

1 far less than a bona fide issue in the case. Anyone who has raised a young boy knows that a third-
2 grader cannot reasonably be expected to self-enforce a no-eating-on-the-bus rule or to eat a sandwich
3 by taking only appropriately-sized bites.
4

5 What is more telling, however, are the lengths Defendants went to in order to persuade the jury
6 that choking *had nothing to do with Harvey's death*. Throughout the trial, Defendants' entire
7 contention was that Harvey died of something *other than* choking.

8 Specifically, Ms. Sanders stated in opening statement the following:
9

10 Harvey Chernikoff died on a bus that was being driven by Jay
11 Farrales of a medical event, and Jay could do nothing to stop it. I call it a
12 medical event because we're not absolutely clear on exactly what caused
13 Harvey to die.

14 We do know that the coroner found a large chunk of what he
15 thought was partially chewed food that smelled of peanut butter. It was so
16 tightly impacted in his airway that it took the coroner ten minutes to
17 remove it, and he had to use a special tool to do it. Now, based on those
18 findings, the coroner concluded that Harvey died as a result of choking.
19 And maybe he did.

20 But on the other hand, and as you will see as the case progresses,
21 the reactions that Harvey had at the time, the way he reacted were not
22 consistent with what one might expect to see with choking, the things we
23 all consider to be universal signs of choking. There wasn't any panicked
24 movements. There wasn't any clutching of the throat. There wasn't any
25 noises.

26 Instead, and as you'll hear from the expert testimony, what happened with Harvey was much
27 more consistent with a sudden fatal event much like a heart attack or a stroke.

28 RT, v. 3, pp. 25-26; emphasis supplied.

Defendants' opening statement was consistent with the way Defendants presented the evidence. Dr.
Michael MacQuarrie, Defendants' expert, testified that Harvey did not choke on a sandwich but
rather he died of a stroke of heart attack. Yet now, Defendants completely reverse course and, in an

1 attempt to create a bona fide issue of his comparative fault, admit for the first time that Harvey died
2 from choking.

3 **2. Defendants Cite No Authority for the Proposition That Liability for Negligence in**
4 **Rendering Aid Can Be Reduced by the Aided Person's Negligence That Triggered the**
5 **Need for Aid, in This Case Harvey's Alleged "Negligent Eating"**

6 **a. This is not a "lost chance" case and, in any event, Defendants have waived any**
7 **assertion to the contrary**

8 In their original Motion for New Trial, Defendants stood the issue of comparative fault on its
9 head by operating from the premise that the fact pattern requires that the case be analyzed as a "lost
10 chance" case. They contended as follows:

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

18 Motion, p. 7. It is unclear whether Defendants have abandoned this assertion in their Supplemented
19 Motion. Out of caution, Plaintiffs will reiterate their previous response to this argument. In their
20 original Motion, Defendants cited Perez v. Las Vegas Med. Ctr., 107 Nev. 1, 805 P.2d 589 (1991), in
21 support of their assertion. As previously argued, however, Perez is inapposite. In that case, the court
22 said:

23 Of course, the plaintiff or injured person [in a "lost chance" case] cannot
24 recover merely on the basis of a decreased chance of survival or of
25 avoiding a debilitating illness or injury; the plaintiff must in fact suffer
26 death or debilitating injury before there can be an award of damages.
27 Additionally, the damages are to be discounted to the extent that a
28 preexisting condition likely contributed to the death or serious debilitation.

107 Nev. at 6, 805 P.2d at 592. The preexisting condition in Perez was an aneurism or congenital
defect in a brain artery. The patient died of a massive brain hemorrhage after his medical providers

1 had made no attempt to diagnose the cause of persistent headaches of which the plaintiff had
2 complained. The evidence showed that if he had been given proper medical care, he "might" have
3 lived. Id. at 3, 805 P.2d at 590.

4
5 Contrary to Defendants' contention (made, incidentally, for the first time in their original new
6 trial motion and, thus, waived), this is not a "lost chance" case. There was overwhelming evidence
7 that Defendants violated their own standards of conduct in several respects, *and that this negligence*
8 *played a causative role in Harvey's choking.* As previously noted, the evidence showed that
9 Defendants negligently failed to enforce their own rule against eating on the bus, a rule that was
10 admittedly intended to prevent mentally disabled passengers from choking. As also previously noted,
11 the driver also failed to scan the interior of the bus every five seconds, as required. Had he done so, he
12 may have spotted Harvey eating and stopped him from doing so. Instead, the driver actually
13 facilitated Harvey's violation of the rule by opening his water bottle for him. Thus, this is not a "lost
14 chance" case such as Perez, where the doctor merely failed to diagnose a preexisting medical
15 condition which he played absolutely no role in causing.

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18 **b. The relevant cases reject the contention that a person's negligence in triggering his**
19 **need for aid can operate to reduce a defendant's liability for failing to render aid**

20 In Son v. Ashland Community Healthcare SVCS, 244 P.3d 835 (Or .App. 2010), the mother of
21 a 16-year-old girl brought a wrongful death action against two physicians alleging that they provided
22 negligent treatment to her daughter at a hospital after she had ingested narcotics. The girl and her
23 father had had a brief argument after she returned home from an unsupervised party at a local motel.
24 It was after this argument that the girl ingested narcotics prescribed to her father.
25

26 The physicians asserted as a defense that the girl caused or contributed to her death by
27 consuming the substances which led to her hospitalization and by failing to assist in her treatment
28 because she did not tell her family, nurses, and the defendants what substances she had consumed.

1 Additionally, the defendant doctors alleged comparative fault on the part of the girl's father in causing
2 or contributing to her death by failing to secure drugs in their home as well as failing to supervise her
3 at a party. The trial court struck the defense regarding the daughter's consumption of substances that
4 led to her hospitalization but allowed the "failure to tell" defenses and the father's alleged comparative
5 fault to proceed. Following trial, the jury returned a verdict for the mother, assessing 25% fault to the
6 daughter, 30% to each of the doctors, and 15% to the father. All parties appealed.

8 On appeal, the court summarized the doctors' argument as follows:

9
10 Defendants' first assignment of error contends that the trial court
11 erred by granting plaintiff's motion to strike defendants' affirmative
12 defense of comparative fault by consumption. That is, that Sara's
13 consumption of the substances that led to her overdose should have been
14 considered in the allocation of fault by the jury. Defendants argue that their
15 consumption affirmative defense was supported by allegations and
16 evidence that Sara's death was the "inevitable result of her lethal drug
17 ingestion and, if defendants were negligent in failing to save her, then
18 Sara's actions combined with their negligence to cause her death."

19 264 P.3d at 842. The court rejected this argument, cogently reasoning as follows:

20 [A] valid defense of comparative fault in medical malpractice cases
21 requires that the plaintiff's negligent conduct relate and contribute to the
22 negligent treatment, because it is the negligent treatment that causes the
23 injury that is at issue. Stated another way, the patient's negligence must
24 have been an element in the transaction on which the malpractice is based.
25 See Richard M. Patterson, Harvey's Medical Malpractice § 4.12 (4th ed.
26 1999). This concept is further elucidated by the limitation of damages in
27 medical malpractice cases to those attributable to the injury that resulted
28 from the negligent care, *rather than the injury necessitated the treatment*.
For example, a plaintiff who negligently breaks his arm and receives
negligent treatment from a doctor that necessitates amputation of that arm,
can recover only damages attributable to the amputation, but cannot recover
for any damages related to the broken arm. In sum, given that the focus in
medical malpractice claims is on the negligent acts or omissions of the
medical provider, *it is inappropriate to use the patient's negligence that
led to the condition that required medical attention to excuse the
defendants' failure to meet the accepted standard of care*. A patient who
negligently injures himself is nevertheless entitled to subsequent non-
negligent medical treatment, and, if not so provided, the patient is entitled
to recover damages for the consequences of that negligence.

1
2 Id. at 843; emphasis added.

3 The court further stated that its holding followed the majority rule in the country, explaining:

4
5 Our conclusion is in line with the majority of other jurisdictions that
6 have dealt with this issue. Although those jurisdictions sometimes differ in
7 the reasoning used to resolve the issue, they often rest on the proposition that
8 “a physician simply may not avoid liability for negligent treatment by
9 asserting that the patient’s injuries were originally caused by the patient’s own
10 negligence.” Fritts v. McKinne, 934 P.2d 371, 374 (Okla.Civ.App.1996).
11 Further, the majority rule most often cited case states that,

12 “to be considered as and constitute contributory negligence in a
13 medical malpractice action, a patient’s negligence must have been an active
14 and efficient contributing cause of the injury, must have cooperated with
15 the negligence of the malpractitioner, must have entered into proximate
16 causation of the injury, and must have been an element in the transaction on
17 which the malpractice is based. Accordingly, * * * the defense * * * is
18 inapplicable when a patient’s conduct provides the occasion for medical
19 attention, care, or treatment which later is the subject of a medical
20 malpractice claim or when the patient’s conduct contributes to an illness or
21 condition for which the patient seeks the medical attention, care, or
22 treatment on which a subsequent medical malpractice claim is based”

23
24 Jensen v. Archbishop Bergan Mercy Hosp., 236 Neb. 1, 15, 459 N.W.2d 178, 186-87 (1990).
25 244 P.3d at 843-44.

26 Finally, the court in Son held that the trial court erred in allowing the jury to consider the
27 alleged comparative fault of the decedent’s father because his conduct “contributed to Sara’s need for
28 medical treatment, but was not an element in the transaction on which the malpractice claim was
based.” Id. at 847.

29 Another instructive case is Harb v. City of Bakersfield, 183 Cal.Rptr.3d 59 (Cal.App. 2015).
30 There, the plaintiff suffered a stroke while driving in Bakersfield and drove his vehicle onto a
31 sidewalk. Upon arriving at the scene, responding officers and paramedics assumed that Harb was
32 drunk and therefore did not take him to a hospital for almost one hour. It was determined at the

1 hospital that Harb had had a stroke. Almost four hours after the accident, Harb was taken into an
2 operating room for surgery. He survived the surgery, but was moved to a convalescent facility
3 because the brain damage he suffered left him unable to care for himself.
4

5 Harb sued the City of Bakersfield, a responding officer, and a paramedic alleging that their
6 delay in getting him medical treatment made the consequences of his stroke much worse. The jury
7 returned a defense verdict. On appeal, the court summarized the premise of the plaintiff's argument
8 and its conclusion as follows:
9

10 [P]laintiffs contend the jury should not have been instructed on
11 comparative negligence because Harb's alleged negligent failure to manage
12 his high blood pressure occurred before the accident and the defendants'
13 interaction with him. Plaintiffs contend any preaccident negligence by
14 Harb is irrelevant because (1) a tortfeasor takes the plaintiff as she finds
15 him and (2) plaintiffs were not seeking to recover damages caused by the
16 stroke, only damages resulting from the delay in treatment caused by the
17 defendants. Whether a plaintiff's preaccident negligence is a type of
18 comparative fault under California law appears to be a question of first
19 impression. We conclude that, where a plaintiff is seeking damages only
20 for aggravation or enhancement of an injury or condition, California will
21 follow the majority view that *a plaintiff's preaccident conduct cannot*
22 *constitute comparative negligence when that conduct merely triggers the*
23 *occasion for aid or medical attention. As a result, defendants who render*
24 *aid or medical attention cannot reduce their liability for the harm*
25 *resulting from their tortious acts and omissions by attributing fault to the*
26 *plaintiff for causing the injury or condition in the first place.*
27

28 Id. at 62; emphasis added. The court then thoroughly discussed cases throughout the country
on the issue, and reiterated its conclusion:

The foregoing cases set forth the majority view that pretreatment
negligence by the patient does not warrant a jury instruction on
contributory or comparative negligence. This view is supported by
comment m to section 7 of the Restatement Third of Torts: Apportionment
of Liability, which states: "[I]n a case involving negligent rendition of a
service, including medical services, a factfinder does not consider any
plaintiff's conduct that created the condition the service was employed to
remedy."

The majority view is expressed in a California practice guide that
addresses malpractice actions: "Negligence, in fact, may often explain why

1 the patient, to begin with, needed and sought out the physician's assistance.
 2 The health care professional, in this instance, takes the patient as he finds
 3 him. Other than in very rare cases, the only legitimate application of the
 4 doctrine of contributory fault is when it takes place concurrently with or
 5 after the delivery of the practitioner's care and treatment." (McDonald, 1
 6 Cal. Medical Malpractice Law & Practice (2014) § 10:13.)

7 Id. at 79. The foregoing authorities are directly applicable here, and, therefore, the alleged
 8 comparative fault of the decedent may not be asserted as a bona fide defense.⁴

9 **II. THERE WAS NO ERROR IN INSTRUCTING THE JURY REGARDING A**
 10 **COMMON CARRIER'S HEIGHTENED DUTY TO ITS PASSENGERS**

11 **A. The Common Carrier Instruction Given by the Court Was Proper**

12 Defendants contend that the Court erred in instructing the jury that a common carrier owes the
 13 highest duty of care to its passengers because the duty to render aid is only a duty of reasonable care.
 14 Motion, pp. 8-10. Defendants, however, overlook Forrester v. Southern Pac. Co., 36 Nev. 247, 134 P.
 15 753 (1913). There, a passenger on defendant's train was ejected at Montello, Nevada. At the time of
 16 the ejection he was ill, and defendant's employees were aware of his sickness. Given his
 17 circumstances, the passenger was compelled to proceed to Reno, traveling in exposed train cars in
 18 inclement weather. As a result, he contracted pneumonia. The passenger sued the railway and
 19 obtained a favorable judgment. On appeal, the defendant contended that the trial court erred in giving
 20 the following instruction:

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

26
 27 ⁴ See Buck v. Greyhound Lines, 105 Nev. 756, 763-64, 783 P.2d 437 (1989) (interpreting NRS 41.141
 28 to permit allocation of comparative fault only when it can be asserted as a bona fide issue); Banks v.
Sunrise Hospital, 120 Nev. 822, 845, n. 62, 102 P.3d 5 (2004) (mere assertion of comparative fault as
 affirmative defense does not implicate operation of NRS 41.141, citing Buck).

1 No. 5 follows closely the decision of this court in the Sherman⁵ case regarding
2 injuries resulting from an accident. We need not determine whether, in regard to the
3 degree of care, it would be applicable in the case suggested in the brief of a passenger
4 who might be injured by stumbling over a suit-case in the aisle. We do conclude that a
5 high degree of care ought to be required before a passenger who is ill and without
6 sufficient means to buy another ticket is expelled from the train hundreds of miles from
7 his destination under the circumstances shown in this case.

8 Id. at 307, 134 P. at 773. The Nevada Supreme Court rejected the defendant's contention,
9 stating:

10 The present case is analogous to Forrester in that Defendants were or should have been aware
11 of the decedent's problem but did not render or summon aid in a timely manner, essentially leaving
12 him helpless. The instruction was properly given.

13 **B. Any Error Would Have Been Harmless in Any Event**

14 Even assuming arguendo that error occurred, it would be harmless. It is fundamental that a
15 common carrier's duties include the following:

16 (1) A common carrier is under a duty to its passengers to take reasonable action

17 (a) to protect them against unreasonable risk of physical harm, and

18 (b) to give them first aid after it knows or has reason to know that they are ill or injured,
19 and to care for them until they can be cared for by others.

20 Restatement (Second) of Torts, § 314A. The duty to render aid and give care to one in need of
21 help was discussed in Lee v. GNLV Corp., 117 Nev. 291, 22 P.3d 209 (2001), in the context of a
22 restaurant customer who choked to death. The court in Lee summarized this duty as follows:

23 In Nevada, as under the common law, strangers are generally under
24 no duty to aid those in peril. See Sims v. General Telephone & Electric,
25 107 Nev. 516, 525, 815 P.2d 151, 157 (1991). This court, however, has
26 stated that, where a special relationship exists between the parties, such as
27 with an innkeeper-guest, teacher-student or employer-employee, an

28 ⁵ *Sherman v. Southern Pacific Co.*, 33 Nev. 385, 111 P. 416 (1910).

1 affirmative duty to aid others in peril is imposed by law. See *id.* at 526,
2 815 P.2d at 157-58 (citing *Keeton et al.*, § 56, at 376). Likewise, we have
3 held that a party who is in “control of the premises” is required to take
4 reasonable affirmative steps to aid the party in peril.” *Id.* at 526, 815 P.2d
5 at 158 (quoting *Keeton et al.*, §

6 56, at 376). Finally, while this court has not so held, other jurisdictions
7 have expressly stated that restaurant owners and their employees owe an
8 affirmative duty to come to the aid of patrons who become ill or are
9 otherwise in need of medical attention. See *Breaux v. Gino’s, Inc.*, 200
10 Cal.Rptr. 260, 261 (Ct. App. 1984) (“It is well established that restaurants
11 have a legal duty to come to the assistance of their customers who become
12 ill or need medical attention . . .”); *Drew v. LeJay’s Sportsmen’s Café,*
13 *Inc.*, 806 P.2d 301, 306 (Wyo. 1991) (“A restaurant whose employees are
14 reasonably on notice that a customer is in distress and in need of emergency
15 medical attention has a legal duty to come to the assistance of that
16 customer.”).

17

18 The law is clear that if a legal duty exists, reasonable care under the
19 circumstances must be exercised. See *Sims*, 107 Nev. at 526-27, 815 P.2d
20 at 157-58; *Keeton et al.*, § 37, at 237 and § 56, at 377-78. Whether a
21 defendant’s conduct was “reasonable” under a given set of facts is
22 generally an issue for the jury to decide. See *Sims*, 107 Nev. at 527, 815
23 P.2d at 158.

24 117 Nev. at 395-96, 22 P.3d at 212. After setting forth the duty, the court in *Lee* held that the
25 restaurant was not required to administer the Heimlich maneuver to the customer and that it acted
26 reasonably under the circumstances in coming to his aid, explaining:

27 Nevada imposes a duty on GNLV to take “reasonable affirmative steps”
28 to aid patrons in need of medical attention. In this case, GNLV’s
employees examined and assessed Sturms’ condition immediately upon
being summoned by Sturms’ dining companion. GNLV employees
diligently continued to monitor Sturms’ condition until his condition
worsened. Upon realizing that Sturms’ medical condition was
deteriorating, GNLV’s employees summoned professional medical
assistance. Thus, we cannot say that the behavior of GNLV’s employees in
these circumstances was anything other than “reasonable.” We perceive no
breach of the duty owed to Sturms in failing to perform the Heimlich
maneuver. Accordingly, although GNLV’s employees owed a duty to
Sturms to act reasonably, we are able to conclude as a matter of law that
GNLV’s employees did not breach this duty.

1 Id. at 298, 22 P.3d at 213.

2 It is clear from the foregoing that if the restaurant had not acted diligently in monitoring the
3 customer's condition and summoning medical assistance, it would have breached a duty of
4 reasonable care. This exactly what Defendants failed to do in this case. Further, Plaintiffs did not
5 argue for an instruction that Defendants should have administered the Heimlich maneuver.
6 Accordingly, since the evidence establishes a failure to exercise reasonable care by the Defendants, it
7 is not probable that the verdict would have been different if the jury had been instructed as
8 Defendants contend. Therefore, the error, if any, was harmless and nonprejudicial and Defendants
9 have not shown otherwise. See Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 666-67, 448 P.2d 46
10 (1968) (judgment cannot be reversed by reason of erroneous instruction unless upon consideration of
11 entire proceedings it shall appear that such error has resulted in miscarriage of justice; prejudice is not
12 presumed; if giving of instruction was error, it was harmless because upon considering entire record,
13 it was not probable that different result would ensue at new trial free of contested instruction; burden
14 is upon party contesting instruction to show probability of different result); Otterbeck v. Lamb, 85
15 Nev. 546, 461, 456 P.2d 855 (1969) (if instruction is erroneous, it must also constitute prejudicial
16 error for reversal to be warranted).

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20 **C. Finally, Defendants Waived Any Objection to Instruction No. 32 Because They**
21 **Offered it and Defense Counsel Acknowledged the Correctness of it and**
22 **Instruction No. 34 During Summation**

23 As noted, Defendants contend that the Court erred in giving Instruction No. 32 to the jury
24 regarding a common carrier's duty to its passengers. Supplemented Motion, pp. 9-11. In addition to
25 the points already made in response to this contention, the Court will recall that it was Defendants
26 who offered the instruction. RT, v. 8, pp. 133-40. Accordingly, Defendants have no basis to
27 challenge their own instruction. See Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345
28

1 (1994) (doctrine of “invited error” embodies principle that party will not be heard to complain on
2 appeal of error which he himself induced or provoked the trial court to commit. The same doctrine
3 applies to new trial motions. Sandman v. Farmers Ins. Exchange, 969 P.2d 277, 282 (Mont. 1998).
4

5 It must also be recalled that defense counsel (Ms. Sanders) informed the jury during
6 summation of the applicability of a common carrier’s heightened duty of care, including the duty to
7 render aid to a mentally disabled passenger. Ms. Sanders stated:

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

12 RT, v. 9, p. 46.

13 **D. Similarly, There Was No Error in Giving Instruction No. 34**

14 Defendants also claim it was error to give Instruction No. 34 concerning the duty of additional
15 care to a mentally disabled person. They contend:
16

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

25 The evidence, moreover, established that First Transit and its
26 drivers are not social workers nor care givers. The special responsibilities
27 imposed under the “Americans With Disabilities Act” are limited to the
28 boarding, securing of assistive devices, and disembarking of paratransit
buses. RTC invites riders unable to care for themselves to bring a PCA or
companion. (App. at 83.) See Boose v. Tri-Cnty. Metro. Transp. Dist., 587
F.3d 997, 1005 (9th Cir. 2009) “[C]omplementary paratransit is not
intended to be a comprehensive system of transportation . . . [but] simply to
provide to individuals with disabilities the same mass transportation service
opportunities everyone else gets, whether they be good, bad, or mediocre.”
(quoting with approval 56 Fed. Reg. at 45,601 (Set. 6, 1991))). While
competent driving requires scanning mirrors, this does not create a duty on

1 the driver to monitor for medical events. The company made clear that
2 personal attendants are welcome to attend to a passenger's en route
3 personal needs and make accommodation for them. Drivers must watch
4 road.

5 Supp. Mot., p. 12; footnote omitted. This argument is devoid of merit.

6 In the first place, there is evidence that Harvey's mental disability impaired his ability to eat
7 as a non-disabled adult would. And there is evidence that Defendants were aware of this. Ms.
8 McKibbens testified that the reason for the rule against eating or drinking on the bus was that
9 mentally disabled people choke when they eat. Mr. Farrales acknowledged that this was one of the
10 reasons for the policy and that he was trained regarding the same. And also contrary to the statements
11 made in the quoted passage, the bus drivers were required by rule to scan the interior of the bus every
12 five seconds and Farrales testified that one of the reasons for this policy was to ensure that the
13 mentally disabled passengers were not doing things they should not be doing. So, while it is certainly
14 true that "[d]rivers must watch road," it is also true that they must also keep themselves apprised of
15 what was happening in their buses. The drivers were also required to check on and secure, if
16 necessary, the safety of the passengers each time they stopped and, again, each time they left a stop.
17 Defendants' argument proceeds as though this evidence and these standards did not exist.
18

19
20 Secondly, insofar as Defendants' liability arises from the failure to come to Harvey's aid or to
21 summon assistance of others, this particular duty did not arise until after he began choking. Further,
22 Defendants cannot disclaim responsibility by simply adopting self-serving policies because the duty
23 to come to decedent's aid arises from the common law. Nor is it accurate for Defendants to claim
24 that "the company expressly informs . . . that the driver [is] not responsible for personal care." To the
25 contrary, Defendants' Exhibit A, page 2, states:
26

27 Americans with Disabilities Act of 1990 (ADA) Paratransit
28 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.

1 *The RTC strives to provide safe and reliable services to all*
2 *members of the community*, and is committed to providing commuters
3 with the most up-to-date information. [Emphasis supplied.]

4
5 Further, Defendants' Exhibit A, page 8 provides:

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

9 . . .

10 No eating is allowed on the vehicle, and drinks must be in spill-
11 proof covered containers. [Emphasis added.]

12 **E. Because Defendants Failed to Object to the Alleged "Abuse" of the Jury Instructions and**
13 **Also Failed to Object to Plaintiffs' Counsel's Analogy to Derek Jeter, These Arguments**
14 **Have Been Waived**

15 Next, Defendants argue that Plaintiffs' counsel "abused" the common carrier instructions by
16 drawing an analogy to the difference between an ordinary MLB player and a star player, such as
17 Derek Jeter. Supp. Mot., pp.13-14. However, Defendants did not lodge a contemporaneous objection
18 to this line of argument. Thus, it is only reviewable under the plain error doctrine. *Lioce v. Cohen*,
19 124 Nev. 1, 19, 173 P.3d 970, 982 (2008). They do not even contend that the alleged "abuse" of the
20 jury instructions and the reference to Derek Jeter constituted plain error.

21 **III. THE \$15 MILLION VERDICT IS NOT EXCESSIVE, NOR DOES IT**
22 **DEMONSTRATE PASSION OR PREJUDICE**

23 The jury was properly instructed that, "No definite standard or method of calculation is
24 prescribed by law by which to fix reasonable compensation for pain and suffering." See Instruction
25 No. 23. This is consistent with Nevada case law. For example, in *Stackiewicz v. Nissan Motor*
26 *Corporation*, 100 Nev. 443, 686 P.2d 925 (1984), the court explained that the mere fact a verdict is
27 "unusually large" is not dispositive as to whether it is the result of passion and prejudice. The court
28 explain:

1 In reversing a district court's order granting a new trial on the issue
2 of damages, we recently noted that the mere fact that a verdict is large is
3 not in itself "conclusive that it is the result of passion or prejudice."
4 Beccard v. Nevada National Bank, 99 Nev. 63, 66 n. 3, 657 P.2d 1154,
5 1156 n. 3 (1983), quoting Miller v. Schnitzer, 78 Nev. 301, 309, 371 P.2d
6 824, 828 (1962). Similarly, in Automatic Merchandisers, Inc. v. Ward, 98
7 Nev. 282, 646 P.2d 553 (1982), although we found the award "unusually
8 high," we did not find it so "flagrantly improper" as to suggest jury passion,
9 prejudice or corruption. In General Electric Co. v. Bush, 88 Nev. 360, 368,
10 498 P.2d 366, 371 (1972), this Court refused to set aside an award of
11 \$3,000,000 when the evidence of special damages went uncontroverted at
12 trial. We refused to "substitute out opinion of damages for that of the
13 jury," when the award, in view of the extent of personal injuries to the
14 victim, did not "shock our judicial conscience."

15 Id. at 455, 686 P.2d at 932. With these principles established, we will now address what
16 Defendants erroneously contend are the indicia of passion and prejudiced:

17 **A. The Award of \$7.5 Million for Harvey's Pre-Death Pain and Suffering is Not Excessive**

18 The standard for assessing an award of damages against a challenge of excessiveness was
19 summarized in Guaranty National Insurance Company v. Potter, 112 Nev. 199, 206-207, 912 P.2d
20 267, 272 (1996), as follows:

21 Generally, this court will affirm an award of compensatory damages
22 unless the award is so excessive that it appears to have been "given under
23 the influence of passion or prejudice." NRCP 59(a)(6); Miller v. Schnitzer,
24 78 Nev. 301, 308, 371 P.2d 824, 828 (1962), abrogated in part on other
25 grounds by Ace Truck & Equip. Rentals v. Kahn, 103 Nev. 503, 746 P.2d
26 132 (1987). The size of the award alone is not conclusive evidence that it
27 was the result of passion or prejudice. Miller, 78 Nev. At 309, 371 P.2d at
28 828. Rather, "[t]he core of the matter seems to be that an appellate court
will disallow or reduce the award if its judicial conscience is shocked." Id.,
at 309, 371 P.2d at 829 (footnote omitted).

29 Defendants contend that \$7.5 million for 50 seconds of pain and suffering is "outrageous."
30 Supp. Mot., p. 15, lns 7-8. First, Plaintiffs do not accept the premise that Harvey was choking for
31 only 50 seconds. The undersigned's recollection is that the conscious choking was *several* long
32 agonizing minutes. But whatever the actual time span was, the Court will recall that Defendants'

1 own expert testified that choking is the most horrific way to die. It is also worth noting that, in the
2 context of the death penalty – reserved for society’s most abhorrent individuals who have committed
3 unspeakably atrocious crimes – enormous resources are expended to find ways to administer the
4 sentence as humanely as possible. Quite probably, if the method selected produced the result endured
5 by Harvey Chernikoff, it would be deemed tantamount to torture and struck down as cruel and
6 unusual punishment in violation of the Eighth Amendment to the United States Constitution. See
7 Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520, 1522 (2008) (upholding constitutionality of lethal
8 injection of three particular chemicals as means of carrying out capital punishment, but noting that
9 capital punishment is unconstitutional when it involves “torture or lingering death.”). Thus, it is
10 astonishing that Defendants would be so glib as to contend that Harvey was in utter agony for ‘only’
11 50 seconds.
12

13
14 Defendants also argue that, “[a]ssuming one additional moment of pain and suffering would
15 cross the legal threshold into a justifiable basis to award damages, it could only be nominal.” Supp.
16 Mot., p. 16, Ins. 6-8. While Plaintiffs have not performed an exhaustive survey of damages awards
17 for the pain and suffering of an asphyxiated plaintiff, it is clear that Defendants’ assessment is
18 misguided. Just by way of example, in Clark v. University Hospital UMDNJ, 914 A.2d 838
19 (N.J.A.D. 2006), an award of \$2 million dollars was affirmed against an assertion that it was a
20 “staggering number” for the amount of time involved. There, the plaintiff’s decedent choked for
21 approximately 4 minutes. But he died in a hospital bed, not on public transportation.
22

23
24 We recognize the \$7.5 million is substantially greater than \$2.5 million. However, we also
25 note that as recently as 2010 and as long ago as 1947, the Nevada Supreme Court has flatly rejected
26 the idea that awards of general damages can validly be measured by reference to awards made in
27
28

1 other cases. In fact, most recently the court cautioned – in a unanimous and en banc decision – that it
2 would be an abuse of discretion to undertake such a comparative approach to general damages.⁶

3 **B. Nor Is the Award of \$7.5 Million to Jack and Elaine Chernikoff Excessive**

4 In this portion of their motion, Defendants proceed on the premise that any argument they
5 make must be accepted as true. They cite no legal authority, yet they contend that the award is
6 “unprecedented.” Supp. Mot., p. 16, ln. 11. Moreover, Defendants argue that the award has “no
7 connection to the factors set forth in law for evaluating this element of damages,” and then proceed to
8 give their own undocumented and self-serving accounts as to what the evidence showed.
9

10 The Court will recall that there is substantial evidence in the record to support a combined
11 award of \$7.5 million to the two Plaintiffs. Essentially, this portion of Defendants’ Supplemented
12 Motion reads like a jury argument and is no basis for rejecting the jury’s assessment of Plaintiffs’
13 damages for the loss of their family member.
14

15 **C. Respectfully, the Court Should Reject Defendants’ Argument that Plaintiffs’ Counsel**
16 **“Improperly Argued for Recovery Based on the Loss of Harvey’s Life”**

17 Assertions of improper argument by counsel are governed by the standards set forth in Lioce v.
18 Cohen, 124 Nev. 1, 18-19, 174 P.3d 970, 982 (2008). There are two separate standards, depending on
19 whether the party asserting error made a contemporaneous objection to the allegedly improper
20 argument. These standards were articulated in Lioce, as follows:
21

22 When a party objects to purported attorney misconduct but the
23 district court overrules the objection and the jury is not admonished, the
24 party moving for a new trial based on the purported attorney misconduct
25 must first demonstrate that the district court erred by overruling the party’s
26 objection. If the district court concludes that it erred by overruling the
27 objection, the district court must then consider whether an admonition to
28

⁶ Wyeth v. Rowatt, 126 Nev. 446, 472 n. 10, 244 P.3d 765, 783 n. 10 (2010), citing Wells, Inc. v. Shoemaker, 64 Nev. 57, 74, 177 P.2d 452, 460 (1947). For other thoughtful and persuasive rejections of this one-size-fits-all approach to general damages, see Washburn v. Beatt Equipment Co., 840 P.2d 860, 871-872 (Wash. 1992) (en banc), and Bertero v. National General Corp., 529 P.2d 608, 624 n. 12 (Cal. 1975) (en banc) (“For a reviewing court to upset a jury’s factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based on different evidence would constitute a serious invasion into the realm of fact-finding.”).

1 the jury would likely have affected the verdict in favor of the moving party.
2 In this, the court must evaluate the evidence and the parties' and the
3 attorneys' demeanor to determine whether a party's substantial rights were
4 affected by the court's failure to sustain the objection.

5 . . .

6 [t]he proper standard for the district courts to use when deciding a motion for a new trial based
7 on unobjected-to attorney misconduct is as follows: (1) the district court shall first conclude that the
8 failure to object is critical and the district court must treat the attorney misconduct issue as having
9 been waived, unless plain error exists. In deciding whether there is plain error, the district court must
10 then determine (2) whether the complaining party meet its burden of demonstrating that is case is a
11 rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error.
12 In the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that
13 results in a substantial impairment of justice or denial of fundamental rights such that, but for the
14 misconduct, the verdict would have been different. [Footnotes omitted; emphasis supplied.]

15 Here, Defendants failed to lodge a contemporaneous objection to any of the several incidents
16 they now attempt to characterize as attorney misconduct. Moreover, Defendants' argument is circular.
17 They argue the verdict was excessive because of attorney misconduct and that the failure to object is
18 excused because the verdict was excessive. This is not an adequate way of discharging their burden
19 of establishing that improper argument occurred, or that this purported misconduct was so
20 fundamental that it resulted in a substantial impairment of justice.

21 In any event, the Defendants have mischaracterized the nature of trial counsel's arguments. He
22 did not suggest to the jury that it should base a "recovery on Harvey's loss of his own life." Rather,
23 he argued to the jury that all lives matter and that, notwithstanding Harvey's mental disability, his
24 parents loved him dearly and valued his life just as much as any other parent would his or her son.
25
26
27
28

D. Defendants' "Other Indicators of Passion and Prejudice" Are Without Substance

1. The Identity of the Awards Does Not Give Rise to an Inference of Error

Citing Nevada Cement Company v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973), Defendants contend that the jury's award of the same amount for the parents' combined damages as it awarded for Harvey's pain and suffering is evidence that the jury was motivated by passion and prejudice. Lemler is completely dissimilar to the instant case. Lemlar was a nuisance case in which 85 plaintiffs sued Nevada Cement Company for spewing particular matter into the air. The jury decided awarded \$5,000 in general damages to each of the 85 plaintiffs. The court explained the absurdity of the situation as follows:

It is entirely proper to order the payment of damages to compensate for discomfort and annoyance caused by a temporary nuisance. [Citations omitted.] In this case, however, the record is clear that some of the plaintiffs were considerably annoyed, while others were only minutely disturbed. Some of them lived near the cement plant, and others were miles distant. Some were within prevailing wind patters and others were not. Some incurred special damages and others did not.

Id. at 450, 514 P.2d at 1182. On this basis, the court in Lemler held that the evidence established that the level of "annoyance and discomfort could not have been the same" for every single one of the 85 plaintiffs. The analogy to Lemler simply does not hold where, as here, there are only two awards and, while each is to compensate for different elements of damages, both are so subjective in nature that mathematical precision is not an option.

2. The Failure to Allocate Fault to Farrales

The jurors were instructed in Jury Instruction No. 30 as follows:

Defendant FIRST TRANSIT is legally responsible for the actions off its employee, Defendant JAY FARRALES, at all times when Defendant JAY FARRALES is acting within the scope of his employment with Defendant FIRST TRANSIT.

1
2 This means that if the jurors felt that Jay Farrales was negligent, that negligence would be
3 imputed to First Transit. The jurors were also instructed on the following:
4

5 In order to establish a claim for negligent training and supervision, plaintiff must prove the
6 following elements:

7 1. Defendant FIRST TRANSIT owed a duty of care to plaintiffs and
8 to the deceased, HARVEY CHERNIKOFF, to reasonably train and
9 supervise its employee, Defendant JAY FARRALES, to ensure that he was
fit for his position;

10 2. Defendant FIRST TRANSIT breached that duty by failing to
11 reasonably train and supervise its employee, Defendant JAY FARRALES,
12 to ensure that he was fit for his position;

13 3. That Defendant FIRST TRANSIT's breach of this duty was the
14 cause of HARVEY CHERNIKOFF's death; and

15 4. Plaintiff JACK CHERNIKOFF and Plaintiff ELAINE
16 CHERNIKOFF suffered damages.

17 See Jury Instruction No. 36. It does not take a strained analysis to determine that the jurors
18 found that Jay Farrales was negligent but assigned First Transit 100% of the fault for that negligence
19 based on the two instructions set forth above. Using this framework, it is clear that the jury verdict
20 was entirely consistent and that Defendants' argument is without merit.
21

22 Furthermore, the failure to object to a purported inconsistency in a jury verdict is waived if it is
23 not made before the jury is discharged. Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 628 P.2d 681
24 (1981).

25 **3. The Assertion that the Jury Was Required to Allocate Fault to Plaintiffs, as a**
26 **Matter of Law, is Frivolous**
27
28

1 Defendants contend that the jury's failure to allocate any percentage of fault to the Plaintiffs is
2 further evidence that it was swept away by passion and prejudice. This assertion is frivolous. It is
3 merely Defendants' attempt to substitute their opinion for that of the jury.
4

5 **4. Because Defendants Fail to Specify the "Trial Tactics" They Contend Inflamed**
6 **Passion and Prejudice. This Assertion Should Be Summarily Rejected**

7 Next on the laundry list is the naked assertion that Plaintiff engaged in nefarious "trial tactic,"
8 which had the result of inflaming passion and prejudice in the jury. None of these trial tactics is
9 identified. Thus, Defendants' sparse citations are untethered to the case and amount to nothing more
10 than abstract legal propositions.

11 **5. There Was Nothing Improper in Conducting Voir Dire to Explore the Panel**
12 **Members' Predispositions Concerning Litigation in Which Substantial Sums of**
13 **Money Are Sought'**

14 Defendants next complain that Plaintiffs' counsel improperly referred to the action in voir dire
15 as a multi-million-dollar case. The right to conduct voir dire free of unreasonable restrictions is
16 secured by statute. NRS 16.030(6) provides that, "[t]he judge shall conduct the initial examination of
17 prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations
18 which must not be unreasonably restricted." The importance of participation by the parties or their
19 attorneys was emphasized in Whitlock v. Salmon, 104 Nev 24, 752 P.2d 210 (1988). In Whitlock,
20 the trial judge completely precluded either party's counsel from participating directly in voir dire.
21 Instead, over objection, he required the attorneys to submit their questions to him and he, in turn,
22 asked the questions of the prospective jurors. *Id.* at 25, 752 P.2d at 211. In reversing the ensuing
23 defense verdict, this court reasoned as follows:
24
25

26 The importance of a truly impartial jury, whether the action is criminal or civil, is so
27 basic to our notion of jurisprudence that its necessity has never really been questioned in
28 this country. *United States v. Bear Runner*, 502 F.2d 908, 911 (8th Cir.1974). The voir
dire process is designed to ensure—to the fullest extent possible—that an intelligent,
alert and impartial jury which will perform the important duty assigned to it by our
judicial system is obtained. *De La Rosa v. State*, 414 S.W.2d 668, 671
(Tex.Crim.App.1967). The purpose of voir dire examination is to determine whether a

1 prospective juror can and will render a fair and impartial verdict on the evidence
2 presented and apply the facts, as he or she finds them, to the law given. *See Oliver v.*
3 *State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969). We are convinced that prohibiting
attorney-conducted voir dire altogether may seriously impede that objective.

4 Usually, trial counsel are more familiar with the facts and nuances of a case and
5 the personalities involved than the trial judge. Therefore, they are often more able to
6 probe delicate areas in which prejudice may exist or pursue answers that reveal a
7 possibility of prejudice. Moreover, while we do not doubt the ability of trial judges to
8 conduct voir dire, there is concern that on occasion jurors may be less candid when
9 responding with personal disclosures to a presiding judicial officer. Finally, many trial
10 attorneys develop a sense of discernment from participation in voir dire that often
11 reveals favor or antagonism among prospective jurors. The likelihood of perceiving such
12 attitudes is greatly attenuated by a lack of dialogue between counsel and the individuals
13 who may ultimately judge the merits of the case. In that regard, we expressly disapprove
14 of any language or inferences in *Frame v. Grisewood*, 81 Nev. 114, 399 P.2d 450
15 (1965)] that tend to minify the importance of counsel's voir dire as a source of
16 enlightenment in the intelligent exercise of peremptory challenges.

17 Id. at 27-28, 752 P.2d at 212-13; footnote omitted. In the omitted footnote, the court referenced a
18 study which "suggests that the judge's presence evokes considerable pressure among jurors toward
19 conforming to a set of perceived judicial standards and that this is minimized when an attorney
20 conducts voir dire." Id. at 28 n. 6, 752 P.2d at 212 n. 6.

21 Since Plaintiffs were seeking an award of more than a million dollars, they had a right to inquire
22 of the panel members regarding their attitudes toward litigation in which large awards are sought.

23 In *DeYoung v. Alpha Construction Co.*, 542 N.E.2d 859 (Ill.App. 1989), a woman who
24 survived a gas explosion and the estate of her mother, who perished in it, brought suit and were
25 awarded \$4,224,694.89. On appeal, one of the defendant's contentions was that a voir dire question,
26 asking whether prospective jurors would be willing to return a verdict "in the millions," was an
27 "improper attempt to indoctrinate the jury" Id. at 764, quoting defendant's argument. The
28 appellate court flatly rejected this assertion, holding that it was entirely proper "to inquire whether
potential jurors have fixed ideas about awards of specific sums of money." Id.

29 In support of its holding, the court in *DeYoung* cited *Kinsey v. Kolber*, 431 N.E.2d 1316
(Ill.App. 1982). In *Kinsey*, plaintiff's counsel, on four occasions, asked whether prospective jurors

1 would have any trouble returning a verdict of over \$2 million, if that amount was supported by the
2 evidence and the law. In support of his contention that these questions constituted an improper
3 attempt to indoctrinate the jurors and to elicit a pledge from them, the defendant also noted that
4 plaintiff's counsel reminded the jurors of their answers during his closing argument. In rejecting the
5 defendant's contention, the court in *Kinsey* noted that acceptance of his position would require the
6 court to overrule long-standing Illinois law:

8 Defendant urges that this remark [in closing argument] supports the indoctrination purpose of
9 the questions asked during voir dire. In advancing this argument defendant is asking us to overrule
10 *Scully v. Otis Elevator Company* (1971), 2 Ill.App.3d 185, 275 N.E.2d 905, *Jines v. Greyhound*
11 *Corporation* (1964), 46 Ill.App.2d 364, 197 N.E.2d 58, rev'd on other grounds (1965), 33 Ill.App.2d
12 83, 310 N.E.2d 562, and *Murphy v. Lindahl* (1960), 24 Ill.App.2d 461, 165 N.E.2d 340, all cases
13 where the court has held that questions concerning a specific verdict amount tended to uncover jurors
14 who might have a bias or prejudice against large verdicts.

16 Id. at 946-47.

18 But the recognition that it is proper to ask prospective jurors on voir dire about any fixed beliefs
19 they may have about large verdicts is not limited to Illinois. The parties' counsel submitted voir dire
20 questions to the court in *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538 F.Supp. 1240
21 (N.D. Ohio 1980). The City of Cleveland submitted the following question:

23 You are each to be aware of the fact that the City of Cleveland is seeking a judgment of
24 millions of dollars from CEI. If the evidence supports the judgment sought by the City
25 of Cleveland, would you have any hesitancy in awarding a judgment of millions of
26 dollars for the City and against CEI?

27 *Id.* at 1249-50. In deciding the question was proper, the court cited cases from several jurisdictions
28 and concluded that its propriety was supported by the "prevailing weight of authority." *Id.* at 1250.

1
2 Among the cases cited in *City of Cleveland* is the Seventh Circuit's opinion in Geehan v.
3 Monahan, 382 F.2d 111 (7th Cir. 1967). There, plaintiff's counsel asked prospective jurors whether
4 they would "have any hesitancy of returning a verdict commensurate with the injuries you find she has,
5 even though it might run many thousands of dollars." *Id.* at 115. Defense counsel objected on the
6 theory that his opponent was attempting to secure a pledge from the jury. The trial court overruled the
7 objection and the Seventh Circuit sustained this ruling, noting that "[s]uch a question is generally in the
8 discretion of the court." *Id.* See also Bunda v. Hardwick, 138 N.W.2d 305 (Mich. 1966).

9
10 Defendants cite nothing but psychological journals in support of their assertion. These are a
11 poor substitute for relevant legal authority.

12
13 Defendants also contend that Plaintiffs' counsel improperly sought a commitment from jurors
14 to "give me what I ask for." No details are provided and no indication is given as to whether
15 Defendants objected when this allegedly occurred. Once again, a thorough response will have to
16 await something more than the three sentences that Defendants have tendered in this portion of their
17 motion. Actually, Defendants' counsel was the only told the jurors that they were bound by a
18 "promise" they had made in voir dire. RT, v. 9, p. 79, lns. 12-13.

19 20 **IV. THE JURY DID NOT DISREGARD THE COURT'S INSTRUCTIONS**

21 In it their Argument IV, Defendants recast and reiterate the same legal arguments in order to
22 bring them under NRCP 59(a)(5), manifest disregard of the jury instructions. Notably, Defendants
23 do no point out that the standard under this portion of Rule 59 is stringent. The movant must
24 demonstrate that, had the jurors followed the instructions, it would have been impossible for them to
25 return the challenged verdict. Weaver Bros. v. Misskelley, 98 Nev. 232, 645 P.2d 438 (1982). We
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1 have already addressed these arguments and they gain no additional traction by Defendants' effort to
2 retool them as disregard of the Court's instructions.⁷

3 **V. DEFENDANTS ARE NOT ENTITLED TO REMITTITUR**


4 Because the awards of damages are not "clearly excessive," as Defendants contend, a reduction
5 by way or remittitur is unwarranted and the Defendants' alternative motion for remittitur should be
6 denied.
7

8 **CONCLUSION**

9 For all the foregoing reasons, it is respectfully submitted that Defendants' Motion for a New
10 Trial and Supplemented Motion for New Trial, should be denied in their entirety.
11

12 DATED THIS 5th day of July, 2016

13 CLOWARD HICKS & BRASIER, PLLC

14 
15 BENJAMIN P. CLOWARD, ESQ.

16 Nevada Bar No. 11087

17 4101 Meadows Lane, Suite 210

18 Las Vegas, Nevada 89107

19 *Attorneys for Plaintiffs*

20
21
22
23
24
25 ⁷ Defendants' attempt to take refuge in *FGA, Inc. v. Giglio*, 128 Nev. ____, 278 P.3d 490 (2012), warrants separate
26 comment. As Defendants note, in *FGA, Inc.*, the Supreme Court held that the general verdict rule does not apply where a
27 party raises overlapping factual theories in support of one single claim. Supp. Mot., p. 22, Ins. 1-3. But this is not the case
28 here. Plaintiff did not file a "one count complaint," as was the case in *FGA, Inc.*, and the Connecticut cases cited and
followed therein. Rather, they filed three claims, apart from the claim for punitive damages that was ultimately dismissed.
In the first count, Plaintiffs alleged that Defendant Farrales was negligent. In the second, they alleged that First Transit
was vicariously liable for his negligence pursuant to respondeat superior. In the third count, Plaintiffs alleged direct
liability against First Transit for its negligence in hiring, training, supervising, and retaining Defendant Farrales.
Accordingly, *FGA, Inc.* is inapposite and the general verdict rule fully applies.

CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Civil Procedure 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 5 day of July 2016, I caused the foregoing **OPPOSITION TO MOTION FOR NEW TRIAL AND SUPPLEMENT**

THERE TO to be served as follows:

☒ Pursuant to N.E.F.C.R. 9 by serving it via electronic service

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

to the attorneys listed below:

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An employee of CLOWARD HICKS & BRASIER, PLLC

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-Fourth Session
May 13, 1987

The Senate Committee on Judiciary was called to order by Chairman Sue Wagner, at 8:00 a.m., on Wednesday, May 13, 1987, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Sue Wagner, Chairman
Senator Erik Beyer, Vice Chairman
Senator Joe Neal
Senator Thomas J. Hickey
Senator Mike Malone
Senator Charles W. Joerg
Senator Herbert M. Jones

STAFF MEMBERS PRESENT:

Carol MacLeod, Committee Secretary

SENATE BILL 248 - Makes various changes to provisions governing duties of landlord upon closure or conversion of mobile home park.

Senator Beyer gave a brief report to the committee regarding the progress of the sub-committee work on S.B. 248.

ASSEMBLY BILL 556 - Revises provisions governing qualification and training of justices of peace.

The committee had a brief discussion regarding an amendment to A.B. 556 which had already been acted upon.

SENATE BILL 198 - Prohibits impersonation of officer or employee of public utility.

SENATOR HICKEY MOVED TO CONCUR WITH AN AMENDMENT TO S.B. 198.

SENATOR MALONE SECONDED THE MOTION

THE MOTION CARRIED BY MAJORITY. (SENATOR NEAL WAS

2020

18

Senate Committee on JUDICIARY
 Date: May 13, 1987
 Page: 2

ABSENT FOR THE VOTE)

SENATE BILL 511 - Revises provisions governing comparative negligence.

Testimony of Pat Cashill, President, Nevada Trial Lawyers Association, and Jim Cashman, Chairman, Coalition for Affordable and Available Liability Insurance (CAALI)

Mr. Cashman testified, "S.B. 511 is a product of our negotiations which were concurred by Chairman Wagner and Chairman Sader...the bill, we suggest to you, is a reasonable compromise on tort reform and modifies the doctrine of joint liability, with some major exceptions."

Mr. Cashman continued, "There was an omission in the bill drafting which was carried through to the bill. The omission is on page 2, between lines 27 and 28...there should be included a section (e) 'Products Liability'...this clearly was the result of our negotiations and we agreed that products liability would be an exception...."

Senator Wagner asked, "You are representing to this committee that all of the people who discussed this issue are in concert with what you are saying, even though they may not be present in the room today?" Both Mr. Cashill and Mr. Cashman replied, "That is correct."

Mr. Cashill explained, "The key concept is 'parties to the action' which will ultimately be dealt with later on in the bill, but the concept is that joint liability will be eliminated subject to the various exceptions...but several liability will be decided only among the parties to the action...those who are in fact named and present in the lawsuit. This eliminates the risk of either side being able to argue that some fault should be rested on the shoulders of a person or persons who is not actually a party so that the jury's attention can be focused precisely on those persons who are parties."

Senator Beyer asked, "Does that eliminate the 'Does I - X' named in a lawsuit?" Mr. Cashill replied, "It will not eliminate the necessity early in a lawsuit of naming the 'Does I - X' before adequate facts may be determinable to actually place names and titles with parties, but it will eliminate the

Senate Committee on JUDICIARYDate: May 13, 1987Page: 3

possibility that anyone who has not been made a party to the action will be the subject of any finger pointing in the lawsuit so that only those who are there...will have their fault allocated among themselves."

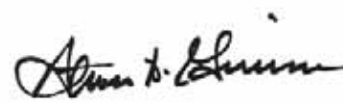
Mr. Cashill, in continuing his explanation, stated, "The substitution of the word 'comparative' instead of 'contributory' simply brings us better into line with the concept of comparative negligence as it is applied in the state where the negligence of the plaintiff is compared to the negligence of defendant. This bill does not alter the concept that where a plaintiff is more than fifty percent responsible for his own harming, he recovers nothing...that concept is unaffected."

Continuing, Mr. Cashill testified, "Section 3 allows for the treatment of a settlement reached before trial with one of the defendants who is in the case. The terms of the settlement...will not be placed before the jury, therefore, the jury's duty of allocating fault among those defendants and the plaintiff who are left in the case will not be skewed in any way by an negotiative settlement which occurred before trial...any settlement may be reached for any number of reasons...the liability, damages, all sorts of things enter into settlement, but the settlement, in our view, can only cloud the jury's ability to properly determine, as between the plaintiff and defendant, who is at fault, therefore evidence of any pre-settlement is not admissible, but the trial judge is required to reduce the verdict by whatever the amount of any pre-trial settlement, therefore, the remaining defendants will be fixed with the responsibility of paying what the net then is, the net being the total amount of damages which the plaintiff is found to have incurred, less whatever was perceived in any settlement reached...the concept of fairness is addressed here by taking into account whatever has been paid to the plaintiff as an offset against the damage."

Mr. Cashman explained that section 4 of S.B. 511 removes joint liability. Mr. Cashill stated section 5 contains the exceptions to joint liability and testified, "Strict liability in tort has to do with inherently dangerous conduct, such as the keeping of wild animals, or shipment of explosives, for example...strict liability in tort is an exception and still allows for joint liability among whoever the tort feassors are. Intentional torts are torts of a particular nature which are non-negligent, those which are actually intent...so, torts of an intentional nature are specifically excluded as are torts

63

63


CLERK OF THE COURT

1 SAO
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DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

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

Plaintiffs,

vs.

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

Defendants.

STIPULATION AND ORDER EXTENDING
PLAINTIFFS' TIME TO FILE SUPPLEMENTAL BRIEFING


The parties STIPULATE that the Plaintiffs; supplement briefing on Defendants' "Motion for New Trial" and "Motion to Alter or Amend the Judgment will be filed and served on or before July 5, 2016.


Dated this 28 day of June, 2016.

Dated this 26th day of June, 2016.

CLOWARD HICKS & BRASIER, PLLC

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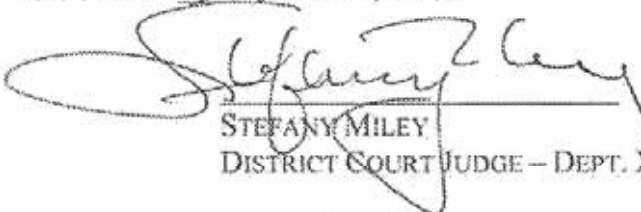
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11 **ORDER**

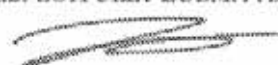
12 Based upon stipulation of the parties, it is hereby ORDERED that Plaintiffs' supplement
13 briefing on defendants' "Motion for New Trial" and "Motion to Alter or Amend the Judgment" will
14 apply: Plaintiffs' supplemental briefing will be filed and served on or before July 5, 2016.

15 DATED this 5-16 day of June, 2016.

16 
17 STEFANY MILEY
18 DISTRICT COURT JUDGE - DEPT. XXIII

19 JUDGE STEFANY A. MILEY

20 RESPECTFULLY SUBMITTED BY:

21  #9589
22 BENJAMIN P. CLOWARD (SBN 11087)
23 4101 Meadows Lane, Suite 210
24 Las Vegas, Nevada 89107
25 (702) 628-9888
26
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CLERK OF THE COURT

1 **RIS**
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21 *Attorneys for Defendants*
22 *First Transit, Inc. and Jay Farrales*

23 DISTRICT COURT
24 CLARK COUNTY, NEVADA

25 JACK CHERNIKOFF and ELAINE
26 CHERNIKOFF,

27 Plaintiffs,

28 *vs.*

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

31 Defendants.

Case No. A-13-682726-C
Dept. No. XXIII

Hearing Date: August 2, 2016
Hearing Time: 9:30 a.m.

REPLY BRIEF ON
MOTION FOR NEW TRIAL

32 Upon receiving the trial transcripts, defendants supplemented their mo-
33 tion for new trial with dozens of examples of attorney misconduct during jury
34 selection and closing argument that tainted the verdict. (Supp. Mot. 19-30.)
35 Plaintiffs respond to almost none of them. For that reason, along with the other
36 reasons briefed in defendants' motion, this case must be retried.

I.

THE VERDICT WAS TAINTED BY ATTORNEY MISCONDUCT

Plaintiffs respond to just one of defendants' arguments regarding attorney misconduct, leaving the rest un rebutted. Because that misconduct was directly connected to plaintiffs' request for the amount the jury actually awarded, the misconduct resulted in "irreparable and fundamental error" that calls for a new trial. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008). *Cf. also* EDCR 2.20(e) (lack of opposition "may be construed as . . . a consent to granting" the motion); *Barr v. Gaines*, 103 Nev. 548, 549, 746 P.2d 634, 636 (1987) (deeming undisputed those facts not opposed on summary judgment).

A. Plaintiffs Improperly Asked for at Least \$15 Million, the Amount the Jury Awarded, as the Value of Harvey's Life

Plaintiffs do not dispute that the value of the decedent's life is an improper measure of damages in a wrongful-death claim. Instead, plaintiffs assert, in a single sentence without citation to the transcript, that they did not make that argument. (Supp. Opp. 30:24.) Defendants' motion, in contrast, pointed to repeated instances where plaintiffs said that "the amount that we're asking for [is] for *Harvey's life*." (Tr. Day 9, at 37:25–38:3, App. 235–36 (emphasis added). *See generally* Supp. Mot. 23–26.) The \$15 million plaintiffs requested and received was based on that improper argument.

B. The \$15 Million Verdict is the Improper Result of Disparaging Defense Tactics, Seeking Punishment, and Inflaming the Jury's Emotions and Local Prejudices

The other misconduct, which plaintiffs do not address, likewise affected the verdict.

For instance, the Nevada Supreme Court has been clear that it is improper to "disparage legitimate defense tactics." *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (finding reversible error). Yet plaintiffs improperly argued that First Transit's autopsy request was a "disrespect[ful]" request to

1 “desecrate [Harvey’s] body” (Tr. Day 9, at 15:12–16, App. 223), and plaintiffs
2 explicitly argued that a \$15 million award would help restore Harvey’s “respect”
3 and “honor” (Tr. Day 9, at 90:12, App. 244).

4 Similarly, without a claim for punitive damages, it was improper to refer
5 to First Transit’s profitability and an imagined decision that if “somebody
6 chokes to death on the bus,” then “safety is not the most important thing” and
7 “we don’t want to be responsible for the things that we do.” (Tr. Day 9, at
8 18:23–19:5, App. 224–25.) *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349,
9 368, 212 P.3d 1068, 1082 (2009) (improper reference to defendant’s uncharitable
10 motives “despite being a highly profitable corporation”). Plaintiffs framed their
11 request for \$15 million as inadequate “money justice” to punish corporations
12 like First Transit that make money “off of people like Jay who they pay \$11 an
13 hour.” (Tr. Day 9, at 37:9–16, App. 235.)

14 Encouraging local prejudice is misconduct, too. *See Butler v. State*, 120
15 Nev. 879, 899, 102 P.3d 71, 85 (2004) (citing *Sipsas v. State*, 102 Nev. 119, 125,
16 716 P.2d 231, 234–35 (1986)). Here, after vilifying First Transit as believing
17 that “[p]eople in Las Vegas don’t matter” and telling the jury “[y]ou get to con-
18 sider” that defendants’ expert is not from Las Vegas (Tr. Day 9, at 12:15, 13:10–
19 18, App. 220, 221), plaintiffs requested \$15 million as a way to restore local
20 pride and show that “all lives matter” (Tr. 9, at 12:15, App. 220).

21 Finally, the verdict is a product of plaintiffs’ improper appeals to sympa-
22 thy rather than reason. *See Grosjean*, 125 Nev. at 364, 368, 212 P.3d at 1078,
23 1082. Plaintiffs’ request for pain-and-suffering damages based on “knowing
24 that you’re dying” and the driver “is doing nothing to help” (Tr. Day 9, at 41:7–
25 9, App. 239) is inextricable from the overtly emotional dramatization by plain-
26 tiff’s counsel of Harvey’s final thoughts—“You’re my friend. Jay, I’m
27 ing. Please, help me. Please help me, Jay.” (Tr. Day 9, at 29:4–12, App. 229.)
28

As detailed in defendants' motion, each instance of misconduct affected the verdict. (Supp. Mot. 22–30.) In combination, the need for a new trial is overwhelming.

II.

AS NRS 41.141 REQUIRES, THE JURY SHOULD HAVE APPORTIONED THE NEGLIGENCE OF PLAINTIFFS' DECEDENT

Apart from the misconduct, a new trial is necessary to correct the omission of decedent Harvey from the verdict form. Defendants objected to the omission at trial, and the error is prejudicial.

A. Plaintiffs Ignore the Context of NRS 41.141

1. To Apportion Fault to a Decedent Who Causes his Own Pain and Suffering, the Action Must Include the Heirs. who Can Bring that Claim, Not the Estate, which Cannot

Plaintiffs argue that for the jury to consider Harvey's comparative negligence, defendants needed to implead the representative of his estate, who had earlier been dismissed from the action. (Supp. Opp. 8:24–9:2.) That makes no sense. Plaintiffs keep underlining the language from NRS 41.141(2)(b)(2), and from *Banks* and *Humpries*, that limits apportionment to "parties" in the action, as if that completes plaintiffs' argument. (Supp. Opp. 3, 7–8.) But it is not at all clear that the estate's representative, rather than the heirs, must a party to a wrongful-death action for the jury to consider the decedent's comparative negligence in causing his own pain and suffering. After all, the estate does not even represent the decedent for purposes of his pain and suffering. NRS 41.085(5). For that claim, the decedent is represented by the *heirs*. *Id.*

Defendants' reading of subparagraph (2)(b)(2) is the only way to make sense of paragraph (2)(a). A plaintiff—any plaintiff—in a wrongful-death action may not recover if the "comparative negligence . . . of the plaintiff's decedent is greater than the negligence of the defendant." Plaintiffs do not dispute that on-

ly the jury can make that determination. So to give effect to that bar in cases where “the plaintiff” is an heir rather than a personal representative suing on behalf of the decedent, the jury must be allowed to weigh the defendant’s negligence against that of “the plaintiff’s decedent.” Plaintiff’s reading, on the other hand, eviscerates the bar, giving the heirs a full recovery even when the “comparative negligence . . . of the [heirs’] decedent is greater than the negligence of the defendant.” *Contra* NRS 41.141(2)(a).

2. *Defendants Properly Objected to the Verdict Form*

Plaintiffs assert that defendants “acquiesced in omitting Harvey from the jury verdict form” (Supp. Opp. 4:3–4), quoting just a snippet of an ongoing dialogue between the Court and defense counsel. Just after the quoted passage, defense counsel LeAnn Sanders quickly clarified defendants’ objection to the omission. (Ex. A, Tr. Day 8, at 163:18–164:3.)

3. *Defendants’ Motives in Dismissing the Estate are Irrelevant*

Plaintiffs argue that by dismissing the estate, defendants made the “conscious decision” to avoid punitive damages by sacrificing a comparative-negligence defense. (Supp. Opp. 3:13–4:2.) No, defendants secured the estate’s dismissal because the estate had no viable claim. That dismissal and the reasons for it have no bearing on the defense of Harvey’s comparative negligence in the action by his parents.

B. Including the Decedent’s Parents is No Substitute for Including the Decedent Himself

Plaintiffs seek to excuse the error in omitting Harvey by claiming that the jury would have allocated any negligence to his parents. (Supp. Opp. 4–6.) Plaintiffs seem to think that Harvey must have been either totally incapable of negligence or totally independent from his parents, with nothing in between. But that is not how the law treats individuals with mental illness or children.

1 See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 11 cmt. c
 2 (2010); *Galloway v. McDonalds Restaurants of Nev., Inc.*, 102 Nev. 534, 537-38,
 3 728 P.2d 826, 828-29 (1986) (quoting *Quillian v. Mathews*, 86 Nev. 200, 203-02,
 4 467 P.2d 111, 112-13 (1970)).

5 Rather, the law holds that a parent and child can each be comparatively
 6 negligent, and that the allocation of fault should go to the jury:

7 [I]n cases involving older children not accompanied by a par-
 8 ent, the two related but distinct questions under discussion
 9 (the child's own negligence, based on an objective standard
 10 of care for children of similar age and intelligence, and the
 11 reasonableness of the parent's supervision in light of the
 12 child's actual ability to exercise care independent of the par-
 13 ent) are for determination by the jury, not matters of law for
 14 the court.

15 *Lash v. Cutts*, 943 F.2d 147, 151 (1st Cir. 1991). Thus, just because parents
 16 bear responsibility for the negligent supervision of their child does not mean
 17 that the child himself is incapable of negligence. See, e.g., *Lash*, 943 F.2d at 151
 18 (combined comparative negligence of five-year-old in not exercising self-care
 19 and his mother in failing to supervise precluded recovery); see also
 20 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 illus. 5
 21 (2000); RESTATEMENT (SECOND) OF TORTS § 316 (1965). Here, similarly, it was
 22 at least a fact issue whether Harvey and his parents bore some responsibility
 23 for his behavior, and the jury could have found Harvey at least partially re-
 24 sponsible for his own predicament even if Harvey's parents had discharged
 25 their duties of supervision.

26 In fact, plaintiffs must understand the concept of overlapping responsibil-
 27 ity. They argued to the jury that both First Transit and Farrales were inde-
 28 pendently negligent, even though First Transit would be vicariously (i.e., strict-
 29 ly) liable for any negligence by Farrales. (See Supp. Opp. 1-2.)

30 **C. This Court Should Consider the Absurd Consequences of**
Plaintiff's Argument in Other Cases, Not Just this Case

31 Plaintiffs criticize what they call "Defendants' overly-fertile imagination"

1 (Supp. Opp. 11:6–7), instead urging the Court to focus narrowly on “this case”
2 (Supp. Opp. 10:18). When the Court is being asked to determine legislative in-
3 tent in interpreting a state, however, that interpretation should make sense for
4 all cases, not just this one. And it is neither “fanciful” nor “absurd” (Supp. Opp.
5 10:7) to assume that the legislature would have wanted NRS 41.141 to produce
6 reasonable results in a case where the decedent is almost entirely responsible
7 for his own death.

8 Importantly, plaintiffs do not actually dispute that the consequences of
9 their interpretation *would* be absurd if applied to other cases. Plaintiffs con-
10 cede that their reading gives the heirs a total recovery for claims that would
11 have been barred had the negligent decedent lived. (Supp. Opp. 8–9.)

12 Contrary to plaintiffs’ argument (at Supp. Opp. 11:5–7), a testator’s intent
13 *does* have relevance to a wrongful-death action. The statute makes that clear in
14 creating separate causes of action for the estate (with recovery going to benefi-
15 ciaries under the decedent’s will) and for the heirs (statutorily defined as those
16 who “would be entitled to succeed to the separate property of the decedent if the
17 decedent had died intestate”). *Compare* NRS 41.085(4) *and* (5). What that
18 statute does not contemplate is an heir using the wrongful-death statute to ef-
19 fectively recover against the estate, which is exactly what plaintiff’s impleader
20 proposal would require, not just in “a scenario that can be dreamt up” (Supp.
21 Opp. 10:10), but in every case where the decedent is actually found negligent.
22 It is reasonable for the Court to harmonize the wrongful-death statute with
23 NRS 41.141 in a way that avoids that result.

III.

HARVEY'S MENTAL CONDITION DOES NOT MAKE HIM INCAPABLE OF NEGLIGENCE

A. The Majority Rule Plaintiffs Cite Required the Jury to Evaluate Harvey's Negligence

Plaintiffs missed the point of defendants' argument, that Harvey was *capable* of at least some negligence, and the jury should have considered it. Indeed, the authorities plaintiffs cite support that position: the jury can consider the mental disability as a factor, but the court cannot absolve the disable person of negligence as a matter of law. (Supp. Opp. 13:10–16 (quoting ARTHUR BEST, COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 10:30 (rev. ed. 2005)).) *See generally* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 13.03[a] (5th ed. 2010); 1 COMPARATIVE NEGLIGENCE MANUAL § 10:5 (updated Mar. 2016).

Even plaintiffs' own arguments sound like factual considerations for a jury, not legal propositions for the Court. Whether it is true that "[a]nyone who has raised a young boy knows that a third-grader cannot reasonably be expected to self-enforce a no-eating-on-the-bus rule or to eat a sandwich by taking only appropriately-sized bites" (Supp. Opp. 14:1–3), and whether that assessment applies to Harvey, go to the jury question whether Harvey acted reasonably in light of his disability.

B. This is Not a Medical-Malpractice Case

1. Different Comparative-Negligence Rules Apply in Medical-Malpractice Cases

In arguing against the jury's consideration of Harvey's negligence, plaintiffs cite extensively to several medical-malpractice cases. (Supp. Opp. 16–20.) Those cases expressly limit their holdings to the medical-malpractice context precisely because those claims are governed by a separate regime with different duties and different liabilities. *See Son v. Ashland Cmty. Healthcare Servs.*, 244 P.3d 835, 843, 847 (Or. Ct. App. 2010) (acknowledging that in a case that

“did not involve a wrongful death action based on medical malpractice,” the defense of comparative negligence was appropriate); *Jensen v. Archbishop Bergan Mercy Hosp.*, 459 N.W.2d 178, 184 (Neb. 1990) (recognizing a special contributory-negligence rule in medical-malpractice cases based on the “disparity in medical knowledge between the patient and his doctor”). For example, in Nevada, had plaintiffs sued under the medical-malpractice statute, their claims would have been limited to \$350,000. See NRS 41A.035.

2. *The Existence of a Special Relationship Does Not Eliminate a Comparative-Negligence Defense*

Even assuming Nevada were to adopt a rule like those in plaintiffs’ cases, it would not dismantle a comparative-negligence defense here. A physician, unlike a common carrier, owes a heightened professional duty of care in rendering medical treatment. Compare NRS 41A.015 (defining “professional negligence”), with RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (2000) (a “special relationship” like that of a common carrier imposes just a duty of “reasonable care” to render aid); cf. also *Mangeris v. Gordon*, 94 Nev. 400, 403, 580 P.2d 481, 483 (1978) (even assuming a massage parlor had a “special relationship” with the victim, its duty to warn of danger would be that of “a reasonable person”). The required skill in rendering medical treatment may, as a policy matter, make it less relevant *how* the injured person came to need treatment. See *Jensen*, 459 N.W.2d at 184. By contrast, the special relationship of a common carrier to its passenger imposes a duty of just *reasonable care* to render aid, where ordinarily there would be no duty at all. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (2000). Once that duty is established, though, the respective negligence of the parties is weighed just like any other negligence case. Cf., e.g., *Hofflander v. St. Catherine’s Hosp., Inc.*, 664 N.W.2d 545, 565 (Wis. 2003).

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care. (Supp. Opp. 21:13–20.) Plaintiffs instead point to the ancient *Forrester* case for support for a heightened duty in that circumstance, but the negligent act in *Forrester* was ejecting a passenger—a pure matter of transportation—not some failure to treat the passenger’s illness en route. *Forrester v. S. Pac. Co.*, 36 Nev. 247, 134 P. 753, 755 (1913).

Plaintiffs do not persuasively distinguish the more recent *Lee v. GNLV* case, which under nearly identical facts imposed just a duty of “reasonable affirmative steps” to render aid. *Lee v. GNLV Corp.*, 117 Nev. 291, 298, 22 P.3d 209, 213 (2001).

C. The Error was Prejudicial

The evidence at trial created a jury question whether defendants acted negligently. There was conflicting testimony regarding what Farrales should have seen or done. (Ex. B, Tr. Day 7 (2/25/16), at 100 (testimony by Farrales that he did not see Harvey eating), 111 (mirror scan would not have revealed Harvey’s distress), 122 (Farrales was appropriately scanning mirrors), 124 (Farrales followed training in calling 911).) Neither the jury’s finding that defendants breached an inapplicable heightened standard, nor the holding in *Lee* that excused GNLV as matter of law, establishes defendants’ breach of a duty of ordinary care without the need for jury findings.

V.

THE AWARD WAS EXCESSIVE

A. Plaintiffs Do Not Defend the Size of the Award

Plaintiffs avoid the issue of the excessive award by stating that the items of damages are subjective and that comparisons to awards in other cases is improper. (Supp. Opp. 28:24–29:2.) By that logic, any award—whether for \$15 million or \$15 trillion—would be unassailable. The only example plaintiffs offer shows that the award here was excessive: a hospital, with duties greater than

1 defendants' here, allowed a patient to suffer more than four times as long as
2 Harvey allegedly did here, but was found liable for less than one seventh the
3 verdict here. *See Clark v. Univ. Hosp.-UMDNJ*, 914 A.2d 838, 843 (N.J. Super.
4 Ct. App. Div. 2006).

5 **B. The Jury's Award Reflects Passion and Prejudice**

6 Plaintiffs complain that defendants did not object to plaintiffs' indoctrina-
7 tion (Supp. Opp. 36:14), but the issue is not just the attorney misconduct. The
8 issue is that such anchoring questions create a "dangerous field" of jurors be-
9 cause they are more likely to orient their verdict in terms of the amount re-
10 quested in voir dire. *E.g., Henthorn v. Long*, 122 S.E.2d 186, 196 (W. Va. 1961);
11 *see also Paradossi v. Reinauer Bros. Oil Co.*, 146 A.2d 515, 519 (N.J. Super. Ct.
12 App. Div. 1958); *Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n*, 181
13 N.W.2d 754, 759 (N.D. 1970); *Goldstein v. Fendelman*, 336 S.W.2d 661, 665 (Mo.
14 1960).

15 That is precisely what happened here: the jury's verdict in an amount
16 plaintiff's counsel requested reflects the jurors' desire to keep their "word" to
17 plaintiff's counsel (Tr. Day 9, at 37:17–38:3, App. 235–36), rather than a proper
18 weighing of the evidence. *See* NRCP 59(a)(5), (6); *Lioce*, 124 Nev. at 22 n.39,
19 174 P.3d at 984 n.39 (error for jury to follow attorney's opinion rather than "the
20 evidence and law that should decide the case").
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Dated this 26th day of July, 2016.

By: /s/Abraham G. Smith

Attorneys for Defendants

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

EXHIBIT A

EXHIBIT A

TRAN


 CLERK OF THE COURT

 DISTRICT COURT
 CLARK COUNTY, NEVADA
 * * * * *

 JACK CHERNIKOFF,
 ELAINE CHERNIKOFF,

 Plaintiff,
 vs.

 FIRST TRANSIT INC.,

 Defendant.

 CASE NO A-13-682726
 DEPT NO. XXIII

**TRANSCRIPT OF
 PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 8

FRIDAY, FEBRUARY 26, 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.

KARR REPORTING, INC.

or replacement of equipment, systems, and Facilities during the coverage period of applicable warranties. The Contractor is responsible for returning all RTC provided warranty and instruction manuals.

(j) Emergency Notification. -- In the event any work operations that are Contractor's responsibility result in an accident, safety hazard, or problem of an emergency nature, Contractor staff shall notify the RTC Project Manager or his or her designee by telephone within one hour. It shall be Contractor's responsibility to initiate immediate corrective action and inform the RTC Project Manager of the final disposition of the particular problem.

(k) Unauthorized Use. -- No Contractor personnel shall take or make unauthorized use of any of the RTC properties, buildings, equipment or materials. The removal of any property of RTC or unauthorized use of the RTC properties, buildings, equipment or materials shall be considered as theft by RTC and RTC shall have the right to, without prior written notice to the Contractor, pursue any remedies at law or inequity. The RTC shall retain the right to withhold from payment any expenses incurred as a result of the Contractor's removal of any of the RTC property that is considered theft by RTC.

(l) Additional Training. -- Technical training of facility maintenance personnel, beyond Contractor employee orientation, is required and should include appropriate certification training, vendor provided training, and maintenance safety training. The Contractor shall provide training for facility maintenance personnel for all new or replacement items over the course of the Contract.

SECTION 25. OPERATING PERFORMANCE STANDARDS

(a) Operation of Vehicles. -- The Contractor shall operate Revenue Vehicles in

accordance with all applicable local, State, and Federal laws and regulations with regard to safety, comfort, and convenience of passengers and the general public.

(b) Service Characteristics. -- The Contractor shall provide service in accordance with Appendix C, Service Characteristics and according to any adjusted schedule established by the RTC Project Manager. The Contractor shall implement schedule changes as directed by the RTC Project Manager in order to adjust schedules to meet varying ridership demands.

(c) CATCOM System. --

(1) CATCOM Workstations. -- RTC will provide the Contractor, over the course of the Contract as needs are identified, six (6) fully functional CATCOM workstation systems to be used in the operations center by Contractor Dispatch and operations staff. There are three (3) CATCOM workstations in operation as of the execution of this Contract.

- (A) A fully functional workstation system will include all hardware, peripherals, and software comparable with the current configuration, or upgraded configuration if such upgrades occur prior to the start of the Contract.
- (B) If during the course of the Contract, the Contractor determines it needs more than the six (6) CATCOM workstations, the Contractor shall be required to provide written justification to the RTC Project Manager for the additional workstation(s).
 - (i) If RTC approves the additional workstation(s) and determines a sufficient business need exists, RTC will purchase the additional workstation(s) and software. RTC will install and maintain the additional workstation(s).
 - (ii) If RTC approves the additional workstation(s), but determines that there is not a sufficient business need for the workstation(s), the additional workstation(s) will be the financial responsibility of the Contractor. RTC will install and maintain the additional workstation(s).

At the close of the Contract, the additional CATCOM workstation(s) purchased by the Contractor will remain the property of the Contractor.

- (C) For network and system integrity and security, RTC may not permit any third party user to own or control devices that attach to the RTC network.

(2) In the event that the CATCOM system malfunctions, the Contractor shall ensure that a paper manifest is generated and properly completed by the Vehicle Operator(s). The Contractor shall ensure the validity of all system data through final trip edit/audit in accordance with Section 2 of this Contract as further described in Appendix P.

(d) Data. - RTC provides Revenue Vehicles with sophisticated radio and diagnostic capabilities which are dependent on the Vehicle Operators' proper activation of the system by correctly logging into the CATCOM Advanced Mobile Data Terminal (AMDT) on vehicles at the start of each shift. The Contractor shall ensure that all data required by the RTC is correctly entered into the RTC scheduling and dispatch system. All required information is critical to system reporting and its level of accuracy is of great importance in whatever form the data is entered whether by the Vehicle Operator marking the manifest and having it manually entered at the end of the service day or as a result of the Vehicle Operator notifying dispatch via the communication system and the Radio Dispatcher logging it into the system; or the Vehicle Operator using the AMDT. Failure to log into the system hinders the flow of information necessary to manage the service day, the receiving of information for Federal reporting requirements, and assisting in quick response to safety and security incidents. Accordingly, such failures may result in assessments of liquidated damages pursuant to Section 9(c)(9)(A) of this Contract.

(1) In order to properly gauge the level of accuracy of the Contractor manifest information, RTC and the Contractor will cooperatively develop, within 120 days of the Notice to Proceed, an accuracy formula by which to measure compliance with this provision. RTC will determine an acceptable level of accuracy, once the formula is applied.

in consultation with the Contractor.

(2) The Contractor shall report the accuracy level on the monthly operation's report.

(3) Performance below the acceptable level of accuracy will require immediate attention by the Contractor to correct the information and to insure that the process of data collection is improved to within the acceptable level of accuracy. An unacceptable level of accuracy, as determined in accordance with paragraph (1) above, could result in a partial withholding of payment of Contractor invoice.

SECTION 26. GENERAL REPORTING REQUIREMENTS

(a) In General. -- The Contractor shall submit all monthly reports on operational performance, maintenance performance, and safety to the RTC Project Manager or his or her specified designee with the monthly invoice(s), as specified in Section 5(c) of this Contract. The Operational report should stipulate by Revenue Vehicle and Revenue Vehicle fleet, vehicle hours, revenue miles, and accidents per 100,000 miles of service. The list below includes the minimum data requirements of the monthly report of the Contractor. The Contractor shall submit required information in a format approved by RTC.

(b) Daily Reports. -- Data Needs for Daily Reports

(1) Operational Data

(A) Service Interruption Log

(B) Route Closure Report

(2) Fleet Maintenance Data

(A) Out of Service Report

(c) Monthly Reports. -- Data Needs for Monthly Report

(1) Operating Data

- (A) Trips completed/missed; ratio
- (B) Analysis of factors impacting on-time performance ratio if below 94%
- (C) Summary of drug and alcohol testing results for all safety-sensitive employees
- (D) Year-to-Date Vehicle Operator turnover rate
- (E) Certified driver list
- (F) Monthly list of all Contractor employees authorized to access the RTC network. This report is due separately on the 20th of each month to reflect access requests for the following month.

(2) Fleet Maintenance Data

- (A) Updated fleet listing
- (B) Overview of maintenance activities
 - (i) Preventive Maintenance Inspection and major repair work
 - (ii) Vehicle down time
 - (iii) Warranty activity on Revenue Vehicles, equipment, and other property owned by RTC.
 - (iv) Fleet availability
 - (v) (Non-fuel) Fluids consumption RTC-owned Revenue Vehicles
 - (vi) Fuel consumption for all Revenue Vehicles (by vehicle and fleet)
 - (vii) Air conditioning maintenance (by vehicle and fleet)
 - (viii) Lift maintenance
 - (ix) Tire usage on RTC-provided tires
 - (x) Miles traveled by all revenue vehicles
 - (xi) Number of accidents (preventable and non-preventable)
 - (xii) Average mileage between PM's
 - (xiii) Number of PM's
 - (xiv) Number of road calls (maintenance and non-maintenance)
 - (xv) Mileage between maintenance road calls

(3) Facility Maintenance Data

- (A) The Contractor shall provide all reports necessary to document the following facility maintenance activities:
 - (i) Equipment failures and any down time associated with the failure
 - (ii) All facility maintenance activity and repairs
 - (iii) All Facility Maintenance warranty activity
- (B) By request and within 72 hours of notice by the RTC Project Manager or his or her designee, the Contractor shall produce reports that reflect a designated reporting period for system and equipment maintenance history on any specified equipment or system. The report should be electronically generated by RTC approved software or as otherwise requested by RTC.

- (d) Monthly Meetings. -- The Contractor should be aware that meetings to discuss

the Contractor's operation and maintenance of the RTC vehicles and facilities will be held at least once a month with the Contractor and RTC key staff designated by the RTC Project Manager. The Contractor will insure that the appropriate Contractor's personnel will be present at these meetings. In addition, a representative of the Contractor shall be present at the regular public meetings of the RTC, and at meetings of other specified RTC advisory committees.

(c) EEO and Drug and Alcohol Testing Forms. -- The Contractor is responsible for completing EEO and Drug and Alcohol Testing forms required for submission to FTA.

SECTION 27. SYSTEM SECURITY AND EMERGENCY PREPAREDNESS

(a) In General. -- The Contractor is responsible for the safety and security of the passengers and capital resources assigned to it by RTC. RTC requires the Contractor to work cooperatively with RTC staff, other Contractors, local, State and Federal representatives in developing, implementing and following security procedures.

(b) Requirements. -- The Contractor will adhere to all local, State and Federal requirements for transit system safety, security, and emergency preparedness.

(c) Personnel Assignment and Certification. -- The Contractor, as part of its personnel staffing plan, will assign its Manager of Driver Development and Safety (DDS Manager) the responsibilities associated with safety, system security and emergency preparedness. In addition, the Contractor will assign one additional qualified person on its staff to act as a back-up to the DDS Manager in the event of the DDS Manager's absence or inability to perform such task.

(1) The individual(s) serving in the safety, system security and emergency preparedness position shall have sufficient training and experience to assist RTC in

coordination of emergency preparedness activities, write and amend the Contractor's supplement to the RTC's System Security and Emergency Preparedness plan, and generate required reports.

- (A) For purposes of this Section, "sufficient training" requires the successful completion of qualification as a Certified Safety Specialist (CSS) based on the U.S. Department of Transportation (USDOT) Transportation Safety Institute (TSI) program.
- (B) The Contractor may assign at the start of the Contract a DDS Manager who has not yet begun the certification process; however, the individual must complete the certification process within twelve (12) months of the Notice to Proceed. Contractor will assure the designated back-up to the DDS Manager receives the Certified Security Specialist Training within eighteen (18) month of the Notice to Proceed.
- (C) Contractor agrees to the certification requirements for any employees who replace the DDS Manager and his/her back-up during the term of the Contract.

(2) The staff person dedicated to system security and emergency preparedness shall attend monthly security group meetings and special meetings with the RTC staff, on behalf of the Contractor, or meetings with the RTC at the request of staff.

(d) Receptionist(s). -- The Contractor shall provide a receptionist at each public entrance to the Contractor's facility capable of screening visitors and trained to respond to security and emergency situations.

(e) Emergency Preparedness. -- The Contractor shall participate in activities and exercises in support of the multi-jurisdictional efforts in Clark County to meet and prepare for local emergencies. The Contractor's dedicated system security and emergency preparedness staff person shall coordinate these events with the RTC's designated security staff person.

(f) Emergency Response. -- Upon verbal or written authorization from the RTC Project Manager, the Contractor shall respond to emergency situations with Contractor personnel and RTC-owned vehicles.

(1) The Contractor is responsible for the safety of its personnel and for any worker's compensation claims that might result from performance of emergency service.

(2) The Contractor will not be responsible for damage to RTC-owned vehicles that results directly from any incident outside of the control of the Contractor while in performance of emergency service.

(3) RTC and the Contractor shall negotiate any reimbursement costs associated with emergency responses under this subsection which are not compensated by the Contract Service Hour rate.

(g) Key or Badge Control. -- RTC will provide keys to the Facilities assigned to the Contractor and will provide security access control badge equipment to all Contractor employees.

(1) The Contractor is responsible for key and badge control and shall maintain a written key and badge control log.

(2) Expenses resulting from inadequate key or badge control that requires the RTC to re-key or replace access control items shall be the responsibility of the Contractor.

(h) Self Audit. -- The Contractor shall conduct a self-audit on safety, security and emergency preparedness on any annual basis and shall participate annually in an RTC audit, based upon the APTA Bus Safety Management Program checklist included at Appendix O to this Contract. The Contractor shall assist RTC during any local, State or Federal audits.

(i) Reporting. -- The Contractor shall meet requirements for the regular reporting of information relating to system safety and security. The following is a list of required reports and the frequency of the reports. RTC will notify the Contractor of its responsibility to provide information as other reports are required by local, State or Federal agencies.

(1) Monthly

- (A) Security and Emergency Incident Report
- (B) NTD Safety and Security Report
- (C) Safety meeting agenda and minutes, including corrective actions taken as a result of items identified through the safety committee.

(2) Quarterly

- (A) Safety and Security incident trend analysis
- (B) Training sessions completed related to transit security
Classify training as either Contractor required or a Federal/State requirement

(3) Annually

- (A) Results of annual self audit
- (B) OSHA Hazard analysis
- (C) Year end trending analysis covering a three year period. (The Contractor shall report year one, and then add one year at a time through year three. After year three of the Contract, the Contractor shall report the three most current years.)

(j) RTC Notice. -- In the event that RTC, in its sole discretion, determines that the Contractor has failed to meet requirements of this Section, RTC will provide written notice to the Contractor of such failure. The Contractor shall respond to RTC's written notice within five (5) calendar days with an action plan for immediate correction of the noted deficiency(ies). Failure of the Contractor to respond within five (5) calendar days to RTC's written notice may result in the assessment of liquidated damages pursuant to Section 9(c)(10).

SECTION 28. PASSENGER INQUIRIES

(a) In General. -- The Contractor will receive calls from the general public regarding the day of service ride status for all contract services except Senior Transportation service.

(b) Staffing Levels. -- The Contractor shall maintain, at a minimum, a staffing level in accordance with its Staffing and Personnel Plan.

- (1) The Contractor shall maintain a quality standard of an acceptance rate of at

minimum 95% of calls and an average hold time not to exceed one minute.

(2) Maintaining the quality standards outlined above is the responsibility of the Contractor. If the Contractor's staffing proposal does not achieve the standards, the Contractor is required to staff up, at no additional cost to RTC, until the staffing level successfully maintains the quality standard.

(c) Call Redirection. - If callers mistakenly contact the Contractor's passenger inquiry line with the intention of registering a complaint, the Contractor's staff shall, in a professional and courteous manner, refer the caller to the RTC Customer Service Call Center. For the infrequent occasion where referral may reach a point of contention with the caller, the requirements set out in Section 29(c) will apply.

SECTION 29. CUSTOMER COMPLAINT REPORTING

(a) In General. - The RTC Customer Service unit will notify the Contractor of customer complaints that RTC receives directly. The Contractor shall address the complaints as outlined in the RTC Passenger Complaint Process set out as Appendix Q to this Contract. The Contractor shall develop an internal process to properly research, record and respond to RTC in a timely manner regarding customer complaints. RTC Customer Service staff will remain responsible for notifying customers of the resolution of complaints. The Contractor will not respond directly to the customer, unless provided expressed direction from the RTC Project Manager or his or her designee.

(b) Contractor Responsiveness. - The Contractor shall investigate, document and submit to RTC any justification regarding customer complaints. RTC will review the Contractor's response and make the final decision concerning the resolution of the complaint. The Contractor shall be responsible for making changes to procedures, retraining of operators,

and reassignment of personnel necessary to correct any actions identified through the Passenger Complaint Process.

(c) Contractor-received Complaints. -- Should Contractor personnel receive complaints from customers, the Contractor shall forward to the RTC Customer Service unit all passenger complaints within 24 hours of the Contractor's receipt of the complaint on a form approved by the RTC Project Manager. The Contractor's logging of complaints shall include a written description of the complaint and any resolution of the complaint by the Contractor.

(d) Complaint Validity. -- For purposes of this Section and the liquidated damage provision of Section 9(c)(7), RTC will consider a customer complaint valid unless RTC determines that the Contractor has sufficiently documented that the complaint is not valid.

(e) Administrative Hearing. -- In cases in which the customer complaint is unable to be resolved, RTC may conduct an Administrative Hearing in which the customer and Contractor may present their positions.

SECTION 30. NO-SHOW PROCEDURES

(a) In General. -- For the Contractor, a No-Show occurs when a Revenue Vehicle arrives on time for a pick-up and the passenger decides not to board the vehicle (No-Show at the Door), is not present at the address listed on the manifest (No-Show), or has called in to cancel the ride within a timeframe specified in the RTC's No-Show Policy (Appendix R). A Vehicle Operator who arrives within the 30 minute on-time window is required to wait for five minutes before departing and recording the trip as a No-Show.

(b) Enforcement. -- RTC enforces a No-Show Suspension Policy that requires accurate recording of No-Show occurrences. The Contractor is responsible for making every reasonable effort to verify that the ride is a valid No-Show before proceeding with the next trip

identification, and for accurately documenting the trip as a No-Show. The Vehicle Operator shall fill out and leave a No-Show Door Hanger and retrieve a copy to be reconciled with the Contractor with the manifest. The Contractor shall forward the copy to RTC.

(c) Standard Practice. — It has been standard practice to return to pick up a passenger who has been listed as a No-Show only if the passenger is at a location other than the home address except for individuals who have entered a disruptive customer status of no-pay, no-ride. The No-Show remains on the record, and the passenger is sequenced into the schedule based on the first available efficient ride.

(d) Disputes. — Disputes regarding No-Shows are processed based on the RTC Passenger Complaint Process (Appendix Q).

SECTION 31. INSURANCE

(a) Required Insurance. — Contractor shall carry and pay premiums for insurance of the types and with the limits of liability not less than stated below. Such insurance shall be maintained in effect during the term of the Contract and shall cover all events occurring during the term of the Contract (commonly known as tail coverage).

(1) Workers' Compensation Insurance covering all of Contractor's employees engaged in work under the Contract as required under the Workers' Compensation Act of the State of Nevada and/or any applicable law or laws of any other state or states. Employer's Liability Insurance with limits of liability of not less than \$100,000 per accident, \$100,000 per employee for disease, and \$500,000 policy total for disease.

(2) General Liability Insurance covering RTC's premises used for storage and maintenance of vehicles used in performance of the Contract with limits of liability of not less than \$500,000 each occurrence combined single limit and \$1,000,000 general policy

aggregate if applicable. Such liability insurance shall also include coverage for Personal Injury Liability, Contractual Liability and Liability for Independent Contractor.

(3) Automobile Liability Insurance covering all Revenue and Support Vehicles used in connection with the work performed under the Contract with limits of not less than \$5,000,000 each occurrence combined single limit for bodily injury and property damage.

(4) Automobile Physical Damage Insurance on all RTC-owned Revenue Vehicles covering collision and fire, theft, combined additional coverage with limits of liability not less than the actual cash value of the vehicle at time of loss or the cost to repair or replace with like kind and quality with deduction for depreciation. Deductibles shall not exceed \$10,000 for each loss and RTC shall be named Loss Payee under the policy. Contractor shall be responsible for payment of any loss under the deductible amount.

(b) RTC Coverage. -- RTC will be named as an additional insured for all commercial coverage for all RTC-owned or leased assets and for all liability coverage for claims arising under this Contract.

(c) Notice. -- All such policies required above shall be endorsed to provide a sixty (60) day written Notice of Cancellation, renewal, or material change to the RTC Project Manager or designee.

(d) Umbrella Policy. -- The limits of liability as required under this Section may be provided by a single policy of insurance or a combination of policies including the so-called umbrella liability policy. Self-insurance or the use of deductibles or self-insured retentions shall not be considered as complying with these requirements unless approved in writing by the RTC Project Manager.

(e) Minimum Insurance Requirements. -- The types of insurance and limits of liability stated in this Section are the minimum acceptable to RTC and shall in no way be

construed as a limitation of Contractor's liabilities and obligations arising out of the performance of the Contract.

(f) Subcontractors. -- The Contractor shall require any and all subcontractors performing work under the Contract to carry insurance to the types and with limits of liability as the Contractor shall deem appropriate and adequate. The Contractor shall obtain and make available for inspection by the RTC Project Manager upon request Certificates of Insurance evidencing insurance coverages carried by such subcontractors.

(g) RTC Approval. -- All insurance required to be maintained or provided by the Contractor and subcontractors shall be with companies and through policies approved by the RTC Project Manager. The RTC Project Manager has the right to inspect in person, prior to commencement of the work, all of the Contractor's insurance policies in regard to required insurance coverages. All such Insurance Companies shall carry a Best's rating of A+ (or equivalent) and be licensed by the State of Nevada.

(h) Copies of Policies. -- Proof that such insurance coverage exists as required above shall be furnished to the RTC in the form of certificates of insurance within fifteen (15) calendar days following notice of award. Renewal or replacement policies shall be furnished fifteen (15) days prior to the expiration date or termination date of any policy furnished in compliance with the requirements of the Contract.

(i) RTC Purchase of Insurance. -- If at any time during the Contract term the Contractor fails to provide proof of insurance required above, RTC reserves the right, but not the obligation, to purchase other insurance to protect the RTC's interests and to withhold from Contractor's payments the cost of such insurance.

SECTION 32. AUDIT AND INSPECTION OF RECORDS

(a) In General. -- The Contractor agrees that RTC, the Comptroller General of the United States, and the U.S. Secretary of Transportation, or any of their duly authorized representatives, shall, for the purpose of audit and examination, be permitted to inspect all work, materials, payrolls, and other data and records, and to audit the books, records, and accounts relating to the performance of the Contract.

(1) Inspection of records will be conducted during regular business hours and on site at the local administrative offices of the Contractor. If the Contractor retains records in a location other than its local administrative offices, the Contractor will have five (5) calendar days in which to return the records to its local administrative office.

(2) The Contractor is further required to maintain all required records on site in a location(s) in the Las Vegas metropolitan area for at least three (3) years after RTC has made final payment and all other pending matters are closed, provided, however, that the Contractor may destroy paper manifests by shredding once RTC informs the Contractor that the manifests in question are no longer needed due to the completion of an FTA Triennial Review.

(b) RTC Audits. -- The RTC Project Manager may, at any time, conduct an audit of any and/or all records kept by the Contractor that are directly or indirectly related to the services provided under the Contract. Appropriate financial adjustments shall be made by the RTC Project Manager based upon any inconsistency, irregularity, discrepancy or unsubstantiated billing revealed as a result of such audit and for the amount of any liquidated damages assessed under Section 9 of this Contract. Any overpayment uncovered in such an audit may be charged against the Contractor's future invoices.

SECTION 33. OWNERSHIP OF DOCUMENTS

The Contractor agrees that any and all information, in oral or written form, whether obtained from RTC, its agents or assigns, or other sources, or generated by the Contractor pursuant to the Contract, shall not be used for any purpose other than fulfilling the requirements of the Contract. Any documents, reports, or data generated by the Contractor in connection with the performance of the Contract shall become the sole property of RTC, subject to any rights asserted by the FTA. The Contractor may retain copies of such items for its files. The Contractor shall not release any documents, reports, or data from this project without prior written consent of RTC.

SECTION 34. CONTINUITY OF SERVICES

(a) In General. - The Contractor recognizes that the services under the Contract are vital to RTC and must be continued without interruption and that, upon Contract termination, another entity, either RTC or another provider, may continue those services. The Contractor agrees to:

- (1) Furnish phase-in training; and
- (2) Exercise its best efforts and cooperate to effect an orderly and efficient transition to the subsequent provider.

(b) Transition Requirements. - The Contractor shall, upon the RTC Project Manager's written notice:

- (1) Furnish phase-in, phase-out services for up to 120 days after the Contract terminates;
- (2) Work with the RTC Project Manager and the subsequent Service Provider to

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develop a plan to transfer responsibilities for the RTC Facilities and vehicle operations. The plan shall specify a training program and a date for transferring responsibilities for each division of work described in the plan, and shall be subject to the RTC Project Manager's approval; and

(3) Provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by the Contract are maintained at the required level of proficiency.

(c) Compensation. -- The Contractor shall be reimbursed for all reasonable RTC approved phase-in, phase-out costs that are incurred and not compensated by the RTC in the Service Hour method of compensation, within the agreed period of time after Contract termination that directly result from phase-in, phase-out operations.

SECTION 35. PERFORMANCE REQUIREMENT

The Contractor shall, at all times during the term of the Contract, perform all work diligently, carefully, and in a professional manner; and shall furnish all labor, supervision, machinery, equipment, material and supplies necessary therefore. Notwithstanding the provision of drawings, technical specifications or other data by the RTC, the Contractor shall have the responsibility of supplying all items and details required to perform the services specified in this Contract. The Contractor shall conduct all work in the Contractor's own name and as an independent contractor (as provided in Section 40), and not in the name of, or as an agent for, RTC.

SECTION 36. HOLD HARMLESS

The Contractor agrees to protect, defend, indemnify and hold RTC, its officers,

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employees and agents, free and harmless from and against any and all losses, penalties, damages, settlements, costs, charges, professional fees or other expenses or liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings or causes of action of every kind and character (hereinafter collectively "claims") in connection with or arising directly or indirectly from the Contractor's failure to perform in accordance with the terms of this Contract, or a failure to perform in accordance with the terms of this Contract by any subcontractor of the Contractor. Without limiting the generality of the foregoing, any and all such claims, relating to personal injury, infringement of any patent, trademark, copyright (or application for any thereof) or of any other tangible or intangible personal or property right, other than for software provided by RTC, or actual or alleged violation of any other tangible or intangible personal or property right, or actual or alleged violation of any applicable statute, ordinance, administrative order, rule or regulation, except for violations caused by compliance with RTC's procedures or policy following a judicial or Federal administrative finding that such RTC procedure or policy violate applicable statute, ordinance, administrative order, rule, or regulation or decree of any court, shall be included in the indemnity hereunder. The Contractor further agrees to investigate, handle, respond to, provide defense for, and defend any such claims, at its sole expense and agrees to bear all other costs and expenses related thereto, whether or not it is alleged or determined that the Contractor was negligent, and without regard to whether such claim is groundless, false, or fraudulent.

SECTION 37. DISCLAIMER OF LIABILITY

RTC will not hold harmless or indemnify the Contractor for any liability whatsoever.

SECTION 38. DISPUTES

(a) **In General.** -- Any dispute between the Contractor and RTC relating to the implementation, interpretation, or administration of this Contract shall be resolved in accordance with this Section.

(b) **Informal Resolution.** -- The parties shall first attempt to resolve the dispute informally in meetings or communications between the Contractor and the RTC Project Manager. If the dispute remains unresolved fifteen (15) days after it first arises, the Contractor may request the RTC General Manager to issue a recommended decision on the matter in dispute. The RTC General Manager shall issue the recommended decision in writing and provide a copy to the Contractor.

(c) **Review by RTC Governing Body.** -- The recommended decision of the RTC General Manager shall become final unless, within fifteen (15) days of receipt of such recommended decision, the Contractor submits a written request for review to the RTC Governing Body. In connection with any such review, the Contractor and the RTC General Manager shall be afforded an opportunity to be heard and to offer evidence on the issues presented. If the dispute remains unresolved to the satisfaction of either party after review by the RTC Governing Body, either party may seek judicial resolution of the dispute in the Eighth Judicial District Court of Nevada or in a Federal District Court in Nevada.

(d) **Contractor Responsibility.** -- Pending final resolution of a dispute under this Section, the Contractor shall proceed diligently with performance in accordance with the Contract and the RTC General Manager's recommended decision.

SECTION 39. SUBCONTRACTING OF CONTRACT AND TRANSFER OF INTERESTS

(a) In General. -- This Contract or any portion thereof shall not be assigned, subcontracted nor the interests, rights, duties or responsibilities of the Contractor transferred unless RTC, in its sole discretion, grants prior written approval. The prohibitions of this provision extend to any merger, acquisition, or consolidation involving the Contractor which would cause its responsibilities under the Contract to be transferred to or be assumed by a new, different, or restructured entity. In any case in which the Contractor desires to subcontract, it shall provide RTC with all proposed subcontracting agreements and documents (including scope of work and terms of compensation). If permitted to subcontract, the Contractor shall be fully responsible for all work performed by the subcontractors.

(b) Effect of Subcontracting. -- The Contractor may not, by subcontract, modify its obligation to perform in full accordance with its Proposal and its BAFO, change its key personnel, alter its maintenance, training or safety programs, or otherwise modify the basis upon which the Contractor was selected and Contract award made. Any action of the Contractor in violation of the preceding sentence shall constitute a breach of the Contract and an act of default. Further, the entering into of a subcontract shall not, under any circumstances, relieve the Contractor of its liability and obligations under the Contract, and all transactions with RTC must be through the Contractor.

(c) Privity. -- Any approval of a subcontract shall not be construed as making RTC a party of such subcontract, giving the subcontractor privity of contract with RTC, or subjecting RTC to liability of any kind to any subcontractor.

(d) Incorporations. -- The Contractor shall incorporate in each subcontract provisions of Sections 42 through 57 of this Contract in full, with the same conditions being imposed upon subsequent subcontractors.

SECTION 40. INDEPENDENT CONTRACTOR

Under the terms of the Contract, the Contractor is an independent contractor and has and retains full control and supervision of the services performed by and full control over the employment and direct compensation and discharge of all persons, other than RTC employees or representatives, assisting in the performance of its services. The Contractor agrees to be solely responsible for all matters relating to wages, hours of work, and working conditions and payment of employees (including the negotiation of labor agreements, if applicable), and for compliance with social security, all payroll taxes and withholdings, unemployment compensation, and all other requirements relating to such matters. The Contractor agrees to be responsible for its own acts and those of its subordinates, employees, and any and all subcontractors during the term of this Contract. The Contractor is required to comply fully with the workers' compensation laws of the State of Nevada as applied to the Contractor and its employees and is required to indemnify and hold RTC harmless for any failure to comply with such laws.

SECTION 41. LICENSING, PERMITS, AND TAXES

The Contractor shall be properly licensed for the services required as a result of the Contract. The cost for any required licenses or permits shall be the responsibility of the Contractor. The Contractor is liable for any and all taxes due as a result of performance of services under the Contract.

SECTION 42. CONFLICT OF INTEREST

(a) Requirement. — No member of the RTC Governing Body or employee, officer or agent of the RTC shall participate in the selection, or in the award or administration, of the

Contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when one of the following has a financial or other interest in any firm proposing on or selected for the award:

- (1) The Governing Body member or the employee, officer or agent;
- (2) Any member of the Governing Body member's, employee's officer's or agent's immediate family;
- (3) The Governing Body member's, employee's, officer's or agent's business partner;
or
- (4) an organization which employs, or is about to employ, any of the above.

(b) Prohibition on Gratuities. – Members of RTC's Governing Body and/or employees, officers, or agents shall neither solicit, demand, nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, subcontractors, or other parties to sub-agreements whereby the intent could reasonably be inferred as influencing the individual in the performance of his or her duties or as intended as a reward for any official act on his or her part.

SECTION 43. ORGANIZATIONAL CONFLICT OF INTEREST

(a) In General. – RTC seeks to eliminate and avoid actual or perceived conflicts of interest and unethical conduct by current or former RTC employees in transactions with RTC.

- (1) Consistent with this concept, no current or former RTC employee may Contract with, influence, advocate, advise, or consult with a third party about an RTC transaction, or assist with the preparation of Proposals submitted to RTC while employed by RTC or within one (1) year after leaving RTC's employment if he or she was substantially

involved in determining the work to be done or process to be followed while an RTC employee.

(2) All bidders, Proposers, vendors, or Contractors who anticipate contracting with RTC must identify in their proposal submission, such current or former RTC employees involved in preparation of bids or proposals or the anticipated performance of work or services if awarded the Contract. Failure to identify former RTC employees involved in this transaction may result in RTC denying or terminating this Contract.

(b) Required Notice. -- Prior to entering into this Contract, the Contractor is (was) required to inform RTC of any real or apparent organizational conflict of interest. Such organizational conflict of interest exists when the nature of the work to be performed under a contract may, without some restriction on future activities, result in an unfair competitive advantage to the Contractor, or may impact the Contractor's objectivity in performing the Contract work.

SECTION 44. INTERESTS OF MEMBERS OF, OR DELEGATES TO, CONGRESS

In accordance with 18 U.S.C. Section 431, no member of, or delegate to, the Congress of the United States shall be admitted to any share or part of the Contract or to any benefit arising therefrom.

SECTION 45. INSPECTION OF WORK

(a) Right to Inspect. -- All work (which term in this Section includes services performed, material furnished or utilized in the performance of services, and workmanship in the performance of services) shall be subject to inspection and test by RTC to the extent practicable at all times and places during the term of this Contract. All inspections by RTC shall be made in such a manner as to not unduly delay the work. RTC shall have the right to

enter the premises used by the Contractor for the purpose of inspecting and auditing all data and records that pertain to the Contractor's performance under the Contract. RTC shall also have the right to enter the premises used by the Contractor for the purpose of inspecting vehicles that are used to provide services under the Contract.

(b) Corrections and Adjustments. – If any work performed is not in conformity with the requirements of this Contract (excluding performance of service hours), RTC shall have the right to require the Contractor to perform the work again in conformity with such requirements at no increase in the total Contract amount. In the event the Contractor fails promptly to perform the work again or take necessary steps to ensure future performance of the work in conformity with the requirements of the Contract, the RTC shall have the right, either by contract or otherwise, to have the work performed in conformity with the Contract requirements and charge to the Contractor any costs to RTC that are directly related to the performance of such work, or terminate the Contract for default as provided in Section 61 of this Contract. When the work to be performed is of such a nature that the defect cannot be corrected by re-performing the work, RTC shall have the right to (1) require the Contractor to immediately take all necessary steps to ensure future performance of the work in conformity with the requirements of the Contract, and (2) reduce the Contract price to reflect the reduced value of the work performed.

SECTION 46. DEBARMENT AND SUSPENSION STATUS

The Contractor shall provide RTC with a certification addressing its debarment and suspension status and that of its principals. The Contractor shall inform RTC of any change in the suspension or debarment status of the Contractor or its principals during the term of the Contract within ten (10) days of any such change.

SECTION 47. ANTI-DISCRIMINATION CLAUSE

The Contractor shall not in any way, directly or indirectly, in the performance of the Contract, discriminate against any person because of age, race, color, disability, sex, national origin, or religious creed.

SECTION 48. EQUAL EMPLOYMENT OPPORTUNITY

With respect to the employees of the Contractor involved in the performance of the Contract whose regular place of employment is located in Clark County in the State of Nevada, the Contractor shall comply with the equal opportunity provisions of the Civil Rights Act of 1964, as amended, and, with respect to such employees, shall adopt an affirmative action plan that complies with Executive Orders Numbers 11375 and 11246 as amended as supplemented in the Department of Labor Regulations 41 C.F.R. Part 60 and of the rules, regulations, and relevant orders of the Secretary of Labor. In connection with the performance of the Contract, the Contractor shall not discriminate against any employee or applicant for employment because of race, religion, color, age, disability, sex or national origin. The Contractor shall take affirmative action to ensure that applicants are employed and treated during their employment without regard to their race, religion, color, age, disability, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeship. The Contractor further agrees to insert a similar provision in all subcontracts.

SECTION 49. AMERICANS WITH DISABILITIES ACT

The Contractor shall comply with all provisions of the Americans with Disabilities Act

of 1990 (P.L. No. 101-336) and Section 504 of the Rehabilitation Act of 1973 (P.L. No. 93-112).

SECTION 50. ENERGY EFFICIENCY

The Contractor shall recognize the mandatory standards and policies relating to energy efficiency that are contained in the State Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. §6321 et seq.).

SECTION 51. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The Contractor shall comply with the provisions under the Contract Work Hours and Safety Standards Act (40 U.S.C. §327-330) as supplemented by Department of Labor regulations (29 C.F.R. Part 5).

SECTION 52. BUY AMERICA

The Contractor shall comply with the applicable Buy America requirements set forth in 49 U.S.C. §5323(j) and the applicable regulations in 49 C.F.R. Part 661, as amended. If the Contractor procures any capital items with Federal funds, it is the Contractor's responsibility to obtain the Buy America certification required under such regulations.

SECTION 53. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

(a) **Federal Policy.** - It is the policy of RTC that DBEs as defined in 49 C.F.R. Part 26 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this Contract. Consequently, the DBE requirements of 49 C.F.R. Part 26 may apply to the Contract.

(b) Agreement. -- The Contractor agrees to ensure that DBEs as defined in 49 C.F.R. Part 26 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under the Contract. In this regard, the Contractor shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform contracts.

(c) Nondiscrimination. -- The Contractor shall not discriminate on the basis of race, color, national origin, physical or mental disability, or sex in the award and performance of contracts assisted by the U.S. Department of Transportation.

(d) Compliance. -- The Contract shall be performed in accordance with the RTC's Disadvantaged Business Enterprise Program adopted August 12, 1999, as amended through February 14, 2002.

SECTION 54. SECTION 13(c) OBLIGATIONS

(a) In General. -- Except as provided in subsection B of this Section, RTC shall be administratively and financially responsible for obligations under Section 13(c) of the Federal Transit Act (49 U.S.C. §5333(b)).

(b) Contractor Obligations. -- The Contractor shall have financial liability for any 13(c) claims or obligations that are created by acts or omissions of the Contractor that are not directed by RTC, and shall also be obligated to comply with any applicable preference in hiring obligations imposed under Section 13(c). In addition, the Contractor shall cooperate with RTC (including the provision of payroll records and other information) in the resolution or defense of any 13(c) claims or disputes for which RTC has responsibility.

(c) Prohibition. -- The Contractor shall not assist or encourage any employee to file

or otherwise pursue a 13(c) claim against RTC, or take any action which is contrary to the interests of RTC under 13(c) or its 13(c) arrangements or agreements, relating to the termination of services under the Contract, any future transition from the Contractor to another service provider, or any other action or event relating to the Contract. If the Contractor fails to comply with this obligation, the Contractor shall be financially liable for all costs incurred by RTC (including attorneys' fees) associated with any 13(c) claims or delays in the receipt of Federal grants.

(d) Future Transitions. -- In the event of a future transition to another service provider, the employees employed by the Contractor for the performance of work under this Contract shall not have any right to guaranteed jobs with that subsequent service provider, nor shall that service provider have any obligation to assume the existing terms and conditions of employment or to recognize the existing union.

SECTION 55. FTA TITLE VI SERVICE STANDARDS

The Contractor agrees to meet RTC's service standards developed in compliance with FTA Circular 4702.1 implementing Title VI of the Civil Rights Act of 1964. Title VI service standards include a minimum of five elements: (1) Vehicle Load; (2) Vehicle Assignment; (3) Vehicle Headway; (4) Distribution of Transit Amenities; and (5) Transit Access.

SECTION 56. ENVIRONMENTAL REQUIREMENTS

The Contractor agrees to comply with any Federal environmental and resource conservation requirements that are in effect during the term of the Contract. The Contractor shall report any violation of standards, orders or regulations issued under the Clean Air Act (42 U.S.C. §7401 *et seq.*) or the Federal Water Pollution Control Act (33 U.S.C. §1251 *et seq.*)

)

resulting from any activity of the Contractor in connection with the performance of the Contract to FTA and to the appropriate U.S. EPA Regional Office. The Contractor shall be responsible for the disposal of hazardous materials, including, but not limited to, waste oil, grease, automatic transmission fluid, diesel fuel and detergents, in accordance with applicable Federal, State and local law and regulations.

SECTION 57. COMPLIANCE WITH LAWS AND PERMITS

The Contractor shall give all notices and comply with all existing and future Federal, State, and local laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Contract, including, but not limited to, the laws referred to in these provisions of the Contract and in the other contract documents. If the Contract documents are at variance therewith in any respect, any necessary changes shall be incorporated by appropriate modification. Upon request, the Contractor shall furnish to the RTC Project Manager certificates of compliance with all such laws, orders, and regulations.

SECTION 58. CANCELLATION OF CONTRACT

In any of the following cases, RTC shall have the right to cancel this Contract without expense to RTC: (1) the Contractor is guilty of misrepresentation; (2) this Contract was obtained by fraud, collusion, conspiracy, or other unlawful means; or (3) this Contract conflicts with any statutory or constitutional provision of the State of Nevada or the United States. This Section shall not be construed to limit RTC's right to terminate this Contract for convenience or default, as provided in Sections 59 and 61, respectively.

SECTION 59. TERMINATION FOR CONVENIENCE

(a) In General. -- The performance of work under this Contract may be terminated by RTC in accordance with this Section whenever the RTC Governing Body determines, upon recommendation of the RTC General Manager, that such termination is in the best interest of RTC. Any such termination shall be effected by delivery to the Contractor of a notice of termination specifying the extent to which performance of work under the Contract is terminated and the date upon which such termination becomes effective.

(b) Actions Following Notice. -- Upon receipt of a notice of termination, and except as otherwise directed by the RTC Project Manager, the Contractor shall: (1) stop work under the Contract on the date and to the extent specified in the notice of termination; (2) place no further orders or subcontracts for materials, services, or Facilities, except as may be necessary for completion of such portion of the work under the Contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination; (4) assign to RTC in the manner, at the times, and to the extent directed by the RTC Project Manager, all of the right, title and interest of the Contractor under the orders and subcontracts so terminated; (5) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of RTC, to the extent the RTC Project Manager may require, which approval or ratification shall be final for all the purposes of this Section ; (6) transfer title to RTC and deliver in the manner, at the times, and to the extent, if any, directed by the RTC Project Manager, supplies, equipment, and other material produced as a part of, or acquired in connection with the performance of, the work terminated, and any information and other property which, if the Contract had been completed, would have been required to be furnished to RTC; (7) complete any such part of the work as shall not have been terminated by the notice of termination; and (8) take such action as may be necessary, or as the RTC Project

Manager may direct, for the protection and preservation of the property related to the Contract which is in the possession of the Contractor and in which RTC has or may acquire an interest. Payments by RTC to the Contractor shall be made by the date of termination but not thereafter. Except as otherwise provided, settlement of claims by the Contractor under this Section shall be in accordance with the provisions set forth in 48 C.F.R. Part 49, as amended.

SECTION 60. TERMINATION BY MUTUAL AGREEMENT

This Contract may be terminated by mutual agreement of the parties. Such termination shall be effective in accordance with a written agreement by the parties. Any other act of termination shall be in accordance with the termination by convenience or default provisions contained in Sections 59 and 61, respectively.

SECTION 61. TERMINATION FOR DEFAULT

(a) In General. -- Subject to the provisions of subsection (c) of this Section, RTC may, by thirty (30)-day advance written notice of default to the Contractor, during which time the Contractor shall have the opportunity to cure the default in accordance with the provisions of subsection (c), terminate the Contract in any one of the following circumstances:

(1) If the Contractor fails to provide the services in the manner required by this Contract or in accordance with the performance standards articulated herein;

(2) If the Contractor fails to perform any of the provisions of this Contract in accordance with its terms; or

(3) If the Contractor fails to make progress in the prosecution of the work under this Contract so as to endanger such performance.

(b) Procurement by RTC. -- In the event that RTC terminates this Contract in

whole or in part as provided in subsection (a) of this Section, RTC may procure, upon such terms and in such manner as the RTC General Manager may deem appropriate, supplies or services similar to those so terminated. The Contractor shall be liable to RTC for costs associated with the termination of this Contract, the procurement of replacement services by RTC, any excess costs of such similar supplies or services, and any increase in the total Contract cost or the hourly rate as a result of the reprourement of services from the date of termination to the expiration date of the original Contract. The Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this section. Any disputes arising under this Section that cannot be resolved by the Contractor and RTC are subject to resolution pursuant to Section 38.

(c) Opportunity to Cure. -- The Contractor will be given the opportunity to cure any such default within thirty (30) day advanced written notice period, or such other longer period as the RTC General Manager, or his designee, may authorize in writing, after receipt of notice from RTC specifying the occurrence of such default.

(d) Claims. -- Except as otherwise provided, settlement of claims by the Contractor under this section shall be in accordance with the provisions set forth in 48 C.F.R. Part 49, as amended.

SECTION 62. FORCE MAJEURE

The Contractor shall not be liable for any failure to perform if convincing evidence has been submitted to RTC that failure to perform this Contract was due to causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God, civil disturbances, fire, war, or floods, but do not include labor-related incidents, such as strikes or work stoppages.

SECTION 63. REPLACEMENT SERVICES

(a) RTC Option. -- In the event that the Contractor is unable, due to a strike, work stoppage, or other event not caused by RTC and not covered by Section 62, to provide services in full compliance with the requirements for the Contract, the RTC may, in lieu of finding the Contractor in default, obtain the services of a replacement operator or provide the services with its own resources (collectively referred to as "replacement services"). RTC may utilize such replacement service as a substitute for all or any part of the Contractor's services, and may maintain such replacement services in effect until the Contractor is able to resume performance in full compliance with the Contract. Prior to implementing replacement services, RTC shall notify the Contractor in writing and provide the Contractor with three (3) days to cure its noncompliance.

(b) Costs. -- If RTC utilizes replacement services under this Section, the Contractor shall be liable to RTC for the actual amount by which the cost of such services exceeds the amount that would have been payable under this Contract for comparable services, including any expenses (including internal administrative costs) incurred by RTC in soliciting and obtaining those services. In addition, the only compensation payable to the Contractor by RTC during any period in which replacement services are being provided shall be for any hours of service actually provided by the Contractor.

(c) Default. -- Any actions taken by RTC pursuant to this section relating to the Contractor's failure to perform shall not preclude RTC from subsequently finding the Contractor in default for the same or any related failure to perform.

SECTION 64. LACK OF FUNDS CLAUSE

(a) In General. -- The entering into of the Contract by RTC is subject to its receipt of local and Federal funds adequate to carry out the provisions of the Contract in full.

(b) Cancellation or Reductions. -- RTC may cancel or reduce the amount of service to be rendered if the RTC Project Manager determines that such action is in RTC's best interests, or that there will be a lack of funding available for the service. In such event, RTC will notify the Contractor in writing thirty (30) days in advance of the date such cancellation or reduction is to be effective. In the event of a termination under this subsection, Contractor's claims shall be dealt with in accordance with Section 59.

SECTION 65. WAIVER OF TERMS AND CONDITIONS

The failure of RTC or the Contractor to enforce one or more of the terms or conditions of this Contract or to exercise any of its rights or privileges, or the waiver by RTC of any breach of such terms or conditions, shall not be construed as thereafter waiving any such terms, conditions, rights, or privileges, and the same shall continue and remain in force and effect as if no waiver had occurred.

SECTION 66. INTERPRETATION, JURISDICTION, AND VENUE

All contractual agreements shall be subject to, governed by, and construed and interpreted solely according to the laws of the State of Nevada. The Contractor hereby consents and submits to the jurisdiction of the appropriate courts of Nevada or of the United States having jurisdiction in Nevada for adjudication of any suit or cause of action arising under or in connection with the Contract documents, or the performance of such Contract, and agrees that any such suit or cause of action may be brought in any such court.

SECTION 67. SEVERABILITY

In the event any provision of this Contract is declared or determined to be unlawful, invalid, or unconstitutional, such declaration shall not affect, in any manner, the legality of the remaining provisions of the Contract and each provision of the Contract will be and is deemed to be separate and severable from each other provision.

SECTION 68. OFFICIAL RECEIPT

Communications shall be considered received at the time actually received by the addressee or designated agent. Communications to RTC should be addressed to RTC Project Manager, as follows:

Susan S. Joseph
RTC Project Manager
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

Communications to the Contractor shall be addressed as follows:

Susan Spry
West Area Vice President
Laidlaw Transit Services, Inc.
15260 West Ventura Blvd., Suite 1050
Sherman Oaks, CA 91403

Notices or communications related to Sections 36, 38, 41, 54, 57 and 59-64 shall also be address to:

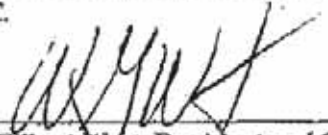
Linda Polling
Senior Purchasing Analyst
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

Beverly Wyckoff
Vice-President and General Counsel
Laidlaw Transit Services, Inc.
55 Shuman Blvd., Suite 400
Naperville, IL 60053

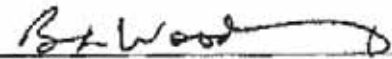
IN WITNESS WHEREOF, the parties have executed this Contract on the day and year

first above written.

LAIDLAW TRANSIT SERVICES,
INC.


W. Gilbert West, President and CEO

REGIONAL TRANSPORTATION
COMMISSION OF SOUTHERN NEVADA


Bruce L. Woodbury, Chairman

APPROVED AS TO FORM:


Zev Rapson, General Counsel

ATTEST:


Toni Michener, Executive Assistant

SECOND AMENDMENT TO THE CONTRACT FOR SPECIALIZED SERVICES

This second Amendment to the Contract for Specialized Services is made and entered into on September 10, 2009 by and between the Regional Transportation Commission of Southern Nevada (RTC) and First Transit, Inc. (Contractor), a corporation authorized to do business in the State of Nevada.

RECITALS

WHEREAS, the RTC and the Contractor entered into a Contract for Operation and Maintenance of Specialized Services (Contract) on March 8, 2007, and entered into an amendment to the Contract December 11, 2008;

WHEREAS, the current economic circumstances facing the RTC, particularly the decline in sales tax revenues, have made it urgent for the RTC to find ways and means to reduce the costs of its specialized services system;

WHEREAS, to address this situation, the RTC and the Contractor have agreed to amend the Contract to make certain reductions in the base service hour rate billed by the Contractor and to approve exercising, through this Amendment, Option Period 1 (Two Years), as outlined in Sections 3 (b) and 4 (c) of the contract; and

WHEREAS, the Parties also desire to make certain technical and conforming changes to the Contract:

NOW, THEREFORE, in consideration of the above and mutual promises hereinafter set forth, the RTC and the Contractor have agreed as follows:

SECTION 1 TERM OF CONTRACT

(a) Option Period 1. – The RTC and the Contractor agree to exercise the first 2-year option period which shall commence July 1, 2010 and end on June 30, 2012. This options period shall represent Contract Year 4 (July 1, 2010- June 30, 2011) and Contract Year 5 (July 1, 2011- June 30, 2012).

(b) Invoices and Payments. – The RTC agrees to pay the Contractor for Option

Period 1 the price stated in Section 3 of this Amendment.

SECTION 2 REDUCTION IN MONTHLY BASE CONTRACT COST

(a) Revised Service Hour Rate. -- For Contract Year 3, beginning July 1, 2009, through six additional months of Contract Year 4 (December 31, 2010), the Contractor agrees that the amount of each monthly invoice submitted to the RTC under the Contract will be calculated on a revised base service hour rate equal to the service hour rate in effect in Contract Year 2. After the 18 month period, wherein the service hour rate has remained at the Contract Year 2 rate, the Contract Year 2 rate will be increased by 3% for the balance of Contract Year 4 (January 1, 2011 to June 30, 2011). The service hour rate in Contract Year 5 will revert to the original Contract rate for Contract Year 5 as stated in Section 4 (a) of the Contract.

(b) Suspension of Certain Requirements. -- In consideration for the base service hour reduction under Section 1(a) of the Amendment, the Contractor shall, for the period of such reduction, be relieved of certain program elements and requirements set forth in the Contract or in the Contractor's plans and programs, as follows:

- (1) **Administrative Staffing:** Remove the position of Recruiter and eliminate 1.5 full time equivalents Trip Editor Personnel by transferring responsibility for CATSTAR trip edit to the RTC.
- (2) **Sunset Maintenance Facility:** Eliminate the position of Terminal Manager and remove the costs associated with facility maintenance.
- (3) **Training Program:** Adjust the hours of Vehicle Operator training to 62 hours, as defined in Exhibit 1.
- (4) **Tool Allowance:** Reduce the amount of budgeted maintenance tool allowance by the sum of \$7,000.00 annually.
- (5) **Liquidated Damages:**
 - a. RTC will comply with Section 9 as set forth in the Contract, but agrees to only deduct assessments for liquidated damages from the Contractor's invoice after the assessment value for the Contract year has exceeded an amount of \$67,000.00 annually.

b. Section 9(c)(4)(B) of the Contract will reflect that Preventive Maintenance Inspections (PMI) are still required every 3,000 miles as per the stated Contractor's maintenance plan, but RTC will only assess vehicles where mileage exceeds 3,300 miles between PMI.

(c) Vehicle Replacement Adjustment -- If RTC is unable to meet its original vehicle replacement schedule as outlined in its Request for Proposal (RFP), a variable service hour rate adjustment will be applied to the service hour rate by vehicle series range. The adjusted service hour rate by vehicle series range will be:

<u>VEHICLE RANGE</u>	<u>YEAR 3</u>	<u>YEAR 4</u>	<u>YEAR 5</u>
1500-1592	\$53.71	\$53.72	No adjustment
1600-1614	\$53.64	\$53.66	No adjustment
1400-1450	No adjustment	\$53.70	No adjustment

(d) Reservation -- Nothing in this Section shall be construed as affecting the right of the RTC to include any of the suspended standards or requirements listed in subsection (b) into a future RFP for Specialized Services or into any future agreement with the Contractor or any other provider.

(e) Reversal of Cost Adjustments -- The Cost Adjustments outlined in subsection (b) will terminate in Year 5 of the Contract. Any early adjustment to the reduced base service hour rate defined in Section 2 (a) of the Amendment, due to improvements in the economic environment, shall be accompanied by the re-instatement, as appropriate, of the standards and requirements suspended under subsection (b).

SECTION 3 REVISED COST OF SERVICE

(a) Rate of Compensation -- The rate of compensation schedule in Section 4(a) of the Contract is amended to read as follows:

CONTRACT YEAR 3 -- July 1, 2009 to June 30, 2010

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
527,771 to 579,806	\$53.19

OPTION PERIOD 1 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>CONTRACT YEAR 4 -</u>	<u>July 1, 2010 to December 31, 2010</u>
558,815 to 613, 995	\$53.19
	<u>January 1, 2011 to June 30, 2011</u>
	\$54.79
<u>CONTRACT YEAR 5 -</u>	<u>July 1, 2011 to June 30, 2012</u>
592,651 to 651,186	\$56.79

(b) In the event that RTC activates into the Specialized Services fleet vehicles returned by the City of Las Vegas City Ride program, RTC agrees to open discussions on the service hour rate adjustment outlined in Section 1 (c) of this Amendment.

SECTION 4 PROVISION OF TIRES

(a) RTC has determined that it is in the public interest to transfer the responsibility for provision of tires to the Contractor. Section 22 (o) of the Contract shall be replaced in its entirety with the following language:

(o) **Tires** - Contractor shall supply vehicle manufacturer specified (or approved equal) tires for RTC-owned vehicles. Contractor shall comply with its tire supplier's tire control procedures.

(1) Re-treads or re-manufactured tires are not permitted. The Contractor will only use new tires.

(2) Abused, damaged or alignment-worn tires shall be identified and immediately changed by the Contractor.

(3) It shall be the responsibility of the Contractor to ensure that all wheels are properly maintained. Damaged rims shall be the responsibility of the Contractor.

(4) The Contractor shall also be responsible for maintaining the appearance of wheels. Both steel and aluminum wheels shall be polished on a regular basis.

As consideration of the additional expense transferred to the Contractor through subsection (a), an amount of 36 cents per service hour shall be added to the base service hour rate for each of the remaining years of the Contract, starting with Contract Year 3, including Option Period 1 (Two Years) and, if exercised by the RTC, Option Period 2 (Two Years).

SECTION 5 TECHNICAL CHANGES

(a) First Transit Info-Manager Software and Support

a. Revise Section 2 (d) (6) to add

(l) Contractor will supply RTC with access to and training in First Transit's Info-Manager software component for enhanced dispatching and reporting analysis for Trapeze Software.

b. Revise Section 2 (d) (6) (G) to add,

"Assure compliance with RTC's Internet Usage policy by Contractor employees who utilize RTC's directly-connected host computer system."

(b) Liquidated Damages -

a. Apply Exhibit 2 of the Amendment (Trip Edit Accuracy Standards) to Section 9 (c) (9) (B) of the Contract.

b. Add to Section 9 (c) a new subsection, described as follows:

(13) Failure to Report a Vehicle Camera System Malfunction

(A) For any Revenue Vehicle in which the RTC installed Camera System is not in working condition during or at the end of a Vehicle Operator's run and the Vehicle Operator does not provide a same day report of the malfunction to Contractor IT staff, the RTC will assess liquidated damages in the amount of \$250.00 for each occurrence.

(B) The Contractor IT staff will have 3 days in which to report the Camera system malfunction to the RTC. Failure to report the malfunction as prescribed will result in a liquidated damage of \$100.00 per day of non-compliance.

(c) Radio Dispatcher Training - Section 17 (b) shall be amended to add,

(b) (8) First Transit Info-Manager dispatching and reporting analysis software.

(d) Customer Service Inquiry -- Section 17A will be added to the Contract.

SECTION 17A CUSTOMER SERVICE REPRESENTATIVES

(a) In General. -- The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to answer customer inquiries on ride status and to work with the Specialized Services reservation, scheduling and dispatch software. Customer Service Representatives (CSR) shall work closely with RTC Reservation Center personnel to satisfactorily resolve same day trip modifications, schedule same day trip requests, and shall provide prompt and accurate responses to trip inquiries of each day's scheduled passengers.

(b) Training. -- All CSR personnel are required to complete the Contractor's Training Program and shall also maintain ongoing training requirements for passenger inquiry staff. Training programs shall contain, at a minimum, the following components:

- (1) CATCOM radio communications and Specialized Services reservation, scheduling and dispatch software.
- (2) Local geography familiarization.
- (3) RTC rider and operations policies.
- (4) Customer courtesy and problem resolution.
- (5) ADA sensitivity and legal requirements
- (6) First Transit's Info-Manager software

(c) Drug and Alcohol Testing. -- All CSRs shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of the Contract

(e) Spare Ratio -- Revise the scheduling spare ratio in Section 22 (p) to 20%.

SECTION 6 APPLICABILITY OF TERMS

Except as otherwise specifically modified by the amendments made herein, all terms and conditions of the Contract shall continue in full force and effect and be binding on the parties as expressed in the time periods outlined in the Contract dated March 8, 2007.

IN WITNESS WHEREOF, the parties have caused this Second Amendment to be duly executed on September 10, 2009.

REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA

By: Lawrence L. Brown III
Lawrence L. Brown III
Chairman

Date: 9/10/09

Approved as to Form:

By: Zev Kaplan
Zev Kaplan
General Counsel

FIRST TRANSIT, INC.

By: Nick Promponas
Nick Promponas
Senior Vice President

Date: _____

Attest:

By: Lisa Magnusson
Lisa Magnusson
Executive Assistant

EXHIBITS

Exhibit 1- Vehicle Operator Training Hours
Exhibit 2- Trip Edit Accuracy Standards

**First Transit Second Amendment
Exhibit 1**

Classroom Training Hours			
Topic	First Transit Required Minimum	Las Vegas Current Time	Amended Training Time
FT Introduction	0.50	1.00	0.50
IP & Risk Assessment	1.00	1.50	1.00
Substance Abuse	1.00	1.00	1.00
Basics of Safety	1.00	1.50	1.00
Defensive Driving/Smith System	4.00	5.00	4.00
Pre-Trip/DVI Process	0.50	1.00	0.50
Customer Service	1.00	4.00	4.00
ADA / Sensitivity	4.00	9.00	4.00
Workplace Violence/Harassment Prevention	0.00	2.00	1.00
Security Awareness	0.50	2.00	1.00
Emergency Procedures	1.00	2.00	1.00
Map Reading	2.00	2.50	2.00
Safe Work Methods	0.50	0	0.50
Hazardous Communication	0.50	2.00	0.50
Required Paperwork	0.00	2.00	2.00
MDT/Radio Communication	0.50	4.00	3.50
Code of Conduct	0.00	0.50	0.50
	Total Hours: 18	Total Hours: 41	Total Hours: 28
Behind the Wheel Training Hours			
Closed Course/Skills	8.00	8.00	8.00
Road Training Day 1	8.00	9.00	7.00
Road Training Day 2	6.00	9.00	7.00
	Total Hours: 20	Total Hours: 24	Total Hours: 22
Cadet Training Hours			
In Service/Cadet Training Day 1	4.00	10	6
In Service/Cadet Training Day 2	0.00	10	6
	Total Hours: 4	Total Hours: 20	Total Hours: 12
	Total Training Hours: 42	Total Training Hours: 85	Total Training Hours: 62

RTC000128

**First Transit Second Amendment
Exhibit 2
Trip Edit Accuracy Standards**

The categories and accuracy rates are listed in the table below:

Category	Description	Accuracy Rate
Vehicle Assignment	The correct vehicle is assigned to the run. A missing vehicle number or incorrect vehicle number would count as an error.	95%
Arrive / Depart Times	The Actual Arrive and Actual Depart times must match the times recorded on the manifest. Missing or incorrect times will count as an error.	99%
Odometer Readings	The odometer field must match the odometer reading recorded on the manifest. Missing or incorrect odometer values will count as an error.	99%
Passenger Counts	The number of passengers loaded must match what is recorded on the manifest. For example, if the manifest lists a Client and a PCA at a pickup but only the Client boards the vehicle, the PCA must be removed from trip itinerary to match what is recorded. Incorrect passenger counts will result in an error.	98%
Trip Status (P / NS / CD / NM)	The trip must reflect the correct scheduling status as recorded on the manifest. For NS and CD trips where the driver arrived outside the on-time window, the trip must be marked as a Missed Trip (NM). A trip that is marked incorrectly or is missing their scheduling status will result in an error.	98%
Fare Errors	Trip Edit staff are responsible for inputting the Fare Collected and changing Fare Types when operator notes such on the manifest. Each trip will be checked to insure the fare type for each passenger and fare collected are recorded correctly. Incorrect or missing information will result in an error. If multiple errors occur on a single trip, only one error will be counted for the trip.	98%

RTC000129

THIRD AMENDMENT TO THE CONTRACT FOR SPECIALIZED SERVICES

This third Amendment to the Contract for Specialized Services is made and entered into on July 14, 2011 by and between the Regional Transportation Commission of Southern Nevada (RTC) and First Transit, Inc. (Contractor), a corporation authorized to do business in the State of Nevada.

RECITALS

WHEREAS, the RTC and the Contractor entered into a Contract for Operation and Maintenance of Specialized Services (Contract) on March 8, 2007, and entered into amendments to the Contract dated December 11, 2008 and September 10, 2009;

WHEREAS, the current economic circumstances facing the RTC, have made it urgent for the RTC to find ways and means to reduce the costs of its specialized services system;

WHEREAS, to address this situation, the RTC and the Contractor have agreed to amend the Contract to make certain reductions in the base service hour rate billed by the Contractor; and

WHEREAS, the Parties also desire to make certain technical and conforming changes to the Contract:

NOW, THEREFORE, in consideration of the above and mutual promises hereinafter set forth, the RTC and the Contractor have agreed as follows:

SECTION 1 TERM OF CONTRACT

(a) Invoices and Payments. – The RTC agrees to pay the Contractor for Option Period 1 Contract Year 5 the price stated in Section 3 of this Amendment.

SECTION 2 REDUCTION IN MONTHLY CONTRACT COST

(a) Revised Service Hour Rate. – For Contract Year 5, beginning July 1, 2011, through June 30, 2012, the Contractor agrees that the amount of each monthly invoice submitted to the RTC under the Contract will be calculated on a revised service hour rate.

(b) Suspension of Certain Requirements. – In consideration for the service hour rate reduction under Section 1(a) of the Amendment, the Contractor shall, for the period of such reduction, be relieved of certain program elements and requirements set forth in the Contract or in the Contractor's plans and programs, as follows:

- (1) **Administrative and Operations Staffing:** Remove the position of Recruiter and assign one Road Supervisor position to a newly created Operations Supervisor position.
- (2) **Sunset Maintenance Facility:** Eliminate the position of Terminal Manager and remove the costs associated with facility maintenance.
- (3) **Training Program:** Adjust the hours of Vehicle Operator training to 62 hours, as defined in the Second Amendment dated September 10, 2009.
- (4) **Tool Allowance:** Reduce the amount of budgeted maintenance tool allowance by the sum of \$7,000.00 annually.
- (5) **Liquidated Damages:**
 - a. RTC will comply with Section 9 as set forth in the Contract, but agrees to only deduct assessments for liquidated damages from the Contractor's invoice after the assessment value for the Contract year has exceeded an amount of \$67,000.00 annually in all categories except Section 9 (c)(4) (B). All valid liquidated damages for Preventive Maintenance Inspections (PMI) will be assessed and do not count towards the exception assessment value.
 - b. Section 9(c)(4)(B) of the Contract will reflect that Preventive Maintenance Inspections (PMI) are still required every 3,000 miles as per the stated Contractor's maintenance plan, but RTC will only assess vehicles where mileage exceeds 3,300 miles between PMI.

(c) Reservation -- Nothing in this Section shall be construed as affecting the right of the RTC to include any of the suspended standards or requirements listed in subsection (b) into a future RFP for Specialized Services or into any future agreement with the Contractor or any other provider.

SECTION 3 REVISED COST OF SERVICE

(a) Rate of Compensation -- The rate of compensation schedule in Section 4(a) of the Contract is amended to read as follows:

OPTION PERIOD 1 (TWO YEARS)

ASSUMED ANNUAL SERVICE HOURSCOST PER SERVICE HOURCONTRACT YEAR 5 -July 1, 2011 to June 30, 2012

600,000 to 651,186

\$55.79

SECTION 4 CONTINUATION OF SECOND AMENDMENT

(a) Section 4 PROVISION OF TIRES and Section 5 TECHNICAL CHANGES of the Second Amendment dated September 10, 2009 will remain in effect through the active contract period as outlined in Section 3 TERM OF CONTRACT of the original contract dated March 8, 2007.

SECTION 5 APPLICABILITY OF TERMS

Except as otherwise specifically modified by the amendments made herein, all terms and conditions of the Contract shall continue in full force and effect and be binding on the parties as expressed in the time periods outlined in the Contract dated March 8, 2007.

IN WITNESS WHEREOF, the parties have caused this Third Amendment to be duly executed on July 14, 2011.

REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA

By: _____
Lawrence L. Brown III
Chairman

Date: _____

Approved as to Form:

By: _____
Zev Kaplan
General Counsel

008-06 Amendment 3 Page 3

FIRST TRANSIT, INC.

By: _____
Nick Promponas
Senior Vice President

Date: 7/1/11

Attest:

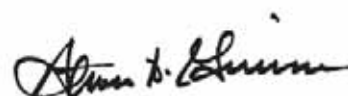
By: _____
Jecia Hutchinson
Executive Assistant

RTC000132

EXHIBIT B

EXHIBIT B

TRAN



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF,
ELAINE CHERNIKOFF,

 Plaintiff,

vs.

FIRST TRANSIT INC.,

 Defendant.

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

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 5

TUESDAY, FEBRUARY 23, 2016

APPEARANCES:

For the Plaintiff:

BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants:

LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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

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1 I don't know exactly. And as I said, the word that I'm going
2 to use, and no disrespect to my -- to you, Mom.

3 But when my mom got out of that cab she looked like
4 a wreck. I have never seen her look disheveled. And she was
5 still crying intensely, wailing, and she was beside herself.
6 And I saw her -- you know, I'd seen her mourn before when her
7 mother died, when her stepfather died. And of course they
8 were sick, et cetera, so you know it's coming. But this was
9 nothing like that and it was just so horrible.

10 And I told her right then, I said, You know, Mom, if
11 I could, even how bad I'm hurting, I wish I could take some of
12 the hurt that's inside of you and put it in me. Because it's
13 just -- it just -- she suffered so bad, and she still -- we
14 all suffer, but she still is. And she sleeps with his
15 blanket, and she said that she's never even going to wash it
16 because it smells like Harvey. And it's just sad that she has
17 to do that.

18 Q Is there anything else that you want the jurors to
19 know about either Harvey or him growing up or anything?

20 A Well, he was just really funny, that was another
21 thing. He always could make people laugh. And friendly. And
22 what he cared about most, I mean, it really sums it up what it
23 says on his headstone, which I never think -- I thought I'd be
24 seeing a headstone of my brother. But it said -- it's going
25 to come to me in a minute, but I really got to think.

CERTIFICATION

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

AFFIRMATION

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

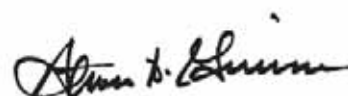
KARR REPORTING, INC.
Aurora, Colorado


KIMBERLY LAWSON

EXHIBIT C

EXHIBIT C

TRAN



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACK CHERNIKOFF,
ELAINE CHERNIKOFF,

 Plaintiff,

vs.

FIRST TRANSIT INC.,

 Defendant.

CASE NO A-13-682726
DEPT NO. XXIII

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

JURY TRIAL - DAY 9

MONDAY, FEBRUARY 29, 2016

APPEARANCES:

For the Plaintiff:

BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.
ALISON M. BRASIER, ESQ.

For the Defendants:

LEANN SANDERS, ESQ.
KIMBERLEY A. HYSON, ESQ.
J. BRUCE ALVERSON, ESQ.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Ms. Sanders, whenever you're ready.

10 Counsel, make yourselves comfortable, please.

11 MS. SANDERS: Thank you, Your Honor.

12 DEFENDANTS' CLOSING ARGUMENT

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

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

CERTIFICATION

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

AFFIRMATION

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

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


KIMBERLY LAWSON

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

62

62


CLERK OF THE COURT

1 OPP
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 **CLOWARD HICKS & BRASIER, PLLC**
5 4101 Meadows Lane, Suite 210
6 Las Vegas, NV 89107
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10 *Attorneys for Plaintiff*

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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

**OPPOSITION TO MOTION FOR
NEW TRIAL AND SUPPLEMENT
THERETO**

COME NOW Plaintiffs, by and through their counsel of record, and hereby oppose Motion for New Trial and the Supplemented Motion, filed herein on March 23, 2016 and May 25, 2016, respectively. This opposition is based upon the accompanying memorandum of points and authorities, as well as all matters properly of record.

FACTS

Jennifer McKibbens was employed as the director of corporate safety by First Transit. RT, v. 3. 53. She testified that one of the rules in First Transit's employee handbook is that passengers refrain from eating food on the bus, and that one of the reasons for this rule was to prevent passengers

1 from harm due to the foreseeable risk of choking. *Id.*, pp. 54-55. She further stated that there was a
2 policy in effect at the time of Harvey's death that the driver of the bus look in the interior and exterior
3 mirrors every five seconds. *Id.*, p. 62. One of the reasons for this rule was to ensure that passengers
4 were following the rules. *Id.*, p. 51. When shown the video of Harvey starting to eat his sandwich,
5 McKibbens said that at this point Mr. Farrales would have been required to scan his mirrors,
6 including the interior of the bus, every five seconds, and that during the period in which Harvey was
7 eating the sandwich Farrales did not tell him not to do so. *Id.*, pp. 72-73. McKibbens did not see
8 Farrales check on Harvey in the video until 8:03:42. *Id.*, p. 74. At this time, Harvey appeared to be
9 unconscious. *Id.*, pp. 90-91.

12 McKibbens identified exhibit 2 as the First Transit employee handbook. *Id.*, p. 76. Page 70 of
13 the handbook provides instructions on how to treat a person who is choking, including blows to the
14 back, the Heimlich maneuver, CPR, and calling 911. *Id.*, pp. 78-81. Plaintiffs' expert, Dr. Stein,
15 testified that the video shows that Harvey was showing signs of distress at six seconds after 8 o'clock.
16 *Id.*, p. 136. It was Dr. Stein's opinion that, if the procedures set forth on page 70 of the employee
17 handbook had been initiated at any time up to and including 8:08:02, Harvey would have survived.
18 *Id.*, p. 156. When first responders arrived at 8:15:14, it was too late. *Id.*, pp. 156-57.

21 Jay Farrales, the driver of the bus, testified that the reason for the no-eating rule was to prevent
22 passengers from choking. *RT*, v. 4, pp. 43-46. He admitted that it was reasonable for the Plaintiffs to
23 rely on him to know and enforce the rules. *Id.*, p. 35. He did not enforce the rule on the day Harvey
24 died. *Id.*, p. 45. He would have tried to help Harvey if he had looked and seen that he needed help.
25 *Id.*, p. 51.

27 Plaintiff Elaine Chernikoff described Harvey's mental handicap and education. She and her
28 husband Jack took Harvey to Johns Hopkins University Hospital for testing after his kindergarten
year in school. *Id.*, p. 59. The Chernikoffs were informed that Harvey was "mentally retarded." *Id.*

1 Thereafter, Harvey was transferred to a school for the mentally disabled. Id., p. 60. His IQ was in
2 the mid-to-low 60s. Id.

3 Harvey read at a level lower than first grade. Id., p. 63. He could eventually read a word from
4 a flash card, but not in a book or newspaper. Id. He would not have been able to understand the
5 signs on the bus. Id., p. 130. Harvey and his family moved to Santa Monica where he entered a
6 special education class. Id., p. 70. He was still unable to learn to read beyond the first grade level.
7 Id., p. 72.

8 9 10 ARGUMENT

11 I. THE COURT PROPERLY EXCLUDED DECEDENT FROM THE JURY 12 VERDICT FORM

13 A. **The Decedent Was Properly Excluded From the Jury Verdict Form Because, Due** 14 **to Defendants' Conscious Decision making, the Estate Was No Longer a Party**

15 When this action was originally filed, the Estate of Harvey Chernikoff was included as a
16 named Plaintiff and the complaint contained a claim for punitive damages. Defendants moved to
17 dismiss the Estate and later moved for summary judgment as to the claim of punitive damages. As a
18 result, Jack Chernikoff was dismissed as a party Plaintiff in his capacity as the decedent's personal
19 representative. Under NRS 41.141(2)(b)(2), fault is to be allocated only as it is "attributable to each
20 party remaining in the action." [Emphasis added.] It is error to allow the jury to apportion the fault of
21 non-parties. Warmbrodt v. Blanchard, 100 Nev. 703, 708-9, 692 P.2d 1282, 1286 (1984) (The "plain
22 language" of NRS 41.141 provides for apportionment of fault only among the plaintiff and other
23 parties to the action against whom recovery is sought.)
24
25

26 In seeking the dismissal of the Estate of Harvey Chernikoff, Defendants were clearly motivated
27 by the desire to avoid exposure to punitive damages, which are recoverable only by the personal
28 representative of the decedent. See 41.085(5)(b). Whatever their motivations, when Defendants

1 secured the dismissal of Harvey's personal representative they forfeited any right to include Harvey on
2 the special verdict form by which the jury allocated fault amongst the remaining parties to the action.¹

3
4 Moreover, Defendants' counsel acquiesced in omitting Harvey from the jury verdict form,
5 once they had secured a ruling that his parents' comparative fault would be apportioned. This point
6 will be developed further in the ensuing argument section. However, for present purposes it will be
7 sufficient to quote the following exchange between the Court and counsel for both sides:

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

12 MR. ALVERSON: *I – I think that's probably true.*

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

14 RT, v. 8, p. 162; emphasis added.

15 **B. Even If It Would Have Otherwise Been Appropriate to Consider Harvey's Negligence,**
16 **Defendants Interest in Doing So Was Satisfied by Inclusion of Harvey's Parents on the**
17 **Jury Verdict Form**

18 When jury instructions and the jury verdict form were settled, Plaintiffs began from the
19 premise that the alleged negligence of neither Harvey nor his parents should be apportioned by the
20 jury. For the reasons expressed *supra* and *infra*, Plaintiffs adhere to that opinion. Nevertheless, in
21 opposing Plaintiffs' position, Defendants' counsel, Kimberley Hyson, argued that Plaintiffs "can't
22 have it both ways." RT, v. 8, p. 149. Defendants' counsel reasoned that either Harvey was capable
23 of reading the no-eating sign on the bus, and otherwise moderating his own behavior, and thus his
24 fault should be apportioned, or his cognitive impairment was sufficiently significant that he could not
25 be expected to appreciate the risks, in which case his parents' fault should be apportioned by the jury
26

27
28 ¹ It is anticipated that Defendants will note that the Estate had not been properly set up in time to allow its joinder as a
plaintiff prior to the expiration of the statute of limitations. This is no answer, however. Defendants were free to file a
third-party complaint for contribution and/or indemnity against the Estate, at which point the personal representative would
have been a party remaining in the action against whom recovery was sought. They did not do so.

1 because they were remiss in not continually reminding him of the no-eating rule or sending a personal
2 care assistant with him on the bus. Mr. Alverson further articulated Defendants' position for
3 assessment of the parents' fault:
4

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

8 THE COURT: I know.

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

14 . . .

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

23 RT, v. 8, p. 152. The Court stated in wanted to "mull it over a bit." RT, v. 8, p. 153. Upon her
24 return, Her Honor rejected Defendants' last ditch effort to themselves "have it both ways" by
25 including the parents and Harvey in the fault assessment calculus:
26

27 THE COURT: . . .

28 So, Ms. Sanders, what are you asking for, that we have comparative
negligence of the parent[s] and Harvey on there?

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

MS. BRASIER: Again, Your Honor, that goes back to was he an
independent, legal – legally independent adult, in which case his parents
would not have any duty because they don't have any obligation towards

1 Harvey, or, like Your Honor was saying, is it a case where the Court sees it
2 as just a formality that the parents didn't have a guardianship over him and
3 that – you know, that they were assuming responsibility for them. It can't
4 – it can't be both.

5 THE COURT: I agree with you.

6 MS. SANDERS: Well, the parents are the ones that are saying
7 Harvey couldn't read. So if they're signing up for the paratransit service –

8 THE COURT: Uh-huh.

9 MS. SANDERS: – they are – they definitely are assuming the
10 responsibility to make sure that he understands the rules and is truly
11 eligible to ride the bus.

12 THE COURT: Well, I agree that there's a potential argument of
13 comparative negligence on the parents. I'm just not seeing the ability to
14 sustain one against Harvey and the parents at the same time because the –
15 the negligence of the – the comparative negligence to the parents would be
16 because Harvey has an inability to do this on his own, they assumed a duty
17 on his behalf.

18 RT, v. 8, pp 165-66. Notably, counsel for Defendants never explained how both Harvey and his
19 parents could have been negligent so that Defendants were not “double dipping” on the negligence not
20 attributable to them.

21 **C. Defendants' Attempt to Distinguish Banks and Humphries is Futile**

22 In their Supplemented Motion for New Trial (at p. 3), Defendants argue:

23 While this Court relied on Banks ex rel. Banks v. Sunrise Hospital to
24 exclude Harvey from the special verdict on apportionment, that
25 interpretation conflicts with the controlling statute. Banks is not on point,
26 as the comparative fault of a plaintiff's decedent was not an issue in that
27 case. The “nonparties” in that case were settling co-defendants. 120 Nev.
28 822, 844-45, 102 P.3d 52, 67 (2004). There is not even dicta in the Banks
opinion that suggests that the Supreme Court was rejecting the plain
meaning of NRS 41.141(1), which requires the comparative negligence “of
the plaintiff's decedent” to be weighed against the fault of the defendant.

The fatal flaw in this assertion is that it ignores the following language in Banks:

Nothing in NRS 41.141 prohibits a party defendant from attempting to establish that either no negligence occurred *or that the entire responsibility for a plaintiff's injuries rests with nonparties*, including those who have separately settled their liabilities with the plaintiff.

120 Nev. at 845, 102 P.3d at 67; emphasis added. This language demonstrates that NRS 41.141 does not allow apportionment of fault between a defendant and a nonparty based on comparative fault, but it does allow a defendant to argue that it was free from fault and that a nonparty was fully at fault for the injury or death.

Plaintiffs' position is also supported by Humphries v. District Court, 129 Nev. ___, 317 P.3d 484 (Adv.Op.No. 85, Nov. 7, 2013). There, the Court declared:

Thus, Café Moda[, L.L.C. v. Palma, 128 Nev. ___, 272 P.3d 137 (Adv.Op.No. 7, Mar. 1, 2012)], Warmbrodt[v. Blanchard, 100 Nev. 703, 692 P.2d 1282 (1984)], and NRS 41.141 indicate that a negligent defendant should be held severally liable only for the percentage of fault apportioned to it where a plaintiff has sued multiple tortfeasors and recovery is allowed against more than one defendant. See Café Moda, 128 Nev. at ___, 272 P.3d at 140 (noting that the amendments to NRS 41.142 that returned several liability to multiple defendants was "designed to prevent the deep-pocket doctrine" (internal quotations omitted)); Warmbrodt, 100 Nev. at 707-08, 692 P.2d at 1285-86 (holding that liability could not be apportioned when recovery was allowed against only one defendant). While allowing a plaintiff to pursue an action against only one negligent defendant for the entirety of the plaintiff's damages is contrary to the policy of applying several liability to a deep-pocket defendant, the statutory scheme in NRS 41.141(4) applies several liability, only when there is "more than one defendant," and here, there is only one defendant. Thus, as illustrated in Warmbrodt, *without Ferrell as a party, NRS 41.141(2)(b)(2) does not permit the fact-finder to apportion fault between Ferrell and New York-New York* [the defendant] . . .

In light of NRS 41.141(4)'s apportionment of fault *and NRS 41.141(2)(b)(2)'s limitation on assignment of fault to parties to the action*, we are not persuaded to alter the traditional analysis of whether cotortfeasors are necessary parties under NRCP 19(a) when a jointly and severally liable defendant is sued.

129 Nev. at ___, 312 P.3d at 489; bracketed material and emphasis supplied.

1 The Court in Humphries further noted that a single defendant in an action may, if the evidence
2 shows that there was some fault of a person not a party, obtain apportionment of fault by impleading
3 that person into the action. The Court explained:

4
5 Finally, we note that New York—New York has the ability to implead Ferrell on a theory of
6 contribution, which will afford New York—New York some relief without requiring joinder of a
7 cotortfeasor as a necessary party under NRCp 19(a). . . .

8
9 While Nevada law allows a defendant to implead a third-party defendant, it
10 does not require the original plaintiff to accept the third-party defendant as
11 a defendant in plaintiff's case. Reid v. Royal Ins. Co., 80 Nev. 137, 141,
12 390 P.2d 45, 47 (1964). Impleader thus provides an avenue to apportion
13 fault when the plaintiff chooses not to pursue a claim against a potential
14 tortfeasor. By not requiring the plaintiff to join a cotortfeasor while
15 permitting the defendant to implead that tortfeasor, we place the burden of
16 joining a nonparty onto the party that has an incentive to bring that
17 nonparty into the litigation.

18 If New York—New York impleads Ferrell as a third-party defendant, the
19 district court should apply those provisions of NRS 41.141 that are
20 applicable to the action. NRS 41.141(1) and 2(a) require that a plaintiff's
21 fault not be greater than the defendant's. Humphries and Rocha cannot
22 recover against New York—New York if their percentage of fault is greater
23 than New York—New York's, even if their percentage of fault is less than
24 New York—New York's and Ferrell's combined percentages of fault.
25 NRS 41.141(2)(a). If Humphries and Rocha can recover, then the jury
26 should render a special verdict "indicating the percentage of negligence
27 attributable to each party remaining in the action," including the third-party
28 defendant, Ferrell. NRS 41.141(2)(b)(2).

23 Id. at ___, 312 P.3d at 490-91; emphasis added.

24 Thus, Nevada case law allows for apportionment of a decedent's comparative fault in a
25 wrongful death action where (1) the decedent's personal representative is a party-plaintiff in the
26
27
28

1 action, or (2) if not, where the defendant impleads him or her into the action as a party under NRC
2 14.²

3 This is consistent with the rule of statutory construction that the public policy behind
4 legislation may be discerned from the whole at, and a statute's provisions should be read as a whole
5 so that no part is rendered inoperative. International Game Tech. v. District Court, 124 Nev. 193,
6 200, 179 P.3d 556, 560 (2008). Defendants' argument violates this principle in that, if accepted, it
7 would render meaningless the language in NRS 41.141(2)(b)(2) which states that the jury "shall
8 return . . . [a] special verdict indicating the percentage of negligence attributable to each party
9 *remaining in the action.*" (Emphasis supplied.)
10

11
12 Defendants attempt to sidestep Humphries by claiming:

13 Plaintiffs seem to be proposing something akin to the situation in
14 Humphries v. Eighth Judicial District Court, 129 Nev., Adv. Op. 85, 312
15 P.3d 484 (2013). In that case, the plaintiffs sued New York-New York, but
16 not a potential co-defendant Erik Ferrell. *Id.* at ___, 312 P.3d at 486. The
17 Court held that while the plaintiffs could not be compelled to join Ferrell as
18 a party to their action, New York-New York could implead Ferrell as a third
19 party. *Id.* at ___, 312 P.3d at 490. The jury would thus allocate fault
20 between both New York-New York and Ferrell, but the plaintiffs' judgment
21 would be joint and several against just New York-New York, with the
22 jury's fault allocation providing the basis for a contribution action against
23 Ferrell. *Id.* at 491.

24 That won't work here, and public policy shows why it shouldn't.
25 The decedent is not some third party whom the heirs can decide not to sue;
26 it is the decedent whose interests the heirs are vindicating. If the
27 Humphries impleader mechanism were required in the drunk-driving
28 scenario, then the heirs could obtain a joint-and-several judgment against
the 1%-negligent defendant, and that defendant would then have an action
for contribution against . . . whom? the heirs? the estate? If it's against the

² NRC 14 provides, in relevant part, as follows:

At any time after commencement of the action a defending party, as a third-party plaintiff, may
cause a summons and complaint to be served upon a person not a party to the action who is or may be
liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . .

heirs, then the whole exercise is kabuki theater to arrive at the same result as simply barring the heirs' recovery in the first place. If it's against the estate, then the wrongful-death statute becomes a back door for disinherited heirs to upend the decedent's estate plan by siphoning from the estate funds that the decedent intended for other beneficiaries. That kind of tactic violates public policy. See *In re Estate of Melton*, 128 Nev. Adv., Op. 4, 272 P.3d 668 (2012) (rejecting heirs attempt to invalidate an estate plan that would result in escheatment).

Supplemented Motion (hereinafter "Supp. Mot."), pp. 4-5, n. 5.

This argument is fanciful and absurd. In the first place, it must be recalled that Plaintiffs initially joined Harvey's personal representative as a Co-Plaintiff and Defendants took affirmative steps to secure a dismissal of that party. Thus, if there is an "exercise" in "kabuki theater" – and there is not – Defendants have only themselves to blame. Second, a scenario that can be dreamt up, even if it has never happened before and may never happen in the future, is not the stuff that can have any significant impact on "public policy." And even if it could, Defendants would be better served to address their highly creative "what if" scenario to the Nevada Legislature, which has crafted and amended NRS 41.141 for decades. See *Humphries*, 129 Nev. at ___, n. 2, 312 P.3d at 489, n. 2 ("[W]e leave it to the Legislature to consider the policies behind Nevada's comparative negligence statute and alter the law if they deem it advisable to do so").³

Defendants' improvident focus on a hypothetical that has no reality or relevance to this case leads them to rely on *In re Estate of Melton*, 128 Nev. ___, 272 P.3d 668 (Nev. Adv. Op. 4, Feb. 16, 2012). *Melton* is inapposite. There, the Court stated:

As indicated above, when responsibly applied, the doctrine [of dependent relative revocation] promotes the general policy of giving effect to a testator's intent. See Am. Jur. 2d Wills § 529 (2002). Jurisdictions that have adopted the doctrine recognize that it "is simply one means of implementing [the] paramount rule" of enforcing a testator's intent as nearly as possible. *Estate of Anderson*, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307, 313 (1997). This policy is sound and coincides with the long-standing objective of this court to give effect to a testator's intentions to the greatest extent possible. See *Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d

³ Meanwhile, Defendants ignore the fact that impleading the estate as a party in a wrongful death action for the purpose of asserting comparative fault of the decedent, as a bona fide defense, furthers the purpose of NRS 41.141 by allowing for allocation of fault among the parties to the action. And this, after all, is the main policy that the statute was intended to implement.

1 1022, 1023 (1985) (“[I]t is the long-accepted position of this court that the
2 ‘primary aim in construing the terms of a testamentary documents must be
3 to effect, to the extent consistent with law and policy, to the intentions of
4 the testator.’” (quoting Concannon v. Winship, 94 Nev. 432, 434, 581 P.2d
11, 13 (1978))). We therefore expressly adopt the doctrine of dependent
relative revocation.

5 Id. at ___, 272 P.3d at 679. Obviously, a testator’s intent has no relevance whatsoever to a
6 wrongful death action. This is particularly true when the “testator” is merely a figment of Defendants’
7 overly-fertile imagination.

8 Defendants’ reliance on Rich v. Taser Int’l, Inc., 2012 WL 1080281 (D.Nev., Mar. 30, 2012),
9 and Moyer v. United States, 593 F.Supp. 145 (D.Nev. 1984), is likewise unavailing. Supplemented
10 Motion, p. 3. In Rich, the caption shows that plaintiff (Randy Rich) sued “as personal representative of
11 Ryan Rich, deceased, and Nick Jensen and Tanya Jensen as Guardians for R.J., a minor.” (Emphasis
12 added.) In the present case, Harvey’s personal representative was not a Plaintiff because Defendants
13 caused him to be dismissed from the action.

14 Moyer also offers no support to Defendants. That case was decided in 1984. At that time, NRS
15 41.141(2)(b)(2) did not contain the phrase “each party remaining in the action.” See NRS 41.141
16 (1985). The phrase was added in 1987 when NRS 41.141(2)(b)(2) was amended. 1987 Nev. Stats., ch.
17 709, SB 511, pp. 1697-98. One of the purposes of the 1987 amendment was explained in the testimony
18 of Pat Cashill, then-President of the Nevada Trial Lawyers Association, at a meeting of the Judiciary
19 Committee on May 13, 1987 (a true copy of the minutes of which are annexed hereto as Exhibit 1).
20 Mr. Cashill stated:

21 Mr. Cashill explained, “The key concept is ‘parties to the action’
22 which will ultimately be dealt with later on in the bill, but the concept is
23 that joint liability will be eliminated subject to the various exceptions . . .
24 but several liability will be decided only among the parties to the action . . .
25 those who are in fact named and present in the lawsuit. This eliminates the
26 risk of either side being able to argue that some fault should be rested on
27 the shoulders of a person or persons who is not actually a party so that the
28 jury’s attention can be focused precisely on those persons who are parties.”

26 Senator Beyer asked, “Does that eliminate the ‘Does I - X’ named in a lawsuit?” Mr. Cashill
27 replied, “It will not eliminate the necessity early in a lawsuit of naming the ‘Does I - X’ before
28 adequate facts may be determinable to actually place names and titles with parties, but it will eliminate

1 the possibility that anyone who has not been made a party to the action will be the subject of any
2 finger pointing in the lawsuit so that only those who are there . . . will have their fault allocated among
3 themselves.”

4 Ex. 1. pp. 19-20; emphasis added. The foregoing demonstrates that Plaintiffs’ argument, as set
5 forth herein, is consistent with the legislative intent underlying the 1987 amendment to NRS 41.141.
6 See Southern Cal. Gas Co. v. Public Utilities, 596 P.2d 1149, 1152 (Cal. 1979) (statements in
7 legislative committee reports concerning statutory objects and purposes which are in accord with
8 reasonable interpretation of statute are legitimate aids in determination of legislative intent).

9
10 **D. Furthermore, Harvey Was Correctly Excluded From the Jury Verdict Form and**
11 **Instruction No. 29 Because There Was No Bona Fide Issue of His Comparative Fault**

12 In their motion for new trial and its supplement, Defendants rely on NRS 41.141(1) and assert
13 as follows:

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

20 . . .

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

28 Supp. Mot., p. 2. As will be shown, the record and the case law fully support the Court’s
decision.

1 **1. Defendants Are Incorrect in Their Contention that, Notwithstanding Harvey Chernikoffs**
2 **Mental Disability, He Would Have Been Held to the Same Standard of Care as Any Other**
3 **Reasonable Person**

4 One of the lynchpins of Defendants' contention that Harvey Chernikoff's comparative fault was
5 a bona fide issue in this case, is the argument that "Harvey is held to the standard of 'ordinary and
6 reasonable care' regardless of his mental impairment." Motion, p. 5. As just shown, this is the
7 opposite of what they argued to secure places for his parents on the jury verdict form, in order to
8 apportion their negligence. They opposed the argument that Harvey was to be treated as any other
9 independent adult by citing of evidence of his deep dependence on his parents. Apart from this
10 inconsistency, the assertion is misleading in that it does not acknowledge that the majority rule is to the
11 contrary. As stated in 2 Best, Comparative Negligence, Law and Practice, § 10.30, p. 10-66 (rev'd ed.
12 2005):

13 In determining whether a mentally disabled adult plaintiff has been
14 contributorily or comparatively negligent, most jurisdictions require that
15 the plaintiff's conduct be reasonable in light of the plaintiff's own mental
16 capacity and the circumstances of the particular case. This subjective
17 standard differs from the objective "reasonable person" standard, applicable
18 to an adult who is not mentally disabled, which compares a plaintiff's
19 conduct to that of a "reasonable" person who is not mentally impaired.
20 [Emphasis added.]

21 Additionally, even in the minority of jurisdictions which hold the mentally disabled to a
22 standard measured objectively against the "reasonable person," there is an exception where a special
23 relationship exists between the plaintiff and defendant. Hofflander v. St. Catherine's Hosp., 664
24 N.W.2d 545, 558 (Wis. 2003). Here, Defendants make money from transporting people with
25 disabilities. Accordingly, it would be shocking to start the analysis that all their customers, despite
26 their individual disabilities, would have to fend for themselves under a standard of conduct well beyond
27 their reach.

28 The evidence showed that Harvey had an IQ of about 60. This means that he functioned at
about the level of a third grade boy. The Court may recall that the video evidence revealed Harvey was
unable even to buckle his own seatbelt. Thus, the notion that Harvey was guilty of comparative fault
because the bite he took from his sandwich was too large, or because he did not self-enforce the rule
against eating on the bus (which even Defendants did not enforce) reveals itself as a contention that is

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1
AGREEMENT

THIS AGREEMENT (hereinafter referred to as the "Contract"), made and entered into on March 8, 2007, by the Regional Transportation Commission of Southern Nevada (hereinafter referred to as "RTC") and Laidlaw Transit Services, Inc. authorized and existing under the laws of Delaware, and authorized to do business in the State of Nevada (hereinafter referred to as the "Contractor"), provides for the Contractor to supply paratransit services in the Clark County area, as described below.

WITNESSETH

WHEREAS, RTC conducted a competitive procurement process to select a provider of paratransit services compliant with the complementary paratransit requirements of the Americans with Disabilities Act of 1990 (ADA) for the RTC's public transportation system, known as the Citizens Area Transit System (hereinafter referred to as "CAT System");

WHEREAS, pursuant to that process, RTC selected the Contractor to provide core Americans with Disabilities Act complementary paratransit services for the CAT System, as described herein (hereinafter referred to as "CAT ADA Paratransit Services");

WHEREAS, through the competitive procurement process referenced above, RTC also selected the Contractor to provide certain transportation services designed to meet the needs of senior citizens (Senior Transportation) and certain other non-ADA paratransit services (CATSTAR);

WHEREAS, the CAT ADA Paratransit Services, Senior Transportation and CATSTAR are collectively referred to as "Specialized Services"; and

WHEREAS, the Contractor is competent to perform the services described herein and desires to enter into this Contract with RTC for the provision of such services;

NOW THEREFORE, in consideration of the mutual promises hereinafter given, it is

mutually agreed by and between the Contractor and RTC as follows:

SECTION 1. DEFINITIONS

As used in this Contract

(a) Americans with Disabilities Act of 1990 (ADA). The term "Americans with Disabilities Act of 1990" or "ADA" means the statute enacted by the United States Congress as Public Law Number 101-336.

(b) Assumed Annual Service Hours. The term "Assumed Annual Service Hours" means the range of service hours (with an identified floor and ceiling) on an annual basis that is anticipated by RTC to meet the requirements of the Contract. The Assumed Annual Service Hour range for each year of the Contract and for each option year is set out in Section 4 of this Contract.

(c) Best and Final Offer. The term "Best and Final Offer" or "BAFO" means the final, written proposal made by the Contractor in response to a written request by RTC after the conclusion of discussions with proposers, and submitted by the date and time specified in RTC's written request.

(d) CAT ADA Paratransit Services. The term "CAT ADA Paratransit Services" has the meaning set forth in the Recitals to this Contract.

(e) CATCOM. The term "CATCOM" refers to the Citizens Area Transit (CAT) Communication system used by RTC in support of radio dispatch activities. The CATCOM paratransit system integrates the Specialized Services scheduling and dispatching software (currently Trapeze PASS) with Global Positioning System (GPS)-based Automatic Vehicle Locator (AVL) functions (currently Orbital TMS Orbcad). It includes data transmissions from equipment, and emergency alarm systems. All information interfaces with other RTC

computer systems.

(f) CATSTAR. The term "CATSTAR" refers to specialized non-ADA services provided through subscription trips for individuals traveling to and from social service agencies that provide sheltered workshop employment opportunities.

(g) Contract. The term "Contract" means this agreement between RTC and the Contractor.

(h) Contractor. The term "Contractor" means the firm, company, corporation, partnership, or association executing this Contract as an entity providing the services specified herein.

(i) Contractor General Manager. The term "Contractor General Manager" means the person identified by the Contractor and approved by RTC, responsible for carrying out the Contractor's duties under the Contract.

(j) Days. The term "days" means calendar days recognized by RTC, unless otherwise specifically noted.

(k) Deadhead. The term "Deadhead" means movement of a Revenue Vehicle, without passenger(s), from the garage or yard to the origin point of the first trip identified on the daily trip manifest, and from the destination point of the last trip identified on the daily trip manifest to the garage or yard.

(l) Deadhead Time. The term "Deadhead Time" means the period of time a Revenue Vehicle is engaged in a Deadhead movement.

(m) Deployment Plan. The term "Deployment Plan" means the organization plan indicating the specific start and stop times on each day for each Revenue Vehicle.

(n) Dispatch. The term "Dispatch" means the function of assigning, including through radio communication, Revenue Vehicles and operators to cover scheduled paratransit

trips and Senior Transportation services.

(o) Facilities. The term "Facilities," in general, means RTC provided buildings, structures, and grounds identified in Appendix E and buildings' related equipment listed in Appendix H. Where sections and subsections in this Contract specifically identify exclusions of Contractor responsibility for actual facility portions, those sections and subsections will control the definition of "Facilities" as it relates to those sections and subsections.

(p) Facility Maintenance. Facility Maintenance is the work required to preserve or restore buildings, grounds, utilities, systems, and equipment to original condition or such condition that it can be effectively and efficiently used for its intended purpose.

(q) Federal Transit Administration (FTA). The term "Federal Transit Administration" or "FTA" means the Federal Transit Administration of the United States Department of Transportation or its successor entity.

(r) Flexible Demand Response (FDR). The term "Flexible Demand Response" or "FDR" refers to an advanced reservation community service demand response provided to eligible seniors.

(s) Governing Body of the Regional Transportation Commission of Southern Nevada. The term "Governing Body of the Regional Transportation Commission of Southern Nevada" or "RTC Governing Body" refers to the elected representatives of the entities of Clark County, Nevada, including the County of Clark and the cities of Las Vegas, North Las Vegas, Henderson, Boulder City, and Mesquite, who make up the voting membership of the Regional Transportation Commission of Southern Nevada.

(t) Holiday Schedule. The term "Holiday Schedule" means a modified schedule to provide a different level of transit service on designated days.

(u) Late Trip. A "Late Trip" is any one-way leg of a trip where the Revenue

Vehicle does not arrive at the passenger's pick-up address by the end of the on-time window.

(v) Manifest. The term "Manifest" means the list of passenger trips provided by RTC staff to the Contractor to be carried out on CAT Specialized Services, and includes, at a minimum, the following information: customer name, pick-up and drop-off addresses, pick-up time, trip identification number, equipment used by the passenger, authorization for Personal Care Attendant (PCA), number of guests, payment status, and special instructions (such as directions or conditions). The manifest may be either electronic or printed.

(w) Missed Trip. A "Missed Trip" occurs when a vehicle does not arrive to pick-up a passenger within 30 minutes of the end of the on-time window.

(x) On-time Performance. The term "On-time Performance" for paratransit services means the performance of passenger trip pick-ups within the On-Time Window as defined by RTC. "On-Time Performance" for Silver-STAR means arriving at a time point within one minute of the scheduled time.

(y) On-Time Window. The term "On-Time Window" means the allowable deviation from the scheduled passenger pick-up time, defined in minutes. The scheduled passenger pick-up time is the time appearing on a Manifest, that RTC indicated to the passenger that the passenger is scheduled to be picked up. For purposes of Specialized Services allowable deviation will be from five (5) minutes before to twenty-five (25) minutes after the scheduled pick-up time stated on the Manifest.

(z) Proposal. The term "Proposal" refers to the written document submitted by the Contractor in response to the Request for Proposals (RFP).

(aa) Public Hearing. The term "Public Hearing" means an open forum in which the opinions and concerns of the public community are solicited.

(bb) Regional Transportation Commission (RTC). The terms "Regional

Transportation Commission," "RTC," and "Commission" shall refer to the Regional Transportation Commission of Southern Nevada, the designated Metropolitan Planning Organization for Clark County, Nevada.

(cc) Revenue Vehicle. The term "Revenue Vehicle" means any vehicle utilized to provide Specialized Services carrying fare-paying passengers in RTC's transportation service area in accordance with this Contract.

(dd) RTC General Manager. The term "RTC General Manager" means the General Manager of the RTC or the person designated in writing by the RTC General Manager to carry out his or her duties under this Contract.

(ee) RTC Project Manager. The term "RTC Project Manger" means the individual designated by the RTC General Manager to administer the RTC's responsibilities under the Contract or the person designated by the RTC Project Manager to carry out his or her responsibilities under the Contract.

(ff) Run. The term "Run" for Silver-STAR means the work assignment for a specified vehicle assigned to one fixed route.

(gg) Run Time. The term "Run Time" for Silver-STAR refers to the time in revenue service for a specified vehicle assigned to one fixed route.

(hh) Schedule. The term "Schedule" means the sequence of the manifest, which instructs the vehicle operator regarding required pick-up and drop-off times.

(ii) Senior Transportation. The term "Senior Transportation" means non-ADA services marketed to passengers 62 and older and provided through Silver-STAR and FDR.

(jj) Service Hours. The term "Service Hours" means the time that begins when a Revenue Vehicle arrives at the first pick-up location on a manifest for ADA Paratransit, CATSTAR and FDR or time point for Silver-STAR and that ends when the Revenue Vehicle

completes the last drop-off on the manifest or time point for Silver-STAR, provided, however, that Service Hours do not include those times when a Revenue Vehicle is out of service for vehicle operator lunch, refueling, mechanical breakdown, or other operational variation which would remove a vehicle from availability for revenue service.

(kk) Service Operation Date. The term "Service Operation Date" refers to the date on which service operations under this Contract begins, which is specified in Section 3(a) as July 1, 2007.

(ll) Silver-STAR. The term "Silver-STAR" refers to a community service one-way loop provide for Senior Transportation.

(mm) Solicitation. The term "Solicitation" means an Invitation to Bid, Request for Proposals, or other form of document used to procure equipment or services.

(nn) Specialized Services. The term "Specialized Services" means a combination of services offered by the Regional Transportation Commission of Southern Nevada to address the specialized transportation needs generally met through regular fixed route transportation, for individuals such as some persons with disabilities and/or some senior citizens.

(oo) Support Vehicle. The term "Support Vehicle" means any vehicle needed to support the operation and maintenance of Specialized Services provided in accordance with this Contract, including, but not limited to, cars, vans, tow trucks, lift-equipped vans, and service trucks.

(pp) System. The term "System" means a complete and organized sum of integral parts that make up a working unit such as hardware, software, mechanical, electrical and structural systems. Examples include, but are not limited to, bus washers, building structures, flooring, fire/life safety, plumbing, mechanical, electrical, pneumatic, HVAC and lighting systems.

(qq) Time Point. The term "Time Point" will be used in reference to Silver-STAR service and means a fixed geographic point where a vehicle is designated to depart in Revenue Service at a specified time.

(rr) Trip. The term "Trip" means the one-way movement of a passenger on CAT Paratransit Services from that passenger's pick-up location to his or her drop-off location as designated on the vehicle operator's manifest.

(ss) Trip Time. The term "Trip Time" means the amount of time scheduled for one Revenue Vehicle to complete a trip.

SECTION 2. STATEMENT OF WORK

(a) In General.

(1) To assist RTC in complying with the paratransit services provisions of Title II of the Americans with Disabilities Act (ADA), and to enhance the provision of public transportation generally in RTC's service area, RTC selected the Contractor through a competitive procurement process, to operate Citizen Area Transit (CAT) ADA Paratransit Services, Specialized non-ADA CATSTAR services, and Specialized Senior Transportation, collectively referred to as CAT Specialized Services. The CAT ADA Paratransit Services system provides door-to-door paratransit to ADA-eligible passengers in a service area that includes the urbanized greater Las Vegas Valley area of Clark County as outlined in Appendix C, Service Characteristics. As set out more fully in subsection (d) of this Section, the Contractor's responsibilities will include the hiring and training of personnel adequate for the operation and maintenance of RTC-provided facilities as well as RTC-provided and/or Contractor-provided Specialized Services vehicles and the dispatching of those vehicles based upon passenger scheduling performed jointly by the Contractor and RTC

and upon manifests generated by RTC. The Contractor will also be responsible for assisting RTC in the development and maintenance of policy direction and standards for the day-to-day administration of Specialized Services provided under this Contract.

(2) The Contractor's performance shall be in accordance with the Contractor's Proposal (attached hereto as Appendix A), as modified by the Contractor's BAFO (attached hereto as Appendix B), and the obligations of this Contract, including the Appendices hereto. However, in the event of a conflict between the Contractor's Proposal or BAFO and the requirements stated in this Contract, the latter shall prevail.

(3) This Contract and the RFP, all addenda to the RFP, and Contractor's response thereto, which are all incorporated herein in their entirety by this reference, shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof, and shall supersede all prior discussions between the parties. Except as set forth herein this Contract may only be modified by mutual written agreement of the parties. The terms and conditions of the Contract or a subsequent written agreement shall control in the instance of any conflicts between this Contract and the RFP, all addenda to the RFP, and contractor's response thereto.

(b) Project Organization. -- A clearly defined allocation of responsibility for all services is critical to the successful administration of this Contract.

(c) Responsibilities of RTC. -- RTC's responsibilities shall be as follows:

(1) Administration

- (A) Establish operating and maintenance requirements for the Contractor in this Contract, including any amendments or supplemental agreements to this Contract.
- (B) Identify and plan for new and revised services and development of service scopes for competitive procurement in accord with the Transportation Improvement Program/Short Range Transit Plan.

- (C) Providing continuing service planning and capital planning, short and long range planning, in accordance with the Planning Policies and Procedures adopted by the Commission.
 - (D) Develop and implement policies on issues related to RTC's public transportation services, including, but not limited to, service area, hours of service, and fares.
 - (E) Coordinate informational reports.
 - (F) Carry out marketing activities, including the publication of informational brochures, and materials that increase the accessibility for visually and hearing impaired persons in accordance with the ADA.
 - (G) Administer a vehicle advertising program for RTC-owned vehicles.
 - (H) Pay the Contractor for services properly rendered.
 - (I) Administer and monitor this Contract and inspect the performance of the Contractor for compliance with the Scope of Service and the Contract.
 - (J) Audit all of the Contractor's records, including but not limited to, cost, performance and compliance with contractual requirements.
 - (K) Comply with Federal, State and local laws and regulations.
 - (L) Provide Contractor with official notice and direction for all meetings, at which the Contractor is responsible for the presentation of information.
- (2) Fares
- (A) Establish and evaluate fare policies and the fare structure.
 - (B) Audit reporting processes for accuracy of data and calculations.
- (3) Operations
- (A) Provide (either directly or by contract) a certification service to determine eligibility of applicants for ADA paratransit services.
 - (B) Maintain a current record of clients eligible for its ADA, non-ADA and, where applicable, senior transportation services. Provide information from such records as may be necessary for the Contractor to perform its responsibilities under the Contract.

- (C) Develop and maintain parameters for use in the deployment, scheduling, and trip manifest development in cooperation with the Contractor.
- (D) Provide (either directly or by contract) a complete customer service information and reservation telephone line, including customer voice phone and TDD service.
- (E) Investigate unsafe practices.
- (F) Provide (either directly or by contract) facility security systems at the Integrated Bus Maintenance Facility (IBMF) to include building access control, camera systems and alarms.
- (G) Provide (either directly or by contract) facility security systems at the Sunset Maintenance Facility to include access gate control, building access control, camera systems and alarms.
- (H) Provide cellular telephones for Road Supervisors for communication with Radio Dispatch.

(4) Facilities, Maintenance, and Rolling Stock

- (A) Install and maintain facilities in accordance with Barrier Free Design Standards issued in the September 6, 1991, Federal Register, 49 C.F.R. Parts 27, 37 and 38, "Transportation for Individuals with Disabilities; Final Rule," as amended.
- (B) Provide administrative and operations office space, vehicle storage, and vehicle maintenance facilities as specified in Appendix E for use by the Contractor in connection with the performance of Contract services.
- (C) Provide the Revenue Vehicles used for CAT Specialized Services for use in provision of the service components described in this RFP, mark those Revenue Vehicles with appropriate logos and paint schemes, and equip those Revenue Vehicles with tires, radios, fareboxes and a camera recording system. The current fleet of Revenue Vehicles is listed in Appendix F.
- (D) Provide Compressed Natural Gas (CNG) and diesel fuel dispensing and monitoring equipment, CNG and diesel fuel and appropriate back-up fueling points as identified in Appendix J. Maintain the CNG fueling sites.
- (E) Maintain the standby generator(s).
- (F) Determine six (6) months in advance of the opening of the Sunset

Maintenance Facility whether RTC will assume the full facility maintenance responsibilities, amend the Contract to accept the Best and Final Offer (BAFO) cost submitted by the Contractor regarding the Contractor assuming the maintenance responsibilities for the Paratransit portion of the Sunset Maintenance Facility, or conduct further negotiations with the Contractor to assume a limited portion of the maintenance responsibilities at the Sunset Maintenance Facility.

(5) Technology Equipment

- (A) Provide and maintain access to various computer software programs which are appropriate for performing the operational functions listed below. The software listed below is currently in use by RTC:
- (i) Trapeze PASS 4.71: Maintaining eligibility information, generating and revising manifests, and conducting radio dispatch functions within the Specialized Services scheduling and dispatch software.
 - (ii) ORPAC FuelOmat: Performing fuel and fluid management. (Formerly Raypac Network, Inc. (RNI)).
 - (iii) Ron Turly Associates (RTA): For the purpose only of Revenue Vehicles provided by the RTC, coordinating vehicle maintenance for the useful lives of those Revenue Vehicles.
 - (iv) MP2: Maintaining RTC-provided Facilities maintenance tracking.
 - (v) Orbital TMS ORBCAD: Radio communications, vehicle tracking through GPS based and AVL, and mobile data terminal interface for manifest dissemination.
 - (vi) Security Management System: The system primarily comprised of closed circuit television (CCTV), access control, intrusion detection, and duress buttons.
- (B) Provide licenses, both portal access and system specific, for given operational business use for software items identified in subsection (A) above.
- (i) Review requests from the Contractor for access to system software beyond that already in use and render decision(s) regarding the requests based on business need as determined by RTC.
 - (ii) Charge the Contractor, through a one time deduction from the monthly invoice payment, for additional portal and software licenses for access to Trapeze, ORPAC or TMS ORBCAD beyond

the level that RTC determines is necessary to perform the services.

- (C) Provide for any changes to CATCOM equipment and procedures, and offer Train-the-Trainer enhancement training.
- (D) Provide and maintain host computer hardware and infrastructure associated with the CATCOM radio dispatch systems.
- (E) Over the course of the contract term, if RTC implements any changes to any of its designated software, the Contractor will be required to participate in scheduled training and to make any necessary adjustments to implement the new software program.
- (F) Purchase, install and maintain required CATCOM radio, automated mobile data terminal (AMDT) and automatic vehicle locator (AVL) equipment for use in Contractor-provided vehicles.
- (G) Provide maintenance to equipment associated with the CATCOM system and for other equipment installed on RTC owned vehicles, including the digital surveillance system and fareboxes.

(d) Responsibilities of the Contractor. -- The Contractor's responsibilities shall be as follows:

(1) Administration

- (A) Provide qualified personnel having transit management, paratransit operation, safety/security, and facility/vehicle maintenance experience, including CNG fuel maintenance experience, necessary to operate the CAT Specialized Services transportation systems.
- (B) Provide and maintain all office equipment and supplies needed for operation of the contracted CAT Specialized Services transportation system including, but not limited to, all computers, including hardware, software required by the Contractor to perform its own administrative functions, and peripherals, all furniture, and all copiers and facsimile equipment.
- (C) Pay monthly telephone bills, utility bills, and other associated expenses for contracted CAT Specialized Services.
- (D) Assist RTC in marketing in accordance with RTC's marketing plans and other marketing activities as determined by the RTC Project Manager.
- (E) Refer all RTC-related media inquiries to RTC, and cooperate in providing public information through RTC.

- (F) Provide all required reports in a timely manner and maintain written and verbal communications with the RTC to the satisfaction of the RTC Project Manager.
- (G) Comply and/or assist with RTC's monitoring and auditing programs including, but not necessarily limited to, Section 5335 (a) filings and Title VI submittals.
- (H) Assist RTC staff in developing improvements to the services contracted. Cooperate and assist with RTC's programs, including but not limited to ridership or customer satisfaction surveys that may be periodically undertaken.
- (I) Attend regularly-scheduled and special meetings with the RTC staff or with RTC at the request of staff.
- (J) Respond promptly and precisely to RTC staff requests for information.
- (K) File operating, financial, and performance reports and invoices in a timely manner in order to allow RTC to review their content or incorporate the data into reports and plans as appropriate for timely delivery to the final user.
- (L) Promptly notify RTC of any deficiencies in proposed CAT Specialized Services system expansion, alterations, and/or service reductions.
- (M) Provide insurance coverage as required in this Contract.
- (N) Submit quarterly reports outlining compliance with the Contractor's Disadvantaged Business Enterprise (DBE) Plan.
- (O) Assure compliance and enforcement of all RTC passenger rules as well as RTC policies and procedures as provided by RTC.

(2) Fares

- (A) Collect fares, retain custody of fares, and tabulate fare receipts in a manner that complies with RTC's established fare policy. Refer to Appendix C for list of fares.
- (B) For passengers who do not pay the full fare, notify RTC through the Fare Non-Payment Acknowledgement form process (Refer to Appendix R).

(3) Operations

- (A) Provide Specialized Services as specified in the corresponding Service Characteristics, Appendix C of this Contract.
- (B) Assign a dedicated full-time Contractor Project Manager who will be responsible for managing all aspects of the Contractor's performance of Contract activities and responsibilities.
- (C) Provide radio dispatch service in accordance with the RTC's trip reservation booking process and manifest development by means of a system that is compatible with the RTC's practice and software.
- (D) Receive and respond to calls on the day-of-service from passengers checking on the status of pre-scheduled trips.
- (E) During business hours, and where not contractually provided by RTC, provide adequately trained staff or sub-contractor personnel to access control points where the general public may otherwise access the facility unchallenged, for example the administrative lobby.
- (F) Supervise CAT Specialized Services with Road Supervisors dedicated to Specialized Services in accordance with the Staffing and Personnel Program included as Appendix S. The on-road, dedicated Road Supervisors will respond to and take corrective action with respect to passenger incidents and in-service failures such as accidents, vehicle breakdowns, equipment failures, and jammed fareboxes.
- (G) Meet or exceed all operations, equipment, and maintenance requirements established in the Contract.
- (H) Meet or exceed performance and safety standards as described in the submitted proposal and the Safety, Security and Emergency Preparedness Plan included as Appendix L to this Contract and provided under separate cover.
- (I) Meet or exceed employee hiring, retention, and training standards specified in this Contract and proposed by the Contractor in the plan submittals.
- (J) Investigate accidents and unsafe practices.
- (K) Cooperate with law enforcement agencies with respect to security activities on-board buses and elsewhere.
- (L) Report immediately to the RTC Project Manager or designee, all accidents (including passenger related accidents). In addition, report any other non-routine event or operational deviation that results in consequences to a CAT Specialized Services customer or to a RTC-

provided Revenue Vehicle.

- (M) Provide information necessary for the RTC to file Section 5335(a) reports to the National Transit Database (NTD) for the FTA.
- (N) Utilize RTC-owned and/or operated fuel facilities identified in Appendix J for the fueling of Revenue Vehicles or absorb the costs of fueling Revenue Vehicles at alternate sites without prior approval from the RTC Project Manager or designee. RTC will not provide fuel nor reimburse the Contractor for the fueling of Support Vehicles.
- (O) Maximize productivity of Specialized Services resources (both Contractor and RTC resources) in a manner consistent with RTC direction, and where applicable, ADA regulations and guidelines.
- (P) Assist in developing processes for optimizing trip manifests generated by RTC using the Specialized Services resources (both Contractor and RTC resources) in a manner consistent with RTC direction, and where applicable, ADA regulations and guidelines.
- (Q) Provide recommendations to RTC staff regarding demand management, and assist RTC in the identification and implementation of "nontraditional" transit services designed to manage demand.
- (R) Assist in developing processes for optimizing trip manifests generated by RTC using the Specialized Services scheduling and dispatch software (Trapeze PASS).
- (S) Assist in expanding the knowledge base and extending the expertise of RTC scheduling staff, and train Contractor dispatch staff to optimize productivity.
- (T) Assist RTC with provision of same day service.
- (U) Assign staff to perform data entry of the manifests to assure that all data required by RTC are correctly entered into the Trapeze system. Refer to Appendix P for the Trip Edit/Trip Audit Process.

(4) Facilities

- (A) Maintain the RTC-provided Facilities dedicated to CAT Specialized Services at the paratransit portion of the IBMF and maintain all related integrated systems including the automatic bus washer(s).
- (B) Develop a Facilities Maintenance Plan (FMP) (to be included as Appendix G of this Contract) that identifies the factors to accomplish the

maintenance of the facilities, equipment, and systems. The FMP will include the following:

- (i) Reporting forms, schedules and procedures for all maintenance activities.
 - (ii) Preventive Maintenance Program/Plan (PMP) identifying the daily, weekly, monthly and yearly preventive maintenance tasks and inspections; including an inventory of all facility fixed assets, task lists, frequencies, and schedules for preventive maintenance.
 - (iii) Notification process to RTC of any deficiencies in the Facilities or any elements of the PMP that are not being accomplished in the time scheduled.
- (C) Develop a fire and emergency evacuation plan in accordance with State and local ordinances of the applicable jurisdictions in which the maintenance facilities are located.
- (D) Share, with other user(s) of the IBMF, maintenance costs for:
- (i) Commercial Driver's License (CDL)/Roads course, including costs for paving, landscaping any related expenses.
 - (ii) The two IBMF access roads.
 - (iii) Security booth at the Simmons Road vehicle access gate and the personnel cost for staffing this booth.
- (E) Accurately maintain the data in the RTC specified facilities maintenance software (currently using MP2).
- (F) Submit a storm water pollution prevention plan in accordance with Appendix M, as required by the Nevada Department of Environmental Protection, and renew the plan annually, as required.
- (G) Administer the data within the Security Management System located in facilities under the control of the Contractor.
- (5) Maintenance and Rolling Stock
- (A) Maintain all Revenue Vehicles and equipment, whether RTC-provided or Contractor-provided, necessary for performance of the Contract; repair or replace any RTC-provided Revenue Vehicles and equipment that are damaged, lost or stolen during the duration of the Contract; and mark all Contractor-provided Revenue Vehicles with appropriate logos and paint schemes

- (B) Provide, maintain, fuel and repair all Support Vehicles used in supporting the Specialized Services specified in this Contract. The Support vehicles and all associated expense, including insurance, parts and repair, are the sole responsibility of the Contractor and are subject to audit by RTC.
- (C) Provide adequate and appropriate shop equipment and special tools as necessary to perform the necessary maintenance tasks of Revenue Vehicles except for those normally and permanently affixed to the building or grounds at the IBMF or the Sunset Bus Maintenance Facility. A list of the tools permanently affixed to the IBMF is set out in Appendix H.
- (D) Acquire and maintain a parts inventory adequate for the type and number of Revenue Vehicles in the fleet.
- (E) Promptly notify RTC of any deficiencies in RTC-provided Revenue Vehicles, or of any deficiencies with Contractor-provided vehicles that would result in not meeting the daily provision of service.
- (F) Promptly notify RTC of any problems with delivery of fuel required to keep the Revenue Vehicles in operation as described in Appendix C, Service Characteristics.
- (G) Provide on-road, dedicated Road Supervisors to respond to and take corrective action with respect to incidents and in service failures such as equipment breakdowns, accidents, jammed fareboxes, and passenger incidents.
- (H) Provide, and replace if necessary during the life of the Contract, non-revenue wheelchair accessible vehicles for use by Road Supervisors.
- (I) In the event that RTC's vehicle level no longer adequately supports ridership demand, provide sufficient vehicles to meet the excess demand, either by purchase, lease or from its existing corporate inventory.
 - (i) The Contractor and RTC agree to work cooperatively to determine the most cost effective and fastest method of providing vehicles.
 - (ii) Contractor and RTC will work together to evaluate the appropriate method of payment to the Contractor for the actual vehicles used. Payment may include, but is not limited to, an adjustment to the hourly service rate; a one-time payment for the Contractor purchase price; a short term payment plan based on manufacturing deadlines; or a monthly lease agreement

- (iii) Contractor will obtain approval from the RTC Project Manager, or designee, prior to activating in Revenue Service the vehicles referenced above.
- (iv) Compliance with this subsection may qualify as an exception to the Prohibition of Pass-Through Payments under Section 7.

(6) Technology Equipment

- (A) Provide Information Technology infrastructure for normal business operations to include, but not limited to, an appropriate network, internet access, Email, etc.
- (B) Maintain all Contractor computer hardware, infrastructure, software, and peripherals, including an appropriate computer systems security and antivirus program.
- (C) Provide appropriate computer hardware and a computer modem (Refer to Appendix I) to interface with the RTC host computer system and to operate the dispatch software provided by and used by RTC, RTA vehicle management software, and ORPAC fuel management software.
- (D) Maintain and upkeep of RTC-required computer hardware and RTC-provided software, including, but not limited to, the RTA fleet management, ORPAC fuel management equipment, and MP2 (or other approved) facilities maintenance software. (All RTC computer hardware is identified in Appendix I.)
- (E) Over the course of the contract term, if RTC implements any changes to its designated software, the Contractor will be required to participate in scheduled training and to make any necessary adjustment to implement the new software program.
- (F) Provide a telephone system that will accommodate the business needs of the Contractor, and provides the infrastructure to receive, place in queue, and record calls from passengers checking on the status of pre-scheduled trips.
 - (i) The Contractor will need to provide automated reporting capabilities to validate the acceptance rate and the hold time levels.
- (G) Comply with RTC Information Technology requirements as set out in Appendix K of this Contract.
- (H) Pay for portal and software licenses for access to Trapeze, ORPAC, or

TMS ORBCAD beyond those licenses for which RTC has determined there to be a business need.

SECTION 3. TERM OF CONTRACT

(a) Contract Term. -- The term of this Contract is for a period of three (3) years with two (2) two (2) year options as described below in subsection (b). Service under the Contract will commence on July 1, 2007 at 12:01 a.m.

(b) Options. -- RTC will have the option of extending this Contract for two (2) additional two (2) year periods commencing respectively the day after Year 3 of the Contract and the day after Option Period 1 of the Contract. RTC will provide the Contractor with notice of whether it intends to exercise an option at least 120 days before the end of the Contract year then in effect (Year 3 or Option Period 1).

(c) Extension of Contract. -- During Year 3 of the Contract and Option Periods 1 and 2 of the Contract, the RTC will have the right to exercise an extension of the Contract of up to 120 days by providing the Contractor at least sixty (60) days' advance written notice. In the event that RTC exercises the right to extend the Contract, the Contractor shall perform all Contract services at the same rates as are applicable for the Contract year during which the extension is exercised.

(d) Transition. -- At the completion of this Contract term, or in the event of a termination of this Contract prior to the completion of its term, the Contractor shall reasonably cooperate in any procurement process conducted by RTC and in any transition to a new contractor to manage and operate Specialized Services (including, but not limited to, the provision of access to RTC-owned vehicles and the Facilities, coordination of equipment transfers, and related actions).

SECTION 4. COST OF SERVICE

(a) Rate of Compensation. – The cost of service to be paid by RTC to the Contractor shall include all services identified in the Contract based upon the combined service hour ranges as follows:

CONTRACT YEAR 1

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
470,490 to 516,921	\$52.18

CONTRACT YEAR 2

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
497,584 to 546,693	\$53.19

CONTRACT YEAR 3

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
527,771 to 579,806	\$54.14*

OPTION PERIOD 1 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>Contract Year 4</u>	
558,815 to 613,995	\$55.75
<u>Contract Year 5</u>	
592,651 to 651,186	\$56.79

OPTION PERIOD 2 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>Contract Year 6</u>	
624,602 to 686,305	\$58.31

Contract Year 7

666,266 to 742,098

\$59.76

* In the event that Sunset Maintenance Facility is available for Contractor use, the rate as of the month of Contractor occupancy shall be \$54.47 for Contract Year 3.

(b) Base Contract Period. -- Year 1 of the Contract shall commence on July 1, 2007, and shall end one year thereafter. Year 2 shall commence on July 1, 2008, and shall end one year thereafter. Year 3 shall commence on July 1, 2009, and shall end one year thereafter.

(c) Option Periods. -- In the event that RTC exercises the first Option, Year 4 of the Contract shall commence on July 1, 2010, and shall end one year thereafter, and Year 5 of the Contract shall commence on July 1, 2011, and shall end one year thereafter. In the event that RTC exercises the second Option, Year 6 of the Contract shall commence on July 1, 2012, and shall end one year thereafter, and Year 7 of the Contract shall commence on July 1, 2013, and shall end one year thereafter.

SECTION 5. INVOICES AND PAYMENTS

(a) Rate and Scope of Compensation. -- The Contractor shall be compensated by RTC for the services performed under this Contract solely on the basis of the service hour rate (as provided in Section 4 of this Contract) provided however, that start-up costs shall be treated separately. This compensation covers all of the Contractor's costs associated with this Contract, including the cost of operating services, acquiring, maintaining, repairing, and replacing Revenue Vehicles (including parts and components) and other equipment, and maintaining and repairing the Facilities.

(b) Start-Up Costs. The Contractor shall submit separate monthly invoices for start-up costs in an amount not to exceed the start-up cost estimate of \$279,050 provided in the

BAFO. The start-up period shall begin on the date of the Notice to Proceed and continue through July 31, 2007.

(c) Invoice Submittal. -- The Contractor will submit a monthly invoice to RTC for the hours of service provided under this Contract. Prior to submittal of the invoice, the Contractor is required to have completed the trip edit and audit process as established by RTC and set out in Appendix P. The invoice must be accompanied by all of the reports required by Section 26 of this Contract. RTC may withhold payment if all required reports do not accompany the Contractor's invoice.

(d) Marking of Invoices. -- Invoices for payment will be so marked, to include a reference to the Contract number and a purchase order number, and will be consecutively numbered. The Contractor shall provide a separate invoice for each of the services provided and shall forward the invoices to:

Accounts Payable
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

(e) Reservation by RTC. -- RTC reserves the right to request any and all information to support any charges submitted in the invoice. The RTC Project Manager may withhold payment for services that he or she believes were improper, failed to meet service specifications, or were otherwise questionable, and may offset liquidated damages, to the extent chargeable under Section 9, against any payment due.

(f) Payment Period. -- Payment will be made within thirty (30) days of verification and acceptance of the invoices by the RTC Project Manager.

(g) Final Payment. -- RTC may withhold from the monthly payment for the last month of the Contract an amount which RTC believes, in good faith, to be sufficient to address

any potential overpayments that need to be reconciled in connection to the Contractor's final invoice and any outstanding payment issues in connection with Contract close out. Upon termination of the Contract, the Contractor shall submit to RTC a final invoice accompanied by all of the reports required by Section 26 of this Contract and including any other financial or accounting information needed for Contract close out. RTC shall pay all amounts in such final invoice not in dispute within thirty (30) days of verification and acceptance of the invoice by the RTC Project Manager. The Contractor and the RTC Project Manager shall meet promptly to attempt to resolve any remaining disputed costs or charges or other outstanding issues.

SECTION 6. ADJUSTMENTS FROM ASSUMED ANNUAL SERVICE HOURS RANGES

(a) **Rate of Compensation.** – Section 4(a) of this Contract includes the Contractor's rates of compensation based on service hours. Section 4(a) also includes the range of service hours to which the rates apply.

(b) **Lack of Service Hours.** – In the event that the total number of service hours during any Contract year is less than the floor number of service hours as set out in the applicable Assumed Annual Service Hours range, either party may request a renegotiation of the rate applicable to those hours that are less than the number of such floor hours.

(c) **Excess of Service Hours.** – In the event that the total number of service hours provided during any Contract year is in excess of the ceiling number of service hours as set out in the applicable Assumed Annual Service Hours range, either party may request a renegotiation of the rate applicable to those hours that are in excess of the number of such ceiling hours.

(d) **Modification of Scope of Work.** – In the event RTC substantially modifies the

scope of work, including but not limited to, the expansion of the service area, hours of service; significant changes in policy, maintenance requirements and performance standards; provision of facilities; or if Federal, State or local legislation or regulations are passed which mandate increased costs to Contractor in providing services hereunder, RTC and Contractor shall renegotiate in good faith rates set forth in Section 4.

(e) Negotiation of Rate Adjustments. -- Any adjustment in rates resulting from this Section shall be negotiated on an annual basis. Any rate increase sought by the Contractor shall be supported by full documentation of costs.

(f) Temporary Modifications. -- Notwithstanding the preceding provisions of this Section, RTC may direct the Contractor to make temporary modifications in the services provided or the schedules in order to address short term operating problems or issues.

SECTION 7. PROHIBITION OF PASS THROUGH PAYMENTS

(a) General Rule. -- The Contractor will only be paid by RTC based on the rate of compensation specified within Section 4 of this Contract. If the Contractor determines that it needs new or additional equipment or property that RTC is contractually obligated to provide under Section 2(c), it will submit a written request for such items to RTC.

(b) Provision by RTC. -- If RTC determines that it is obligated to provide such property or equipment or determines, in its reasonable discretion, that such property or equipment is otherwise necessary for the provision of services, RTC may obtain such needed property or equipment for the Contractor.

(c) Acquisition by Contractor. -- RTC may, in exigent circumstances, permit the Contractor to purchase needed property or equipment directly, but only with prior written approval of RTC.

(d) Contractor Responsibility. -- Property or equipment purchased by the Contractor in a manner that does not comply with the process in this Section will be at the sole expense of the Contractor.

SECTION 8. INVENTORY

(a) In General. -- An Initial Inventory and list of all equipment, tools, Revenue Vehicles, and other property of CAT Specialized Services, as compiled pursuant to the closeout inventory conducted with the preceding service provider of CAT Specialized Services is set forth in Appendix T. The Contractor may, in its discretion, negotiate the purchase of any property owned by the preceding service provider necessary for CAT Specialized Services operations.

(b) Use of Equipment, Materials and Other Property. -- The existing equipment, materials, and other property owned or leased by RTC may be utilized by the Contractor during the term of the Contract for the provision of CAT Specialized Services, provided that the Contractor will be responsible for returning any RTC-owned equipment, tools, Revenue Vehicles, and other property in accordance with subsection (c) of this Section at the termination of this Contract. In the event any property that the Contractor is obligated to supply under Section 2(d) of this Contract requires replacement during the Contract term, such replacement will be at the cost of the Contractor.

(c) Return of RTC-Owned Property. -- The Contractor will be responsible for returning to RTC, at the termination of this Contract, all RTC-owned equipment, tools, Revenue Vehicles, and other property of equivalent type, value, and condition as that identified in the Initial Inventory, normal wear and tear excluded, other than property that was acquired by the Contractor at its own expense and for which it was not reimbursed by

RTC. In the event that RTC and the Contractor have made a written agreement(s) over the life of the Contract for RTC to retain permanently Contractor-purchased items, those items so identified will not be removed.

(d) Final Inventory. -- RTC will conduct a final inventory during the last month of the Contract.

(1) If any RTC-owned equipment, tools or other property is determined, on the basis of a comparison to the Initial Inventory, to be missing, damaged, or otherwise unavailable for use, the Contractor will be responsible for either replacing such equipment, tools or other property or compensating RTC for its replacement value. RTC may deduct any amounts due to RTC for the replacement of RTC-owned equipment, tools, or other property from the final monthly payment due to the Contractor.

(2) If any RTC-owned Revenue Vehicle is determined, on the basis of a comparison to the Initial Inventory to be missing, damaged, or otherwise unavailable for use, the Contractor will be responsible for repairing such Revenue Vehicle to the satisfaction of RTC (both with respect to time and quality of repair), or either replacing such Revenue Vehicle or compensating RTC for its replacement value. RTC may deduct any amounts due to RTC for the replacement of RTC Revenue Vehicles from the final monthly payment due to the Contractor.

(e) Property Disposition. -- During the term of the Contract, the Contractor will, in consultation with RTC, identify any RTC-owned equipment, tools, Revenue Vehicles or other property that the Contractor believes to be obsolete or no longer needed for project services. RTC may sell or otherwise dispose of such property in accordance with any applicable Federal or State law. The proceeds of such sale will be the property of RTC.

SECTION 9. LIQUIDATED DAMAGES

(a) In General. -- RTC may assess liquidated damages for inadequate performance as set forth in subsection (c) below that are not caused by RTC's failure to perform any of its obligations under this Contract. Notwithstanding the previous sentence, RTC will not assess any liquidated damages for inadequate performance which is caused by events beyond the control of Contractor as defined by Section 62 Force Majeure.

(b) Assessment. -- RTC may, in its discretion, assess such damages on a monthly basis and deduct such amounts from the monthly payments due to the Contractor. RTC agrees to assess no damages for the first 90 days of this Contract. RTC will provide the Contractor prior notice of the liquidated damages to be assessed in accordance with the Liquidated Damages Assessment Process Procedure set out in Appendix R. RTC will consider documented information from the Contractor that provides evidence that the inadequate performance did not occur or was beyond the Contractor's control.

(c) Categories of Liquidated Damages. -- The performance failures set forth below may result in an assessment of liquidated damages to the Contractor:

(1) Late Trips. For any service day in which the actual calculated on-time performance is below 92.0% (no rounding), RTC will assess liquidated damages in the amount of \$50.00 for each trip for that service day that exceeds the on-time window by more than five (5) minutes. Note that on-time performance is determined by the performance of passenger pick-ups within the On-Time Window as defined in Section 1(y). The five minute grace period provided by this paragraph for the assessment of liquidated damages for late trips does not extend to the calculation of on-time performance.

(2) Missed Trips.

(A) The Contractor will reimburse RTC for the dollar equivalency, based on

the most current base rate, for the free ride coupons sent to individuals who experience a missed trip.

- (B) In addition to the reimbursement required by subparagraph (A) above, in the event that the Contractor's actual calculated on-time performance on any given service day is below 94.0% (no rounding), RTC will assess liquidated damages in the amount of \$125.00 for each trip on that service day that exceeds the on-time window by more than thirty (30) minutes.

(3) Improper Vehicle Cleaning and Appearance.

- (A) If RTC determines that the Contractor has failed to maintain the cleanliness of a Revenue Vehicle in compliance with Section 23 of this Contract, Vehicle Cleaning and Appearance Standards and Requirements, RTC will assess liquidated damages in the amount of \$100.00 for each vehicle in non-compliance for each day the situation exists.

- (B) If RTC determines that the Contractor has failed to maintain the vehicle appearance standard of a Revenue Vehicle in compliance with Section 23 of this Contract, RTC will assess liquidated damages in the amount of \$100.00 for each vehicle in non-compliance for each day the situation exists.

(4) Below Standard Vehicle Maintenance Performance. The following Vehicle Maintenance failures have been identified as having significant impact to the effective and efficient operation of Specialized Services. Failure to perform to specified standards may result in the assessment of these amounts:

- (A) If a Vehicle Operator fails to properly complete a pre-trip inspection,

RTC will assess liquidated damages in the amount of \$100.00 per occurrence.

- (B) If the Contractor fails to conduct 100% of Performance Maintenance Inspections (PMI) within the required 3,000 mile interval, RTC will assess liquidated damages in the amount of \$100.00 per day for each vehicle operated after the scheduled PMI. The assessment for this failure will increase to \$200.00 per day per vehicle operated more than three (3) days or 500 miles past the scheduled PMI.
- (C) If the Contractor fails to provide effective maintenance to sustain the standard of 10,000 miles or more between valid mechanical road calls, RTC will assess liquidated damages in the amount of \$100.00 for each valid mechanical road call prior to the 10,000 miles measure in a monthly reporting period. For purposes of this provision, road call mileage is calculated by dividing the number of valid mechanical road calls by the total mileage of revenue fleet vehicles traveled in a monthly reporting period. For example, 500,000 miles traveled per month with 50 valid road calls equals 10,000 miles between road calls.

(5) Failure to Report Mechanical Breakdowns or Respond to In-service Failures in a Timely Manner.

- (A) If the Contractor fails to report a valid mechanical breakdown resulting in a service failure in accordance with Section 22(t) of this Contract, RTC will assess liquidated damages in the amount of \$100.00 per occurrence.
- (B) If the Contractor fails to respond, in accordance with Section 22(t) of this Contract, to an in-service failure or interruption, such as the breakdown

of a Revenue Vehicle, an accident involving a Revenue Vehicle, or any other incident causing a delay in service, so as either to fail to make the affected Revenue Vehicle fit for passenger service or to fail to provide a replacement vehicle within thirty (30) minutes of the time the Vehicle Operator reports, or should have reported, the in-service failure or interruption, in accordance with the procedures set out in subsection (t) of Section 22 of this Contract, RTC will assess liquidated damages in the amount of \$100.00 per incident of non-compliance.

- (C) In the event that a Vehicle Operator does not notify Radio Dispatch of an in-service failure which results in delay to passengers of RTC's Specialized Services, the impact to the passenger is compounded as the Contractor will not have the opportunity to respond within thirty (30) minutes. For this type of egregious failure, RTC will assess liquidated damages in the amount of \$500.00 per occurrence.

(6) Below Standard Facility and Equipment Maintenance Performance.

- (A) If the Contractor fails to comply with scheduled Facility maintenance in accordance with Section 24(c) of this Contract, RTC will assess liquidated damages in the amount of \$250 per day for each delayed preventive maintenance task that preventive maintenance is delayed beyond the applicable schedule. If the Contractor allows the delay of any preventive maintenance task to go beyond thirty (30) days, liquidated damages will be raised to \$500.00 per day.
- (B) If RTC-provided facility equipment is out of service, due to any failure by the Contractor to provide supplies, parts, equipment etc., RTC will

assess liquidated damages in the amount of \$250 per day for each piece of equipment out of service. If the Contractor allows any equipment to remain out of service, due to these issues, beyond thirty (30) days, liquidated damages will be raised to \$500.00 per day.

(7) Failure to Provide Acceptable Customer Service.

- (A) If the Contractor permits any employee who is the subject of five (5) or more valid customer complaints during any consecutive three (3) month period to remain in a public contact position for Contract services, RTC will assess liquidated damages in the amount of \$100.00 per day for every day that the employee was in contact with the public after receipt of the fifth customer complaint.
- (B) If the Contractor exceeds a ratio of 1.5 complaints for every 1,000 passenger trips in any single month, RTC will assess liquidated damages in the amount of \$75.00 for each valid complaint in excess of the 1 complaint for every 1,000 passenger trips.
- (C) If the Contractor does not respond in a timely manner to a customer comment, as outlined in the Customer Comment Process in Appendix Q, RTC will assess liquidated damages in the amount of \$100.00 per comments per day that the comment remains unanswered.

(8) Failure of Vehicle Operators to Maintain Approved Uniform Appearance. If a Vehicle Operator of the Contractor is found to be out of uniform during revenue service or in violation of the Contractor's written standards for appearance, RTC will assess liquidated damages in the amount of \$100.00 for each incident.

(9) Failure of Vehicle Operators to Log into the CATCOM System.

- (A) For any Revenue Vehicle in which the Advanced Mobile Data Terminal (AMDT) is in working condition and the Vehicle Operator fails to properly log into the system prior to leaving the designated bus yard, RTC will assess liquidated damages in the amount of \$500.00.
- (B) If the Contractor fails to meet the accuracy standards set out in Appendix P for trip edit and audit for three (3) consecutive months, RTC will assess liquidated damages in the amount of \$10,000.00 and liquidated damages in the amount of \$5,000.00 per month for any additional consecutive month that such failure continues.

(10) Failure to Meet Security Requirements. Failure by the Contractor to meet the security requirements as required in Section 27 of this Contract constitutes a serious breach of confidence between RTC and its Contractor.

- (A) If the Contractor fails to respond within the five (5) days to written notice of a failure to meet security requirements, RTC will assess liquidated damages in the amount of \$100.00 per day beginning from the date of notice of the failure.
- (B) Upon written notice of any additional failure of the same nature, RTC will assess liquidated damages in the amount of \$500.00 per day that the deficiency remains uncorrected.

(11) Failure to Report an Accident in a Timely Manner. If the Contractor fails to follow the prescribed time period in Section 22(v) for notification of an accident involving an RTC-owned vehicle, RTC will assess liquidated damages in the amount of \$5,000.00 per incident of non-notification. In addition, if the Contractor fails to follow the prescribed time periods for notification of an accident involving a Contractor-owned vehicle used in

revenue service or in training for revenue service, and such accident results in property damage (other than vehicle damage) or personal injury (including death), RTC will assess liquidated damages in the amount of \$5,000.00 per incident of non-notification.

(12) Failure to Maintain the Personnel Plan.

- (A) If the Contractor fails to provide a replacement for a key personnel position(s) within sixty (60) days, as required by Section 14(c), RTC will deduct the monthly salary and benefits of the vacant position for each full month that the position is vacant and assess liquidated damages in the amount of \$100.00 per day that the position(s) remains unfilled.
- (B) If the Contractor fails to provide for the replacement of vacant non-key personnel position(s) within thirty (30) days of the date the position becomes vacant in compliance with the Staffing and Personnel Program included as Appendix S, RTC will assess a liquidated damages in the amount of \$100.00 per day that the position(s) remains unfilled.

(d) Notice and Assessment. -- After the conclusion of each month, RTC will calculate and notify the Contractor in writing of any liquidated damages to be imposed for that month.

(1) If the Contractor disagrees with any of the liquidated damages assessed, the Contractor may respond to RTC in writing within five (5) days of receipt of the notice and provide an explanation or rationale for the Contractor's disagreement. Unless rescinded based on information from the Contractor, all amounts of liquidated damages imposed will be deducted by RTC from the payment for service otherwise due to the Contractor, however, not to exceed the maximum allowable liquidated damages assessment set out below in paragraph (2). If the Contractor continues to contest the

assessment of liquidated damages, the dispute is subject to resolution pursuant to Section 38 of this Contract.

(2) The maximum allowable liquidated damages assessment in any given month will be limited to five (5) percent of the monthly invoice amount.

SECTION 10. HOLIDAY SCHEDULES

(a) Regularly Planned Holidays. -- RTC reserves the right to require the Contractor to operate modified schedules on holidays as the RTC Project Manager deems appropriate. Regularly planned holiday schedules will be operated on the following holidays:

New Years Day
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

(b) Additional Holidays. -- Other holidays that may be deemed appropriate based upon customer demand are:

Martin Luther King Day
President's Day
Veteran's Day
Family Day (the day following Thanksgiving)

(c) CATSTAR and Silver-STAR. -- CATSTAR will operate in accordance with the social service agencies' work schedules. RTC will provide the Contractor with no less than two (2) weeks advance notice of CATSTAR social service agency holidays. Silver-STAR will follow CAT Fixed Route holiday schedules.

SECTION 11. DEVELOPMENT OF DEPLOYMENT PLAN

(a) RTC Cooperation. -- RTC intends to work cooperatively with its Contractor in

development of the vehicle deployment plan and the Silver-STAR route schedule used for purposes of scheduling Specialized Services trips by means of the Specialized Services scheduling and dispatching software. RTC is responsible for determining the allowable service hours, the route starting and ending times, and the route designations.

(b) Contractor Cooperation. -- The Contractor is expected to work cooperatively with RTC in development of the vehicle deployment plan and the establishment of time points for the Silver-STAR route schedule used for purposes of scheduling Specialized Services trips by means of the Specialized Services scheduling and dispatching software. The Contractor is responsible for determining employee bid packages for provision of service.

(c) Joint RTC/Contractor Scheduling Team. -- RTC, in an effort to maintain a cooperative environment, will establish a joint RTC/Contractor Scheduling Team to work together on reaching an efficient, cost-effective and high quality deployment plan and to discuss other scheduling issues that arise throughout the course of any given month.

SECTION 12. FARE COLLECTION

(a) Fare Recording. -- The Contractor's vehicle operators will record each boarding by type of fare, including recording of non-fare boarding and free-rides coupons. The Contractor will maintain all data necessary for the operation of the farebox and data reporting system to the satisfaction of RTC. Failure to pay a fare is considered a violation of RTC policy as defined in the RTC Disruptive Passenger Policy and Fare Non-Payment Procedure, also located in Appendix R.

(b) Fare Retention and Documentation. -- The Contractor will retain the fares collected as partial payment of the monthly invoice. The RTC Specialized Services scheduling and dispatching software system will be the documentation for the dollar value of the required

fares collected. Each month, RTC will deduct the total fares actually collected from the amount invoiced by the Contractor.

SECTION 13. FARE STRUCTURE

(a) In General. - RTC has determined the fare structure for CAT Specialized Services and incorporated that structure into Appendix C. RTC retains the right to make any fare adjustments it deems appropriate. The fare structure determined by RTC will be incorporated into this Contract between the RTC and the Contractor by reference.

(b) Methods of Payment. - The Contractor will accept all means of payment approved by RTC, including, but not necessarily limited to, cash, passes, tickets, transit punch cards, and electronic transit fare cards. All methods of payment will be recorded. The Contractor will ensure that passengers are required to show proper identification, where applicable, to qualify for CAT Specialized Services. Examples of proper identification include the CAT ADA Paratransit Services Identification Card, Reduced Fare Identification Card, or program specific identification cards (e.g., FDR or Division of Aging Services identification). RTC will provide samples of each of these examples to the Contractor.

SECTION 14. PROJECT MANAGEMENT

(a) Management Structure and Key Personnel Plan. - The Contractor shall comply with its Management Structure and Key Personnel Plan for CAT Specialized Services set out as Appendix U to this Contract.

(b) Contractor General Manager. - The Contractor has designated a full-time Contractor General Manager dedicated to services performed under this Contract who will supervise the day-to-day operation of the service, as well as the management of the project's

accounts and operating records. The Contractor General Manager shall be based out of the Specialized Services Administrative offices at the IBMF. The Contractor General Manager must have a minimum of five (5) years management and supervisory experience in public transportation with at least three (3) years of ADA paratransit operations experience. The Contractor General Manager or his or her designee will be available by telephone or in person during all hours of operation to make decisions as necessary at the request of RTC.

(c) Key Personnel. - RTC reserves the right to approve the selection of the Contractor General Manager and to direct the removal of the Contractor General Manager during the term of the Contract. The Contractor must notify the RTC Project Manager at least thirty (30) days prior to any contemplated changes to key personnel, and the RTC Project Manager must provide written approval of changes to key personnel prior to the action being taken excluding employee resignation and termination for cause. No key personnel position is to remain vacant for longer than sixty (60) days. While the Contractor conducts an extensive search, the Contractor may fill a vacant key personnel position temporarily provided that the individual filling the position meets the qualifications of the position. Key personnel include the following positions or their equivalents: Contractor General Manager; Managers of Operations, Quality Assurance, Vehicle Maintenance, Facilities Maintenance, Driver Development and Safety; and CATCOM Systems Specialist; and a staff person assigned to system security and emergency preparedness.

(1) Manager of Operations. - The Manager of Operations shall have a minimum of five (5) years management and supervisory experience in public transportation with at least three (3) years of ADA paratransit operations experience, as well as sufficient technical expertise of the Trapeze Pass Software operating system to effectively interact with RTC on the joint RTC/Contractor Scheduling Team and to oversee the dispatch functions.

(2) Manager of Quality Assurance. - The Manager of Quality Assurance shall have a minimum of three (3) years management/supervisory experience in public transportation.

(3) Manager of Vehicle Maintenance. - The Manager of Vehicle Maintenance shall have a minimum of five (5) years journey level mechanic experience with full knowledge and extensive experience in diesel engine repair, CNG engine repair, automotive electrical, and air conditioning repair. He or she should also have an educational background consisting of, at minimum, an associate's degree, possess ASE automotive/truck certifications (preferably Master Certified), and have prior experience in transit maintenance (additional experience may be substituted for an associate's degree). Strong managerial and training experience with a minimum of three (3) years experience in maintenance supervision of ten or more mechanics is required. The Maintenance Manager must be legally licensed to operate a bus in the State of Nevada with a valid Class C license with Passenger ["P"] and Air Brake endorsements as well as maintain a valid medical certificate and any other licenses or certificates required by applicable Federal, state, or local regulations.

(4) Manager of Facilities Maintenance. -- The Manager of Facilities Maintenance shall have at minimum five (5) years experience in the maintenance and repair of major commercial, industrial or public facilities, including three (3) years of supervisory/management experience. This position may be combined with the Manager of Vehicle Maintenance provided the Manager has the requisite

experience.

(5) CATCOM Systems Specialist. - The CATCOM Systems Specialist shall have sufficient skills to supervise Contractor support staff's performance of all CATCOM and camera recording systems operator functions, including, but not limited to, administration of data within the CATCOM systems and incident/accident form options; creation of special route and block data; report creation; systems performance monitoring; vehicle information updating; performance of routine maintenance on associated hardware components; and data management of recorded information from the camera system. The CATCOM Systems Specialist will also manage the security elements of the Contractor's system and any requirements directed by RTC in connectivity with RTC's network, communicating to RTC additions and deletions of names of Contractor staff with authorized CATCOM/Trapeze access.

(6) With the exception of the Contractor General Manager, two key personnel positions may be combined, provided that the individual proposed can demonstrate through a resume and interview process that they have the required qualifications for each position.

(d) Availability. - The Contractor will provide the telephone numbers of at least two (2) members of management with the authority and responsibility to make binding decisions, acting as agent for the Contractor. These management individuals will also respond in person to any emergency or accident involving extensive property damage or injuries.

(e) Media Interaction. - The Contractor will provide the telephone number of a member of management with the authority and responsibility to speak to the news media regarding issues pertinent to Contractor responsibilities and actions. This person will be expected to be available by phone at any time of the day. He or she will also be responsible for

coordinating media activities and inquiries with the RTC's Communication Department staff prior to interviews taking place, to ensure accurate and consistent information is being disseminated.

(f) Contract Compliance. -- The Contractor General Manager will insure that key personnel manage the project in compliance with the submitted plans and all contractual agreements.

SECTION 15. GENERAL REQUIREMENTS FOR PERSONNEL

(a) In General. -- The Contractor will provide qualified personnel capable of performing the services required under this Contract. The total number of personnel necessary for operations and services has been determined by the Contractor and is reflected in the Staffing and Personnel Program (Appendix S). At all times during the term of the Contract, the Contractor shall adhere to the staffing levels stated in its Staffing and Personnel Program. The Contractor will be responsible for the payment of all employee wages and benefits.

(b) Training. -- All employees of the Contractor will have completed the Contractor's Employee Training Program, as outlined in the Contractor's proposal in Appendix A, Program and the Contractor will also maintain ongoing training for employees. Training program, for all classifications, will include a section on transit security approved by the RTC Project Manager of his or her designee.

(c) Mapping. -- Each vehicle operator released from training must be able to determine the location of any address and arrive on time by use of a map or written instructions (lefts and rights). The Contractor must issue each new vehicle operator an appropriate Las Vegas map book, to be determined with RTC approval, with the vehicle

operator's name marked on the book. The map book is to be shown to the RTC upon request. The Contractor must ensure that each paratransit vehicle operator maintains possession of the approved map book that is no more than two years old throughout employment. The Contractor must ensure that each Silver-STAR vehicle operator maintain possession of the Silver-STAR route design.

(d) Manifest Submission. -- The Contractor must require vehicle operators and dispatchers to accurately complete and submit the required completed manifests and all other data requested by RTC in a form approved by the RTC Project Manager and within the time frame specified by the RTC Project Manager.

(e) Priority in Hiring. -- The Contractor will afford a priority in hiring to employees of the preceding service provider of CAT Specialized Services. Such a priority shall not require the hiring of any such employee if the Contractor determines that the employee is not qualified for the position (under the terms of the Contractor's employment standards and personnel policies), or the Contractor determines that the employee should not be hired because of past employment history (such as documented disciplinary actions, habitual absenteeism, etc.). The priority in hiring will not extend to any individual who was dismissed from his or her employment for cause. Nothing in this section will require the Contractor to recognize any union that represented the workforce of the preceding service provider, or to assume or otherwise apply the terms and conditions of any collective bargaining agreement between the preceding service provider and any union.

(f) Uniforms. -- The Contractor will cause all vehicle operators, dispatchers and personnel available to the public to be attired in such uniforms or clothing as approved by the RTC Project Manager. Such clothing will display the service logo or name. The cost of such uniforms will be borne by the Contractor. The Contractor will submit for RTC approval a

sample of any modification to the uniforms to be worn by each uniformed job category.

(g) Attitude. -- All project personnel will maintain a professional, courteous manner with passengers, including answering to the best of their ability all passenger questions; refraining from disparaging RTC or the Contractor to passengers or the media; and performing other tasks as directed. Vehicle operators are specifically prohibited from showing the manifest to a passenger or customer.

(h) Drug and Alcohol Testing. -- FTA's requirements relating to the testing of employees who perform safety-sensitive functions are set forth in Parts 653 and 654 of title 49 of the Code of Federal Regulations (C.F.R.). The Contractor shall agree to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. Parts 653 and 654, produce any documentation necessary to establish its compliance, and permit any authorized representative of the U.S., Department of Transportation or its operating administrations, the State Oversight Agency of Nevada, or the RTC to inspect the facilities and records associated with the implementation of the drug and alcohol testing program. A summary report of drug and alcohol testing results (exclusive of individual test results) will be provided to RTC. Any safety-sensitive employee who does not pass the medical examination or whose drug/alcohol screening tests show evidence of alcohol dependency or drug abuse will not be permitted to perform work under the Contract.

(i) Employee Removal. -- RTC reserves the right to require the Contractor to immediately remove an employee from CAT Specialized Services for any of, but not limited to, the following items:

- (1) Committing unsafe or inappropriate acts while providing Specialized Services.
- (2) Revocation or non-renewal of a valid Nevada driver's license.
- (3) Distributing any unauthorized materials while performing services under this Contract.

- (4) Soliciting a gratuity from a passenger.
- (5) Failure to notify the Contractor of an arrest or conviction of a criminal offense of a Class A or Class B misdemeanor or felony; or placement on probation or deferred adjudication for the same; or a driving while intoxicated (DWI) charge, before the end of the business day following the day the employee receives notice of such action.
- (6) Incurring excessive customer complaints due to discourtesy, rudeness, use of profanity or any other act deemed unacceptable.
- (7) Failing or refusing to take a drug or alcohol test.

(j) Employee Retention. -- The Contractor will maintain personnel and compensation plans that are designed to encourage employee retention and longevity and minimize employee turnover. Such plans shall include employee incentives and rewards and provide fair and reasonable wage and benefit packages for employees.

(k) Requirements. -- The Contractor's Staffing and Personnel Program and/or Employee Training Program shall incorporate the requirements of this Section as well as the requirements of Sections 16, 17, 18 and 19 of this Contract. The Contractor will be in breach of this Contract and subject to termination for default should any personnel not meeting the requirements of the Staffing and Personnel or Employee Training Programs be employed by the Contractor for the purpose of performing duties pursuant to the Contract.

SECTION 16. VEHICLE OPERATORS

(a) Licensure. -- Each Vehicle Operator will have a valid Nevada Commercial Driver's License, Class C or above with passenger endorsement as well as any other licenses required by applicable local, State, and Federal laws and regulations. Medical testing related to drug and alcohol use will be conducted by the Contractor in accordance with applicable Federal laws and regulations. A summary report of test results will be provided to the RTC Project Manager. Any Vehicle Operator who does not pass the medical examination or whose drug/alcohol screening tests do not comply with applicable standards for alcohol or drug use

will not be permitted to operate any vehicle used to provide service under this Contract.

(b) Driving Ability. -- Each Vehicle Operator will be alert, careful, and competent in terms of driving ability and habits.

(1) Vehicle Operators are prohibited from using personal cell phones or entertainment devices while operating in revenue service.

(2) Vehicle Operators are prohibited from using tobacco products inside any RTC vehicle, in proximity to any RTC vehicle or RTC building, near fuel tanks or pumps, or in any restricted areas.

(c) Vehicle Operator Courtesy. -- Each Vehicle Operator will be courteous to all passengers and be expected to deal with difficult passenger situations in a caring and professional manner. Vehicle Operators are required to enforce Specialized Services rider guidelines.

(d) Vehicle Operator Appearance. -- Each Vehicle Operator will wear a regulation uniform and be neat and clean in appearance at all times while in Revenue Service.

(e) Driving Records. -- The Contractor shall not employ any person as a vehicle operator whose driving record is not acceptable as defined in this Subsection or who has been convicted of a felony involving a crime of violence or committed in the use of a commercial vehicle, or a committed serious traffic violation (as defined in the Commercial Driver's License standards, requirements, and penalties). An unacceptable driving record is defined as a record that includes more than three (3) moving violations and/or chargeable accidents within the previous two (2) year period at time of hire.

(f) Vehicle Operator History. -- Prior to employing any person as a vehicle operator, the Contractor shall obtain from each applicant detailed information concerning such applicant's employment experience, driving record, professional driving experience, motor

vehicle violations and accidents, criminal history, personal and character reference, and complaints filed against such persons in the course of any employment as a professional driver, whether by any bus service provider or otherwise. The Contractor shall investigate and verify the accuracy of the information obtained from all job applicants.

(g) Background Checks. -- To comply with subsections (e) and (f), the Contractor shall perform a background check of each applicant prior to hiring the applicant as required to become a vehicle operator. The background check shall include, at a minimum, a Motor Vehicle Record (MVR) report and a report from a third party organization experienced at searching for any record of criminal convictions. The Contractor is required to conduct a re-check every three (3) years for continuing employees.

(h) Drug and Alcohol Testing. -- Vehicle Operators shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

(i) Training. -- All Vehicle Operators are required to complete the Contractor's Training Program and be fully trained in defensive driving and vehicle handling in accordance with an approved defensive driving program. The Contractor shall also maintain ongoing training for Vehicle Operators.

(1) Training programs must contain, at a minimum, the following components:

- (A) Nevada Commercial Driver's License, Class C or above, driving and testing preparation.
- (B) ADA Sensitivity
- (C) Blood Born Pathogen procedures
- (D) Local geography familiarization
- (E) Map reading and interpretation
- (F) Customer courtesy and problem resolution
- (G) Safety, defensive driving and accident procedures
- (H) Transit security and incident command system procedures
- (I) RTC history and ADA Paratransit Eligibility Determination (1 hour)

(2) With regard to ADA Sensitivity, RTC requires Vehicle Operator training

through community partnerships to better prepare Vehicle Operators to work with persons who experience a disability. This training should emphasize situations relating to persons experiencing cognitive or psychiatric impairments.

(3) With regard to the training element referred to in subsection (i)(1)(B), RTC will provide a qualified staff person to conduct the RTC ADA Paratransit and Eligibility Determination process section of the training, which will include information relating to RTC's expectations on customer relations, including sensitivity to working with passengers with disabilities. RTC will participate in one (1) refresher training meeting annually for veteran drivers to cover relevant matters pertaining to RTC policies and procedures and customer relations.

(4) Prior to implementation, the RTC Project Manager must approve the initial training program and any subsequent changes to the training format that was initially submitted in the proposal and approved by RTC and approval shall not be unreasonably withheld.

(j) CAT Specialized Services Training. -- Vehicle Operators will be trained in, and be cognizant of, all operational procedures relating to Specialized Services, including but not limited to, a thorough knowledge of the CATCOM system and the service area and street network. The Contractor is responsible for updating on a regular basis the knowledge of its Vehicle Operators regarding new or extended streets, new developments or complexes, and points of interest.

(k) Notices. -- Vehicle Operators will, pursuant to requests by RTC Project Manager, hand out notices to passengers or otherwise render assistance in RTC's monitoring and supervising operations.

(l) Fares. -- Vehicle Operators will honor special passes, collect tickets, issue fare

non-payment forms as determined by RTC.

(m) Timepieces. - Vehicle Operators will have available at all times during operation of any Revenue Vehicle in connection with these services a timepiece having an accuracy of +/- one (1) minute per month and the accuracy of the timepiece will be verified based on Standard Naval Observatory time each day by the Contractor's on-duty supervisor(s).

(n) Backup Operators. - The Contractor shall have adequate numbers of fully qualified Vehicle Operators available as backup operators during all operating hours to ensure consistent and reliable service.

(o) Accident Reporting. - Vehicle Operators must immediately report any traffic accidents, passenger accidents, or other non-routine event to the Contractor's dispatcher and follow both RTC and Contractor procedures for proper handling of accident reporting and passenger assistance.

(p) Required Documentation. - Vehicle Operators must have in their possession at all times while on duty, valid Nevada CDLs, U.S. Department of Transportation Medical Cards, and CAT Specialized Services employee identification cards.

(q) CATSTAR Deployment. - In any contract year, the Contractor shall not conduct more than two (2) deployments of CATSTAR Vehicle Operators unless RTC provides prior written authorization for additional deployment(s).

SECTION 17. VEHICLE DISPATCHERS & RADIO DISPATCHERS

(a) In General. - The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to dispatch vehicles and operate the RTC CATCOM communication system and Specialized Services scheduling and dispatch software.

Dispatchers shall work closely with RTC Reservation Center personnel to accommodate same day trip modifications and shall provide prompt and accurate responses to trip inquiries of each day's scheduled passengers.

(b) Training. -- All radio dispatch personnel are required to complete the Contractor's Training Program and shall also maintain ongoing training requirements for dispatchers. Training programs shall contain, at a minimum, the following components:

- (1) CATCOM radio communications and Specialized Services scheduling and dispatch software.
- (2) Local geography familiarization.
- (3) RTC rider and operations policies.
- (4) DOT and RTC emergency action plan implementation strategies.
- (5) Customer courtesy and problem resolution.
- (6) Accident/incident procures.
- (7) Transit security and incident command system procedures.

(c) Passenger Inquiry Training. -- All Dispatchers shall be required to receive proper training in passenger inquiries. The Contractor shall receive RTC's approval prior to initiating passenger inquiry training.

(d) Drug and Alcohol Testing. -- All Dispatchers shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of the Contract.

SECTION 18. ROAD SUPERVISORS

(a) In General. -- The Contractor shall designate specific personnel as "Road Supervisors" and shall establish the responsibilities and accountability of those employees. The Contractor shall require Road Supervisors to be available on duty during all shifts. Road Supervisors shall monitor revenue operations and shall, in limited circumstances, be available to transport passengers.

- (1) Road Supervisors shall be deployed in the field during all service hours of

operation, have use of Contractor-provided non-revenue vehicles, and be able to respond quickly during all hours of revenue service to Vehicle Operator requests for assistance, emergency conditions, or to transport passengers, if necessary, due to vehicle service interruptions. The Contractor-provided non-revenue vehicles used by Road Supervisors must be wheelchair accessible.

(2) The Road Supervisors shall be responsible, at minimum, for:

- (A) Ensuring timely pull-out of Revenue Vehicles.
- (B) Ensuring adherence to schedule pick-up and drop off times.
- (C) Assisting with passengers' concerns and comments.
- (D) Responding to accidents and incidents.
- (E) Assisting Vehicle Operators with new and/or modified schedules.
- (F) Managing responses to Revenue Vehicle and equipment failures by dispatching additional vehicles or equipment, as necessary, and arranging for a mechanical response to the failure.
- (G) Maintaining communications with the base facility, the Vehicle Operators of CAT Specialized Service Revenue Vehicles, and with other on-duty Road Supervisors.

(b) Licensure. – The Contractor shall require all Road Supervisors to maintain a valid Nevada CDL, Class C or above, and require that all Road Supervisors be prepared to drive Revenue Vehicles as may be warranted.

(c) Drug and Alcohol Testing. – All Road Supervisors shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

(d) Training. – In addition to the components identified in Section 16(i) of this Contract, the Employee Training Program for Road Supervisors shall include the following components:

- (1) Maintaining Schedules
- (2) Incident and Accident Management
- (3) Operational Communications
- (4) Management Training and Decision making
- (5) Vehicle and Equipment Familiarization
- (6) Transit Security and Incident Command Procedures

(e) Pull-Out. -- The Contractor shall require Road Supervisors to be in the yard during peak hour, pull-out periods to coordinate the timely and orderly assignment and departure of vehicles.

SECTION 19. VEHICLE MECHANICS

(a) In General. -- The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to maintain and service Revenue Vehicles on-site. The mechanical workforce must include personnel capable of repairing and maintaining all systems of the CAT Specialized Services vehicle fleet including lifts, air conditioners, heating units, engines and transmissions. The mechanics assigned to this Contract must meet the requirements for vehicle maintenance as follows:

(1) Knowledge of:

- (A) Diesel and Gasoline Engines;
- (B) Drivetrains;
- (C) Hydraulic, Air and Electromagnetic Braking Systems (Brake Retarders);
- (D) Suspension/Steering;
- (E) Electrical/Electronic Systems;
- (F) Heating, Ventilation, and Air Conditioning;
- (G) Wheelchair Lifts;
- (H) Alternative Fuel Systems;
- (I) Preventive Maintenance Inspections.

(2) Ability to:

- (A) Complete reliable and safe preventive maintenance inspections;
- (B) Independently diagnose and repair defects on systems as necessary;
- (C) Use automotive test equipment and specialized tools effectively;
- (D) Obtain precision measurements as required;
- (E) Diagnose and perform repairs on systems related to automotive, light-duty trucks, paratransit vehicles;
- (F) Diagnose, repair, and maintain vehicle powertrains, including but not limited to engines, transmissions, driveshaft, differentials, grade retarders and related sub components;
- (G) Diagnose, repair, and maintain vehicle brake systems, suspension/steering, electrical/electronic systems, and related sub components;

- (H) Diagnose, repair, and maintain electrical systems. Must be able to read and understand electrical schematics;
- (I) Diagnose, repair, and maintain air conditioning/heating/ventilation systems and certified to perform repairs and handle refrigerant incidental to repairs;
- (J) Adjust, repair, or replace damaged body parts and window glass;
- (K) After on-the-job training, diagnose, repair, and maintain wheelchair lifts, and alternatively-fueled engines; and
- (L) Read and understand parts and repair manuals, and electrical/vacuum schematics; complete the necessary paperwork associated with the job.

(b) **Skills and Availability.** -- The Contractor will ensure that the skills, capability, and availability of maintenance personnel are adequately matched to the type of maintenance and repairs needed for the CAT Specialized Services at the time they are needed.

(1) Maintenance activities will be carried out at times that do not interfere with scheduling of Revenue Vehicles to meet peak period service demands.

(2) Competent, experienced vehicle mechanics shall be available during all hours of CAT Specialized Services to respond to any in-service failures or Revenue Vehicle or equipment problems that arise in the yard during the pre-trip vehicle inspections.

(c) **Training.** - Training for all maintenance personnel must contain, at a minimum, the following components:

(1) All Maintenance Personnel

- (A) Security and emergency preparedness training.
- (B) Hazmat and storm water training.
- (C) OSHA and DOT compliance, health and safety training.
- (D) Hazardous waste operations and emergency response training.
- (E) Lockout/tagout training.
- (F) Forklift or loading equipment training (as required).
- (G) Maintenance safety training.
- (H) Transit Security and Incident Command Procedures

(2) Maintenance Management and Mechanic Personnel

- (A) Vendor provided training.
- (B) Brake Inspection Certification training.
- (C) Electromagnetic braking systems (brake retarder) training.

- (D) Wheelchair lifts manufacturers training.
- (E) Alternative fuel system training.
- (F) Air Conditioning and refrigerant training.
- (G) Material handling and storage requirements training.

In addition to above, Contractor will provide incentive to encourage and reward mechanics and maintenance management personnel who possess ASE Certification per Contractor's published ASE bonus Program, included as Appendix V and provided under separate cover. The Contractor will cooperate with RTC to provide space for and schedule all vehicle mechanics for new vehicle service training, as needed with the receipt of either expansion or replacement vehicles.

(d) Fueling and Cleaning. -- The Contractor shall also have on duty a sufficient quantity of maintenance personnel to fuel and clean the required number of Revenue Vehicles for pull-out as required in Section 22.

(1) Maintenance personnel are required to have knowledge of vehicle fueling procedures and vehicle cleaning/detailing programs as required by Contract

(2) Maintenance personnel are required to have the ability to:

- (A) Accurately inspect vehicle fluid levels and add fluids as needed.
- (B) Operate vehicles to facilitate a weekly safety brake inspection procedure.
- (C) Maintain up-to-date, accurate records of vehicle fueling and vehicle cleanliness requirements.

(e) Licensure. -- The Contractor shall require all Vehicle Mechanics to maintain a valid Nevada CDL, Class C or above.

(f) Drug and Alcohol Testing. -- All Vehicle Mechanics shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

SECTION 20.

USE OF EQUIPMENT

(a) Use of RTC-Provided Property. -- The Contractor shall use RTC-provided Revenue Vehicles and the Facilities only for services contracted for by RTC.

(b) Use of Contractor-Provided Property. -- Contractor-provided Revenue Vehicles may be used in conjunction with non-RTC contracted services provided that the use of the vehicle does not impede the quality of service supplied to RTC and does not negatively impact the maintenance of the Revenue Vehicles.

(1) The Contractor-provided Revenue Vehicles must clearly be identifiable to passengers as being in service for the CAT Specialized Services designated service, but that identification may not be visible if in use for non-RTC contracted service.

(2) The Contractor presentation, application and location for the service logo must receive written approval from RTC before being affixed to any vehicles used in CAT Specialized Services revenue service.

(c) New Facility. -- RTC is in the process of planning for a new Bus Maintenance Facility located on Sunset Road to replace the facilities used on Tompkins Avenue.

(1) The Contractor will have space available at the Tompkins Bus Maintenance Facility for up to 40 vehicles and will have use of the CNG fueling pumps. There is no RTC-provided office space for the Contractor at the Tompkins facility and, consequently, the Contractor shall have no facility maintenance responsibility for the Tompkins facility unless the Contractor chooses to add temporary office facilities within its designated space at its expense.

(2) When the Sunset Bus Maintenance Facility is operational, the Contractor will have Administrative, Vehicle Maintenance and Vehicle parking space for sixty (60) vehicles (See Appendix G). The Tompkins facility will no longer be used once the equipment at the Tompkins facility has been moved to the Sunset Bus Maintenance Facility. The Contractor

shall be responsible for costs associated with moving any Contractor-owned equipment, furniture or supplies from the Tompkins facility. The Contractor shall relocate the vehicles used to contract services from the Tompkins facility to the Sunset Bus Maintenance Facility without additional charge to RTC.

SECTION 21. VEHICLE FUELING

(a) In General. -- RTC expects its Contractor to manage the fueling of vehicles in the most efficient and cost-effective manner possible. RTC will provide fuel for all Revenue Vehicles in accordance with this Section.

(b) Designated Sites. -- Revenue Vehicles used for the services described in this Contract, where RTC provides the fuel, will be fueled by the Contractor at the designated fueling sites (Refer to Appendix J). RTC will not reimburse the Contractor for fuel provided from unauthorized fueling sites.

(c) Fueling. -- RTC has CNG and diesel fuel contracts for its fueling sites at the IBMF, Sunset Bus Maintenance Facility, and at the Tompkins facility that provide the least-cost fuel available. RTC also owns public fueling sites for CNG fuel with a different contract for fuel purchased. (The Sunset Henderson public fueling site is included in this later group of fueling sites. Refer to Appendix J) RTC will reimburse the Contractor for fuel provided from the Sunset Henderson public fueling site only to the extent that the fuel from Sunset Henderson public fueling site does not exceed five (5) percent of the total fuel paid for by RTC.

SECTION 22. VEHICLE MAINTENANCE

(a) In General. -- The Contractor shall maintain all vehicles in accordance with all local, State, and Federal requirements for safety and in accordance with all manufacturer's

recommendations and warranties. The Contractor shall have responsibility to establish and maintain a comprehensive program to perform maintenance on all Revenue Vehicles to be used for contracted services described in this Contract. All maintenance and repairs of vehicles shall be in accordance with RTC specified standards, whether performed by the Contractor or authorized sub-contractors.

(1) Revenue Vehicles will not be operated with defects that make them unsafe to operate. The Contractor will make necessary repairs, adjustments, or additions prior to placing any Revenue Vehicle in service.

- (A) The Contractor is required to use quality materials when doing any repairs to the vehicles.
- (B) Contractor shall ensure that all mechanical parts and materials meet or exceed O.E.M. specifications. The Contractor shall supply all fluids, additives, oil, lubricants, refrigerants and software (nuts, bolts, springs, bulbs, etc.) as well as replacement of fire extinguisher, first aid kits, wheelchair tie-down straps, lap belts, hydraulic pump handles, and lift covers and these items are vehicle-related costs.
- (C) The lubricants used shall meet or exceed the standards recommended by the vehicle manufacturer.

(2) The Contractor shall maintain vehicles and schedule maintenance activities to assure that the maximum number of vehicles is available for Revenue Service during peak hours. The Contractor will not remove vehicles from Revenue Service during peak periods except to conduct emergency repairs, and will minimize the amount of time needed to conduct preventive maintenance. It is not the intent of this requirement to preclude necessary maintenance during normal hours. This requirement is intended only to ensure that the maximum number of vehicles shall be available for service during the service day.

(b) Specifications, Standards and Cost-Inclusivity. -- All maintenance and repair of vehicles will be completed, including the routine replacement of components, within the Contract price, and to the manufacturer's specifications and standards, at a minimum.

(1) All maintenance will meet the standard specified in the Contractor's Maintenance Program.

(2) Contractor's responsibility includes, but is not limited to:

- (A) Body and glass damage due to accident;
- (B) Any damage due to vandalism including body and glass damage;
- (C) Excessive wear and tear on vehicle (due to Contractor error/negligence);
- (D) Rim and Tire damage from misuse, abuse, damaged or worn due to poor alignment shall be the responsibility of the Contractor;
- (E) Any damage due to improper, lack of or delayed preventive maintenance;
- (F) Lost articles and replacements such as fire extinguisher, wheelchair securement straps, lap belts, hydraulic pump handles, and lift covers. These shall be part of the vehicle's operating costs and shall be supplied by Contractor;
- (G) Interior damage;
- (H) Any damage due to Operator or Contractor negligence;
- (I) Wheelchair lift damage due to negligence;
- (J) Fluids, additives, oil, lubricants, refrigerants and software (nuts, bolts, springs, bulbs, etc.);
- (K) Vehicle transition expenses.

(c) Pre-Trip Inspection. -- Each Vehicle Operator, prior to beginning revenue service, shall inspect his or her assigned vehicle daily before pulling out of the yard in accordance with State requirements and Contractor procedures. If there are any defects, the Vehicle Operator must enter the defect on a Contractor provided Defect Report notice and report the defect to Contractor Operations staff for determination of usability of the vehicle. If there are no defects, the Vehicle Operator must sign and date the notice prior to leaving the bus yard. Defect Report notices are to remain with the vehicle during that day and shall be replaced on a daily basis. The pre-trip inspection procedure must be approved by the RTC Project Manager.

(1) The following items, at a minimum, must be found to be adequate in amount, in operable condition, and otherwise functioning correctly:

- (A) Turn signals, emergency flashers, and any other electrically illuminated signs
- (B) Headlights, on both high and low beams
- (C) Brake lights
- (D) Inside lights
- (E) Windshield wipers
- (F) Door operation
- (G) Horn
- (H) Brakes, foot and hand
- (I) Oil level and pressure
- (J) Battery charging by generator or alternator
- (K) Steering
- (L) Communications equipment, including Mobile Data Terminal
- (M) Heater(s), all
- (N) Air conditioning system
- (O) Safety equipment
- (P) Amount of all fuel and other fluid levels
- (Q) Wheelchair lifts or ramps
- (R) Wheelchair securement straps and tie-downs
- (S) Cleanliness, interior and exterior
- (T) Security walk-through

(2) Any defects identified by the Vehicle Operator, either during the pre-trip or during revenue service, and/or the inspector will be noted on a Defect Report notice. The Contractor shall take appropriate action to correct defective items noted in a Defect Report notice prior to re turning the vehicle to revenue service.

(d) Weekly Inspection. -- Each Revenue Vehicle will receive a regular weekly inspection to ensure its proper operating condition. In addition to the items of the pre-trip inspection, the weekly inspection will include: (1) Engine operation, and (2) Transmission function.

(e) Record of Inspection. -- A written record (preferably in electronic format) of all inspections will be kept by the Contractor. A summary report will be furnished to the RTC

Project Manager monthly, with respect to the RTC-owned Revenue Vehicles, with other scheduled operations reports.

(f) Preventive Maintenance. -- Preventive maintenance on RTC vehicles must be performed in accordance with vehicle manufacturer's recommended Preventive Maintenance Inspection (PMI) intervals. The Contractor shall develop a Preventive Maintenance plan and maintain records which detail the work performed for each vehicle inspection. These records must be available for review by RTC's Maintenance Administrator.

(1) A Preventive Maintenance Inspection (PMI) shall be performed on each RTC-owned vehicle at 3,000 mile intervals. The 3,000 mile interval shall not be exceeded. It is recommended that the Contractor establish a window of 500 miles prior to the 3,000 mile limit to ensure the interval is not exceeded (not less than 2,500 or more than 3,000 miles between PMI's). The minimum work performed for each inspection is to be reported to RTC on documents developed by Contractor and approved by the RTC Maintenance Administrator.

(2) An RTC vehicle shall not be placed in service if it has traveled more than 3,000 miles since the last PMI. If a vehicle has not met preventive maintenance standards, it shall be removed from service and be subject to liquidated damages as outlined in Section 9.

(3) RTC will periodically inspect vehicles and generate the RTC Inspection Report to identify items that require action by the Contractor. After RTC submits the Inspection Reports to the Contractor, the Contractor shall address all noted open items to RTC's satisfaction within fifteen (15) days or at the next PMI, whichever comes first, unless repair item(s) is safety related, in which case the vehicle shall not be permitted to re-enter service until completed. The Contractor shall return the completed Inspection Report to the RTC Maintenance Administrator or his or her designee upon completion. RTC will consider

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the PMI and the Inspection Report to be incomplete if items identified on the discrepancy sheets have not been addressed to RTC's satisfaction within the prescribed period.

(g) Warranty Work. -- The Contractor shall be responsible for the conduct of all warranty work on RTC vehicles assigned to the Contractor and the administration of all warranty paperwork with manufacturer. The Contractor shall obtain manufacturer authorization to perform warranty maintenance or shall transport vehicles at the Contractor's cost to an authorized warranty service provider.

(h) Components. -- All components of each Revenue Vehicle's body, appurtenances, and frame will be sound and undamaged while the vehicle is in revenue service.

(i) RTC Inspections. -- The RTC's Maintenance Administrator or his or her designee may conduct announced and unannounced inspections of the vehicles at any time either at the Contractor's location or while the vehicle is in service. The Contractor shall maintain RTC vehicles at all times in such a way as to protect RTC's investment. This requires prompt response to ensure that repairs are done at the point where they shall require the least expenditure.

(1) Examples of prompt response are:

- (A) Repairing an engine miss promptly to avoid a dropped valve or severely scored cylinder wall;
- (B) Routine oil sampling of engines to avoid catastrophic failures;
- (C) Identifying and responding to trends which affect vehicle reliability; and
- (D) Repairing body damage or graffiti, which affects vehicle appearance.

(2) In addition to the Contractor's maintenance efforts, RTC shall periodically conduct oil sampling/analysis as a quality assurance measure.

(j) Vehicle Management Software. -- The Contractor shall utilize the RTC-provided Ron Turly Associates vehicle management software, or other approved program to

record the labor, parts and materials required each time preventive maintenance and repairs are performed on an RTC vehicle. This information shall be used by the Contractor to maintain and prepare required maintenance reports for submission to RTC and shall be retained in the permanent vehicle file for each assigned vehicle.

(k) Maintenance Personnel Capabilities. -- All repair work will be performed by maintenance personnel who have demonstrated experience and documented training in the work to be done. Maintenance personnel will have the necessary equipment and tools to perform any authorized work.

(l) Accident Repair Vendors. -- It shall be the responsibility of the Contractor to secure a reputable accident damage repair vendor or vendors.

(m) Off-Property Repairs. -- The Contractor shall be responsible for the movement of vehicles within Southern Nevada. If repairs, maintenance or warranties are to be performed at locations other than the Contractor's premises, the Contractor shall provide transportation to and from the repair location.

(1) The Contractor shall perform quality control inspections on vehicles returning from off property repairs ensuring vehicles are safe to return into service.

(2) The Contractor shall also provide transportation of replacement parts and equipment from selected vendors.

(3) As new vehicles are added to the fleet and retired vehicles are removed, it is the Contractor's responsibility to provide Vehicle Operators or a drive-a-way service to relocate vehicles as needed.

(n) Uniformed Vehicle Usage. -- The Contractor will utilize all vehicle types in the fleet provided by RTC on an equal and consistent basis, and will maintain all vehicle types as uniformly as possible.

(o) Tires. -- RTC shall supply tires for RTC-owned vehicles. Contractor shall comply with RTC's tire supplier's tire control procedures, tire service report and vehicle tire inventory.

(1) Abused, damaged or alignment-worn tires shall be charged to the Contractor.

(2) It shall be the responsibility of the Contractor to ensure that all wheels are properly maintained. Damaged rims shall be the responsibility of the Contractor.

(3) The Contractor shall also be responsible for maintaining the appearance of wheels. Both steel and aluminum wheels shall be sent out for polishing on a regular basis.

(p) Spare Ratio. -- For purposes of scheduling Revenue Vehicles, RTC and the Contractor will maintain a spare ratio of 15% of the total fleet of Revenue Vehicles required at peak utilization as calculated under FTA guidelines.

(q) Shop Equipment and Tools. -- The Contractor is required to provide adequate and appropriate shop equipment and special tools as necessary to perform the necessary maintenance tasks required to meet RTC's standards and requirements as described herein. (Examples of such tools include, but are not limited to, opacity meters, electronic testing equipment and torque wrenches). The Contractor is required to calibrate and maintain tools to equipment manufacturer's specifications.

(r) Research and Demonstration Projects. -- The Contractor shall, at the instruction of the RTC Project Manager, participate in ongoing research or demonstration projects for the purpose of field testing various components, systems, or vehicles.

(s) Red Tagged Vehicles. -- If, in the opinion of RTC, a vehicle does not meet RTC safety standards as outlined in this Contract, the vehicle may be "red tagged." A vehicle that has been "red tagged" shall not go into service and/or shall be immediately removed from service.

(I) A vehicle that has been disallowed to pull-out from bus yard during a pull-out inspection conducted by RTC shall be put on hold for any of the following conditions (the list is representative, but not all inclusive).

- (A) Safety equipment missing (per Vehicle Code requirements);
- (B) Wheelchair lift inoperative;
- (C) Wheelchair lift brake interlock inoperative;
- (D) Wheelchair lift restraint missing or inoperative;
- (E) Tires: Flat, worn, embedded objects or bald;
- (F) Passenger door interlock inoperative;
- (G) Headlights out;
- (H) Taillights out;
- (I) Turn signals out or inoperative;
- (J) Horn not working;
- (K) Windshield wipers not working;
- (L) Engine smoking excessively;
- (M) Brake lining too thin;
- (N) Fluid leaks;
- (O) Coolant leaks;
- (P) Air conditioning, heating, and ventilation systems inoperative;
- (Q) Exhaust system leaking or damaged;
- (R) Steering with excessive play;
- (S) Loose or missing lug nuts;
- (T) Vehicles with body damage in excess of \$500.00 damage may be red-tagged by RTC; and
- (U) Any noncompliance with Federal Motor Safety Standards and other governing agency safety, vehicle operation regulations.

(2) A "red tagged" vehicle may not be released for service until such time as the problems associated with it have been rectified by the Contractor and verified by RTC.

(t) Road Failures. -- In the event of a vehicle failure while in revenue service, the Contractor shall require the Vehicle Operator to contact Radio Dispatch immediately with details of the vehicle failure. Upon notice of the vehicle failure from the Vehicle Operator, the Contractor shall deploy a vehicle immediately to replace the failed vehicle to ensure the continuation of service. Contractor's Dispatch staff shall document the Service Interruption Log each time the Contractor responds to a road failure whether or not a vehicle has to be exchanged or replaced due to a malfunction or a mechanical problem. The Contractor shall

either make the affected Revenue Vehicle fit for passenger service or provide a replacement vehicle within thirty (30) minutes of the Vehicle Operator's notice to Radio Dispatch of the vehicle failure.

(u) Accident Reporting. -- In the event of a traffic accident, a passenger accident, an emergency or other non-routine event involving a Revenue Vehicle in which vehicle damage, property damage or personal injury (including death) results, the Contractor shall notify the RTC Project Manager within one hour of receipt of such information. The Contractor must follow up with specific details from the accident or incident investigation within three (3) hours from the time RTC was originally notified. The Contractor shall prepare all reports required by the Contract. The Contractor shall comply with all applicable laws and regulations in the case of any accident.

(v) Fuel Management Equipment. -- The Contractor shall utilize and maintain all fuel management equipment (ORPAC FuelOmat) hardware included, but not limited to the fueling facilities and on board vehicle equipment. This includes, but is not limited to, the proper calibration of all vehicle identification units (VIU's) and troubleshooting, resetting, and required repairing of any malfunction, repair and/or replacement of any necessary parts.

SECTION 23. VEHICLE CLEANING AND APPEARANCE STANDARDS AND REQUIREMENTS

(a) In General. -- The Contractor shall maintain the cleanliness of all Revenue Vehicles in accordance with established performance standards. The Contractor shall steam clean the engine and the under carriage of each Revenue Vehicle once every six (6) months.

(b) Interior Cleaning. -- The Contractor shall ensure that vehicle interiors are swept or vacuumed daily to remove all dirt and debris and that mopping is carried out as necessary, but no less often than twice weekly. Under no condition will RTC accept a cleaning

plan that would permit Revenue Vehicle interiors to be cleaned with water and a hose.

(c) Exterior Cleaning. -- The Contractor shall ensure that vehicle exteriors are washed and scrubbed every other day, provided, however, that vehicles shall be washed and scrubbed as soon as practicable during or following every rain day in order to maintain RTC's standards for vehicle appearance.

(d) Insect Extermination. -- The Contractor shall ensure that all Revenue Vehicles undergo insect extermination as necessary to eliminate the presence of insects. The extermination process shall be applied while vehicles are out of service. The Contractor shall not place any vehicle in revenue service while any noxious fumes or detectable odors remain in the vehicle.

SECTION 24. FACILITY MAINTENANCE AND OPERATIONS STANDARDS AND REQUIREMENTS

(a) In General. -- The Contractor shall be responsible for maintaining the IBMF in accordance with all local, State and Federal requirements for safety. The Contractor shall ensure that sufficient qualified personnel, supplies, parts, and equipment are available at all times to ensure timely maintenance of all RTC provided Facilities and equipment. The Sunset Maintenance Facilities, when operational, will be maintained by RTC. Notwithstanding the previous sentence, RTC may determine, in consultation with the Contractor, that maintenance of the Sunset Maintenance Facilities shall be transferred to the Contractor. Prior to any such transfer, RTC and the Contractor shall negotiate specific line items to determine the appropriate cost adjustment for such Contractor provided maintenance. For purpose of this Section, the term "Facilities" only refers to the Facilities for which the Contractor has maintenance responsibilities.

(b) Potential Re-evaluation. -- Notwithstanding the preceding paragraph, RTC

may in the future, chose to re-evaluate its Facility Maintenance Plan to include taking over at the IBMF a portion or all of the identified maintenance tasks, either directly or by third-party contracting. In the event that RTC determines to assume responsibility for the IBMF, RTC will provide the Contractor advance notice of this intent, and negotiate adjustments to the service hour rate to reduce the rate for costs associated with Facility Maintenance at the IBMF.

(c) Facilities Maintenance Plan. -- The Contractor shall develop a Facilities Maintenance Plan (FMP) that clearly identifies how it intends to accomplish facilities and auxiliary equipment maintenance. The plan shall include a Preventive Maintenance Program/Plan (PMP) to, meet or exceed the standards listed in the Regional Transportation Commission IBMF Paratransit Preventive Maintenance Task Lists dated May 10, 2006, which is included as Appendix H to this Contract. The Contractor's PMP will clearly identify the daily, weekly, monthly and yearly preventive maintenance tasks, inspections, and schedules.

(1) The FMP shall include the proposed reporting forms, schedules and procedures for all maintenance activities. The Contractor must receive the approval of the RTC Facilities Manager or his or her designee prior to the implementation of the FMP, and RTC will approve a FMP, which may reflect modifications to the plan submitted by the Contractor, prior to the commencement of service on July 1, 2007.

(2) In compliance with the Contractor's FMP, the Contractor shall maintain a written and/or electronic record, in a format approved by RTC, of all maintenance and repairs to the Facilities. In addition, the Contractor shall immediately notify the RTC Project Manager or his or her designee in writing of any necessary major repairs to the Facilities, or associated equipment or systems, that the Contractor intends to undertake, and of any potential environmental or structural concerns with the Facilities, or associated equipment or systems.

(3) RTC requires that the Contractor provide, within its PMP, a notification process by which the Contractor identifies how it will notify RTC of (A) any deficiencies in the Facilities or (B) any elements of the PMP that are not being accomplished in the time scheduled; and/or (C) the explanation for failing to meet PMP timeframes. If there is a delay to any scheduled preventive maintenance task, RTC requires a written and verbal (e-mail and phone) notification to the RTC Project Manager or his or her designated representative within a maximum of 72 hours of any scheduled PMP. In the case of an emergency, immediate notification to the RTC Project Manager or his or her designee is required. In all cases the Contractor will ensure that contact is made with the appropriate RTC representative.

(d) Standards. -- In compliance with RTC standards and the Contractor's FMP, the Contractor shall maintain the Facilities in a clean and orderly condition and shall operate the Facilities in a safe and efficient manner. The Contractor shall be responsible for all preventive and routine maintenance of the Facilities and associated equipment and systems. Such maintenance will be conducted in accordance with industry standards and with applicable builders' or manufacturers' manuals, standards, specifications and instructions for proper maintenance, repair and operation. Maintenance and repair of the Facilities and associated equipment and systems will be performed at the Contractor's expense, provided however, that major structural modifications or major repairs to the Facilities, and/or replacement of major systems or major equipment will be the responsibility of RTC, unless the need for such modification, repair or replacement was due to inaction, the negligent act or omission of the Contractor. RTC will assume responsibility for all costs associated with maintenance and repair of the Emergency Generator. The Contractor shall use the Facilities only for contracted Specialized Services work.

(e) Environmental Obligations. --

(1) During the term of this Contract, the Contractor will be responsible for the proper handling, use, storage, and disposal of all waste oil and hazardous materials produced at the Facilities, and for all other environmental requirements specified in Section 56 of this Contract. The Contractor will develop an environmental program to properly manage all RTC Facilities. As part of the environmental program, the Contractor will also develop a plan for the containment and clean up of spilled fuel, oil, and any hazardous materials consistent with the obligations of Section 56, and will be responsible for carrying out all such containment and clean up activities. Such program and plan will be submitted to RTC for review and approval.

(2) RTC will provide Facilities for use by the Contractor in a condition that complies, at the time the Contractor assumes occupancy, with all Federal, State and local environmental laws and regulations. The Contractor will return the Facilities to RTC at the conclusion of this Contract in a condition that complies with all Federal, State and local laws and regulations, and will take and be financially responsible for all remedial actions necessary to remove any hazardous materials from the Facilities generated by Contractor, its employees, or subcontractors, including any actions identified in the audit conducted under paragraph (3) below.

(3) An environmental audit will be conducted by RTC (or a consultant of RTC) at the conclusion of this Contract to assess the environmental condition of the Facilities, and to assist in determining the Contractor's compliance with the requirements of this Section and Section 56 of this Contract. RTC may also, in its discretion, periodically conduct environmental audits during the term of this Contract. In this Section, the term "hazardous materials" includes flammable, explosive, or radioactive materials, chemicals, hazardous

wastes, toxic wastes or materials, or similar substances, and any petroleum products or derivatives deemed hazardous by Federal, State, or local law.

(f) Permits. -- The Contractor will be responsible for obtaining and maintaining a Class I Waste Water Discharge Permit for the Facilities, which permit will be renewed annually. RTC has obtained a storm water pollution prevention permit for the North Las Vegas Facility from the Nevada Division of Environmental Protection, and the Contractor will be responsible for the annual renewal of such permits.

(g) Repair Standards. -- All maintenance of and repair work to the Facilities shall be performed by personnel of the Contractor (or any RTC-approved subcontractor) who have demonstrated experience and documented training in the work to be done. The Contractor shall ensure that Facility Maintenance personnel have the necessary equipment and tools to perform all work efforts.

(h) Telephone and Utilities. -- The Contractor shall be responsible for the monthly telephone bills, monthly telephone rental equipment costs, and utilities (i.e., gas, water and electric), including the electricity costs of compression of gas at the Facilities.

(i) Manuals, Instruction and Repairs. -- RTC shall provide the Contractor with written manuals and instruction in the proper use, operation, care and maintenance of the systems and equipment at the Facilities. The Contractor shall comply with such manuals and instruction and shall properly use, operate, and maintain the systems and equipment. RTC shall provide the Contractor with all available information regarding any applicable warranties for such systems, equipment, and Facilities. The Contractor shall notify the RTC Project Manager or his or her designee of any necessary repairs, failures or problems with systems, equipment, or Facilities covered by applicable warranties. RTC shall be responsible for all direct dealings with manufacturers and other entities concerning any necessary repairs

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 10
PAGES 2251-2500**

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1 more.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So when you analyze this situation, remember, you

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 THE COURT: Oh, is it pretty short?

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

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

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

20 PLAINTIFFS' REBUTTAL CLOSING ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: All right. Thank you.

14 Can he get sworn in.

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

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

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

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

21 (Outside the presence of the jury.)

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

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

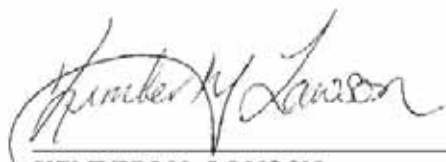
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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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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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.

SUPPLEMENTED MOTION FOR NEW TRIAL

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

MEMORANDUM OF POINTS AND AUTHORITIES

A new trial is necessary due to errors of law that materially affected the outcome and because the jury's verdict is excessive, demonstrating passion, prejudice, lack of serious analysis, disregard for this Court's instructions and the influence of

misconduct and improper and misleading argument. The verdict is irredeemably tainted and unreliable.

I.

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

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

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

The Court erred by excluding Harvey's comparative negligence from the jury's apportionment of fault. The error of law is manifest in both the verdict form and the jury instruction regarding comparative negligence (Instruction No. 29), which did not even mention the decedent's negligence. This prejudicial error requires a new trial because a reasonable jury could have found that Harvey was more than 50% at fault for his own death. *See Verner v. Nev. Power Co.*, 101 Nev. 551, 555–56, 706 P.2d 147, 151 (1985) (failure to follow NRS 41.141 was *per se* reversible error).

1. NRS 41.141 Requires Apportionment of the Decedent's Fault

The language in NRS 41.141(1) is clear and unambiguous:

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

NRS 41.141(1) (emphases added). The statute bars recovery to an heir where the comparative negligence of the decedent is greater than the defendant's. NRS

41.141(2)(a).¹ In this sense—interpreting the statute to be in harmony with itself—the decedent is treated as “a party” for purposes of fault allocation under NRS 41.141(2)(b). This is necessary to determine whether the “comparative negligence . . . of the plaintiff’s decedent is greater than the negligence of the defendant.” NRS 41.141(2)(a). *See also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 & cmt. b (2000).

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

2. *Banks Does Not Preclude the Jury’s Consideration of the Decedent’s Fault*

While this Court relied on *Banks ex rel. Banks v. Sunrise Hospital* to exclude Harvey from the special verdict on apportionment, that interpretation conflicts with the controlling statute. *Banks* is not on point, as the comparative fault of a plaintiff’s decedent was not an issue in that case. The “nonparties” in that case were settling co-defendants. 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). There is not even dicta in the *Banks* opinion that suggests that the Supreme Court was rejecting a plain reading of NRS 41.141(1), which requires the comparative negligence “of the plaintiff’s decedent” to be weighed against the fault of the defendant.

¹ Prior to the enactment of this statute, any contributory negligence would bar recovery. *Café Moda, LLC v. Palma*, 128 Nev. Adv., Op. 7, 272 P.3d 137, 139 (2012); *Anderson v. Baltrusaitis*, 113 Nev. 963, 967 n.3, 944 P.2d 797 n.3 (1997).

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

3. *The Decedent's Negligence is Relevant to an Action by the Heirs of the Decedent*

The relevance of the decedent's comparative negligence does not depend on who brings the wrongful-death action. Under NRS 41.085, the decedent's losses are divided into two recoveries: one to the personal representative of the estate for "[a]ny special damages, such as medical expenses, which the decedent incurred or sustained before the decedent's death, and funeral expenses," and "[a]ny penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent had lived"; and a second to the heirs for decedent's "pain, suffering or disfigurement." The Nevada Legislature contemplated that *either* kind of wrongful-death action—by "the estate *or* one of the survivors"—would be subject to the rules in NRS 41.141. (Leg. Hist. at 66, App. 67 (statement of Senator Mike Sloan) (emphasis added).) Thus, the decedent's comparative negligence must be apportioned in an action brought by the heirs.

This statutory result, including the plaintiff's decedent in the assessment of comparative fault, makes sense considering that the heirs are the only ones who can recover pain and suffering on the decedent's behalf. NRS 41.085(5). A contrary rule would have absurd consequences. Take, for example, a drunk and reckless driver who is 99% responsible for his own death in an accident. Under plaintiffs' interpretation, the driver's comparative negligence would bar the *estate's* action for funeral costs against a defendant who was only 1% responsible, but the driver's *heirs* would be entitled to a full recovery of the driver's pain and suffering.³ Perversely, however, such a

³ Plaintiffs seem to be proposing something akin to the situation in *Humphries v. Eighth Judicial District Court*, 129 Nev., Adv. Op. 85, 312 P.3d 484 (2013). In that case, the plaintiffs sued New York-New York, but not a potential co-defendant Erik Ferrell. *Id.* at ___, 312 P.3d at 486. The Court held that while the plaintiffs could not be compelled to join Ferrell as a party to their action, New York-New York could implead Ferrell as a third party. *Id.* at ___, 312 P.3d at 490. The jury would thus allocate fault between both New York-New York and Ferrell, but the plaintiffs' judgment would be joint and several against just New York-New York, with the jury's fault allocation providing the basis for a contribution action against Ferrell. *Id.* at 491.

That won't work here, and public policy shows why it shouldn't. The decedent is not some third party whom the heirs can decide not to sue; it is the decedent whose interests the heirs are vindicating. If the *Humphries* impleader mechanism were re-

rule would actually punish the *least* blameworthy defendants because the estate is least likely to pursue a claim when there is no colorable claim for punitive damages, the estate's most significant item of recovery. Because only the heirs, not the estate, have a claim to the decedent's pain and suffering, the estate's presence in the lawsuit is irrelevant.

As the text, legislative history, and logic all demonstrate, the defendant in a wrongful-death case should bear only his equitable share compared to the fault of the decedent. *Moyer*, 593 F. Supp. at 147.

B. Harvey's Mental Impairment Does Not Eliminate the Bona Fide Issue of his Comparative Negligence

1. *The Jury Can Allocate Fault to a Mentally Disabled Plaintiff*

It may be emotionally tempting to assume that Harvey's mental disability rendered him incapable of comparative negligence, but that is not the law. "An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 11 (2010); *see also* RESTATEMENT (SECOND) OF TORTS § 283B (1965) ("Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.").

As a policy matter, there is no reason a different rule should apply when the question is a disabled person's comparative negligence rather than primary negligence. Although some have advanced the theory that "there is less opposition in allowing the mentally ill to recover damages, rather than avoid them," 1 COMPARATIVE NEGLIGENCE MANUAL § 10:4 (updated Mar. 2016), that seems backwards. If mentally

quired in the drunk-driving scenario, then the heirs could obtain a joint-and-several judgment against the 1%-negligent defendant, and that defendant would then have an action for contribution against . . . whom? the heirs? the estate? If it's against the heirs, then the whole exercise is kabuki theater to arrive at the same result as simply barring the heirs' recovery in the first place. If it's against the estate, then the wrongful-death statute becomes a back door for disinherited heirs to upend the decedent's estate plan by siphoning from the estate funds that the decedent intended for other beneficiaries. That kind of tactic violates public policy. *See In re Estate of Melton*, 128 Nev. Adv., Op. 4, 272 P.3d 668 (2012) (rejecting heirs' attempt to invalidate an estate plan that would result in escheatment).

1 disabled people are unable to function in the world without exercising ordinary care,
2 they should be assisted. Nevada, regardless, has never stated that a mentally disa-
3 bled person who fails to exercise reasonable care can escape a finding of comparative
4 negligence.

5 Defendants recognize that several courts hold that the plaintiff's "disability can
6 be considered in the course of the more open-ended process of apportioning percent-
7 ages of responsibility between the plaintiff and the defendant." RESTATEMENT (THIRD)
8 OF TORTS: PHYSICAL & EMOTIONAL HARM § 11 cmt. c (2010).

9 But to say that some courts let the jury consider a mental disability as a factor
10 in the apportionment of fault is a far cry from *eliminating* the jury's consideration of
11 comparative fault altogether. *See id.*; *Miller v. Trinity Med. Ctr.*, 260 N.W.2d 4, 7
12 (N.D. 1977) (upholding comparative negligence finding against plaintiff whose "mental
13 confusion did not completely interfere with his perception of danger"); *see also* VICTOR
14 E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 13.03[a] (5th ed. 2010); 1 COMPARATIVE
15 NEGLIGENCE MANUAL § 10:5 (updated Mar. 2016). Similarly, even if defendants had
16 held themselves out as providers of medical care, that "special relationship" would not
17 preclude a comparative-fault allocation as a matter of law unless "the particular
18 harm" were foreseeable and "the mentally disabled person is able to show that she was
19 totally unable to appreciate the risk of harm and the duty to avoid it." *Hofflander v.*
20 *St. Catherine's Hosp., Inc.*, 664 N.W.2d 545, 563–65 (Wis. 2003).

21 Eliminating a comparative-negligence defense whenever a plaintiff demon-
22 strates a mental disability would also clash with Nevada's treatment of comparative
23 negligence in children. *See Galloway v. McDonalds Restaurants of Nev., Inc.*, 102 Nev.
24 534, 537-38, 728 P.2d 826, 828-29 (1986) (quoting *Quillian v. Mathews*, 86 Nev. 200,
25 203–02, 467 P.2d 111, 112–13 (1970), which rejected the rule that children under sev-
26 en are incapable of negligence). It is for the jury to decide whether "the particular
27 child has the capacity to exercise that degree of care expected of children of the same
28 age." *Id.*

2. *There is a Bona Fide Jury Question of Harvey's Comparative Negligence*

Here, defendants maintain that Harvey should be held to the standard of an or-

1 dinary, reasonable person, just as he would be if a claim were asserted against him.
2 Since First Transit was not acting as a medical agent, and its obligations to provide
3 special assistance to disabled persons pursuant the Americans with Disabilities Act
4 (ADA) regard only boarding, safely securing the passengers in their seats, and helping
5 them disembark, *see* 49 C.F.R. § 37.121, Harvey should have had a personal care at-
6 tendant (PCA), as First Transit allows, to ensure that Harvey could conform his con-
7 duct to that of a reasonable person.

8 Nonetheless, even considering Harvey's mental disability as a factor, plaintiffs
9 cannot take away the question of Harvey's comparative negligence as a matter of law.
10 Plaintiffs admitted that Harvey "was sort of higher functioning" in comparison to oth-
11 er special-needs individuals (Tr. Day 4, at 60:13–15, App. 208), that "[h]e didn't need
12 somebody to take him to the bathroom and help him, or *he had those kind of skills*"
13 (Tr. Day 4, at 51:21–23, App. 207), and that he could understand signs (Tr. Day 4, a
14 104:20–23, App. 212). In fact, he had sufficient capacity to work, to merit a California
15 driver's license and drive under his parents' supervision, and to live away from his
16 parents semi-independently. (Tr. Day 4, at 79–80, 102, App. 209–10, 211.)

17 Plaintiffs' theory of the case, moreover, rests on Harvey's having been negligent
18 in performing the very tasks he was admittedly able to handle. Although defendants
19 believe Harvey may have died of other causes, plaintiffs allege that Harvey died be-
20 cause he choked on a bolus of food. If that were the case, Harvey's death would be due
21 at least in part to his own disregard of First Transit's rule not to eat on the bus, which
22 was both posted prominently on the bus itself and included in the rider's guide. More-
23 over, the inherent hazard of choking after failing to adequately chew food is obvious.
24 Based on the size of the bolus in Harvey's throat, Harvey must have been gobbling the
25 sandwich. And Harvey did so rapidly and while hunched over in his seat, based on the
26 video image from an on-board camera. He may have done this to evade the driver's
27 vision because he was aware of the rule prohibiting food on the bus. Regardless of his
28 motive, however, his crouched position hindered any chance the driver may have had

1 to see him eating and remind him that it was disallowed—assuming the driver even
2 had a duty to do so.

3 The jury must compare any responsibility by Farrales and First Transit to ren-
4 der aid against Harvey's responsibility for his own predicament by disregarding the
5 posted rules and self-care, which created the conditions of his alleged choking.

6 **C. The Error in Excusing Harvey's**
7 **Comparative Fault was Prejudicial**

8 The error in eliminating defendants' comparative-negligence defense was not
9 harmless. No reasonable jury could find defendants 100% responsible for Harvey's
10 death. Defendants did not cause the alleged choking, and there remains the factual
11 issue whether any aid undertaken by defendants would have been successful in extri-
12 cating Harvey from that self-induced peril.

13 Because defendants were entitled to have Harvey included in the apportion-
14 ment of fault, and because his fault was a bona fide issue in the case, a new trial is
15 necessary.

16 **II.**

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

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

22 **A. Courts Must Define Duty in Light of the Foreseeability**
23 **of the Harm—"Negligence in the Air" is Not Enough**

24 Courts, not juries, are responsible for defining the legal standard of reasonable
25 conduct in a negligence case, and they must do so "*in the light of the apparent risk.*"
26 *Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997) (emphasis in orig-
27 inal). Foreseeability of harm is a predicate to establishing the duty element of a negli-
28 gence claim. *Ashwood v. Clark County*, 113 Nev. 80, 85, 930 P.2d 740, 743 (1997). In
other words, mere "negligence in the air" cannot serve as a standard of care in Nevada
or as an intuitive reason for the standard chosen.

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

In light of the alleged cause of Harvey's injury, choking on a sandwich, it was error to instruct the jury that First Transit and Farrales owed Harvey "the highest degree of care." See Instruction No. 32 ("A common carrier has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance.")

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

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

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

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

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

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

The term 'special relationship' has no independent significance.

1 It merely signifies that courts recognize an affirmative duty arising
2 out of the relationship where otherwise no duty would exist at
all.

3 RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (2000).

4 The extent of a common carrier's duty to render aid is only a "duty of reasonable care."

5 *Id.* ("An actor in a special relationship with another," including "a common carrier
6 with its passengers," owes "a duty of reasonable care"); *Abraham v. Port Auth.*, 29
7 A.D.3d 345, 346 (N.Y. 2006) ("A common carrier is subject to the same duty of care as
8 any other potential tortfeasor, *i.e.*, reasonable care under the circumstances, and is not
9 subject to a higher standard because of this status"); 13 C.J.S. *Carriers* § 520 ("While a
10 carrier must give aid to an individual who becomes ill . . . the carrier need only exer-
11 cise reasonable care under the circumstances, regardless of whether the carrier is a
12 common carrier.").

13 "In Nevada, as under the common law, strangers are generally under no duty to
14 aid those in peril." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001).
15 There is no general duty to be a "Good Samaritan." Put simply, the "special relation-
16 ship" does not create a heightened duty, but rather only a duty to render reasonable
17 care at all.

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

20 The case of *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), is particularly
21 instructive, as it involved the duty to render aid within the analogous "special rela-
22 tionship" of innkeeper and patron. In *Lee*, the Nevada Supreme Court found that the
23 relationship between a business proprietor and its patrons justifies an exception to the
24 general no-duty rule, but the exception is limited to providing basic first aid and sum-
25 moning expert medical assistance to a patron in need. *Id.* at 298–99, 22 P.3d at 213–
26 14. Thus, in *Lee*, the Supreme Court affirmed the district court's grant of summary
27 judgment in favor of the Golden Nugget in a case in which an inebriated restaurant
28 **patron choked on food and died.** 117 Nev. at 299, 22 P.3d at 214. In *Lee*, as here,

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

Thus, in light the nature of the alleged negligence and injury at issue, it was error to instruct the jury that First Transit and Farrales owed Harvey “the highest degree of care.” That general rule did not apply to the particular circumstances of the alleged tort. The jury should have decided whether defendants met only the standard of reasonable care.

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

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

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

Instruction No. 34. Any “greater duty of care to a handicapped passenger . . . may only be imposed when the carrier knows or reasonably should know of the particular hand-

icap.” *Washington Metro. Area Transit Auth. v. Reading*, 674 A.2d 44, 53–54 (Md. Ct. Spec. App. 1996).

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

The evidence, moreover, established that First Transit and its drivers are not social workers or care givers. The special responsibilities imposed under the Americans with Disabilities Act are limited to the boarding, securing of assistive devices, and disembarking of paratransit busses.⁴ RTC invites riders unable to care for themselves to bring a PCA or companion. (App. at 83.) See *Boose v. Tri-Cnty. Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009) (“[C]omplementary paratransit is not intended to be a comprehensive system of transportation . . . [but] simply to provide to individuals with disabilities the same mass transportation service opportunities everyone else gets, whether they be good, bad, or mediocre.” (quoting with approval 56 Fed. Reg. at 45,601 (Sept. 6, 1991))). While competent driving requires scanning mirrors, this does not create a duty on the driver to monitor for medical events. The company made clear that personal attendants are welcome to attend to a passenger’s *en route* personal needs and make accommodation for them. Drivers must watch the road.

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

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

The instructions cannot be deemed harmless error. Plaintiffs' counsel repeatedly relied on the concept of heightened duty during his closing argument. Plaintiffs' counsel argued that the common carrier duty of care was heightened, the equivalent of a standard major league baseball player—better than the ordinary person, but not necessarily the best of the best. Then, however, counsel argued that common carriers had a super-heightened duty to the mentally disabled, more like Derek Jeter—the best of the best. (Tr. Day 9, at 31–35, App. 230–34.) He encouraged the jury to apply this super-heightened standard, arguing that First Transit, Inc., as a common carrier, had a super-heightened duty to monitor disabled passengers while operating the bus. (*Id.*) By comparison, he argued that “reasonable care” was analogous to “peewee baseball.” (*Id.* at 31, App. 230.)

It was under this almost strict-liability standard that plaintiffs argued—and the jury apparently accepted—that First Transit's internal policies constituted special legal duties. But they did not. For instance, First Transit's rule against eating—which is merely an extension of the Regional Transit Center's rule applicable to all RTC vehicles alike—did not create a duty, much less a heightened one. That rule in all RTC vehicles is implemented for cleanliness. Choking is not a particular “consequence against which the [rule] was intended to protect.” *Cf. O'Leary v. Am. Airlines*, 475 N.Y.S.2d 285, 288 (N.Y. App. Div. 1984). Nor can the inclusion of CPR instructions within employee manuals give rise to a heightened duty, “since internal rules and manuals, to the extent they impose a higher standard of care than is imposed by law are irrelevant to establish a failure to exercise reasonable care.” *Abraham v. Port Auth.*, 815 N.Y.S.2d 38, 40–41 (N.Y. App. Div. 2006); *Cooper v. Eagle River Mem'l Hosp., Inc.*, 270 F.3d 456, 462 (7th Cir. 2001) (“[T]he internal procedures of a private organization do not set the standard of care applicable in negligence cases.”). “As a policy matter, it makes no sense to discourage the adoption of higher standards than the law requires by treating them as predicates for liability.” *De Kwiatoowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1311 (2d Cir. 2002). Thus, assuming arguendo that the rule against eating on the bus and the inclusion of resuscitation in the com-

pany's manuals are even admissible to inform the meaning of "reasonable care" under the circumstances, they do not establish any duties beyond reasonable care. (App. 75.)

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

III.

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

The \$15 million verdict constitutes "excessive damages appearing to have been given under the influence of passion and prejudice." NRCP 59(a)(6). Not only is the amount unjustifiable, but the jury's apportionment of fault and the short time spent deliberating also exhibit the jury's passion, prejudice and lack of seriousness. Much of that passion, moreover, is explained by the improper arguments of plaintiffs' counsel.

Under NRCP 59(a)(6), a district court may grant a new trial when it appears that "excessive damages have been given under the influence of passion or prejudice." NRCP 59(a)(6); *see also Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993) (citing *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984)), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999). Although "excessiveness" and "passion and prejudice" are elusive standards, *Harris v. Zee*, 87 Nev. 309, 486 P.2d 490 (1971), if the amount of the award is so great that it "shocks the judicial conscience," a new trial should be ordered. *See Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996); *Hazelwood*, **Error! Bookmark not defined.** 109 Nev. at 1010, 862 P.2d at 1192. Among the factors this Court has considered in determining the excessiveness of an award are: (1) the reasonableness of the award in light of the evidence,⁵ (2) the size of the

⁵ *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196–97, 866 P.2d 274, 284–85 (1993); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983).

award relative to other awards in comparable cases,⁶ (3) the relationship of the special damages to the general damages,⁷ and (4) inappropriate conduct at trial designed to arouse passion or prejudice in the jury favorable to the plaintiffs.⁸ In determining whether an award “shocks the judicial conscience,” no single factor is dispositive. The amount of the award itself can also demonstrate passion and prejudice. *See Guar. Nat’l*, 112 Nev. at 207, 912 P.2d at 272.

A. Awarding \$7.5 Million for 50 Seconds of Conscious Pain and Suffering is Outrageous

The jury awarded \$7.5 million for the pain and suffering experienced by Harvey. Even construed in a light most favorable to plaintiffs, the evidence shows that Harvey would not have been conscious for more the 50 seconds after he allegedly began to choke. (Stein Dep. 77:10–19, App. 166; *see also id.* 59:14–15, 95:3–8, App. 148, 184; Tr. Day 4, at 46:14–19, App. 206.) A \$7.5 million award for such a short moment of time proves that the jury was not thinking coolly and rationally.

Damages for pain and suffering are recoverable only where the victim was consciously aware of her pain and suffering. *See Banks*, 120 Nev. at 843, 102 P.3d at 66 (nurse’s testimony that victim responded to his environment presented sufficient evidence for the jury to consider “whether [the victim] was conscious of his pain and suffering”); *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991) (citing cases and predicting that “a Nevada court would follow the majority of other jurisdictions, and require pain and suffering to be consciously experienced”).⁹

Granting that the physical pain, panic, and fear involved in choking are horri-

⁶ *Nev. Indep. Broad. Corp.*, 99 Nev. at 419, 664 P.2d at 347; *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 712-13, 542 P.2d 198, 208 (1975).

⁷ *Drummond*, 91 Nev. at 713, 542 P.2d at 208.

⁸ NRCP 59(a)(2); *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *De-Jesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000).

⁹ Chief Judge Reed also noted that the legislative history of NRS 41.085 made reference to “conscious pain and suffering.” *Id.* (citing *Hearings on S. 99 before the Nevada State Senate Judiciary Comm.* (Jan. 31, 1979) (Attachment C, Letter of Peter Neumann)).

ble, awarding \$7.5 million for 50 seconds of pain and suffering¹⁰ (Stein Dep. 77:10–19), is simply untethered from reality and justice. While courts do not apply a stop-watch approach to the length of conscious pain and suffering, there must be an appreciable time of consciousness in order to justify an award. The Ninth Circuit has held that 10 seconds of consciousness is insufficient to warrant any award. *See Ghotra ex rel. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1996). Assuming one additional minute of pain and suffering would cross the legal threshold into a justifiable basis to award damages, it could only be nominal.¹¹

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

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

The award has no connection to the factors set forth in law for evaluating this element of damages, on which this Court instructed the jury—*e.g.*, the ages of the deceased and heirs, respective life expectancies, the probability of financial support, etc. (See Jury Instruction No. 22.) First, the family’s remaining time together would not have been long anyway. Jack and Elaine Chernikoff are both in their late seventies. (Tr. Day 3, at 210–11, App. 199–200.) Harvey was in his fifties and had numerous comorbidities, such as a history of cancer, hypertension, hypercholesterolemia, diabetes, and history of transient ischemic attack. (Stein Rep. 1 App. 87.) The excessiveness is especially apparent in light of plaintiffs’ contention that the entire \$7.5 million award

¹⁰ In fact, it is not clear that Harvey experienced any pain and suffering associated with choking. The video images do not reveal any significant struggle involving the standard signs of choking leading up to Harvey’s death. Harvey does not cough, attempt to cough, try to get out of his seat, clutch his throat or panic in any way. Plaintiffs’ expert Dr. Stein admitted that these signs of choking did not occur. (Stein Dep. 35–36, App. 124–25.)

¹¹ No award of pain and suffering is appropriate at all unless the jury found that Farrales breached a duty of care *before Harvey passed out*. Plaintiff presented two theories of duty, breach and causation. The first involved Farrales’ “failure” to stop Harvey from eating or to notice any distress before he passed out. The second theory of liability criticized Farrales for not doing enough to rescue Harvey after he lost consciousness. Legally, the award of conscious pain and suffering could only be justified by the first theory.

1 represents just past damages—more than \$1 million a year from the time of Harvey’s
2 death until the trial. (See Opp. to Mot. to Alter & Amend the Judgment, filed Apr. 11,
3 2016, at 6.)

4 Second, while defendants do not doubt that plaintiffs had affection for Harvey,
5 and vice-versa, they did not spend a lot of time together. Harvey did not live with his
6 parents, and had not lived with them permanently since the age of 18. (Tr. Day 4, at
7 123:14–18., App 214.) He lived in California until 2010, while his parents lived in
8 Nevada. (Tr. Day 3, at 213–215., App. 201–03) The parents traveled every summer
9 without him. (Tr. Day 4, at 91:13–15, 124–25, App. 211, 215–16.)

10 Third, Harvey did not provide financial support. (Tr. Day 4, at 125:15–22, App.
11 216.) (That is not an aspersion on Harvey. But it must be pointed out because lost fi-
12 nancial support is a major reason for this element of damages.)

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

15 **C. Other Indicators of Passion and Prejudice**

16 **1. *The Jury Awarded Identical***
17 ***Amounts for Dissimilar Claims***

18 It is clear that the jury here did not bring real thought and individual analysis
19 to these claims. Jurors are charged to thoughtfully, carefully and impartially consider
20 the evidence before deciding upon a verdict. Nev. J.I. 11.01 (“Whatever your verdict is,
21 it must be the product of a careful and impartial consideration of all the evidence in
22 the case under the rules of law as given you by the court.”). As this court has recog-
23 nized, “[s]ince the purpose of a general damage award is to compensate the aggrieved
24 party for damage actually sustained, an identical award to multiple plaintiffs who are
25 dissimilarly situated is erroneous on its face.” *Nev. Cement Co. v. Lemler*, 89 Nev. 447,
26 450-51, 514 P.2d 1180, 1182 (1973). That claims are tried together does not make
27 them worth the same amount.

28 Here, the jury awarded the same amount for Harvey’s few minutes of alleged

1 pain and suffering as they did for the parents' remaining years. And there was no dis-
 2 tinction between the parents. This identity of awards shows that the jury failed to
 3 genuinely analyze the claims.

4 **2. *The Jury's Allocation of Fault Defies the Evidence, Reflect-***
 5 ***ing Passion, Prejudice and a Lack of Seriousness***

6 The indicia of passion and prejudice may be evident in the jury's allocation of
 7 fault, as well as in the amount of the award. *See, e.g., Scott v. County of Los Angeles*,
 8 32 Cal. Rptr.2d 643, 655 (Ca. App. 1994). In this case, the allocation is nonsensical.

9 The jury checked boxes on the verdict form indicating that the jurors found Far-
 10 rales to be negligent and that his negligence was (at least technically) a cause of Har-
 11vey's death. Nevertheless, the jury then found that Farrales' negligence did not
 12 amount to even one percent among the contributing causes.

13 On one hand, after having found that Farrales was negligent and that his negli-
 14 gence was a cause of the damages, the jury's allocation of 0% fault to him demon-
 15 strates either a complete misunderstanding of the instructions or blatant disregard for
 16 them.¹² Jurors are not at liberty to find a defendant at fault and a cause of an injury
 17 and then disregard that determination in order to direct all liability only to his "deep
 18 pocket" co-defendant.¹³ *That exemplifies prejudice.*

19 On the other hand, if the jurors did understand the instructions and did follow
 20 them then they necessarily concluded that Farrales' negligence was *de minimis*—it
 21 amounted to less than one percent of all causes of Harvey's death. And, if that is the
 22 case then the judgment against First Transit must be vacated as a matter of law pur-
 23suant to NRCP 50(b). Judgment would have to be entered in favor of First Transit.

24 The gravamen of plaintiffs' allegation is that Farreles failed to prevent Harvey
 25 from eating his sandwich and then he came to Harvey's aid inadequately. Plaintiffs'

26 ¹² To be clear, First Transit maintains that neither Farrales nor First Transit were
 27 negligent. The issue is whether the verdict is rational assuming that either defendant
 28 was negligent.

¹³ In evaluating the propriety of the jury's deliberation, it makes no difference how the
 legal doctrine of *respondeat superior* may come to bear outside of the jurors' purview.
 Indeed, if the jurors made their determination based on their intuition of the law, in-
 stead of the Court's instructions, that would constitute misconduct by the jury, which
 would also necessitate a new trial. NRCP 59(a)(2).

causes of action against First Transit rest on (1) vicarious liability for the negligent acts of Farrales *to the extent* that Farrales' omissions contributed to the death, and (2) the theory that Farrales' omissions resulted from inadequate training. If the extent of Farrales' contribution to the injury is *de minimis*, First Transit's resulting vicarious liability would be *de minimis*. And if Farrales' negligence was not a bona fide issue in the case, it does not matter how he was trained.

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

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

4. *Counsel Suggested that Jurors Had Committed During Voir Dire to Award Over Ten Million if they Believed Plaintiffs Satisfied their Prima Facie Case*

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

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

During *voir dire*, plaintiffs' counsel improperly focused on establishing that the prospective jurors would return a verdict "into the tens of millions of dollars" if plaintiffs proved their case. (Tr. Day 1, at 73:24–74:1, App. 195–96.) Plaintiffs' counsel knew full well that, by doing so, he was implanting a numerical value in the minds of the jury to represent plaintiffs' damages before any evidence was ever admitted. This tactic is prejudicial and improper. *See generally* Adam D. Galinsky & Thomas Muss-

weiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 657-669 (2001) (hereinafter "*First Offers as Anchors*"); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519 (1996) (defining anchoring as "the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number");¹⁴ Chopra, *The Psychology of Asking a Jury for a Damage Award*, at 1 (as recognized by the plaintiffs' bar, "[a]nchoring can sway decisions even when the anchor provided is completely arbitrary"); see also John Malouff & Nicola Shutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989) (mock juries awarded damages largely based upon what plaintiff's counsel requested).

The resulting prejudice is evident in the jury's decision to actually award \$15 million. This award is too coincidental considering the fact that plaintiff's counsel never admitted evidence justifying an award over \$10 million.

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

During closing arguments, plaintiffs' counsel reminded the jurors of his request during voir dire for "tens of millions of dollars," and went so far as to suggest that the

¹⁴ See also W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (June 2001) (describing a mock juror study, which showed that allowing plaintiff's attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested amounts]"); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (Aug. 1999) (demonstrating "anchor-and-adjust" phenomenon whereby jurors use awards suggested by plaintiff's counsel as a starting point and set punitive awards at a compromise figure based on the suggested amount); cf. Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, PSYCHOLOGY SCIENCE, Vol. 19, No. 2, 121-127 (2008) (noting that anchoring effects account for a wide variety of numerical judgments, ranging from appraisal of homes to estimates on risk and uncertainty, and estimates of future performances); Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: Anchoring Effects in Personal Injury Damages Awards*, 6 J. Experimental Psychol. Applied 91-103 (June 2000) (describing mock juror study in which exaggerated requests for pain-and-suffering damages produced exaggerated awards and concluding that counsel's award recommendations alter jurors' beliefs about what constitutes an acceptable award).

jurors had given their “word,” obligating them to give plaintiffs at least \$15 million because plaintiffs had proved their case:

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

In this case, the amount we’re asking for for Harvey’s life, for the loss of companionship, for the loss of relationship, for the things that they destroyed is \$15 to \$25 million.

(Tr. Day 9, at 37:17–38:3, App. 235–36 (emphasis added).)

By doing so, plaintiff’s counsel encouraged the jury to disregard the merits of the claim and to issue a verdict based on their “promise” to plaintiffs’ counsel. *See Li-
oce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 982-83 (defining as improper jury nullification an attorney’s argument that the jury should “send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness”).

IV.

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

The verdict shows a “disregard by the jury of the instructions of the Court.” NRCp 59(a)(5). That, too, calls for a new trial.

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

Instruction No. 22 informed the jury that it could award for “[a]ny damages for pain, suffering, or disfigurement of the decedent.” For that element of damages, the jury awarded \$7.5 million for the 50 seconds that Harvey allegedly experienced pain and suffering. That exorbitant amount not only reflects the jury’s passion and prejudice (*see* section II.A), it also shows a disregard of this jury instruction.

It is important to note that if any part of the \$7.5 million relates to the alleged failures of Farrales after Harvey passed out, the judgment must be vacated and a new trial conducted. That is because we cannot know on which factual theory the jury re-

1 lied in reaching its conclusions as to liability and damages. *FGA, Inc. v. Giglio*, 128
 2 Nev. ___, 278 P.3d 490, 496 (2012) (“general verdict rule” does not apply where a party
 3 raises overlapping factual theories in support of one single claim).

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

5 The award of \$7.5 million to the elderly heirs also shows disregard for the fac-
 6 tors set forth Instruction No. 22 for evaluating an heir’s claim. The amount indicates
 7 no consideration of the ages of the parents and Harvey, or of their relatively short life
 8 expectancies, or of the fact that Harvey provided no support, or the reality that Harvey
 9 and his parents had lived in different states and only saw each other occasionally. It
 10 also appears that the jury failed to thoughtfully factor the possibility that even if Har-
 11vey had been revived, *but not within the first couple of minutes*, he would have had a
 12 serious brain injury, rendering him unable to give the degree of companionship and
 society that he had before.

13 **C. The Jury Disregarded the Instructions not to Rely on**
 14 **Sympathy and to Apply “Calm and Reasonable Judgment”**

15 The Court instructed the jurors that they had to reach their awards with “calm
 16 and reasonable judgment” (Instruction No. 23) and not on the basis of sympathy (In-
 17 struction No. 24). The jurors manifestly disregarded that charge. They returned the
 18 verdict in less than 30 minutes. They awarded two massive, identical figures that
 19 demonstrate no regard for the finer points of the case. (See section III.) The allocation
 20 of fault conflicts with the evidence. (See section I.) And the jury gave plaintiffs the
 21 exact amount of money that plaintiffs’ counsel referred to in his closing argument, \$15
 22 million. Sympathy, passion and prejudice are the only possible explanations for the
 award.

23 **V.**

24 **REGARDLESS OF WHETHER THE VERDICT IS INHERENTLY EXCESSIVE, IT WOULD**
 25 **HAVE BEEN DIFFERENT BUT FOR COUNSEL’S MISCONDUCT**

26 An independent, yet complementary, reason to vacate the jury’s verdict is that
 27 misconduct by plaintiffs’ counsel affected the verdict. *Lioce* makes clear that for unob-
 28 jected-to misconduct to constitute plain error it is not necessary that the resulting ver-
 dict be inherently excessive. 124 Nev. at 7, 174 P.3d at 974. Indeed, in that case, the

misconduct led to defense verdicts. *Id.* Rather, it is enough that the misconduct affects what the jury would have otherwise awarded.

A. The Verdict Reflects Plaintiffs' Improper Argument for Recovery Based on the Value of Harvey's Life

Plaintiffs improperly argued for damages that would reflect the value of Harvey's life, basing recovery on Harvey's loss of his own life. (Tr. Day 9, at 37:25–38:1; 40:1–2, App. 235–36; 238 (“Certainly the value of Harvey is worth as much as a painting or a sculpture or a car.”).) The Nevada wrongful death statute, NRS 41.085, allows only certain particular elements of damage, such as conscious pain and suffering of the decedent or the heir's grief and sorrow. It was improper for plaintiffs to argue, contrary to the law, that the entire value of Harvey's life could be recovered at all, and certainly not in those elements of recovery.

1. *Wrongful-Death Claims are Limited to the Statutory Items of Recovery*

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

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

As progeny of that act, wrongful death law allows recovery for two separate and distinct types of harm: (1) the decedent's claims for the *decedent's damages* incurred *up until the time of death* (along with special damages for actual costs incurred because of the death) and (2) the harm suffered by heirs for *their* individual losses. NRS 41.085(4), (5). Those are the only recoveries contemplated by the statute.

2. *The Value of the Decedent's Life is Not an Recoverable Item of Damages in a Wrongful-Death Claim*

The loss of the decedent's life is not an element in either of Nevada's wrongful-death causes of action. The Supreme Court of Pennsylvania articulated the rationale

for excluding hedonic damages of the decedent in wrongful death cases:

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

Willinger, 393 A.2d at 1191.

Similarly, the decedent's theoretical loss of life's pleasures is not one of the harms which the heirs suffer. STUART M. SPEISER, RECOVERY OF WRONGFUL DEATH § 6:45 (4th ed. updated July 2014). In *Brereton v. U.S.*, 973 F.Supp. 752, 754 (E.D. Mich. 1997), the court opined:

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

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

The great majority of courts that have confronted this issue also interpret their wrongful death statutes to disallow damages for the loss of life itself (either by limiting them to the period between injury and death, or else properly concluding that hedonic damages as a subset of pain and suffering necessarily requires conscious awareness).¹⁵

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

1 In other words, “the overwhelming majority of decisions . . . have rebuffed efforts to
2 expand wrongful death damages to include loss of life’s pleasures.” SPEISER, *supra*
3 § 6:45.

4 **3. *The Verdict for \$15 Million is the Direct Result***
5 ***of Plaintiffs’ Improper Request for that***
6 ***Amount as the “Value of Harvey”***

7 Without independent evidence supporting the jury’s exact award of \$15 million,
8 the only explanation for that amount is that plaintiffs’ counsel asked for it, expressly
9 because that was “the amount that we’re asking for for *Harvey’s life*,” among other
10 things. (Tr. Day 9, at 37:25–38:1, App. 235–36.) It was misconduct to encourage the
11 jury to base their award on principles that are contrary to the law. *See Lioce*, 124 Nev.
12 at 18, 174 P.3d at 981. And because plaintiffs’ efforts at jury nullification succeeded,
13 the misconduct rises to plain error. *Id.*

14 The misconduct was particularly palpable because of the vivid imagery plain-
15 tiffs’ counsel used. He described pondering the question “what is the value” of Har-
16 vey’s life over meals, visits, and calls with plaintiffs. (Tr. Day 9, at 38:22–39:4, App.
17 236–37.) Plaintiffs’ counsel catalogued the high prices paid for various sculptures,
18 paintings, and luxury cars, and concluded:

18 And I said to myself if the value of a hunk of metal is worth 48
19 million, if the value of a Van Gogh is worth 66, if the value of a
20 car is worth 52, then certainly the value of a human life is worth
21 just as much.

22 . . . I thought to myself certainly the life of this man, of this
23 sweet man, is worth at least half the value of a painting or a car
24 or a sculpture.

25 (Tr. Day 9, at 39–40, App. 237–38.) He then drew an emotional picture of a firefighter
26 in a burning museum being asked to save a valuable painting, but then seeing Harvey
27 through the smoke:

28 Who is he going to come out of the building with? That’s the
question that I ask. Who is he going to come out of the building
with? Because I—it’s not going to be the painting. It’s going to be
Harvey.

29 *Wahl*, 987, P.2d 127, 131 (Wash. Ct. App. 1999); *Prunty v. Schwantes*, 162 N.W.2d 34,
30 38 (Wis. 1968).

(Tr. Day 9, at 40:25–41:4, App. 238–39.) Given such an emotionally charged dilemma—either to follow the law of wrongful-death damages or to award an amount to “honor” the inestimable value of a human life (*see* Tr. Day 9, at 90:11, App. 244)—of course the jury chose to award damages based on the value of Harvey’s life. Plaintiffs’ counsel asked the jurors to return an award based on broad policy preferences, despite the law. And the jurors did.

B. The Verdict Reflects Plaintiffs’ Efforts to Vilify Defendants for Defending the Lawsuit

Plaintiffs’ counsel also vilified defendants for even raising a defense and taking the case to trial, improperly suggesting that defendants should have “ma[d]e the choice to do the right thing and to say, you know what, we made a mistake, here are all the rules that we violated, we’re sorry.” (Tr. Day 9, at 81:2–4, App. 240; *see also* Tr. Day 9, at 11:6–18, App. 219 (mocking defendants for allegedly thinking “[s]afety is our core value . . . unless you’re unfortunate enough to choke to death on one of our buses. Then we’re going to come into court.”).) Whether defendants admitted to liability voluntarily, as opposed to requiring plaintiffs to prove their case, has no relevance to the amount of damages plaintiffs would be entitled to, so it should not have been a topic for argument. *See Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991) (approving “an attorney’s duty to defend his or her clients fully, vigorously, and even with arguments which might be offensive or ultimately unsuccessful” (internal quotation marks omitted)).

Plaintiffs, however, explicitly tied their request for damages to the misconception that defending the case amounted to “disrespect” for Harvey’s life. In just one example, plaintiffs’ counsel disparaged First Transit for even *requesting* an autopsy that would have shown the cause of death:

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 [imitate a response to choking]. ***Don’t let them disrespect this family any more.***

(Tr. Day 9, at 15:12–16, App. 223.) Plaintiffs then made an improper golden-rule argument, inviting the jurors to place themselves in plaintiffs’ shoes (*see Lioce*, 124 Nev. at 22, 174 P.3d at 984):

Use your common sense if you have kids. *If you have kids you know what your kids do* [when they are choking], they don’t . . . go like this. Instead, what they do is their eyes go like this and they panic. . . . So please don’t let them disrespect this family any more.”

(Tr. Day 9, at 25:20–26:1, App. 227–28.)¹⁶ Plaintiffs’ request for \$15 million was thus framed as an opportunity for the jury to give Harvey the “respect” and “honor” that First Transit allegedly denied him in their defense of the lawsuit. (Tr. Day 9, at 90:5–12, App. 244.)

Because the jury’s award was expressly predicated on restoring “respect” to Harvey’s family based on an improper argument that a vigorous defense was “disrespectful,” the verdict must be vacated.

C. The Verdict Reflects Plaintiffs’ Improper Request for “Justice” and Punishment, Rather than Compensation

The heirs in a wrongful-death suit have no claim for punitive damages. *Compare* NRS 41.085(4) *with* NRS 41.085(5)(b). Plaintiffs, nonetheless, requested a verdict of \$15 million based on ideas of punishment rather than compensation. The jurors’ agreement with plaintiffs’ figure means that they, too, saw their verdict as a way to punish bad behavior.

Tapping into one of the most powerful recent messages for social change, plaintiffs’ counsel instructed the jury that “[y]our job will be to determine whether all lives matter in America, or just some” (Tr. Day 9, at 89:9–16, App. 243), implying than anything less than the verdict plaintiffs requested would amount to a decision that Harvey’s life did not matter. That stemwinder echoes the one deemed improper in *Lioce*, where the attorney said that “when the jury speaks through its verdict it’s a reflection

¹⁶ At another point, plaintiffs’ counsel expressed shock that defendants would try to argue against the existence of a duty: “Are you kidding me? There is no duty to check on your passengers. I honestly—I don’t believe this.” (Tr. Day 9, at 87:13–21, App. 241.)

1 of our society views and beliefs and values as to what justice is or should be.” 124 Nev.
2 at 13, 174 P.3d at 978.

3 Plaintiffs’ counsel also explicitly tied their damages request to the notion that
4 First Transit deliberately cut corners and that the verdict needed to be large enough to
5 send First Transit a message, lest First Transit continue to think:

6 Safety is our core value unless somebody chokes to death on the
7 buys and we have to create an excuse. And in that situation, then
8 we’re going to come in and we’re going to tell folks that, you know
9 what, safety is not the most important thing. We can alter it and
10 be flexible on the rules, on the safety rules because we don’t want
11 to be responsible for the things that we do.

12 (Tr. Day 9, at 18:23–19:5, App. 224–25.)

13 The message repeatedly referenced First Transit’s income and the alleged
14 tradeoff First Transit made between profit and safety

15 Real justice in this case would be if Harvey didn’t have to
16 die. . . .

17 Instead we come in and we ask for money, their money. Money
18 that they make off of people like Jay *who they pay \$11 an hour*.
19 We call that money justice.

20 (Tr. Day 9, at 37:9–16, App. 235.) “First Transit smashed, destroyed, and crushed
21 their relationship with their son *over \$88*.” (Tr. Day 9, at 41:22–23, App. 239.) “Hey,
22 we [First Transit] can’t be trusted to do our job that *we’re getting paid a lot of*
23 *money* for.” (Tr. Day 9, at 20:15–17, App. 226.) These types of accusations are proper,
24 if at all, only in the context of a punitive-damages analysis. But here they provided
25 the foundation for a punitive verdict that should have been only compensatory.

26 **D. Plaintiffs Played on Local Prejudices**

27 Plaintiffs’ counsel injected his personal opinion about the justness of his cause
28 by inflaming the jury’s local prejudices. He repeatedly told the jury that First Transit
had consciously decided:

[I]t’s the wild wild west. We can do whatever we want here.
People in Las Vegas don’t matter. Our neighbors to the west
in California, they matter. We’re going to teach those folks [in
California] how to do [first aid]. But we’re going to make a choice
here over 88 bucks not to train our drivers.

(Tr. Day 9, at 11:25–12:19, App. 219–20.) And he offered his personal opinion of defendants’ expert that “the brutal honesty is he’s paid money to save and help avoid responsibility,” telling the jury “[y]ou get to consider” that defendants’ expert is not from Las Vegas and is a “long time buddy of” defense counsel. (Tr. Day 9, at 13:10–18, App. 221.) In contrast, plaintiffs’ counsel vouched for plaintiffs’ expert that “[h]e has zero dog in the fight” and “[h]e lives here in Las Vegas.” (Tr. Day 9, at 14:2–10, App. 222.)¹⁷ The argument echoes the one found to be prejudicial misconduct in *Sipsas v. State*, where the attorney disparaged the opposing party’s expert for being a “hired gun from Hot Tub Country,” a reference to Marin County, California. 102 Nev. 119, 124–25, 716 P.2d 231, 234 (1986).

This improper appeal to local prejudice cannot be disentangled from the verdict. In light of plaintiffs’ theory that the \$15 million verdict would be the jury’s way to show that “all lives matter” (Tr. Day 9, at 89:9–16, App. 243), the verdict expressed the jury’s local outrage at a company that would think “[p]eople in Las Vegas don’t matter.” (Tr. 9, at 12:15, App. 220.)

E. Plaintiffs’ Counsel Improperly Appealed to the Jurors’ Sympathies

Virtually plaintiffs’ entire closing argument was based on sympathy toward Harvey and his parents, rather than the law of wrongful-death claims. That was improper. See *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009).

A couple examples are particularly glaring. Plaintiffs’ counsel vouched that Harvey’s parents could not have been negligent in putting him on a bus while knowing that he had a tendency to eat on the bus:

They did everything for [their son]. 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.***

¹⁷ Plaintiffs also made repeated reference to “promises” First Transit made to the Las Vegas “community.” (Tr. Day 9, at 11:6–7; 20:25, 34:13–15; 88:10–11; 88:14–19, App. 219, 226, 233, 242 (“they come into our community and bid on this massive project”).)

(Tr. Day 9, at 20:6–13, App. 226 (emphasis added).) Plaintiffs’ counsel also offered a reenactment of what Harvey and the driver Farrales supposedly experienced and thought during Harvey’s final moments:

And I can only imagine as he is slumped over in this seat he’s thinking to himself, I know that Jay, I know that you just got back on the bus, why aren’t you helping me? Why aren’t you helping me, Jay? I like you. You’re my friend. Jay, I’m ing. Please, help me. Please help me, Jay.

(Tr. Day 9, at 29:4–12, App. 229.)

[A]nd [Farrales]—he’s likely in his mind thinking, Harvey, I want to help you. . . . Harvey, I just don’t know how to help you because I haven’t been trained by my company for \$88.

(Tr. Day 9, at 29:13–20, App. 229.) These emotional displays colored the plaintiffs’ pain-and-suffering request—“knowing that you’re dying, knowing that the driver gets back on the bus and is doing nothing to help.” (Tr. Day 9, at 41:7–9, App. 239.) The verdict of a reasonable jury would have been different but for plaintiffs’ improper arguments.

VI.

IN THE ALTERNATIVE, THE VERDICT MUST BE REMITTED

If a new trial is not granted, the Court should at least remit the damages. This court is empowered to review a jury’s award. If that award is clearly excessive, this court can remit the award. *Lee v. Ball*, 116 P.3d 64, 66 (2005) (citing *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 5 P.3d 1043 (2000)). At risk of understatement, the damages are excessive in this case. An appropriate award would be \$100,000 or less.

Dated this 25th day of May, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: /s/ Daniel F. Polsenberg

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 25th day of March, 2016, I caused a true and correct
3 copy of the foregoing "Supplemented Motion for New Trial" to be served *via* the Court's
4 electronic filing system and by courtesy email upon the following counsel of record.

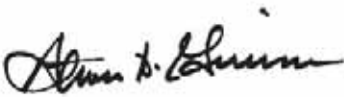
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DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

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

Defendants.

Case No. A-13-682726-C

Dept. No. 23

**DEFENDANTS' SUPPLEMENTED
MOTION TO ALTER
OR AMEND THE JUDGMENT**

Hearing Date: August 2, 2016
Hearing Time: 9:30 a.m.

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

POINTS AND AUTHORITIES

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

I.

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

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

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

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

**1. *The State's Political Subdivisions
Enjoy Sovereign Immunity***

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

Counties and the entities that they operate are political subdivisions for purposes of sovereign immunity. *See Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 751, 961 P.2d 754, 756 (1998) (recognizing immunity for UMC); *see also Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (2007) (recognizing immunity for CCSD). That includes a regional transportation commission such as RTC, which is created and operated by the county. *See* NRS 277A.170; NRS 41.0307(1) (defining "employee" to include an employee of a "commission" of "a political subdivision of the State which is created by law").

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

4 Sovereign immunity extends to an “arm of the state,” too. *See Graham v.*
5 *State*, 956 P.2d 556, 562 (Colo. 1998), *cited with approval in Simonian v. Univ.*
6 *& Cmty. Coll. Sys.*, 122 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006).
7 Factors that Nevada has considered include whether the entity is (1) subject to
8 the approval and control of the government; (2) mentioned as a state entity
9 within the Nevada Revised Statutes, and (3) “in possession of some sovereign
10 powers,” which the Court has interpreted to mean that the entity carries out
11 “sovereign functions.” *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187,
12 193–95 & n.32, 128 P.3d 1057, 1061–62 & n.32 (2006) (footnotes omitted) (ex-
13 tending immunity to a community college).

14 The U.S. Supreme Court recently confirmed that immunity extends to
15 private groups hired to perform public services. In *Filarsky v. Delia*, the Court
16 held that a private attorney hired to interview a city employee suspected of ma-
17 ligning was immune from a § 1983 action. 132 S Ct. 1657, 1665–66 (2012).¹
18 The Court rejected the argument that only full-time government employees de-
19 served such immunity, noting that distinguishing between full-time and ad-hoc
20 government employment “creates significant line-drawing problems” and leads
21 to the perverse result that private groups working in tandem with government
22 will “be left holding the bag—facing full liability for actions taken in conjunction
23 with government employees who enjoy immunity for the same activity.” *Id.*

24 The *Filarsky* decision echoes the Nevada Supreme Court’s concern in

25 ¹ The Nevada Supreme Court has held that federal precedents on sovereign
26 immunity under the Federal Tort Claims Act are relevant to the interpretation
27 of NRS 41.032. *Scott v. Dep’t of Commerce*, 104 Nev. 580, 583, 763 P.2d 341,
28 343 (1988). In similar fashion, it has looked to other jurisdictions’ interpreta-
29 tions of state action under § 1983. *Simonian v. Univ. & Cmty. Coll. Sys.*, 122
30 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006).

1 *Falline v. GNLV Corp.*, where the Court held that denying statutory immunity
 2 to self-insured employers—who perform for their employees the functions of the
 3 State Industrial Insurance System—“would constitute an unwarranted, dis-
 4 criminatory source of liability against” those private employers. *Falline v.*
 5 *GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) (plurality opinion).

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

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

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

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

23 (Contract, § 2(a)(1), Ex. A, at 11–12.) See generally 42 U.S.C. § 12143; 49 C.F.R.
 24 §§ 37.121(a), 37.123. RTC and First Transit share the task of complying with
 25 these federal statutes and regulations, which are required government services.

26 ² Although First Transit’s immunity in *Gordon* was subsequently abrogated by
 27 a specific statute subjecting transportation contractors to liability, *Rocky Hill*,
 28 105 A.3d at 868 n.13, Nevada law contains no such exception to general sover-
 eign-immunity principles.

(Contract § 2(c), (d), Ex. A, at 12–23.) RTC and First Transit expressly agreed to collaborate on the creation and submission of the federally mandated paratransit plan. (Contract § 11, Ex. A, at 38–39.) *See* 49 C.F.R. § 37.135. First Transit also operates vehicles owned by RTC, uses offices owned by RTC, enforces RTC’s rules, transports passengers based on RTC’s reservation, collaborates with RTC on marketing and service planning, and provides reports to satisfy RTC’s requirements. (Contract § 2(c), (d), Ex. A, at 12–23.)

Beyond all that, First Transit depends on RTC for its income: First Transit only “retain[s] custody of fares” for RTC; RTC then pays First Transit’s invoices out of those collected fares. (Contract §§ 2(d), 12, Ex. A, at 16–23, 39–40.) First Transit also faces a rigorous audit and oversight process for its expenditures and invoices. (Contract §§ 2(d)(1)(G), 5(c), 7, Ex. A, at 17, 26, 28–29.)³

While there are some factors that the *Gordon* court considered that do not apply here—such as whether the entity was created by statute, whether the entity’s officers and directors are “state functionaries,” whether the entity’s employees are state employees, and whether a judgment against the entity “would have the same effect as a judgment against the state”—none of those factors are individually disqualifying. *Gordon*, 861 A.2d at 1175–76. In fact, First Transit in the *Gordon* case met just one of the factors, in that the adverse judgment against First Transit would ultimately require payment from the state. *Id.* at 1175. Granted, the state here did not agree to indemnify First Transit, so defendants do not argue that that factor favors First Transit here. (Contract §§ 37, 40, Ex. A, at 90, 93.) But viewed in the broader context, a judgment that harms First Transit’s ability to provide paratransit services in turn impairs the state’s performance of its obligations under the ADA.

³ As the *Gordon* court noted, the fact that First Transit “derives a profit from the enterprise does not affect” the immunity analysis. 861 A.2d at 1174.

1 All of these acts, as part of the contract with RTC, entitle First Transit to
2 share in RTC's sovereign immunity and the \$100,000 damages cap under NRS
3 41.035.

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

6 Here, it is especially important to respect First Transit's immunity as an
7 arm of the state because to find otherwise would interfere with federal law.
8 Federal law, including the ADA, is supreme in Nevada courts. *See generally*
9 U.S. CONST. art. VI. The federal regulations implementing the ADA require
10 First Transit to "stand in the shoes" of the state for purposes of ensuring Neva-
11 da's ADA compliance. 49 C.F.R. § 37.23; App'x D to Part 37: Construction and
12 Interpretation of Provisions of 49 CFR Part 37, at 465–66 (2007). To ensure
13 that First Transit can adequately discharge Nevada's duties under the ADA,
14 state courts must respect First Transit's immunity.

15 **C. The Legislative History of an Unenacted Bill is Not Helpful**

16 It is always dubious to interpret the current state of the law by reference
17 to a bill that has not been enacted. *See Sullivan v. Finkelstein*, 496 U.S. 617,
18 632 (1990) (Scalia, J., concurring). In their preliminary opposition, plaintiffs
19 ask the Court to infer from the Legislature's failure to pass a provision *expressly*
20 giving entities like First Transit immunity that First Transit is *not* immune
21 under current law. While such a statute, of course, would bypass a factors
22 analysis under the "arm of the state" doctrine, in the absence of that provision
23 this Court can still find immunity by applying that traditional doctrine.

24 In any case, the bill's failure in the 2015 legislative session does not re-
25 flect a considered *rejection* of sovereign immunity for entities like First Transit.
26 To the contrary, the Senate Governmental Affairs Committee passed the bill,
27 but no further action was permitted during that legislative session because of a
28 self-imposed deadline for hearing bills. *See Overview for SB 478*,

1 <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/2181/Overview> (“no
2 further action allowed” because of Joint Standing Rule No. 14.3.2, which impos-
3 es a 79-day deadline for action in the house of origin).

4 II.

5 PREJUDGMENT INTEREST ON 6 THE LOSS-OF-CONSORTIUM 7 CLAIM MUST BE VACATED

8 “[W]hen a general verdict form does not distinguish between past and
9 present damages, a trial court cannot award prejudgment interest.” *Shuette v.*
10 *Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549-50 (2005);
11 *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982). Although the ju-
12 ry’s verdict for Harvey Chernikoff’s pain and suffering represents just past
13 damages, the award for Jack and Elaine Chernikoff’s loss of consortium in-
14 cludes both past and future damages but makes no allocation between the two.
15 In this situation, prejudgment interest on the loss-of-consortium award is im-
16 proper and must be vacated.

17 Any suggestion that the loss-of-consortium award might just be for past
18 damages would be unserious. The jury was explicitly instructed to compensate
19 plaintiffs for “any grief or sorrow reasonably certain to be experienced in the fu-
20 ture.” (Instruction No. 22.) Plaintiffs’ son testified to the ongoing grief: “[Elaine
21 Chernikoff] suffered so bad, and she still—we all suffer, but *she still is*. And she
22 sleeps with his blanket, and she said that she’s never even going to wash it be-
23 cause it smells like Harvey.” (Tr. Day 5, at 116:12–16, Ex. B, at 122 (emphasis
24 added).) And plaintiffs made it a theme of their case that the jurors were to
25 award not just plaintiffs’ grief and sorrow for a snapshot of time, but the entire
26 value of Harvey’s life. (Tr. Day 9, at 39–42, Ex. C, at 125–28.) In fact, plain-
27 tiffs’ counsel compared the measure of damages to those a driver of a smashed
28 Ferrari would be entitled to: “full justice . . . the full value of that car,” not just a

1 temporary loss of use. (Tr. Day 9, at 41:16–23, Ex. C, at 127.) The request to
 2 vindicate plaintiffs’ “smashed, destroyed, and crushed . . . relationship with
 3 their son” was not a limited request for past damages. (*Id.*)

4 Because the jury awarded an unallocated amount of past and future dam-
 5 ages for plaintiffs’ loss of consortium, prejudgment interest on that award is
 6 unavailable.⁴

7 CONCLUSION

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

11 Dated this 25th day of May, 2016.

12 LEWIS ROCA ROTHGERBER CHRISTIE LLP

13
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24
 25
 26
 27 ⁴ Defendants did not waive this argument by not insisting that the verdict form
 28 include separate awards. Defendants’ objection is not to the verdict form itself
 but rather to the post-verdict award of prejudgment interest.

EXHIBIT A

EXHIBIT A

**REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA**

CONTRACT WITH

LIDLAW TRANSIT SERVICES, INC.

**Dated
March 8, 2007**

RTC000013