Senate.

Apr. 27—In Senate. Read first time. Referred to Committee on Judiciary. To committee.

May 7—From committee: Amend, and do pass as amended.

May 8—Read second time. Amended. To printer.

May 9—From printer. To re-engrossment. Re-engrossed. Second reprint.

May 10—Taken from General File. Placed on General File for next legislative day.

May 11—Read third time. Passed, as amended. Title approved, as amended. To Assembly.

May 14—In Assembly.

May 18—Senate amendment not concurred in. To Senate.

May 19—In Senate.

May 21—Senate amendment not receded from. Conference requested. First Committee on Conference appointed by Senate. To Assembly.

May 22—In Assembly. First Committee on Conference appointed by Assembly. To committee.

May 28—From committee: Concur in Senate amendment and further amend. First Conference adopted by Assembly. First Conference report adopted by Senate. To printer.

May 29—From printer. To re-engrossment. Re-engrossed. Third reprint. To enrollment.

June 4—Enrolled and delivered to Governor.

June 5—Approved by the Governor. Chapter No. 685. A. B

Effective July 1, 1979.

A. B. 335—Committee on Judiciary, Feb. 7.

Summary—Removes court's power, on its own motion, to set aside conviction and permit defendant to withdraw plea of guilty. (BDR 14-818) Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

Feb. 7—Read first time. Referred to Committee on Judiciary. To printer.

Feb. 8—From printer. To committee.

A. B. 333

ASSEMBLY BILL NO. 333—COMMITTEE ON JUDICIARY

FEBRUARY 7, 1979

Referred to Committee on Judiciary

SUMMARY—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to liability in tort; consolidating, clarifying and amending certain provisions relating to comparative negligence; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 17.305 is hereby amended to read as follows:

17.305 NRS 17.215 to 17.325, inclusive, do not apply to [breaches] :

1. *Breaches* of trust or of other fiduciary obligation.

2. *Any action in tort wherein the several liability of multiple defendants has been determined pursuant to NRS 41.141.*

SEC. 2. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [.] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by] :

(1) By general verdict the total amount of damages the plaintiff

would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return a]

(2) A special verdict indicating the percentage of negligence attributable to [each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.] *the plaintiff.*

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

(c) If there is more than one defendant, the jury shall return a special verdict finding the percentage of negligence attributable to each defendant.

(d) In determining issues of negligence and comparative negligence, the jury shall not weigh or consider the negligence of any persons or entities who are not parties to the litigation.

3. Where recovery is allowed against more than one defendant in such an action:

(a) The defendants are severally liable to the plaintiff.

(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The [jury or] judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.

SEC. 3. NRS 698.310 is hereby repealed.

Minutes of the Nevada State Legislature
Assembly Committee on JUDICIARY
Date: February 16, 1979
Page: 1

2/16

Members Present:

Chairman Hayes
Vice Chairman Stewart
Mr. Banner
Mr. Brady
Mr. Coulter
Mr. Fielding
Mr. Horn
Mr. Malone
Mr. Polish
Mr. Prengaman
Mr. Sena

Members Absent:

None

Guests Present:

Virgil Anderson	AAA
Barbara Bailey	Nevada Trial Lawyers
Daryl E. Capurro	Nevada Motor Transport Assn.; Nevada Franchised Auto Dealers Assn.
Richard Garrod	Farmers Insurance Group
Virgil Getto	Assemblyman
Robert F. Guinn	Nevada Motor Transport Assn.; Nevada Franchised Auto Dealers Assn.
Don Heath	Insurance Division
Michael Malloy	Washoe County District Attorney's Office
Steve McMorris	Douglas County District Attorney
Peter Neumann	Nevada Trial Lawyers
Patsy Redmond	Insurance Division
Norman C. Robinson	Deputy Attorney General; Highway Division
Dan Seaton	Clark County District Attorney's Office
George L. Vargas	American Insurance Association
Richard Wagner	Pershing County District Attorney

Chairman Hayes called the meeting to order at 8:00 a.m.

ASSEMBLY BILL 146

Consolidates and clarifies certain provisions relating to comparative negligence.

ASSEMBLY BILL 333

Consolidates, clarifies and amends certain provisions relating to comparative negligence.

Assemblyman Getto said that he had introduced A.B. 146 at the request of the Highway Department. He said he had been

convinced that the bill would save money for the State of Nevada.

Mr. Robinson said that there is presently a conflict in the State law regarding NRS 17.215 and 41.141. He said that A.B. 146 eliminates that conflict. The conflict was in regard to splitting costs of damages in court cases involving comparative negligence.

Mr. Robinson referred to a large diagram which he used in his presentation to the Committee. He imagined a situation in which two defendants might be involved. One defendant was 10% negligent in the situation, and the other was 90% negligent. In this case, the first defendant was sued for $100,000 since he had the financial ability to pay the judgment, and the second defendant was not touched.

Mr. Robinson said the defendant who had paid the full amount should be able to collect $90,000 from the other person involved due to the division of negligence. He said, however, that NRS 17.295 provides for prorata shares of awards and specifically states that degrees of negligence are not to be considered. Therefore, the defendant that had paid the full $100,000 could only collect half of that amount from the other defendant, who in this case was $90,000 negligent.

Mr. Robinson noted that the same problem was considered by the Supreme Court of Kansas, and it was ruled that a plaintiff could only be liable for the amount of harm which he caused, and a jury could consider the negligence of any party that was not a party to the action.

Mr. Getto said that the first two parts of both bills being considered were identical. He said that the last section of each bill was where the differences arose.

Mr. Vargas spoke in support of A.B. 146 and against A.B. 333. He suggested a situation in which a plaintiff would be 30% negligent; defendant one would be 30% negligent; and defendant two would be 40% negligent. He said that if the 40% negligence was not considered, there would be a standoff between the plaintiff and defendant one.

Mr. Anderson spoke in favor of A.B. 146 and endorsed the remarks made by Mr. Vargas.

Mr. Capurro spoke in favor of A.B. 146 and in opposition to A.B. 333. He noted that people he represents in the Nevada Motor Transport Association and the Nevada Franchised Auto Dealers Association are virtually 100% insured and at times can become the sole defendant in an action that could have involved several parties who might have been negligent. He said that members of the associations have assets that are also at stake when lawsuits arise. Because of the present language, there is a great deal of potential liability to those involved in this industry.

Mr. Garrod said that if A.B. 333 was adopted, it would become much harder for commercial and private automobile owners to obtain insurance. He also stated that the management of his company was contemplating whether or not they would continue to write insurance in Nevada.

Mr. Neumann said he was opposed to A.B. 146 as it was drafted but was in favor of A.B. 333. He said there may have to be a technical amendment to A.B. 333. He stated that the law has said that a plaintiff should not have the burden of proving how much at fault each of a number of defendants might have been.

Mr. Neumann said that defendants in cases have always been jointly and severally liable. He said there has always been a chapter that allows defendants to split costs of a decision among themselves. He said that the problem with the present state of the law is the terrible conflict between NRS 17.215 and 41.141.

Mr. Neumann distributed copies of an article (Exhibit A) written by Kent Robison concerning the problems addressed by these bills.

Mr. Neumann referred to a case in Las Vegas in which a stamp vending machine had fallen on an individual. In attempting to keep the machine from falling, a "Good Samaritan" had stopped to help the victim. The victim sued the installer of the machine, and the jury ruled in favor of the victim. However, under NRS 41.141, the jury found that the installer of the machine was 90% negligent, and the Good Samaritan was 10% negligent. He said that because of this finding and due to the fact that the Good Samaritan was not a party to the case, the plaintiff was only able to collect 90% of the damages. He said it would only be fair for a person to be able to collect all of the damages that would be awarded to him without considering the negligence of a party not in the case.

Mr. Neumann said that A.B. 146 will make sure that a jury would have to allocate negligence among defendants. He said there must be a way to solve a case between the plaintiff and defendants.

Mr. Neumann said that under present law, if a jury determines that two people were a proximate cause, then the plaintiff is entitled to recover damages and look to either defendant. He asked why a plaintiff would not be allowed to go to where the money is and let the defendants go after their money from each other.

Mr. Neumann presented jury instructions (Exhibit B) from a case he was involved in. He said that in order for the plaintiff to prevail, the jury had to fill out a complicated verdict form which he called a "crossword puzzle." He said the verdict form in favor of the defendant was a two-line item.

He said that in this case the jurors were confused about the verdict, and that was the reason why they voted in favor of the defendant.

Mr. Neumann said he would like to see Chapter 17 of NRS amended to give the courts the discretion to allocate among joint defendants the percentage of damages that each one must pay rather than saying this would be divided in prorata amounts.

Mr. Malone said he could be a defendant in an action with another defendant who might be an indigent. He said that because he might be the only one sued due to the plaintiff knowing he had money and the other defendant did not, he could end up paying the whole amount of damages.

Mr. Neumann said that this situation has always been a problem. He asked, however, if it was right to say that a person who is injured should get nothing.

ASSEMBLY BILL 334

Extends jurisdiction of district courts in divorce cases to adjudication of rights in property held in joint tenancy.

Mr. Wagner said this bill has to do with the wording of a recent Nevada Supreme Court decision. He said the decision was that if property being held in a marriage was held in joint tenancy that it was not joint property. He said that the problem is that district courts are refusing to divide community property at the time of the divorce. He said the bill was a clean-up type thing, and he said the courts should have to exercise this jurisdiction.

ASSEMBLY BILL 338

Limits privilege of husband or wife to prevent testimony of other to testimony regarding events occuring after marriage.

Mr. McMorris said that the husband-wife privilege causes a great deal of problems in prosecution of cases. He said it is one of the situations under the present law that is abused by defense attorneys or their clients. He said that if a wife observes her husband commit a criminal act, and she wants to testify against him, his attorney can invoke the husband-wife privilege to prevent her testimony. He said that some couples get married so that one spouse will not have to testify about the actions of the other spouse.

Mr. McMorris said the bill would provide that actions that took place before marriage could not be included in the husband-wife privilege. He said this was a critical bill from the standpoint of prosecutors.

EXHIBIT A
Page 1 of 2

ADVOCATES FOR JUSTICE
NEVADA TRIAL LAWYERS ASSOCIATION
NTL
100 N. Arlington, Reno, Nv 89501

NEWSLETTER

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VOL. I NO. 9 January 29, 1977

NEVADA'S COMPARATIVE NEGLIGENCE STATUTES

Analyzed in light of the Uniform Contribution Among Tortfeasors Act

Trial lawyers, judges and even jurors are presently confronted with the confusion created by Nevada's Comparative Negligence Statute, NRS 41.141. This statute provides that in actions "in which contributory negligence may be asserted as a defense," the plaintiff's negligence is to be compared to the negligence of the defendant or combined negligence of multiple defendants. Moreover, 41.141 (3d and b) creates "several" liability where recovery is allowed against more than one defendant, and the jury must apportion damages among the defendants in accordance with their respective degree of negligence.

On the other hand, NRS 698.310, the Comparative Negligence statute of Nevada's Motor Vehicle Insurance Act (no fault), does not contain any provision relating to apportionment of damages among multiple defendants. Furthermore, 698.310 does not limit the comparative negligence concept to only those actions "in which contributory negligence may be asserted as a defense."

One may argue that in any action against multiple defendants arising out of the operation of a motor vehicle the jury must not consider the respective negligence of the defendants inter se. The only consideration for the jury is the comparison of the combined negligence of the defendants to the negligence of the plaintiff. Once the determination is made that the plaintiff should recover, the defendants must then resort to the Uniform Contribution Among Tortfeasors Act which specifically provides that in determining the pro rata shares of a tortfeasor's liability, the defendants' relative degrees of fault shall not be considered (NRS 17.295, et seq.).

This trilogy of confusion can create as many problems as the fertile defense mind can conjure. Why is the liability "several" under 41.141, and yet presumably "joint and several" under 698.310? The injured plaintiff is more likely to recover his damages if 698.310 is applied instead of 41.141. Moreover, if the contribution act (NRS 17.215, et seq.) forbids consideration of relative degrees of fault among defendants, why should a jury be charged with the near impossible chore of apportioning damages among the defendants in accordance with each defendant's negligence?

Legislation is the solution to this statutory paradox. NRS 41.141 (3) should be amended to read as follows: "where recovery is allowed against more than one defendant in such an action the defendants are jointly and severally liable to the plaintiff." In addition, the no-fault comparative negligence statute should be repealed to eliminate the potential of any conflict with the general comparative statute as amended. This way the injured plaintiff's right to recover is enhanced and the multiple defendants are still governed by the Uniform Contribution Act.

The apparent simplicity of this proposal is deceptive. Although the NTLA Judiciary Committee has requested that bills be drafted amending 41.141 and repealing 680.310, the opposition to passing the proposed legislation will be intense. The statutes (41.141, 17.215-17.325 and 680.310) creating the existing inconsistencies within and between the comparative negligence statutes and the contribution act were all enacted in 1973. Yet, in the very next legislative session the legislature was requested to amend 41.141 so as to provide joint and several liability against multiple defendants and eliminate the jury's obligation to apportion the amount of liability among defendants. That proposal, A.B. 460, was resoundingly defeated.

Fellow NTLA member Allan Earl was responsible for the introduction of A.B. 460, which was referred to the Judiciary Committee. Allan Earl

(Continued on Page 2)

☆ "NV.'S COMP. NEGL. STAT. ANALYZED IN ★ LIGHT OF UNIFORM CONTRIB. AMONG TORT NTLA wi FEASORS ACT" NTLA NEWSLTR., VOL.I,#9.

Legislators, the press, and all NTLA members on February 15, 1977 from 5:00 P.M. to 8:00 P.M. in Suite #901 at the Ormsby House in Carson City. Invitations will not be mailed to NTLA members, so mark your calendars now. We urge all members to take advantage of this chance to meet our legislators. Please plan to attend!!

Comparitive Neg. (Cont. from Page 1)

. Pete Neumann appealed to the committee on . fundamental concept of fairness to the plaintiff and also pointed out the conflicts and inconsistencies between the existing law and the Contribution Act. Jim Brooke, lobbying for the Nevada Board of Bar Governors, supported A.B.460

Opponents to A.B. 460 were ably represented by Virgil Anderson for AAA, George Vargas for the American Insurance Association, and Daryl Capurro for Nevada Motor Transport Association. The thrust of the opposition was that the joint and several liability concept was unfair to the adequately insured defendant. For instance, if the combined negligence of five defendants was 70% and one heavily insured defendant was 10% negligent, he might be required to pay the entire judgment to a plaintiff who may have been 30% negligent. The opponents also relied on their thoroughly familiar "higher costs to the people" argument. Mr. Vargas even resorted to throwing rocks at the contingent fee system from within his proverbial glass house. The minutes to the April 10, 1975, hearing read, "Mr. Vargas stated that the contingent fee system in Nevada is great to cause one to forget one's ethics." The minutes further read that Mr Vargas suggested "that if the Legislature wants to do something contructive, it should take a look at the lawyers' contingency fee basis."

Notwithstanding the confusion created as to the merits, A.B. 460 came out of the Judiciary Committee with a "do pass" recommendation. However, when voted on by the entire assembly the legislation failed miserably; yeas-8, nays-30. It is not surprising that the predominantly non-lawyer 1975 assembly did not understand the proposed legislation. Olga Korbut would be impressed with the cerebral gymnastics required to coherently discuss the complications presented by 698.310, 41.141 and 17.215 et seq. Notwithstanding the complexities involved, the suggested change in 41.141 and repeal of 680.310 is desirable for both plaintiff and defendant.

In a recent Washoe County case, Rampone v.Baker & Drake, Inc., the insurance carrier for Baker & Drake made a persuasive argument that NRS 41.141 (3a and c) was not intended to establish liability of multiple defendants inter se. Baker & Drake argues that Section 3 of 41.141 governs the determination of each defendant's liability to the plaintiff, not their liability to each other. Thus, 41.141 (comparative) covers the relationship between plaintiff and defendants while 17.215 et seq.(contribution) governs the relationship among defendants. The logic is compelling. It also points out that Section 3 of 41.141 is an entirely meaningless provision.

For example, assume a jury awards plaintiff $100,000.00 and Defendant A is found 80% negligent and Defendant B is found 20% negligent. Defendant A pays plaintiff $80,000.00 and is entitled to recover $30,000.00 from Defendant B under the contribution act. Defendant B pays plaintiff $20,000.00 and Defendant A $30,000.00

The reasoning in and holding of Safeway v. Nest-Kart is appropriate to Nevada's paradox. In 1971, the Nevada Legislature enacted our first contribution statute (which has since been repealed). Chapter 584, Statutes of Nevada 541, pages 1264-1266. Subsection 4 of §2 and subsection 2 of §9 of that act expressly provided that the relative degree of fault of each joint tortfeasor was to be considered in determining the contributive shares of those tortfeasors. This statute was repealed in 1973 when the legislature adopted our current contribution law which does away with the use of relative degrees of fault in contribution issues. Accordingly, Nevada now provides for contribution by simply dividing the total liability by the number of tortfeasors found liable.

So why have the jury determine respective amounts of negligence for each defendant? It has no bearing on contribution. The jury's only consideration is which of the defendants is liable and whether their combined negligence exceeds the compared negligence of the plaintiff. The extensive jury instructions and special verdict forms needed to express relative degrees of fault constitute an unnecessary encumbrance of confusion which has no bearing on the ultimate payment by the defendants. The solution is to amend 41.141 to eliminate section 3 and provide for joint and several liability against the defendants, and allow the defendants access to contribution in accordance with the contribution act.

Other problems, such as prolonged and more difficult settlement negotiations, cross claims against marginally liable defendants, compromises, releases and covenants not to execute exist under 41.141 as it is presently written. Indeed the areas of confusion and misunderstanding are too numerous to mention. Clarity and hopefully simplicity would result from the legislation proposed in this article. However, nothing constructive will occur unless conscientious efforts are made to explain the problems to our legislators.

Kent R. Robison
Chairman NTLA Judicial Admin.
& Civil Procedure Comm.

Tort Trends

We plan to publish a regular column describing Nevada court cases that would be of interest to our members. Such cases may be either plaintiff or defense verdicts and may be either District Court or Supreme Court decisions. If you have tried a case or know of a case that poses a unique situation or matters of first impression, please submit a brief description of the case to our State Office. Cases will be reviewed by the Board of Governors and as many as possible will be selected for publication.

Letters to the Editor

NTLA will welcome letters to the editor from members who wish to comment on any article that we have published. Letters should be directed to the State Office and should not exceed 300 words in length.

Minutes of the Nevada State Legislature
Assembly Committee on JUDICIARY
Date: April 12, 1979
Page: 1

4/12

Members Present:

Chairman Hayes
Vice Chairman Stewart
Mr. Banner
Mr. Brady
Mr. Coulter
Mr. Fielding
Mr. Horn
Mr. Malone
Mr. Polish
Mr. Prengaman

Members Absent:

Mr. Sena

Guests Present:

Virgil Anderson	AAA
Jon Benson	Lawyer
Myram Borders	United Press
Robert E. Cahill	Nevada Resort Associates
Chris Chrystal	Las Vegas Sun
Brian Greenspun	Las Vegas Sun
Bob Heaney	Lawyer
Norman Herring	State Public Defender
Loyal Robert Hibbs	Defense Attorney
Joe Jackson	Reno Newspaper
Peter Neumann	Nevada Trial Lawyers Association
Margo Piscevich	Defense Attorney
Robert W. Ritter	Nevada State Journal
Norman Robison	Attorney General
Julien G. Sourwine	Attorney
George L. Vargas	American Insurance Association
Donald K. Wadsworth	D.A.'s Office
Eugene J. Wait	Defense Attorney

ASSEMBLY BILL 146

Consolidates and clarifies certain provision relating to comparative negligence.

ASSEMBLY BILL 333

Consolidates, clarifies and amends certain provisions relating to comparative negligence.

Mr. Peter Neumann testified on the bills. He stated that most of these cases involve insurance companies and that the Comparative Negligence Act and the Uniform Contribution Among Tortfisers Act was made to allocate liability (fault) to more than one defendant. There is a conflict that exists between

these two statutes. The people who cause injury (Tortfeisers) have never had the right of contribution among each other. Then a statute was enacted in 1973, The Legislature passed the Uniform Contribution Among Tortfeisers Act. This act was for all persons engaged in litigation and it provided a way for the jury to compare the negligence of claim on the one side of the case with the negligence of the defendant or defendants on the other side of the case. This was passed to somehow provide a way of allocating damages among defendants in cases where there was more than one defendant involved. This was on a pro-rata basis. The defendants would share the damages equally, 1/2 and 1/2; 1/3, 1/3, and 1/3, etc.

The Legislature passed at the same time the Comparative Negligence Act which was for a completely different purpose. Under former law the plaintiff who was one percent to blame for the accident could not recover anything, no matter how bad the damages and even though the defendant or defendants caused 99 percent of the damages. When the Legislature passed this act it made it to where if the plaintiff were at least not more than 50 percent to blame for an accident, he could at least get something for his damages. This Act was never intended to allocate or determine the rights of the defendants among each other. The jury or judge could if asked determine the defendants liability in proportion to their negligence. (Allocate fault among the co-defendants or multiple defendants of a case). This statute was a mechanism for deciding plaintiff vs. defendant and to see if the plaintiff should be allowed to recover anything. It says that the negligence of the combined defendants should be compared to the negligence of the plaintiff.

He feels that it is impossible to divide an indivisible injury and that the jury would say that both defendants were equally to blame. If 45 percent of the blame went to defendant #1 with a $100,000. insurance policy, plaintiff could recover full amount but when he tried to collect the other $45,000 (45% of the blame) from defendant #2 who had a $15,000. insurance policy he would only get $15,000. This would total to $60,000, thus shortchanged by $30,000. The jury is not allowed to know if there is or isn't any insurance or how much.

Eugene Wait, Defense Attorney for Insurance Companies, testified for A.B. 146. He has been acquainted with the Tortfeisers Act and he personally asked the Legislature to pass a bill for this in 1968 and it was voted on in 1969. In 1971 the bill came out with equitable contributions; settlements were almost impossible to get.

George L. Vargas, representing the American Insurance Association, testified against A.B. 146. He feels that this would establish the practice of law to assert the contributory negligence of someone else who was the sole cause of the accident.

Mr. Heaney, Nevada Trial Lawyers Association, spoke on A.B. 333. Mr. Heaney is against the fact that if the plaintiff is more than 50% at fault, he does not get any type of settlement. He feels that the defendant will not be found liable in an instance where he is 1% at fault. He stated that the burden should not be placed on the jury to make the decision of deciding who is how much at fault and that this type of legislation could increase welfare because the plaintiff cannot make himself whole again without a settlement. Mr. Heaney feels that A.B. 146 advocates limit recovery of the plaintiff.

Mr. Loyal Hibbs testified on these issues. He felt that Mr. Neumann was wrong because he feels that this does not protect the insurance. Many people these days are under insured, some are not even insured. He also added that we are no longer faced with a 12 person jury; it is either a 6 or an 8 person jury. 3/4 must agree and on a 6 person jury it must be unanimous. He feels that it is unfair to allocate the plaintiff to choose the person who will pay his damages and if we cannot divide the plaintiff's injuries, we cannot divide the negligence of the defendents.

Julien Sourwine, Attorney at Law testified for A.B 146 and against A.B. 333. Mr. Sourwine stated that the juries are asked to divide injuries; and they do it day in and day out. The fault of each person who is at fault should be the measure of his own liability. If the financial condition of defendant is immaterial and irrelevant, then the amount of insurance that he has should also be immaterial and irrelevant. He feels that A.B. 333 should be amended to read joint and several.

Jon Benson, Attorney at Law, testified on these issues. He feels that you can be the proximate cause of someone's accident without being the only cause. He also feels that the financial condition is irrelevant.

Rene Ashelman, Nevada Trial Lawyers Association, testified on this bill. He feels that there is no way to achieve perfect justice. He stated that the plaintiff will never fully recover even with all of the money in the world. Mr. Ashelman stated that things can never be put back the way that they were before and that the burden should not be placed on the injured party. He stated that the legislature should accept the fact that they are not going to achieve a perfect and fair result no matter what is adopted.

ASSEMBLY BILL 524

Limits dissemination of certain criminal records and provides for their examination and challenge.

Myram Borders, United Press International, testified against A.B. 524. She feels that this bill is an attempt to usurp

Steve Coulter feels that the bill should read that the landlord is responsible for paying 5% interest and leave out the section relating to separate accounts and co mingling. 4/23

Mr. Horn feels that bill is an excellent concept but would it create more tenant and landlord problems along with an increased bookeeping workload? He also feels that this could encourage non-refundable deposits.

Mr. Coulter moved to Do Pass A.B. 702; Mr. Fielding seconded the motion. Under committee rule 3 the motion lost to the following vote:

Aye - Prengaman, Coulter, Fielding, Sena - 4

Nay - Hayes, Stewart, Malone, Horn, Polish, Banner, Brady- 7

Absent - None

ASSEMBLY BILL 584

Mr. Stewart moved to Do Pass A.B. 584; Mr. Sena seconded the motion. The committee approved the motion on the following vote:

000014

Aye - Unanimous

Nay - None

Absent - None

000014

SENATE BILL 346

Mr. Brady moved Do Pass S.B. 346; Mr. Sena seconded the motion. The committee approved the motion on the following vote:

Aye - Hayes, Stewart, Prengaman, Fielding, Coulter, Brady, Sena - 7

Nay - Horn, Polish, Banner - 3

Absent - None

Not Voting - Malone - 1

ASSEMBLY BILL 333

Consolidates, clarifies and amends certain provisions relating to comparative negligence.

Mr. Brady moved to Do Pass A.B. 333 as amended; Mr. Prengaman seconded the motion. The committee approved the motion on the following vote:

SECOND READING AND AMENDMENT

Assembly Bill No. 187.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 807.
Amend section 1, page 1, line 4, by deleting *"any felony"* and inserting *"murder, kidnaping or arson"*.
Amend the title of the bill, 1st line, by deleting "a felony" and inserting "certain crimes".
Assemblyman Hayes moved the adoption of the amendment.
Remarks by Assemblyman Hayes.
Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 203.
Bill read second time.
The following amendment was proposed by the Committee on Labor and Management:
Amendment No 757.
Amend section 1, page 1, line 5, by deleting *"65"* and inserting *"55"*.
Assemblyman Bremner moved the adoption of the amendment.
Remarks by Assemblyman Bremner.
Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 317.
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 808.
Amend section 1, page 1, line 16, by deleting *"full period provided by law."* and inserting *"period of suspension that would have occurred absent the reinstatement."*.
Assemblyman Stewart moved the adoption of the amendment.
Remarks by Assemblyman Stewart.
Amendment adopted.
Bill ordered reprinted, engrossed and to third reading

Assembly Bill No. 333
Bill read second time.
The following amendment was proposed by the Committee on Judiciary:
Amendment No. 616.
Amend the bill as a whole by deleting section 1 and renumbering sections 2 and 3 as sections 1 and 2.
Amend section 2, page 2, by deleting lines 12 through 14.
Amend section 2, page 2, line 15, by deleting *"(d)"* and inserting *"(c)"*.

4/30

Amend section 2, page 2, by deleting lines 19 through 24 and inserting: "such an action [:

(a) The], *the* defendants are *jointly and* severally liable to the plaintiff.

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]".

Amend the title of the bill to read:

"An Act relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; and providing other matters properly relating thereto.".

Assemblyman Prengaman moved the adoption of the amendment.

Remarks by Assemblyman Prengaman.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 341.

Bill read second time, ordered engrossed and to third reading.

Assembly Bill No. 448.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 806.

Amend section 1, page 1, line 3, by deleting *"board"* and inserting *"director"*.

Amend section 1, page 1, line 4, by deleting *"properly and"*.

Assemblyman Hayes moved the adoption of the amendment.

Remarks by Assemblyman Hayes.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 510.

Bill read second time.

The following amendment was proposed by the Committee on Commerce:

Amendment No. 802.

Amend section 1, pages 1 and 2, by deleting lines 1 through 22 on page 1 and lines 1 through 5 on page 2, and inserting:

"Section 1. NRS 623.195 is hereby amended to read as follows:

623.195 1. Any applicant for registration under this chapter who has qualified for the 5-year level of experience or study, as prescribed in NRS 623.190 and regulations of the board, shall be issued a temporary certificate of registration and is authorized to obtain a seal as a residential designer. No applications for temporary certificates may be made after October 31, 1975.

2. The certificate of registration and seal of a residential designer shall become permanent, subject to annual renewal, after he satisfactorily passes an examination as prescribed by the board.

3. A residential designer who holds a temporary certificate of registration must apply for the examination if his temporary certificate is to

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT

A. B. 333

ASSEMBLY BILL NO. 333—COMMITTEE ON JUDICIARY

FEBRUARY 7, 1979

Referred to Committee on Judiciary

SUMMARY—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [.] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by] :

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return a]

(2) A special verdict indicating the percentage of negligence attributable to [each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.] *the plaintiff.*

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

(c) In determining issues of negligence and comparative negligence, the jury shall not weigh or consider the negligence of any persons or entities who are not parties to the litigation.

3. Where recovery is allowed against more than one defendant in such an action]:

(a) The] , *the* defendants are *jointly and* severally liable to the plaintiff.

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]

SEC. 2. NRS 698.310 is hereby repealed.

002034

MR. ROBINSON moved DO PASS, Mr. Bergevin seconded. MOTION CARRIED UNANIMOUSLY. DO PASS S.B. 280.

S.B. 120: Removes exemption of certain large parcels from laws relating to subdivisions and parcel maps.

Mr. Bergevin moved DO PASS, Mr. Marvel seconded. MOTION CARRIED UNANIMOUSLY. DO PASS S.B. 120.

5/2

S.B. 475: Reorganizes communications system used by state.

Mr. Craddock moved DO PASS, Mr. Bergevin seconded.MOTION CARRIED UNANIMOUSLY. DO PASS S.B. 475.

S.B. 446: Revises provisions governing issuance of bonds and collection of special assessments by general improvement district.

MS.Westall moved DO PASS, Mr. Jeffrey seconded. MOTION CARRIED UNANIMOUSLY. DO PASS S.B. 446.

Mr. Bergevin said he was afraid of the bonded indebtedness and general discussion ensued which developed several problem areas and the committee agreed to hold the bill for further consideration.

A.B. 333: Consolidates, clarifies and amends certain provisions relating to comparative negligence.

Mr. Dini passed the Chair to Mr. Harmon and then moved that A.B. 333 be sent to the floor with no recommendation. Ms. Westall seconded. Mr. Harmon requested a roll call vote. Mr. Bergevin, Yes; Mr. Bedrosian, yes; Mr. Getto, no; Mr. Jeffrey, yes; Mr. Craddock, yes; Mr. Robinson, no; Mr. Harmon, no; Ms. Westall, Yes; Mr. Marvel, no; Mr. Fitzpatrick, no; Mr. Dini, yes. MOTION CARRIED 6-5.

A.B. 333 SENT TO THE FLOOR WITH NO RECOMMENDATION

Mr. Dini asked the committee how they wanted to handle BDR 22-2026, (The Metro Funding Formula)

Mr. Getto said he had problems with running the law suit and study parallel, but Mr. Robinson responded that he felt that a law suit is beneficial to both parties, and injecting the legislature is not proper.

Mr. Robinson moved DO PASS BDR 22-2026 (A.B. 816), Mr. Fitzpatrick seconded.

Mr. Harmon said he would like to amend the motion to leave the 56/44 in effect, but effective for fiscal year 1980. He said that he felt the county is in a compromising situation . Ms. Westall seconded.

Assemblyman Stewart moved that the Assembly concur in the Senate amendment to Assembly Bill No. 141.

Remarks by Assemblyman Stewart.

Motion carried.

Bill ordered enrolled.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Barengo moved that Assembly Bill No. 333 be taken from the Chief Clerk's desk and placed on the General File.

Remarks by Assemblyman Barengo.

Motion carried.

5/10

GENERAL FILE AND THIRD READING

Assembly Bill No. 333.

Bill read third time.

The following amendment was proposed by the Committee on Government Affairs:

Amendment No. 1027.

Amend section 1, page 2, line 10, after "action", by deleting the closed bracket, and inserting an open bracket.

Amend section 1, page 2, line 12, by deleting the period and inserting:

"[.] , *except that:*

(a) For purposes of this section, no defendant is jointly liable if his conduct was not a substantial factor in bringing about the harm, injury or damage complained of, and

(b) A defendant whose negligence is less than that of the plaintiff is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.".

Assemblyman Barengo moved the adoption of the amendment

Remarks by Assemblyman Barengo.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

UNFINISHED BUSINESS

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the Speaker and Chief Clerk signed Assembly Bills Nos. 441, 504, 549, 590, 598, 601, 606, 648, 667, 695, 714, 732, 738, 741; Senate Bills Nos. 41, 72, 221, 228, 335, 349, 360, 362; Assembly Concurrent Resolution No. 47; Senate Concurrent Resolution No. 38.

GUESTS EXTENDED PRIVILEGE OF ASSEMBLY FLOOR

On request of Assemblyman Banner, the privilege of the floor of the Assembly Chamber for this day was extended to Mr. Norman Anthonisen.

On request of Assembly Bedrosian, the privilege of the floor of the Assembly Chamber for this day was extended to Mesdames Dorothy Barrett and Janet Marie Bedrosian.

(REPRINTED WITH ADOPTED AMENDMENTS)
SECOND REPRINT **A. B. 333**

ASSEMBLY BILL NO. 333—COMMITTEE ON JUDICIARY

FEBRUARY 7, 1979

Referred to Committee on Judiciary

SUMMARY—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896)
FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [.] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by] :

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return a]

(2) A special verdict indicating the percentage of negligence attributable to [each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.] *the plaintiff.*

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

(c) In determining issues of negligence and comparative negligence, the jury shall not weigh or consider the negligence of any persons or entities who are not parties to the litigation.

3. Where recovery is allowed against more than one defendant in such an action [:

(a) The] , *the* defendants are *jointly and* severally liable to the plaintiff [.] . *except that:*

(a) For purposes of this section, no defendant is jointly liable if his conduct was not a substantial factor in bringing about the harm, injury or damage complained of; and

(b) A defendant whose negligence is less than that of the plaintiff is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]

SEC. 2. NRS 698.310 is hereby repealed.

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GENERAL FILE AND THIRD READING

Assembly Bill No. 333.

Bill read third time.

The following amendment was proposed by Assemblyman Getto:

Amendment No. 1176.

Amend the bill as a whole by renumbering sections 1 and 2 as sections 5 and 6 and inserting new sections designated sections 1 through 4, preceding section 1, to read as follows:

"Section 1. NRS 17.225 is hereby amended to read as follows:

17.225 1. Except as otherwise provided in [NRS 17.215 to 17.325,] *this section and NRS 17.235 to 17.305,* inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his [pro rata] *equitable* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his [pro rata] *equitable* share. No tortfeasor is compelled to make contribution beyond his own [pro rata] *equitable* share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

Sec. 2. NRS 17.265 is hereby amended to read as follows:

17.265 NRS [17.215 to 17.325,] *17.225 to 17.305,* inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

Sec. 3. NRS 17.295 is hereby amended to read as follows:

17.295 In determining the [pro rata] *equitable* shares of tortfeasors in the entire liability:

1. [Their relative degrees of fault shall not be considered;

2.] If equity requires, the collective liability of some as a group [shall constitute] *constitutes* a single share; and

[3.] *2.* Principles of equity applicable to contribution generally [shall] apply.

Sec. 4. NRS 17.305 is hereby amended to read as follows:

17.305 NRS [17.215 to 17.325,] *17.225 to 17.305,* inclusive, do not apply to breaches of trust or of other fiduciary obligation.".

Amend section 1, page 2, by deleting lines 6 through 8.

Amend section 2, page 2, by deleting line 24 and inserting:

"Sec. 6. NRS 17.215, 17.315, 17.325 and 698.310 are hereby repealed.".

5/16

Amend the title of the bill, 2nd line, after "negligent;" by inserting "changing a provision for contribution among tortfeasors;".

Assemblyman Getto moved the adoption of the amendment.

Remarks by Assemblymen Getto, Stewart and Bedrosian.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Assembly Bill No. 826.

Bill read third time.

The following amendment was proposed by the Committee on Commerce:

Amendment No. 1172.

Amend the bill as a whole by deleting section 1 and renumbering sections 2 through 4 as sections 1 through 3.

Amend the bill as a whole by inserting a new section designated section 4, following section 4, to read as follows:

"Sec. 4. NRS 685A.210 is hereby amended to read as follows:

685A.210 1. The commissioner may adopt reasonable regulations, consistent with the Surplus Lines Law, for any [and all] of the following purposes:

(a) Effectuation of the law; *and*

(b) Establishment of procedures through which determination is to be made as to the eligibility of particular proposed coverages for export. [; and

(c) Establishment, procedures and operations of any voluntary organization of surplus lines brokers or others designed to assist such brokers to comply with the Surplus Lines Law, and for the collection on behalf of the state and remission to the commissioner of the tax on surplus lines coverages provided for in NRS 685A.180.]

2. Such regulations carry the penalty provided by NRS 679B.130.".

Assemblyman Banner moved the adoption of the amendment.

Remarks by Assemblyman Banner.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

REPORTS OF COMMITTEES

Mr. Speaker:

Your Committee on Judiciary, to which was referred Senate Bill No. 27, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

KAREN HAYES, *Chairman*

MOTIONS, RESOLUTIONS AND NOTICES

In compliance with a notice given on a previous day, Assemblyman Weise moved that the vote whereby Assembly Bill No. 137 was passed be reconsidered.

Remarks by Assemblymen Weise and Robinson.

Motion carried.

Assemblyman Weise moved that the Assembly adjourn until Thursday, May 17, 1979, at 1 p.m.

Motion lost on a division of the house.

(REPRINTED WITH ADOPTED AMENDMENTS)
THIRD REPRINT

A. B. 333

ASSEMBLY BILL NO. 333—COMMITTEE ON JUDICIARY

FEBRUARY 7, 1979

Referred to Committee on Judiciary

SUMMARY—Consolidates, clarifies and amends certain provisions relating to comparative negligence. (BDR 3-896)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to liability in tort; creating joint as well as several liability of multiple defendants where plaintiff is contributorily negligent; changing a provision for contribution among tortfeasors; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 17.225 is hereby amended to read as follows:

17.225 1. Except as otherwise provided in [NRS 17.215 to 17.325,] *this section and NRS 17.235 to 17.305*, inclusive, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

2. The right of contribution exists only in favor of a tortfeasor who has paid more than his [pro rata] *equitable* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his [pro rata] *equitable* share. No tortfeasor is compelled to make contribution beyond his own [pro rata] *equitable* share of the entire liability.

3. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

SEC. 2. NRS 17.265 is hereby amended to read as follows:

17.265 NRS [17.215 to 17.325,] *17.225 to 17.305*, inclusive, do not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity

obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

SEC. 3. NRS 17.295 is hereby amended to read as follows:

17.295 In determining the [pro rata] *equitable* shares of tortfeasors in the entire liability:

1. [Their relative degrees of fault shall not be considered;

2.] If equity requires, the collective liability of some as a group [shall constitute] *constitutes* a single share; and

[3.] 2. Principles of equity applicable to contribution generally [shall] apply.

SEC. 4. NRS 17.305 is hereby amended to read as follows:

17.305 NRS [17.215 to 17.325,] *17.225 to 17.305,* inclusive, do not apply to breaches of trust or of other fiduciary obligation.

SEC. 5. NRS 41.141 is hereby amended to read as follows:

41.141 1. In any action to recover damages for *death or* injury to persons or *for injury to* property in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought, but any damages allowed [shall] *must* be diminished in proportion to the amount of negligence attributable to the person seeking recovery [.] *or his decedent.*

2. In [such] *those* cases, the judge may [,] and when requested by any party shall instruct the jury that:

(a) The plaintiff may not recover if his contributory negligence *or that of his decedent* has contributed more to the injury than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return [by] :

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover [except for] *without regard to* his contributory negligence.

[(c) If the jury determines that a party is entitled to recover, it shall return:]

(2) A special verdict indicating the percentage of negligence attributable to [each party.

(d) The percentage of negligence attributable to the person seeking recovery shall reduce the amount of such recovery by the proportionate amount of such negligence.] *the plaintiff.*

(3) By general verdict the net sum determined to be recoverable by the plaintiff.

3. Where recovery is allowed against more than one defendant in such an action [:

(a) The] , *the* defendants are *jointly and* severally liable to the plaintiff [.] , *except that:*

(a) For purposes of this section, no defendant is jointly liable if his conduct was not a substantial factor in bringing about the harm, injury or damage complained of; and

(b) A defendant whose negligence is less than that of the plaintiff is not jointly liable and is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him.

[(b) Each defendant's liability shall be in proportion to his negligence as determined by the jury, or judge if there is no jury. The jury or judge shall apportion the recoverable damages among the defendants in accordance with the negligence determined.]

SEC. 6. NRS 17.215, 17.315, 17.325 and 698.310 are hereby repealed.

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3. The annual registration fee for a cosmetological establishment is $18.".

Amend the bill as a whole by deleting section 11 and renumbering sections 12 through 16 as sections 11 through 15.

Amend section 13, page 7, line 21, by deleting "*$25,*" and inserting: "*$20,*".

Amend section 13, page 7, line 22, by deleting "*$15.*" and inserting: "*$7.50.*".

Amend section 16, page 8, by deleting lines 29 through 34, inclusive, and inserting:

"Sec. 15. All licenses issued under NRS 644.190 to 644.335, inclusive, before July 1, 1979, expire on that date. All licenses renewed by the board after July 1, 1979, expire July 1, 1981, and every 2 years thereafter.".

Assemblyman Tanner moved the adoption of the amendment.

Remarks by Assemblyman Tanner.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

GENERAL FILE AND THIRD READING

Assembly Bill No. 333.

Bill read third time.

Remarks by Assemblymen Getto, Stewart, Barengo and Weise.

Roll call on Assembly Bill No. 333:

YEAS—34.

NAYS—FitzPatrick, Harmon, Rusk—3.

Absent—Bennett.

Not voting—Bremner, Weise—2.

Assembly Bill No. 333 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Glover gave notice that on the next legislative day he would move to reconsider the vote whereby Assembly Bill No. 333 was this day passed.

GENERAL FILE AND THIRD READING

Assembly Bill No. 594.

Bill read third time.

Remarks by Assemblymen FitzPatrick and Mann.

Roll call on Assembly Bill No. 594:

YEAS—39.

NAYS—None.

Absent—Bennett.

Assembly Bill No. 594 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Assembly Bill No. 723.

Bill read third time.

3. The annual registration fee for a cosmetological establishment is $18.".

Amend the bill as a whole by deleting section 11 and renumbering sections 12 through 16 as sections 11 through 15.

Amend section 13, page 7, line 21, by deleting "*$25,*" and inserting: "*$20,*".

Amend section 13, page 7, line 22, by deleting "*$15.*" and inserting: "*$7.50.*".

Amend section 16, page 8, by deleting lines 29 through 34, inclusive, and inserting:

"Sec. 15. All licenses issued under NRS 644.190 to 644.335, inclusive, before July 1, 1979, expire on that date. All licenses renewed by the board after July 1, 1979, expire July 1, 1981, and every 2 years thereafter.".

Assemblyman Tanner moved the adoption of the amendment.

Remarks by Assemblyman Tanner.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

GENERAL FILE AND THIRD READING

Assembly Bill No. 333.

Bill read third time.

Remarks by Assemblymen Getto, Stewart, Barengo and Weise.

Roll call on Assembly Bill No. 333:

YEAS—34.

NAYS—FitzPatrick, Harmon, Rusk—3.

Absent—Bennett.

Not voting—Bremner, Weise—2.

Assembly Bill No. 333 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Glover gave notice that on the next legislative day he would move to reconsider the vote whereby Assembly Bill No. 333 was this day passed.

GENERAL FILE AND THIRD READING

Assembly Bill No. 594.

Bill read third time.

Remarks by Assemblymen FitzPatrick and Mann.

Roll call on Assembly Bill No. 594:

YEAS—39.

NAYS—None.

Absent—Bennett.

Assembly Bill No. 594 having received a constitutional majority, Mr. Speaker declared it passed, as amended.

Bill ordered transmitted to the Senate.

Assembly Bill No. 723.

Bill read third time.

SB 292 Provides for periodic payments of certain damages recovered in malpractice claims against providers of health care. (See minutes of March 15, 28, 29, April 3, 20, May 1 and 15 for testimony and discussion.)

After discussion on the bill, and many points that were still not clear, Senator Sloan stated that he felt that time was too short to amend it to a point that it would get through the Assembly.

Senator Dodge stated that he agreed and that this whole subject of structured payments should be looked at in the next session.

Senator Sloan moved to "indefinitely postpone" SB 292.

Seconded by Senator Ashworth.

Motion carried unanimously among those present. Senators Raggio and Hernstadt were absent for the vote.

5/23

AB 511 Provides procedure for appointment of guardians of adults and establishes special guardianships for persons of limited capacity. (See minutes of May 11 for testimony and discussion.)

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Senator Ford stated that this is really an important bill because a person has to be declared either competent or incompetent, there is no room for someone that is partially incompetent. Also, this bill allows for counsel to be appointed which has never been abllowed before.

Senator Close stated that the problem is, who is going to appoint counsel. If you waive a jury and the person is found to be incompetent, you could be guilty of malpractice. There is a big problem if you start appointing attorneys, because the money is going to come out of these people's estates.

Senator Dodge stated he felt these people could get railroaded into guardianships. A lot of them, even if we may think they are off their rocker, but to get them certified as incompetent, he feels this is wrong. He felt rather than have this bill there could be some simple amendments drawn for the present law which would cover these partial situations.

No action was taken on this bill at this time.

AB 333 Consolidates, clarifies and amends certain provisions relating to comparative negligence.

Peter Neumann, Attorney, stated that there has been in the statutes, for 6 years at least, a conflict between two very important statutes. One statute is the contribution between tortfeasors and the other is comparative negligence. Both statutes were a change in the common law of this state. There used to be no contribution among tortfeasors. The law always

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said if two tortfeasors are guilty, they come in to court with unclean hands as among each other, and the court wouldn't entertain a motion by one to have the other one participate in paying any judgment that was owed to the plaintiff as long as both were at fault in proximately causing an injury or damage. The insurance companies wanted contribution because they felt it would help them spread the risk among causal defendants. That was passed in Chapter 17. When this was passed, in approximately 1973, that same year the Legislature changed the law concerning the old defense of contributory negligence. That law was, that if a plaintiff was even one percent at fault in causing his own injury or damage he couldn't get anything. So recognizing that wasn't exactly fair, the Legislature modified comparative negligence and said that in this state a plaintiff can be up to 50% the cause of his own injury and still be able to maintain a suit against those that caused his injury. He could not collect if his fault was over 50% and the damages were reduced comparative to the percentage of his own fault.

Senator Ashworth stated that in the first section of NRS 41.141, are they talking about combined negligence or the defendants and not the defendants individually.

Mr. Neumann stated that Sections one and two were really the only sections necessary, and Section three should never have been put in the statute. The main thrust of the comparative negligence statute was that if a plaintiff came into court with some blame, the Legislature would still allow him to maintain an action, but reduce his recovery by the amount of his own neglect.

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Senator Ashworth asked if Mr. Neumann was saying that if the plaintiff were 30% negligent, one defendant was 10%, the other was 60%, that you would add the two defendants together to determine whether or not the plaintiff was more than 50% negligent?

Mr. Neumann answered, "yes." The justification for that is that we never adopted pure comparative negligence in Nevada. We still have contributory negligence as an absolute defense. The plaintiff can get zero, and often does, in those cases where the jury finds the plaintiff is more than 50% negligent. For the jury or court to be able to compare negligence there was a mechanism here that allowed the jury to lump the percentage together, if there is more than one defendant, for the purposes of seeing if the plaintiff can recover at all.

Senator Ashworth stated that the way he reads this is, then the plaintiff cannot recover agsint the 10%.

Mr. Neumann stated that he could if he were joined with the 60% defendant. We would like to have a straight joint and several liability because it makes cases so much more easily ascertainable by juries. This bill would also put proximate cause into the law, which is important.

Senator Hernstadt asked what would happen if you had a judgment of $100,000. In your hypothetical one would be liable for $70,000 and the other for $7,000. The one that was liable for the $7,000 had $100,000 worth of insurance and the one that was liable only had $15,000 worth of insurance. How could the plaintiff then recover the full amount of the judgment.

Mr. Neumann stated that under present law the defendant that only had the 10% would be liable for the full amount. Under the proposed bill the defendant would be able to spread the burden of that loss to the extent that the jury found the other defendant was a cause, and to the extent that the other defendant had something to pay it with. In your case the 10% would only have to pay the $7,000.

Senator Hernstadt stated that in that case the plaintiff would just loose out on the rest. That does not seem right.

Mr. Neumann stated that is why they wasnted to retain straight joint and several in the original bill, but the insurance industry raised the objection that it was unfair because it could end up where the defendant that was less liable would end up paying the whole damage. As we were not able to get the bill through the Assembly the way it was originally drafted, we agreed to the compromise.

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Eugene Waite, Defense Lawyer, stated that there is one basic misconception that has been presented to this committee and other committee's. The existing comparative statute says that the liability of the respective defendants is several and only several. The contribution statute has no application whatever. There is no conflict. The jury allocates the percentage of respective defendants and that is what they pay. Comparative says several liability, not joint liability. What is joint liability. If you talked about that in a contract context, you would think we were crazy. Whenever you impose joint liability for seperate conduct of seperate defendants, you are making somebody pay somebody else's bill.

Senator Dodge stated that the Uniform Contribution Act has still been retained, and that is the common law soncept of joint and several liability and the contribution from the person that pays more than his proportionate share of liability for the contribution. You can make a case to the fact that maybe we ought to wipe out the Uniform Contribution Act and just put everything in several liability. Is that what you are saying?

Mr. Waite stated that if you decide that the jury can decide that the plaintiff is only 30% at fault, the same fairness should be retained for the defendant. A plaintiff should only be penalized for what he himself caused to himself. He felt that the Uniform Contribution Act should be eliminated in those cases where comparative is applied. So he would urge that the bill be killed.

Al Pagni, Attorney, Reno, stated that he is in opposition to the bill. One of the misplaced problems with this bill is that everyone assumes that all cases go to a verdict. It has been his experience that 95% of the cases never get to the jury. The joint liability creates considerable problems in trying to evaluate and dispose of a case. A substantial factor in bringing about harm, is a difficult concept for a jury to evaluate. "If I understand Mr. Neumann, substantial factor means proximate cause. If that is what it means then you will never have several liability because if the defendant is held in, there must be proximate cause. I am not sure what it means, and if I don't understand what it means I don't think a jury will either, and yet the jury is going to have to make the determination."

Kent Robison, Nevada Trial Lawyers Association, stated that he believes if it is an equitable share, the court would look at the equitable principals and not necessarily apply a pro-rata formula. He stated that they are in favor of the bill.

Senator Raggio asked what Mr. Robison's interpretation of substantial factor would be.

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Mr. Robison stated that he couldn't imagine a case where a court would have to make a distinction between proximate cause and substantial factor. Under proximate cuase the tortfeasor is liable.

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Margo Piscevich, Attorney, Reno, stated she is in opposition to this bill. She stated that as far as she knows this would be the only law on the books that speaks in terms of equitable share. Under joint liability the concept is to make the plaintiff whole. Under several liability it is that each party is liable for what they do. There is nothing inherently fair about someone who is 10% at fault paying 100% of a liability and there is no public policy that actually promotes that. She believes that this particular act came from the American Motorcycle case (see attachment A), and the disent in that says, "Until today, neither policy nor law called for fully compensating the negligent plaintiff. Prior to Y the negligent plaintiff was denied all recovery under the contributory negligent doctrine." The California case, with it's strict or pure comparative negligence tried to provide in its court rule that, "Okay, the plaintiff can recover from all the defendants because of its individible injury." If this bill is processed, she would strongly urge that Subsection A be deleted. The duty to pay would then be equated to the degree of fault.

Neil Galitz, Las Vegas, stated that a contract situation involves a voluntary agreement in which specific terms are set forth. A tort is not a voluntary situation. The plaintiff is there involuntarily, because a wrong has been done. This act would mean that when it comes to finding the uncollectable portion, someone is going to pay. It means that the plaintiff

will will just be out the amount that is uncollectable. It is really much more fair that the person who is substantially at fault bears the loss on the uncollectable portion. This act decides who is responsible in a proper, equitable manner. He also agreed that Subsection A should come out.

Darryl Cappurro, Managing Director of the Nevada Motor Transport Association, stated they are in opposition to the bill. This bill is substantially identical to two bills that were introduced in the past two sessions. It is the same concept of comparative negligence. By passing comparative negligence, when the Legislature did, they recognized that there had been changes in society. We are opposed to this bill mainly because we are 100% insured. The figure of 40% was tossed out, as the number of people who are uninsured in this state, who are driving on our roads. Our limits are much higher then what is required by the Safety Responsibility Act, so in most cases we will be the defendant and they will come after us simply because the insurance money is there. "I find it hard to believe that anyone would embrace the concept that if one of our trucks was involved, where we had a 10% responsibility, under AB 333 we could be held liable for the entire amount, if that 40% is an uninsured motorist." He feels that it is right for the plaintiff to be made 100% whole, but not for his people to have to pay it and then try to collect on that portion that is uncollectable. If the plaintiff cannot collect then surely his people would be unable to collect.

John Benson, Reno, stated he is in favor of the bill and submitted a statement in support of the bill to the Committee. (see attachment B.)

As the Committee had to go into session, the meeting was adjourned.

Respectfully submitted,

Virginia C. Letts

Virginia C. Letts, Secretary

APPROVED:

Mel. D Close Jr.

Senator Melvin D. Close, Jr., Chairman

ATTACHMENT "A"

578 P.2d 899
20 Cal.3d 578

1978

AMERICAN MOTORCYCLE ASSOCIATION, Petitioner,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

VIKING MOTORCYCLE CLUB et al., Real Parties in Interest.

L.A. 30737.

Supreme Court of California, In Bank.

Feb. 9, 1978.

As Modified on Denial of Rehearing March 16, 1978.

Minor, through guardian ad litem, filed action against multiple parties to recover for injuries sustained in a cross-country motorcycle race. One defendant motorcycle association moved for leave to file cross complaint against minor's parents alleging they had been actively negligent in allowing him to enter race. The trial court denied the motion, and the defendant sought a writ of mandate to compel the court to grant the motion. The Supreme Court, Tobriner, J., held that: (1) adoption of the comparative negligence rule does not warrant the abolition of the doctrine of joint and several liability; (2) the common-law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity on a comparative basis; (3) the contribution statutes do not preclude the court from adopting the common-law right of comparative indemnity; (4) a comparative negligence defendant is authorized to file a cross complaint against any person, whether already a party to the action or not, from whom the named defendant seeks to obtain total or partial indemnity, and (5) the motorcycle association's cross complaint stated a cause of action for comparative indemnity from the parents and the trial court should have permitted its filing.

Peremptory writ of mandate issued.

Clark, J., dissented and filed an opinion.

Opinion 65 Cal.App.3d 694, 135 Cal.Rptr. 497, vacated.

1. Negligence ⇐61(1)

Under common-law principles, negligent tort-feasor is generally liable for all damage of which his negligence is a proximate cause and tort-feasor may not escape this responsibility simply because another act, either "innocent" occurrence such as "Act of God" or other negligent conduct, may also have been cause of injury; in order to recover damages sustained as a result of indivisible injury, plaintiff is not required to prove that tort-feasor's conduct was sole proximate cause of injury, but only that such negligence was a proximate cause. West's Ann.Civ.Code, § 1714.

2. Negligence ⇐15

In concurrent tort-feasor context, phrase "joint and several liability" embodies general common-law principles that tort-feasor is liable for any injury of which his negligence is a proximate cause and liability attaches to concurrent tort-feasor in such situation not because he is responsible for acts of other independent tort-feasors who may also have caused injury, but because he is responsible for all damage of which his own negligence was proximate cause. West's Ann.Civ.Code, § 1714.

See publication Words and Phrases for other judicial constructions and definitions.

3. Negligence ⇐15

Adoption of doctrine of comparative negligence in *Li v. Yellow Cab Co.* does not warrant abolition of joint and several liability of concurrent tort-feasors; under doctrine of comparative negligence, concurrent tort-feasor whose negligence is proximate cause of indivisible injury remains liable for total amount of damages, diminished only in proportion to amount of negligence attributable to person recovering.

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4. Negligence ⇐15

Feasibility of apportioning fault on comparative negligence basis does not render indivisible injury "divisible" for purposes of joint and several liability rule.

5. Negligence ⇐97

Although plaintiff's self-directed negligence would justify reducing recovery in proportion to his degree of fault for accident, insofar as plaintiff's conduct creates only risk of self-injury, such conduct, unlike that of negligent defendant, is not tortious.

6. Negligence ⇐15

In comparative negligence cases, contributory negligence of plaintiff must be proportioned to combined negligence of plaintiff and of all tort-feasors, whether or not joined as parties, in determining to what degree injury was due to fault of plaintiff, inasmuch as plaintiff's actual damages do not vary by virtue of particular defendants who happen to be before court, damages which plaintiff may recover against defendants who are joint and severally liable should not fluctuate in such manner.

7. Indemnity ⇐13.2(2)

Common-law equitable indemnity doctrine should be modified to permit partial indemnity among concurrent tort-feasors on comparative fault basis

8. Indemnity ⇐13.2(2)

Contribution statutes do not preclude Supreme Court from adopting comparative partial indemnity as modification of common-law equitable indemnity doctrine. West's Ann.Code Civ.Proc. §§ 875–879.

9. Contribution ⇐1

Purpose of 1957 contribution statute was to lessen harshness of then prevailing common law no-contribution rule; nothing in legislative history suggests that legislature intended by enactment to preempt field or to foreclose future judicial developments which further act's principal purpose of ameliorating harshness and inequity of old no-contribution rule. West's Ann.Code Civ.Proc. §§ 875-879

10. Indemnity ⇐13.3

Although contribution statute, by its terms, releases settling tort-feasor only from liability for contribution and not partial indemnity, legislative policy underlying provision dictates that tort-feasor who has entered into "good faith" settlement with plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by concurrent tort-feasors; plaintiff's recovery from nonsettling tort-feasors should be diminished only by amount that plaintiff has actually recovered in good-faith settlement, rather than by amount measured by settling tort-feasors' proportionate responsibility for injury. West's Ann.Code Civ.Proc. § 877.

11. Parties ⇐51(4)

Defendant in comparative negligence action, who may be jointly and severally liable for all of plaintiff's damages, should be permitted to bring other concurrent tort-feasors into suit, even when such concurrent tort-feasors have not been named defendants in original complaint, effects of interaction of partial indemnity doctrine with existing cross complaint procedures will work no undue prejudice to plaintiff's right to control size and scope of proceeding since trial court, in furtherance of convenience or to avoid prejudice, may order separate trials. West's Ann.Code Civ.Proc. §§ 1048, 1048(b).

12. Indemnity ⇐15(6)

In motorcyclist's action to recover from sponsoring motorcycle association damages for injuries incurred while participating in cross-country motorcycle race for novices, defendant association's cross complaint against plaintiff's parents, alleging that they negligently failed to exercise their power of supervision over their minor child, and that such negligence was active whereas association's negligence, if any, was passive, stated cause of action for comparative indemnity and trial court should have permitted its filing West's Ann.Code Civ. Proc. §§ 428.10 et seq., 428.20, 428.70.

EXHIBIT A

Lawler, Felix & Hall, Thomas E. Workman, Jr., Erwin E. Adler and Jane H. Barrett, Los Angeles, for petitioner.

John W. Baker, Los Angeles, Caywood J. Borror, San Bernardino, Francis Breidenbach, Richard E. Goethals, Stephen J. Grogan, Henry E. Kappler, Los Angeles, Kenneth L. Moes, Santa Barbara, W. F. Rylaarsdam, Pasadena, and Lucien A. Van Hulle, San Bernardino, as amici curiae on behalf of petitioner.

No appearance for respondent.

Jack A. Rose, Anaheim, for real parties in interest.

William P. Camusi, Los Angeles, Robert E. Cartwright, San Francisco, Edward I. Pollock, Los Angeles, Wylie A. Aitken, Santa Ana, Leonard Sacks, Encino, Leroy Hersh, David B. Baum, San Francisco, Stephen I. Zetterberg, Claremont, Robert G. Beloud, Upland, Ned Good, Los Angeles, Arne Werchick, San Francisco, Sanford M. Gage, Beverly Hills, Joseph Posner, Los Angeles, Herbert Hafif, Claremont, and William B. Boone, Santa Rosa, as amici curiae on behalf of real parties in interest.

[1a] [1] TOBRINER, Justice.

Three years ago, in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 119 Cal.Rptr. 858, 532 P.2d 1226, we concluded that the harsh and much criticized contributory negligence doctrine, which totally barred an injured person from recovering damages whenever his own negligence had contributed in any degree to the injury, should be replaced in this state by a rule of comparative negligence, under which an injured individual's recovery is simply proportionately diminished, rather than completely eliminated, when he is partially responsible for the injury. In reaching the conclusion to adopt comparative negligence in *Li*, we explicitly recognized that our innovation inevitably raised numerous collateral issues, "[t]he most serious [of which] are those attendant upon the administration of a rule of comparative negligence in cases involving multiple parties." (13 Cal.3d at p. 823, 119 Cal.Rptr. at p. 87, 532 P.2d at p. 1239.) Because the *Li* litigation itself involved only a single plaintiff and a single defendant, however, we concluded that it was "neither necessary nor wise" (13 Cal.3d at p. 826, 119 Cal.Rptr. 858, 532 P.2d 1226) to address such multiple party questions at that juncture, and we accordingly postponed consideration of such questions until a case directly presenting such issues came before our court. The present mandamus proceeding presents such a case, and requires us to resolve a number of the thorny multiple party problems to which *Li* adverted.

For the reasons explained below, we have reached the following conclusions with respect to the multiple party issues presented by this case. First, we conclude that our adoption of comparative negligence to ameliorate the inequitable consequences of the contributory negligence rule does not warrant the abolition or contraction of the established "joint and several liability" doctrine; each tortfeasor whose negligence is a proximate cause of an indivisible injury remains individually liable for all compensable damages attributable to that injury. Contrary to petitioner's contention, we conclude that joint and several liability does not logically conflict with a comparative negligence regime. Indeed, as we point [1a] out, the great majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability rule; we are aware of no judicial decision which intimates that the adoption of comparative negligence compels the abandonment of this long-standing common law rule. The joint and several liability doctrine continues, after *Li*, to play an important and legitimate role in protecting the ability of a negligently injured person to obtain adequate compensation for his injuries from those tortfeasors who have negligently inflicted the harm.

Second, although we have determined that *Li* does not mandate a diminution of the rights of injured persons through the elimination of the joint and several liability rule, we conclude that the general principles embodied in *Li* do warrant a reevaluation of the common law equitable indemnity

doctrine, which relates to the allocation of loss *among* multiple tortfeasors. As we explain, California decisions have long invoked the equitable indemnity doctrine in numerous situations to permit a "passively" or "secondarily" negligent tortfeasor to shift his liability completely to a more directly culpable party. While the doctrine has frequently prevented a more culpable tortfeasor from completely escaping liability, the rule has fallen short of its equitable heritage because, like the discarded contributory negligence doctrine, it has worked in an "all-or-nothing" fashion, imposing liability on the more culpable tortfeasor only at the price of removing liability altogether from another responsible, albeit less culpable, party.

Prior to *Li*, of course, the notion of apportioning liability on the basis of comparative fault was completely alien to California common law. In light of *Li*, however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. As we explain, many jurisdictions which have adopted comparative negligence have embraced similar comparative contribution or comparative indemnity systems by judicial decision. Such a doctrine conforms to *Li*'s objective of establishing "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal.3d at p. 813, 119 Cal.Rptr. at p. 864, 532 P.2d at p. 1232)

Third, we conclude that California's current contribution statutes do not preclude our court from evolving this common law right of comparative indemnity. In *Dole v. Dow Chemical Company* (1972) 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, the New York Court of Appeals recognized a similar, common law partial indemnity doctrine at a time when New York had a contribution statute which paralleled California's present legislation. Moreover, the California contribution statute, by its own terms, expressly subordinates its provisions to common law indemnity rules, since the comparative indemnity rule we recognize today is simply an evolutionary development of the common law equitable indemnity doctrine, the primacy of such right of indemnity is expressly recognized by the statutory provisions. In addition, the equitable nature of the comparative indemnity doctrine does not thwart, but enhances, the basic objective of the contribution statute, furthering an equitable distribution of loss among multiple tortfeasors.

Fourth, and finally, we explain that under the governing provisions of the Code of Civil Procedure, a named defendant is authorized to file a cross-complaint against any person, whether already a party to the action or not, from whom the named defendant seeks to obtain total or partial indemnity. Although the trial court retains the authority to postpone the trial of the indemnity question if it believes such action is appropriate to avoid unduly complicating the plaintiff's suit, the court may not preclude the filing of such a cross-complaint altogether.

In light of these determinations, we conclude that a writ of mandate should issue, directing the trial court to permit petitioner-defendant to file a cross-complaint for partial indemnity against previously unjoined alleged concurrent tortfeasors.

1. *The facts.*

In the underlying action in this case, plaintiff Glen Gregos, a teenage boy, seeks to recover damages for serious injuries which he incurred while participating in a cross-country motorcycle race for novices. Glen's second amended complaint alleges, in relevant part, that defendants American Motorcycle Association (AMA) and the Viking Motorcycle Club (Viking)—the organizations that sponsored and collected the entry fee for the race—negligently designed, managed, supervised and administered the race, and negligently solicited the entrants for the race. The second amended complaint further alleges that as a direct and proximate cause of such negligence, Glen

suffered a crushing of his spine, resulting in the permanent loss of the use of his legs and his permanent inability to perform sexual functions. Although the negligence count of the complaint does not identify the specific acts or omissions of which plaintiff complains, additional allegations in the complaint assert, inter alia, that defendants failed to give the novice participants reasonable instructions that were necessary for their safety, failed to segregate the entrants into reasonable classes of equivalently skilled participants, and failed to limit the entry of participants to prevent the racecourse from becoming overcrowded and hazardous.[1]

AMA filed an answer to the complaint, denying the charging allegations and asserting a number of affirmative defenses, including a claim that Glen's own negligence was a proximate cause of his injuries. Thereafter, AMA sought leave of court to file a cross-complaint, which purported to state two causes of action against Glen's parents. The first cause of action alleges that at all relevant times Glen's parents (1) knew that motorcycle racing is a dangerous sport, (2) were "knowledgeable and fully cognizant" of the training and instruction which Glen had received on the handling and operation of his motorcycle, and (3) directly participated in Glen's decision to enter the race by signing a parental consent form. This initial cause of action asserts that in permitting Glen's entry into the race, his parents negligently failed to exercise their power of supervision over their minor child; moreover, the cross-complaint asserts that while AMA's negligence, if any, was "passive," that of Glen's parents was "active." On the basis of these allegations, the first cause of action seeks indemnity from Glen's parents if AMA is found liable to Glen.

In the second cause of action of its proposed cross-complaint, AMA seeks declaratory relief. It reasserts Glen's parents' negligence, declares that Glen has failed to join his parents in the action, and asks for a declaration of the "allocable negligence" of Glen's parents so that "the damages awarded [against AMA], if any, [may] be reduced by the percentage of damages allocable to cross-defendants' negligence." As more fully explained in the accompanying points and authorities, this second cause of action is based on an implicit assumption that the *Li* decision abrogates the rule of joint and several liability of concurrent tortfeasors and establishes in its stead a new rule of "proportionate liability," under which each concurrent tortfeasor who has proximately caused an indivisible harm may be held liable only for a *portion* of plaintiff's recovery, determined on a comparative fault basis.

The trial court, though candidly critical of the current state of the law, concluded that existing legal doctrines did not support AMA's proposed cross-complaint, and accordingly denied AMA's motion for leave to file the cross-complaint. AMA petitioned the Court of Appeal for a writ of mandate to compel the trial court to grant its motion, and the Court of Appeal, recognizing the recurrent nature of the issues presented and the need for a speedy resolution of these multiple party questions, issued an alternative writ; ultimately, the court granted a peremptory writ of mandate. In view of the obvious statewide importance of the questions at issue, we ordered a hearing in this case on our own motion. All parties concede that the case is properly before us.

2. *The adoption of comparative negligence in Li does not warrant the abolition of joint and several liability of concurrent tortfeasors.*

[1] In evaluating the propriety of the trial court's ruling, we begin with a brief

1. Glen's second amended complaint is framed in six counts and names, in addition to AMA and Viking, numerous individual Viking officials and the Continental Casualty Company of Chicago (AMA's insurer) as defendants. In addition to seeking recovery on the basis of negligence, plaintiff claims that various defendants (1) were guilty of fraud and misrepresentation in relation to the race, (2) acted in bad faith in refusing to settle a medical reimbursement claim allegedly covered by insurance and (3) intentionally inflicted emotional distress upon him. Only the negligence claim, however, is relevant to the present proceeding.

review of the established rights of injured persons vis a vis negligent tortfeasors under current law. Under well-established common law principles, a negligent tortfeasor is generally liable for all damage of which his negligence is a proximate cause; stated another way, in order to recover damages sustained as a result of an indivisible injury, a plaintiff is not required to prove that a tortfeasor's conduct was *the sole* proximate cause of the injury, but only that such negligence was a proximate cause. (See generally 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 624, pp. 2906-2907 and cases cited; Rest.2d Torts, §§ 432, subd. (2), 439.) This result follows from Civil Code section 1714's declaration that "[e]very one is responsible . . . for an injury occasioned to another by his want of ordinary care or skill . . . ." A tortfeasor may not escape this responsibility simply because another act—either an "innocent" occurrence such as an "act of God" or other negligent conduct—may also have been a cause of the injury.

In cases involving multiple tortfeasors, the principle that each tortfeasor is personally liable for any indivisible injury of which his negligence is a proximate cause has commonly been expressed in terms of "joint and several liability." As many commentators have noted, the "joint and several liability" concept has sometimes caused confusion because the terminology has been used with reference to a number of distinct situations. (See, e. g., Prosser, Law of Torts (4th ed. 1971) §§ 46, 47, pp. 291–299, 1 Harper & James, Law of Torts (1956) § 10.1, pp. 692-709.) The terminology originated with respect to tortfeasors who acted in concert to commit a tort, and in that context it reflected the principle, applied in both the criminal and civil realm, that all members of a "conspiracy" or partnership are equally responsible for the acts of each member in furtherance of such conspiracy.

Subsequently, the courts applied the "joint and several liability" terminology to other contexts in which a preexisting relationship between two individuals made it appropriate to hold one individual liable for the act of the other; common examples are instances of vicarious liability between employer and employee or principal and agent, or situations in which joint owners of property owe a common duty to some third party. In these situations, the joint and several liability concept reflects the legal conclusion that one individual may be held liable for the consequences of the negligent act of another.

[2] In the concurrent tortfeasor context, however, the "joint and several liability" label does not express the imposition of any form of vicarious liability, but instead simply embodies the general common law principle, noted above, that a tortfeasor is liable for any injury of which his negligence is a proximate cause. Liability attaches to a concurrent tortfeasor in this situation not because he is responsible for the acts of other independent tortfeasors who may also have caused the injury, but because he is responsible for all damage of which his own negligence was a proximate cause. When independent negligent actions of a number of tortfeasors are each a proximate cause of a single injury, each tortfeasor is thus personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain a recovery for his injuries, the fact that one of the tortfeasors is impecunious or otherwise immune from suit does not relieve another tortfeasor of his liability for damage which he himself has proximately caused.

Prior to *Li*, of course, a negligent tortfeasor's liability was limited by the draconian contributory negligence doctrine: under that doctrine, a negligent tortfeasor escaped liability for injuries which he had proximately caused to another whenever the injured person's lack of due care for his own safety was also a proximate cause of the injury. In *Li*, however, we repudiated the contributory negligence rule, recognizing with Dean Prosser that "'[p]robably the true explanation [of the doctrine's development in this country was] that the courts [of the 19th century] found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of con-

trol over the jury, by which the liabilities of [1344] rapidly growing industry were curbed and kept within bounds.'" (13 Cal.3d at p. 811, fn. 4, 119 Cal.Rptr. at p. 863, 532 P.2d at p. 1231 (quoting Prosser, *Comparative Negligence* (1953) 41 Cal.L.Rev. 1, 4)). cf. *Dillon v. Legg* (1968) 68 Cal.2d 728, 734-735, 69 Cal.Rptr. 72, 441 P.2d 912.) Concluding that any such rationale could no longer justify the complete elimination of an injured person's right to recover for negligently inflicted injury, we held in *Li* that "in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured in person or property shall not bar recovery, but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the person recovering." (13 Cal.3d at p. 829, 119 Cal.Rptr. at p. 875, 532 P.2d at p. 1243.)

[3] In the instant case AMA argues that the *Li* decision, by repudiating the all-or-nothing contributory negligence rule and replacing it by a rule which simply diminishes an injured party's recovery on the basis of his comparative fault, in effect undermined the fundamental rationale of the entire joint and several liability doctrine as applied to concurrent tortfeasors. In this regard AMA cites the following passage from *Finnegan v. Royal Realty Co.* (1950) 35 Cal.2d 409, 433–434, 218 P.2d 17, 32: "Even though persons are not acting in concert, if the results produced by their acts are indivisible, each person is held liable for the whole. . . . *The reason for imposing liability on each for the entire consequences is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant.* This liability is imposed where each cause is sufficient in itself as well as where each cause is required to produce the result." (Emphasis added.) Focusing on the emphasized sentence, AMA argues that after *Li* (1) there *is* a basis for dividing damages, namely on a comparative negligence basis, and (2) a plaintiff is no longer necessarily "innocent," for *Li* permits a negligent plaintiff to recover damages. AMA maintains that in light of these two factors it is logical inconsistent to retain joint and several li bility of concurrent tortfeasors after *L* As we explain, for a number of reasons w cannot accept AMA's argument.

[4] First, the simple feasibility of appo tioning fault on a comparative negligen basis does not render an indivisible injur "divisible" for purposes of the joint an several liability rule. As we have alread explained, a concurrent tortfeasor is liab for the whole of an indivisible injury whe ever his negligence is a proximate cause that injury. In many instances, the negl gence of each of several concurrent tor feasors may be sufficient, in itself, to cau the entire injury; in other instances, it simply impossible to determine whether not a particular concurrent tortfeasor's ne ligence, acting alone, would have caused th same injury. Under such circumstances, defendant has no equitable claim vis a v an injured plaintiff to be relieved of liabil ty for damage which he has proximately caused simply because some other tor feasor's negligence may also have caus the same harm. In other words, the mer fact that it may be possible to assign son percentage figure to the relative culpabili of one negligent defendant as compared another does not in any way suggest th each defendant's negligence is not a proxi mate cause of the entire indivisible injur

Second, abandonment of the joint an several liability rule is not warranted b AMA's claim that, after *Li*, a plaintiff is n longer "innocent." Initially, of course, it by no means invariably true that after injured plaintiffs will be guilty of neg gence. In many instances a plaintiff w be completely free of all responsibility f the accident, and yet, under the propos abolition of joint and several liability, su a completely faultless plaintiff, rather th a wrongdoing defendant, would be force to bear a portion of the loss if any one the concurrent tortfeasors should prove f nancially unable to satisfy his proportion share of the damages.

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[5, 6] Moreover, even when a plaintiff is partially at fault for his own injury, a plaintiff's culpability is not equivalent to that of a defendant. In this setting, a plaintiff's negligence relates only to a failure to use due care for his own protection, while a defendant's negligence relates to a lack of due care for the safety of others. Although we recognized in *Li* that a plaintiff's self-directed negligence would justify reducing his recovery in proportion to his degree of fault for the accident,[2] the fact remains that insofar as the plaintiff's conduct creates only a risk of self-injury, such conduct, unlike that of a negligent defendant, is not tortious. (See Prosser, Law of Torts, *supra*, § 65, p. 418.)

Finally, from a realistic standpoint, we think that AMA's suggested abandonment of the joint and several liability rule would work a serious and unwarranted deleterious effect on the practical ability of negligently injured persons to receive adequate compensation for their injuries. One of the principal by-products of the joint and several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such a case the rule recognizes that fairness dictates that the "wronged party should not be deprived of his right to redress," but that "[t]he wrongdoers should be left to work out between themselves any apportionment." (*Summers v. Tice* (1948) 33 Cal.2d 80, 88, 199 P.2d 1, 5.) The *Li* decision does not detract in the slightest from this pragmatic policy determination.

For all of the foregoing reasons, we reject AMA's suggestion that our adoption of comparative negligence logically compels the abolition of joint and several liability of concurrent tortfeasors. Indeed, although AMA fervently asserts that the joint and several liability concept is totally incompatible with a comparative negligence regime, the simple truth is that the overwhelming majority of jurisdictions which have adopted comparative negligence have retained the joint and several liability doctrine. As Professor Schwartz notes in his treatise on comparative negligence: "The concept of joint and several liability of tortfeasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question." (Schwartz, Comparative Negligence (1974) § 16.4, p. 253; see, e.g., *Gazaway v. Nicholson* (1940) 190 Ga. 845, 9 S.E.2d 154, 156; *Saucier v. Walker* (Miss.1967) 203 So.2d 299, 302–303; *Kelly v. Long Island Lighting Co.* (1972) 31 N.Y.2d 25, 30, 334 N.Y.S.2d 851, 855, 286 N.E.2d 241, 243; *Walker v. Kroger Grocery & Baking Co.*, *supra*, 214 Wis. 519, 252 N.W. 721, 727; *Chille v. Howell* (1967) 34 Wis.2d 491, 149 N.W.2d 600, 605. See also U. Comp. Fault Act, § 2, subd. (c).) AMA has not cited a single judicial authority to support its contention that the advent of comparative negligence rationally compels the demise of the joint and several liability rule. Under the circumstances, we hold that after *Li*, a concurrent tortfeasor whose

2. A question has arisen as to whether our *Li* opinion in mandating that a plaintiff's recovery be diminished in proportion to the plaintiff's negligence, intended that the plaintiff's conduct be compared with each individual tortfeasor's negligence, with the cumulative negligence of all named defendants or with all other negligent conduct that contributed to the injury. The California BAJI Committee, which specifically addressed this issue after *Li*, concluded that "the contributory negligence of the plaintiff must be proportioned to the combined negligence of plaintiff and of all the tortfeasors, whether or not joined as parties . . . whose negligence proximately caused or contributed to plaintiff's injury." (Use note, BAJI No. 14.80 (5th ed. 1975 pocket pt.) p. 152.) We agree with this conclusion, which finds support in decisions from other comparative negligence jurisdictions. (See e. g., *Pierringer v. Hoger* (1963) 21 Wis.2d 182, 124 N.W.2d 106; *Walker v. Kroger Grocery & Baking Co.* (1934) 214 Wis. 519, 252 N.W. 721, 727–728.) In determining to what degree the injury was due to the fault of the plaintiff, it is logically essential that the plaintiff's negligence be weighed against the combined total of all other causative negligence; moreover, inasmuch as a plaintiff's actual damages do not vary by virtue of the particular defendants who happen to be before the court, we do not think that the damages which a plaintiff may recover against defendants who are joint and severally liable should fluctuate in such a manner

negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only "in proportion to the amount of negligence attributable to the person recovering." (13 Cal.3d at p. 829, 119 Cal.Rptr. at p. 875, 532 P.2d at p. 1243.)

[29] [13] *Upon reexamination of the common law equitable indemnity doctrine in light of the principles underlying Li, we conclude that the doctrine should be modified to permit partial indemnity among concurrent tortfeasors on a comparative fault basis.*

Although, as discussed above, we are not persuaded that our decision in *Li* calls for a fundamental alteration of the rights of injured plaintiffs vis a vis concurrent tortfeasors through the abolition of joint and several liability, the question remains whether the broad principles underlying *Li* warrant any modification of this state's common law rules governing the allocation of loss *among* multiple tortfeasors. As we shall explain, the existing California common law equitable indemnity doctrine—while ameliorating inequity and injustice in some extreme cases—suffers from the same basic "all-or-nothing" deficiency as the discarded contributory negligence doctrine and falls considerably short of fulfilling *Li*'s goal of "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (13 Cal.3d at p. 813, 119 Cal.Rptr. at p. 864, 532 P.2d at p. 1232.) Taking our cue from a recent decision of the highest court of one of our sister states, we conclude—in line with *Li*'s objectives—that the California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.

In California, as in most other American jurisdictions, the allocation of damages among multiple tortfeasors has historically been analyzed in terms of two, ostensibly mutually exclusive, doctrines: contribution and indemnification. In traditional terms, the apportionment of loss between multiple tortfeasors has been thought to present a question of contribution; indemnity, by contrast, has traditionally been viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two. (See, e. g., *Alisal Sanitary Dist. v. Kennedy* (1960) 180 Cal.App.2d 69, 74–75, 4 Cal.Rptr. 279; *Atchison, T. & S.F. Ry. Co. v. Franco* (1968) 267 Cal.App.2d 881, 886, 73 Cal.Rptr. 640.) As we shall explain, however, the dichotomy between the two concepts is more formalistic than substantive,[3] and the common goal of both doctrines, the equitable distribution of loss among multiple tortfeasors, suggests a need for a reexamination of the relationship of these twin concepts. (See generally Werner, *Contribution and Indemnity in California* (1969) 57 Cal.L.Rev. 490.)

Early California decisions, relying on the ancient law that "the law will not aid a wrongdoer," embraced the then ascendant common law rule denying a tortfeasor any right to contribution whatsoever. (See, e. g., *Dow v. Sunset Tel. & Tel. Co.* (1912) 163 Cal. 136, 121 P. 379.) In 1957, the California Legislature enacted a bill to ameliorate the harsh effects of that "no contribution" rule; this legislation did not, however, sweep aside the old rule altogether, but instead made rather modest inroads into the contemporary doctrine, restricting a tortfeasor's statutory right of contribution to a narrow set of circumstances. We discuss the effect of the 1957 contribution legislation in more detail below; at this point it is sufficient to note that the passage of the 1957 legislation had the effect of forestalling any evolution of the California common law contribution doctrine beyond its pre-1957 "no contribution" state. Over the past two decades, common law developments with respect to the allocation of loss between joint tortfeasors in this state have

3. As Judge Learned Hand observed more than a quarter of a century ago: "[I]ndemnity is only an extreme form of contribution." (*Slattery v. Marra Bros.* (2d Cir. 1951) 186 F.2d 1, 13.)