

1 these instructions because First Transit specifically contracted to provide paratransit services.  
2 First Transit knew that it would be transporting individuals with disabilities. Although there is  
3 no duty to perform the Heimlich maneuver in Nevada, *Lee v. GNLV Corp.*, 117 Nev. 291, 22  
4 P.3d 209 (2001) does not stand for the proposition that First Transit could simply disregard  
5 Harvey while he died. Additionally, First Transit had policies to scan the bus regularly, and the  
6 testimony and video evidence presented at trial demonstrated that the bus was not regularly  
7 scanned. The Court also treats any challenge to these jury instruction issues as waived because,  
8 although the Court recognizes that defendants disagreed that there was even a basis for a  
9 common-carrier instruction, Defendants offered as an alternative to plaintiffs' common-carrier  
10 instructions the very instructions of which they now complain and have otherwise failed to  
11 properly object. See NRCP 51(c); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194  
12 P.3d 1214 (2008); *Pearson v. Pearson*, 110 Nev. 293, 871 P.2d 343 (1994).

13           **c. Attorney Misconduct.** In their motion for new trial, Defendants argued  
14 that Plaintiffs' counsel committed misconduct by (A) abusing the jury instruction on a  
15 heightened standard of care; (B) referring to this case as a multi-million dollar case in voir dire;  
16 (C) telling the jury that it was required to give Plaintiffs what they asked for; (D) arguing for  
17 recovery based upon the value of Harvey's life; (E) vilifying Defendants for defending the  
18 lawsuit; (F) requesting justice and punishment, rather than compensation; (G) playing on local  
19 prejudices; and (H) improperly appealing to the jurors' sympathies. The Court has reviewed  
20 each of the statements offered by Defendants as claimed instances of attorney misconduct under  
21 the standards in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) and subsequent case law on  
22 attorney misconduct. The Court notes that Defendants did not contemporaneously object to any  
23 of these claimed instances of attorney misconduct, although the Court probably would have  
24 sustained an objection in some instances. The Court treats Defendants' failure to object as a  
25 waiver of the issue. Having presided at the jury trial and being familiar with the evidence  
26 presented to the jury, the Court does not find that the verdict would have been different but for  
27 the claimed instances of attorney misconduct. Defendants have not satisfied their burden to  
28

1 demonstrate plain error or irreparable and fundamental error. The Court also rejects any  
2 characterization of these claimed errors under an NRCP 59(a) new trial standard.

3 **d. Passion and Prejudice.** The Court reiterates that, having presided at the  
4 trial and being familiar with the evidence, the \$15 million verdict was not excessive. From the  
5 video shown at trial, there are at least 50 seconds where Harvey is choking and going through  
6 stages of being in distress. The expert testimony presented confirms that choking is an  
7 excruciating death, for which there is awareness, helplessness, and fear involved. Even the  
8 defense expert, Dr. MacQuarrie, testified that when someone chokes, he experiences “panic,  
9 complete panic.” The Court does not find that the \$7.5 million award to Harvey was excessive.  
10 *See, e.g., Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984). The Court  
11 also does not find that the \$7.5 million award to Jack and Elaine Chernikoff was excessive.  
12 Harvey’s family members testified for long periods of time, showed pictures, and demonstrated a  
13 close family relationship. The defense did not object to the content of this testimony, which the  
14 Court considers a waiver of the excessiveness arguments now presented. *See Bridges v. State*,  
15 116 Nev. 752, 6 P.3d 1000 (2000). The Court does not only consider the parents’ life  
16 expectancy in evaluating the alleged excessiveness of their recovery; as people get older, the  
17 value of life becomes more important, so life expectancy is not a sole consideration.

18 **e. Jury’s Manifest Disregard of the Court’s Instructions.** Having  
19 reviewed Defendants’ specific challenges to the Court’s instructions given to the jury, the Court  
20 concludes that Defendants have not satisfied their burden under NRCP 59(a) to demonstrate that  
21 the jury manifestly disregarded the Court’s instructions. Defendants cannot demonstrate that the  
22 jury disregarded the Court’s instructions to the level that it would have been impossible for the  
23 jury to reach its verdict. *See Weaver Bros. v. Misskelley*, 98 Nev. 232, 645 P.2d 438 (1982);  
24 *Eikelberger v. Tolotti*, 94 Nev. 58, 574 P.2d 277 (1978); *M&R Inv. Co. v. Anzalotti*, 105 Nev.  
25 224, 773 P.2d 729 (1989).

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f. **Remittitur.** Since the Court has determined that the \$15 million verdict was not excessive, the Court declines to remit the jury's verdict.


IT IS SO ORDERED.

Dated this 6<sup>th</sup> day of June, 2017.

  
DISTRICT COURT JUDGE  
JUDGE STEFANY A. MILEY

Respectfully submitted by:

RICHARD HARRIS LAW FIRM


By   
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*Attorneys for Plaintiffs,  
Jack Chernikoff and Elaine Chernikoff*

Approved<sup>1</sup> as to form and content:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By   
Daniel F. Polsenberg, Esq.  
Nevada Bar No. 2376  
Joel D. Henriod, Esq.

<sup>1</sup> Defendants recognize that this order expresses the Court's reasoning and conclusions. However, defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions of law articulated in the order.

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7401 W. Charleston Boulevard  
6 Las Vegas, Nevada 89117

7 *Attorneys for Defendants,*  
*First Transit, Inc. and Jay Farrales*  
8

9

10 [CASE NO. A682726—ORDER DENYING DEFENDANTS’ MOTION FOR NEW TRIAL]  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

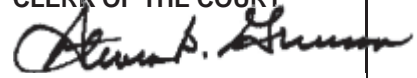
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20 [LSanders@AlversonTaylor.com](mailto:LSanders@AlversonTaylor.com)

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,  
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28 Plaintiffs,  
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30 vs.  
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32 FIRST TRANSIT, INC.; JAY FARRALES;  
33 DOES 1-10; and ROES 1-10, inclusive,  
34  
35 Defendants.

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

38 **AMENDED CASE APPEAL STATEMENT**

- 39 1. Name of appellants filing this case appeal statement:  
40 Defendants FIRST TRANSIT, INC. and JAY FARRALES
- 41 2. Identify the judge issuing the decision, judgment, or order appealed from:  
42 THE HONORABLE STEFANY A. MILEY
- 43 3. Identify each appellant and the name and address of counsel for each  
44 appellant:

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*Attorneys for Appellants First Transit, Inc. and Jay Farrales*

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LEANN SANDERS  
ALVERSON, TAYLOR, MORTENSEN & SANDERS  
7401 West Charleston Boulevard  
Las Vegas, Nevada 89117  
(702) 384-7000

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

*Attorneys for Respondents Jack Chernikoff and Elaine Chernikoff*

BENJAMIN P. CLOWARD  
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CHARLES H. ALLEN  
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(404) 419-6674

MICAH S. ECHOLS  
MARQUIS AURBACH COFFING  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
(702) 382-0711

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

Charles H. Allen is not licensed to practice in Nevada. A copy of the order granting him permission to appear is attached hereto as Exhibit A.

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained counsel

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- 7. Indicate whether appellant is represented by appointed or retained counsel on appeal:  
Retained counsel
- 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:  
N/A
- 9. Indicate the date the proceedings commenced in the district court, e.g., date complaint, indictment, information, or petition was filed:  
Complaint filed May 31, 2013
- 10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:  
This is a wrongful death action. Defendants appealed on April 8, 2016 from the judgment upon the jury verdict in favor of the decedent's heirs, entered on March 9, 2016.  
Defendants appeal also from the amended judgment and the orders on post-trial motions, which were entered on June 7, 2017.
- 11. Indicate whether the case has previously been the subject of an appeal or an original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding.  
N/A
- 12. Indicate whether this appeal involves child custody or visitation:  
This case does not involve child custody or visitation.
- 13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:  
The parties already participated in the Supreme Court's settlement program. The parties could not reach an agreement.  
Dated this 7th day of June, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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BY: /s/ Joel D. Henriod  
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(702) 949-8200

*Attorneys for Defendants First Transit, Inc. and Jay Farrales*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of June, 2017, I caused a true and correct copy of the foregoing "Amended Case Appeal Statement" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

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*/s/ Yolanda Griffin*  
An Employee of Lewis Roca Rothgerber Christie LLP

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# EXHIBIT A

# EXHIBIT A

CLERK OF THE COURT

1 NOE  
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 7 E-Mail: Benjamin@RichardHarrisLaw.com  
*Attorneys for Plaintiff*

9 **DISTRICT COURT**  
 10 **CLARK COUNTY, NEVADA**

11  
 12 JACK CHERNIKOFF, ELAINE  
 CHERNIKOFF,

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

14 Plaintiffs,

15 vs.

16  
 17 FIRST TRANSIT, INC. LAIDLAW  
 TRANSIT SERVICES, INC dba FIRST  
 18 TRANSIT; JAY FARRALES; DOES 1-10,  
 and ROES 1-10 inclusive,

19 Defendants.

20 **NOTICE OF ENTRY OF ORDER**

21 TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD.

22  
 23 PLEASE TAKE NOTICE that an Order Granting Motion for Association of Out of State  
 24 Counsel Pro Hac Vice was filed with the Court on May 27, 2014.

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1 A copy of which is attached hereto.

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DATED this 28<sup>th</sup> day of May 2014.

RICHARD HARRIS LAW FIRM

*#10664*  
*[Signature]*

BENJAMIN P. CLOWARD, ESQ.  
Nevada Bar No. 11087  
801 South Fourth Street  
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RICHARD HARRIS  
LAW FIRM

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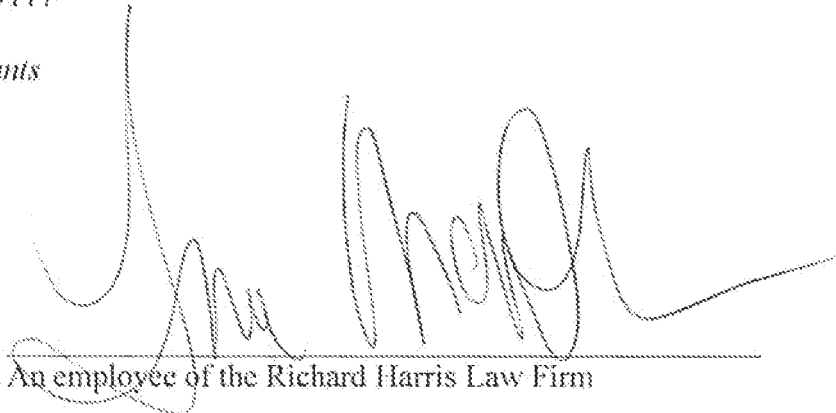
CERTIFICATE OF SERVICE

Pursuant to NRCF 5(b), I certify that I am an employee of RICHARD HARRIS LAW FIRM, and that on this 20 day of May, 2014, I served a copy of the foregoing

NOTICE OF ENTRY OF ORDER as follows:

- U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or
- Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCF 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or
- Hand Delivery—By hand-delivery to the addresses listed below.

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 Shirley Blazich, Esq.  
 ALVERSON, TAYLOR,  
 MORTENSEN & SANDERS  
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 Las Vegas, Nevada 89117  
 Fax (702) 385-7000  
*Attorneys for Defendants*



\_\_\_\_\_  
 An employee of the Richard Harris Law Firm

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 RICHARD HARRIS  
 LAW FIRM

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CLERK OF THE COURT

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8 Telephone: (702) 444-4444  
9 Facsimile: (702) 444-4455  
10 *Attorney for Plaintiff*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 The Estate of HARVEY CHERNIKOFF,  
14 Deceased; by JACK CHERNIKOFF as  
15 personal representative, individually and as  
16 heir; ELAINE CHERNIKOFF individually  
17 and as heir,

18 **Plaintiffs,**

19 vs.

20 **FIRST TRANSIT, INC. LAIDLAW**  
21 **TRANSIT SERVICES, INC dba FIRST**  
22 **TRANSIT; JAY FARRALES; DOES 1-10,**  
23 **and ROES 1-10 inclusive,**

24 **Defendants.**

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

27 **ORDER GRANTING MOTION FOR**  
28 **ASSOCIATION OF OUT OF STATE**  
**COUNSEL PRO HAC VICE**

29 CHARLES H. ALLEN, ESQ, having filed his Motion to Associate as Counsel under  
30 Nevada Supreme Court Rule 42, together with a Verified Application for Association of  
31 Counsel, a Certificate of Good Standing in the state of Georgia, and the State Bar of Nevada  
32 Statement; said application having been noticed, no objections having been made, and the Court  
33 being fully appraised in the matter, and good cause appearing, it is hereby ORDERED that said

1 application is hereby granted, and CHARLES H. ALLEN, ESQ. is hereby associated as counsel  
2 for this action only.

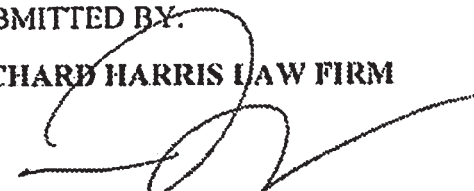
3 Dated this 22 day of May, 2014.

4  
5  
6   
7 \_\_\_\_\_  
8 DISTRICT COURT JUDGE

K

9 SUBMITTED BY:  
10 RICHARD HARRIS LAW FIRM

JUDGE STEFANY A. MILEY

11  
12 By:   
13 BENJAMIN P. CLOWARD, ESQ.  
14 Nevada Bar No. 11087  
15 801 South Fourth Street  
16 Las Vegas, Nevada 89101  
17 *Attorney for Plaintiffs*

RICHARD HARRIS  
LAW FIRM

1 something, the jury apportions causative role to that and we're liable. But the jury  
2 didn't do that here. The jury in its emotional state wanted to protect the driver or  
3 wanted to take it out on the employer, didn't think it through at -- at best, was  
4 emotionally involved and inflamed at worst, and in either case I think that requires a  
5 new trial.

6 Three points on the closing argument issues. Mr. Cloward says that he  
7 didn't go after us in general for defending just because we said we had no duty to  
8 monitor. We had no duty to monitor. That's my legal position and it's certainly a  
9 factual position that we should be allowed to argue to the jury. And that's not  
10 something that the plaintiff can say the jury needs to take it out on the defendant for  
11 arguing.

12 Yes, there -- it's our position that this was a heart attack. Yes, we could  
13 have argued it in the alternative, but we -- but -- but look what they did. They -- they  
14 came in here and part of their argument was they want to cut up Harvey's body. I  
15 mean that's the kind of inflammatory argument that comes up with excessive  
16 verdicts.

17 Closing point. Mr. Cloward says that -- that in -- in both cases we've  
18 had I've -- I've said things about his -- his conduct. I have a lot of respect for Ben. I  
19 like Ben immensely. The other case was *Khoury* and I -- that was an entirely  
20 different issue. I didn't raise these kind of issues. What I raised in *Khoury* was the  
21 use of challenges for cause in jury selection. I -- I -- I don't want anybody to think  
22 that I think that this is a pattern of conduct with Mr. Cloward, but I do think that this is  
23 an issue -- I do see it as a pattern of conduct generally. Mr. Cloward says he  
24 doesn't follow that school of thought.

25 THE COURT: Okay, well --

1 MR. POLSENBERG: But I do see it as -- I do see it as an issue in this case.

2 THE COURT: Let me thank you both for *Khoury* because --

3 MR. POLSENBERG: Thank you, Your Honor.

4 THE COURT: -- I think the first time the Supreme Court has addressed much  
5 needed -- I mean they've addressed issues which are -- have been in dispute for  
6 years so finally at least on some of those issues, thank you to both of you, they've  
7 been decided by the Nevada Supreme Court. But is there anything else on this  
8 particular case?

9 MR. CLOWARD: On -- on this -- on this motion?

10 THE COURT: On this particular motion, I'm sorry.

11 MR. CLOWARD: None from plaintiff, Your Honor. None from plaintiff, sorry.

12 THE COURT: Okay.

13 MR. CLOWARD: Thank you.

14 MR. POLSENBERG: And -- and I'm sorry, I didn't make that -- want to make  
15 that personal. I was trying to make it dispersonal.

16 THE COURT: And I said thank you to both for *Khoury* because it helps me  
17 out.

18 MR. POLSENBERG: Yeah.

19 THE COURT: It's going to eliminate probably two or three motions in limine  
20 per case.

21 MR. CLOWARD: Yeah. I -- I guess --

22 THE COURT: But let's talk about this case.

23 MR. CLOWARD: One thing that I did want to just -- I didn't -- I'm not  
24 conceding with what we've set forth in the -- in our opposition. Mr. Polsenberg says  
25 I've changed my position now. I'm not changing my position of what's set forth in the



1 opposition, I was just trying to key in on what I thought was important.

2 MR. POLSENBERG: I'm -- I'm sorry if I implied that. I didn't mean that.

3 MR. CLOWARD: Okay.

4 THE COURT: Thank you.

5 MR. CLOWARD: Okay.

6 THE COURT: Okay. All right. I'm going to deny the request for a new trial  
7 and let me go over each of the grounds articulated by the defense.

8 The first one that we spent a lot of time on today and a lot of time was  
9 spent on in the briefs was the issue of Harvey's exclusion from the verdict form.  
10 Throughout the course of the trial I don't think anyone disputes there was a lot of  
11 discussion about how the -- the parents failed to take certain acts in order to care for  
12 their son, and these were argued by both the plaintiff and the defense and they  
13 argued actually a lot by the defense in that as I've previously indicated there was  
14 argument that -- and there was -- you know, that Harvey was able to get his driver's  
15 license but he -- he really -- the only reason he could do it is there was just constant  
16 repetition because he didn't have really an ability to -- to understand or remember  
17 things.

18 It was pointed out that he was approved for a personal caregiver by the  
19 bus at no additional cost and yet his parents fell below their obligations in not  
20 insisting that Harvey had a personal caregiver. In fact, Harvey did in fact have a  
21 personal caregiver when he was at his residence. He just -- there was no insistence  
22 that he likewise had one when he was riding the bus.

23 There was a lot of discussion and contemplation at the time of trial  
24 regarding comparative negligence and certainly I believe is -- well it wasn't originally  
25 agreed to by plaintiff, but there was a discussion, there was an acknowledgment that



1 comparative negligence was appropriate to be included on the verdict form. The  
2 question was how. And after much discussion it was determined that the  
3 comparative negligence of the parents was going to be relevant because there was  
4 a lot of -- like again, there's a lot of evidence presented at trial regarding the  
5 diminished capacities of Harvey and that his parents should have stepped up to the  
6 plate and provided for his care and safety.

7           The reason that both Harvey and the parents were not both included on  
8 the verdict form was frankly because there was an acquiescence by Mr. Alverson,  
9 counsel for the defense, that both should not be on the verdict form. And so I think  
10 with respect to that issue there is a waiver on that issue.

11           With respect to the common carrier jury instruction, let me kind of parcel  
12 it out because I know Mr. Polsenberg attacked that on two grounds. Number one,  
13 the -- the propriety of even giving a common carrier instruction and the actual  
14 instruction that was given. As far as the common carrier jury instruction, I -- I do  
15 think that it was appropriate to give that instruction. This is a situation where  
16 testimony was presented that -- this is situation where First Transit is specifically  
17 contracted to provide paratransit services. In fact, in order to be able to qualify for  
18 those paratransit services, the person requesting the services or someone on their  
19 behalf had to go down and affirmatively apply for the -- for -- for the services and set  
20 forth that the individual did in fact have a disability. And that is what happened in  
21 this particular case.

22           As far as the -- the case that was cited by -- by the defense of there's  
23 no duty in the state of Nevada to perform the Heimlich maneuver but there is  
24 another things that you can take from that case. In that case even though they  
25 didn't have an obligation to perform the Heimlich maneuver, there's nonetheless

1 discussion within that case of they didn't just -- person wasn't just choking and they  
2 just left him and went about their business waiting for the paramedics to arrive.  
3 They -- even though they -- they didn't perform the Heimlich --

4 May I have a tissue?

5 THE CLERK: Sure.

6 THE COURT: -- maneuver, they did in fact stay with him and monitor him and  
7 I guess provide some sort of care to him while waiting for the -- for the paramedics  
8 to arrive. I'm sorry, I have allergies.

9 In this particular case there was testimony presented that there was  
10 policies at First Transit that they were supposed to scan the bus regularly. There  
11 was evidence presented both by way of testimony and by way of a video which  
12 clearly showed that there was no scanning of the bus on a regular basis so I think  
13 that it's different from the restaurant situation in that in this case it wasn't like he was  
14 scanning the bus regularly or provided, I don't know, any kind of care to Harvey.  
15 Quite simply he wasn't doing what First Transit's own policy and procedures require.

16 With respect to the jury instruction itself, I do recognize that many  
17 attorneys offer alternative jury instructions which I appreciate. In this particular case  
18 though I think there's a waiver as far as the content of the jury instruction itself. I  
19 recognize the defense disagrees there was even a basis for a common carrier  
20 instruction. However, that -- the instruction that was ultimately given by the Court it  
21 was in fact presented by the defense and I think the defense has waived any --  
22 waived any arguments that the content of the instruction itself was in conflict with  
23 Nevada law. And that really goes into the -- on number 34 as well. Let's see.

24 As far as the -- let me just sum them -- sum them up as the arguments  
25 regarding improper closing by the plaintiff. I'm going to deny those. As I previously



1 indicated, there were not contemporaneous objections and quite frankly had a  
2 contemporaneous objection been made, there are some that I probably would have  
3 granted the objection, but quite simply there was no contemporaneous objection and  
4 the Court did not have the opportunity thus to rectify the situation, redirect the  
5 closing.

6           With respect to the amount of the verdict, the total of 15 million, I do  
7 recognize that seven and a half million is a lot of money, but I think given everything  
8 that was presented as far as Harvey's choking I -- I don't think that is excessive.

9           You know, Mr. Polsenberg, you gave the example of the -- the  
10 helicopter that went down and presumably the reason it was awful is because  
11 there's a certain awareness that if you're falling out of the sky, there's a high  
12 likelihood that you could die. Okay?

13           In this particular case, what we can tell from the video is there's at least  
14 50 seconds of Harvey going through stages of being in distress of some sort and I  
15 think the fact that it's choking and that it's a common -- fairly common occurrence  
16 amongst anyone, I -- I think that also needs to be taken into consideration because I  
17 think if anyone had choked and I think there was evidence presented by the expert  
18 who said that choking is an excruciating death, similar to the helicopter going down,  
19 there's also an awareness, if you've ever choked, that you're choking and that  
20 there's a helplessness and a fear and everything else. And I -- I -- I -- again, it was  
21 borne out by the -- the expert who testified the same thing that it is in fact a horrible  
22 death, so taking that all into consideration, I don't think the seven and a half million  
23 dollars was excessive.

24           As far as the seven and a half million dollars to the parents, I don't think  
25 that's excessive either. There was testimony by the parents on the stand and the

1 defense did not object. There was a very long testimony where Harvey's family  
2 members testified. His mother testified, his father testified, his brother testified.  
3 They showed pictures. There was no objection to the -- by the defense as to the  
4 content of what was being offered.

5           There was evidence presented that this family had a very close  
6 relationship, they -- even though they may not have lived together, they got together  
7 -- there's pictures of birthday parties and all sorts of things that they would do  
8 together as a family and I think there was evidence there showing a close familial  
9 bond and, you know, frankly I think that as far as the age of the parents and the age  
10 of Harvey, my experience and watching other people get older as well is I find that  
11 as you get older, the value of life becomes more important and becomes more  
12 important than material possessions so I don't think you can sit here and simply look  
13 at the fact of, you know, they're 70 years old, the life expectancy of a female is  
14 somewhere along 81 years. I -- I don't think you can look at it like that.

15           Let me see what else. I think I've covered everything. Is there anything  
16 I missed?

17           MR. CLOWARD: Your Honor, I just wanted to, I guess, ask the Court whether  
18 it would consider addressing whether a jury instruction for comparative negligence  
19 for Harvey would have been -- whether there was even evidence to support that,  
20 because other than the one comment that he violated the rule by eating, you know,  
21 all of the arguments advanced in the brief about him hunching down and different  
22 things, that's -- that's not evidence, that's speculation, that's argument. The only  
23 potential evidence was that he ate the sandwich in violation of the rule, but their own  
24 Rule 30(b)(6) said yeah, it's probably reasonable for him to have thought it was okay  
25 to eat if Mr. Farrales helped him drink.



1           So I don't think that that jury instruction -- I just want because obviously  
2 this is going to go up and I think that that's an important issue that the -- that the  
3 Supreme Court would want to look at is whether there was even an evidentiary  
4 basis for a comparative -- even if it was waived or was not waived, I mean assuming  
5 in -- in -- in the alternative that it was not waived and that a jury instruction should  
6 have been given, I don't think that factually there were facts developed to even  
7 support that jury instruction to begin with. That's my, I guess, argument --

8           MR. POLSENBERG: Well, couple of things on that. I don't think that 30(b)(6)  
9 testimony came in.

10          MR. CLOWARD: It did.

11          MR. POLSENBERG: It's the -- in *Buck versus Greyhound*, the court reviewed  
12 the actual record and determined whether there was good faith basis to raise  
13 comparative fault. This is -- and -- and I'm not saying they waive any of their  
14 arguments, but since this is a change in their argument, I haven't had the chance to  
15 address that and I don't think the Court's had the chance to address that, so for all of  
16 us to have to do it impromptu or off the cuff probably is not a smart thing to do.

17          THE COURT: I have to agree with you because I did go back and read the  
18 transcript, but I read the portions that were applicable to what's before me today.

19          MR. CLOWARD: Fair enough.

20          THE COURT: I have -- course I have some recollection -- independent  
21 recollection of the testimony and everything else, but it's been several months and  
22 I've had lots of cases in between.

23          MR. CLOWARD: Sure.

24          THE COURT: So I -- I couldn't really address that issue.

25          MR. CLOWARD: I understand. That's -- that's fair.



1 THE COURT: And it was a little bit -- it was not really what was developed so  
2 much in your brief. But as far as talking about the testimony that did come out with  
3 respect to the parents, I point that out because I wanted to highlight the fact that  
4 there was obviously a contemplation and thought process and an acknowledgement  
5 that comparative negligence was appropriate on the verdict form. The question was  
6 how was it going to be presented on the verdict form and I was trying to explain the  
7 reasons of why it ended up on the verdict form as it did.

8 So who wants to do my order?

9 MR. CLOWARD: We will.

10 THE COURT: Plaintiffs prevailing. Okay, Mr. Polsenberg for review form and  
11 content or Ms. Sanders --

12 MR. POLSENBERG: Yeah, we have one other motion.

13 THE COURT: Yeah.

14 MR. POLSENBERG: But we can be quick on that. It's the motion to alter and  
15 amend the judgment. We're -- we're moving in two regards. One is the -- one is --  
16 one is easy, one is harder. The harder one is that we should get the equivalent of  
17 sovereign immunity.

18 They point out that the -- the *Falline versus GNLV* case that I'm relying  
19 on is a plurality opinion and -- and it was. And you were talking earlier about some  
20 case you went back and looked at the -- at the briefs. If you look at the briefs in  
21 *Falline*, the issue of sovereign immunity was never even raised by the parties.  
22 Justice Steffen and I'm trying to remember the judge who -- who agreed with him on  
23 -- those two justices on their own raised this issue. The issue there was can there  
24 be third party bad faith. Two justices said yes, one said no, and the plurality opinion,  
25 the lead opinion says yes there can be, but since they're doing the same kind of

1 thing SIIS does, third party administrators should have sovereign immunity, the cap  
2 of liability and no punitive damages.

3 I think our case is stronger here that -- than that case and that's why I  
4 think we have a chance of getting more than a -- the plurality opinion, because here  
5 it isn't just a party who's doing the same kind of thing as a government entity, it's a  
6 party doing things for a government entity.

7 And the other issue we have is that the jury did not decide how much of  
8 the damages for the parents was past and future and therefore under the case law  
9 none of it gets prejudgment interest.

10 MR. CLOWARD: Your Honor, just --

11 THE COURT: That was fast.

12 MR. CLOWARD: -- in -- I'm sorry.

13 THE COURT: No. I'm ready. I'm just looking for one of my notes.

14 MR. CLOWARD: Okay.

15 THE COURT: Yes sir.

16 MR. CLOWARD: I can wait.

17 THE COURT: No, it's okay. I'm good.

18 MR. CLOWARD: Okay. I -- I guess the -- regarding the immunity issue, this  
19 is something that the -- some legislators tried to actually pass this last session.  
20 They tried to have the immunity extended, which to me is the best evidence that  
21 there's -- there's no such immunity that's currently afforded to First Transit.

22 The argument that -- that comes out of the case that's cited is -- out of  
23 *Falline* is essentially that if it's an entity like Clark County School District that they  
24 are entitled to -- or immunity. I don't think there's any argument that the RTC is  
25 entitled to immunity, but that immunity does not extend then to all individuals who



1 interact with that entity. I mean imagine the result -- imagine there's, you know, a  
2 computer repair company that comes into a Clark County school and while they're  
3 there, you know, repairing a computer they assault some student. Are you going to  
4 say well, Clark County they're -- they're afforded immunity so we're going to extend  
5 that immunity to the computer repair individual? That's just one of many  
6 circumstances.

7 Here RTC is the government immunity. There's no question that they  
8 would be afforded the -- the protection, but that protection does not then extend to  
9 every entity that the RTC works with, and especially doesn't apply to First Transit as  
10 evidenced by the recent attempt to have immunity extended to First Transit and  
11 similar companies.

12 Second, Your Honor, the -- the contract between RTC and First Transit  
13 itself sets forth that First Transit is required to have insurance up to, you know, one  
14 or two million dollars. I can't remember the specific amount. Why is there that  
15 requirement if immunity is afforded to First Transit?

16 And then regarding the -- the prejudgment interest argument, we cited  
17 the cases -- first, *State Ex. Rel. Department of Transportation versus Hill*. This is  
18 114 Nevada 810. Defendant waives this issue by not -- not objecting to the verdict  
19 form at the time of trial. Our position is that had First Transit wanted this separated,  
20 then First Transit should have proposed a jury verdict form indicating past loss of  
21 consortium, future loss of consortium on the jury verdict form. That was not done.

22 And second, the *Hazelwood v. Harrah's* case, 109 Nevada 1005, it says  
23 second, even if the jury instructions state that the jury is to consider any damages  
24 the plaintiff might suffer in the future and no evidence of future damages was  
25 presented to the jury, an award of prejudgment interest on the entire amount is

1 proper. And so we feel that the award of interest was also proper for those reasons  
2 and the reasons set forth in the brief. Thank you.

3 THE COURT: Is there anything else?

4 Okay. I'm just trying to think how going to best articulate this. I'm going  
5 to grant in part and deny in part the motion. Let me start with the part that I'm  
6 denying.

7 I did get a lot -- I did have the opportunity do a lot of reading in this case  
8 because I went back and I -- I read the cases cited by the defense. And I looked at  
9 NRS 41.035 (sic) which defines political subdivision. In many of the cases cited by  
10 the defense in support of their position, there really was no dispute that the entity  
11 involved was in fact a political subdivision. Either they were specifically articulated  
12 under 41.0305 as a political subdivision or there's another case for example where it  
13 was regarding the community college system and there had been multitude of cases  
14 throughout the country that had already decided it was a political subdivision.

15 In all the cases cited -- a lot of the cases cited by the defense, again,  
16 there was no dispute that the actors involved were in fact a political subdivision. My  
17 assumption is that what the defendant is going under is under 41.0305 it indicates  
18 that the Regional Transportation Commission is a political subdivision. Obviously  
19 First Transit contracts with the RTT -- RTC to provide services for handicapped  
20 individuals. The question would become now which defense argued is whether First  
21 Transit providing the paratransit services is basically an arm of the State and you  
22 guys cited a lot of cases for me to look at in that regard.

23 There's a three-part test which was cited to me that comes from the  
24 case of *Simonian versus University and Community College System of Nevada*, 122  
25 Nevada 187. In that part (sic), they did in fact set forth a three-part test. That three



1 part test included number one, whether it's subject to the approval and control of the  
2 Governor, the legislature and other agencies of the government and to treat it as a  
3 state or a state agency through the Nevada Revised Statutes and possess certain  
4 sovereign powers.

5 With respect to the third prong, I don't think that it possessed any  
6 certain sovereign powers. As far as I -- I don't think that the other two criteria are  
7 satisfied whatsoever.

8 And also the defense cited to the case of *Gordon* which was a case  
9 which was eventually abrogated by statute where in fact the same entity, First  
10 Transit, was in fact found to be an arm of the state. However, I think that *Gordon*  
11 which is cite -- oh heck. *Gordon* is 1 -- 272 Connecticut 81, it's a 2004 case. And  
12 that case I think is -- it's very, very different and the -- the court there was very clear  
13 as to the reasons it found that it was an arm of the state.

14 Quite simply, they found that there was an extraordinary level of state  
15 dependency and control in that in that particular case the state owned all the  
16 busses, office assets, et cetera. The state collected the revenue on a monthly  
17 basis. The state -- the operating budge for First Transit was financed entirely by the  
18 state. The state purchased the liability insurance and indemnified the First Transit  
19 company. And all major policy, planning and operations were within the control of  
20 the state. I think that's quite simply very, very different than the situation here.

21 In this particular case, if you go back and look at the contract of First  
22 Transit with the Regional Transit Commission, it says specifically in there -- in fact  
23 it's a huge subsection that says First Transit is an independent contractor. First  
24 Transit retained full control and supervision of the services performed. First Transit  
25 has full control over employment and compensation. First Transit is solely

1 responsible for wage and hour, working conditions, payment of employment taxes,  
2 et cetera. First Transit is solely responsible for the acts of its employees. And --  
3 and I think most importantly, First -- it indicates that First Transit is required to  
4 indemnify and hold RTC harmless which I think is very important to consider  
5 because in *Gordon* it was the opposite. The -- the RTC had to indemnify and hold  
6 First Transit harmless. In this particular case it was the opposite. First Transit had  
7 to indemnify and hold the RTC harmless.

8           And the reason I think that's very important is when you go back and  
9 look at the cases and one of them is a UMC case and the Nevada Supreme Court  
10 talks about the reason for these statutory caps and this immunity and everything  
11 else and they go into a detailed discussion as to the reasons why. Quite simply,  
12 they want to protect the Nevada Treasury. They don't want the taxpayers to be  
13 adversely affected by these huge lawsuits.

14           And taking that analogy and applying it to this case, I -- I don't think that  
15 it's an arm of the government because of all the reasons indicated. There is not a  
16 situation in this case where the Nevada Treasury could be adversely affected  
17 because First Transit is the one that would have to indemnify the RTC which is the  
18 political subdivision. It's not the political subdivision indemnifying RTC so I just don't  
19 think all the public policy reasons even exist for finding the First Transit to be an arm  
20 of the government in this situation.

21           With respect to the second issue which was the verdict form with  
22 respect to the loss of consortium not allocated between past and future, I was not  
23 going to allow prejudgment interest. Jury instruction number 22 does in fact talk  
24 about future and that there is the son's testimony during the course of the trial that  
25 the mom was still grieving.



1 MR. CLOWARD: Sure.

2 THE COURT: So I think that there was certainly evidence in the record of  
3 future pain and suffering, not just past so --

4 MR. CLOWARD: Sure.

5 THE COURT: -- I am not going to allow the prejudgment interest on that.

6 MR. CLOWARD: Fair enough, Judge.

7 THE COURT: Is there anything else? Was I clear? Is there anything you  
8 guys would like clarification on? No?

9 MR. POLSENBERG: No. Thank you, Your Honor.

10 THE COURT: So you've won and lost, Mr. Polsenberg. How about you do  
11 this one.

12 MR. POLSENBERG: Sure. That's like *Khoury*. I won this little teeny part and  
13 he won everything else.

14 THE COURT: I don't know how happy you guys are, but I'm happy *Khoury*  
15 came out because it answers a lot of questions. Thank you.

16 MR. CLOWARD: Thank you, Judge.

17 MR. POLSENBERG: Thank you very much, Your Honor.

18 MS. SANDERS: Thank you, Your Honor.

19 MR. POLSENBERG: Thank you.

20 [Proceedings concluded at 11:25 a.m.]

21 ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual  
22 proceedings in the above-entitled case to the best of my ability.

23



24

Tracy A. Gegenheimer, CER-282, CET-282  
Court Recorder/Transcriber

25



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CLERK OF THE COURT

1 SUBT  
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19 *Attorneys for Plaintiffs*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

18 )  
19 JACK CHERNIKOFF and ELAINE )  
20 CHERNIKOFF, )  
21 )  
22 Plaintiffs, )  
23 )  
24 vs. )  
25 )  
26 FIRST TRANSIT, INC.; JAY )  
27 FARRALES; DOES 1-10, and ROES 1-10 )  
28 inclusive, )  
29 )  
30 Defendants. )

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

**SUBSTITUTION OF ATTORNEY**

Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF hereby substitutes BENJAMIN P. CLOWARD, ESQ. of the RICHARD HARRIS LAW FIRM, as their counsel of

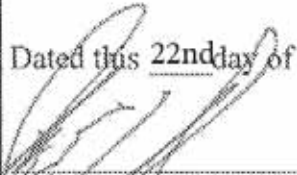
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**RICHARD HARRIS**  
**LAW FIRM**


002589

1 record in the above entitled action in place and stead of HICKS & BRASIER formerly known  
2 as CLOWARD HICKS & BRASIER.

3  
4  
5 Dated this 22nd day of March, 2017.

Dated this 22nd day of March, 2017.

6  
7   
8 JACK CHERNIKOFF

  
9 ELAINE CHERNIKOFF

10 I, HEREBY CONSENT the substitution of BENJAMIN P. CLOWARD, ESQ., of the  
11 RICHARD HARRIS LAW FIRM as attorney for Plaintiffs, JACK CHERNIKOFF and  
12 ELAINE CHERNIKOFF, in the above-captioned action in place and stead of HICKS &  
13 BRASIER formerly known as CLOWARD HICKS & BRASIER.

14 DATED THIS 24th day of March, 2017.

15 HICKS & BRASIER, PLLC.


16 /s/ Alison M. Brasier

17 ALISON M. BRASIER, ESQ.  
18 Nevada Bar No. 10522  
19 4101 Meadows Lane, Suite 210  
20 Las Vegas, Nevada 89107

21 I HEREBY AGREE to substitute in place and stead of HICKS & BRASIER formerly  
22 known as CLOWARD HICKS & BRASIER in the above entitled action as counsel for  
23 Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF.

24 DATED this 24th day of March, 2017

25  
26 RICHARD HARRIS LAW FIRM

27 By:   
28 BENJAMIN P. CLOWARD ESQ.  
Nevada Bar No. 11087  
801 South Fourth Street  
Las Vegas, Nevada 89101

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RICHARD HARRIS  
LAW FIRM

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CERTIFICATE OF SERVICE

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Pursuant to NRCP 5(b), I hereby certify that I am an employee of RICHARD HARRIS LAW FIRM and that on the 24 day of March, 2017, I caused the foregoing SUBSTITUTION OF ATTORNEY to be served as follows:

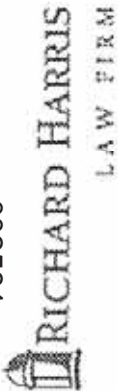
pursuant to EDCR 7.26, by sending it via facsimile; and/or

to the attorney listed below:

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Steven D. Grierson  
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10 *Attorneys for Plaintiffs,*  
*Jack Chernikoff and Elaine Chernikoff*

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,

Case No.: A682726  
Dept. No.: XXIII

15 Plaintiffs,

16 vs.

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

19 Defendants.

20  
21 **AMENDED JUDGMENT UPON THE JURY VERDICT**

22  
23 This action came on for trial before the Court and the jury, the Honorable Stefany A.  
24 Miley, District Court Judge, presiding, and the issues having been duly tried and the jury having  
25 duly rendered its verdict.<sup>1</sup>

26  
27  
28 <sup>1</sup> Exhibit 1: Jury Verdict.

002592

002592



1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE  
2 CHERNIKOFF, have and recover of Defendant FIRST TRANSIT, INC. the following sums:

3	Pain and suffering by Harvey Chernikoff:	\$7,500,000.00
4	Grief, sorrow, loss of companionship, society,	
5	Comfort, and loss of relationship suffered by	
6	Plaintiffs, JACK CHERNIKOFF and ELAINE	
	CHERNIKOFF:	+ <u>\$7,500,000.00</u>
7	<b>Total Damages</b>	<b>\$15,000,000.00</b>

8  
9 IT IS FURTHER ORDERED AND ADJUDGED that Harvey Chernikoff's past damages  
10 shall bear Pre-Judgment interest in accordance with Lee v. Ball, 121 Nev. 391, 116 P.3d 64  
11 (2005) and NRS 17.130 at the rate of 3.50% per annum plus 2% from the date of service of the  
12 Summons and Complaint on June 7, 2013, through the entry of the Judgment on March 8, 2016:

13 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: \$7,500,000.00**

14 06/07/13 through 03/08/16 = \$1,135,787.67

15 [(1,006 days) at (prime rate (3.50%) plus 2 percent = 5.50%)]

16 [Pre-Judgment Interest is approximately \$1,130.14 per day]

17 **PLAINTIFFS' TOTAL JUDGMENT**

18 Plaintiffs' total judgment is as follows:

19	<b>Total Damages:</b>	<b>\$15,000,000.00</b>
20	<b>Prejudgment Interest:</b>	<b><u>\$1,135,787.67</u></b>
21	<b>TOTAL JUDGMENT</b>	<b>\$16,135,787.67</b>

22  
23 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as  
24 follows:


25 JACK CHERNIKOFF and ELAINE CHERNIKOFF are hereby awarded Sixteen Million,  
26 One Hundred Third-Six Thousand, Nine Hundred Seventeen Dollars and 81/100  
27 (\$16,135,787.67) against Defendant FIRST TRANSIT, INC., which shall bear post-judgment  
28

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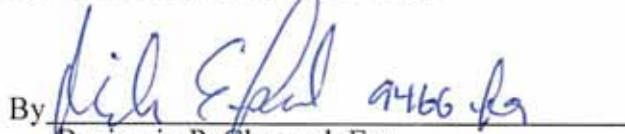
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1 interest at the adjustable legal rate from the date of the entry of judgment (March 8, 2016) until  
2 fully satisfied.<sup>2</sup>

3  
4 Dated this 6<sup>th</sup> day of June, 2017.

5  
6   
7 DISTRICT COURT JUDGE  
8  
9 JUDGE STEFANY A. MILEY

8 Respectfully submitted by:  
9 RICHARD HARRIS LAW FIRM

10  
11 By   
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27 <sup>2</sup> The legal interest rate according to NRS 17.130 was 5.50% at the time of the entry of the judgment on  
28 March 8, 2016 and has adjusted to 5.75% as of January 1, 2017.



1 Approved<sup>3</sup> as to form and content:

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12 *Attorneys for Defendants,*  
*First Transit, Inc. and Jay Farrales*

15 [CASE NO. A682726—AMENDED JUDGMENT UPON THE JURY VERDICT]

26 \_\_\_\_\_  
 27 <sup>3</sup> Defendants believe that this order expresses the Court’s reasoning and conclusions. However,  
 28 defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions  
 of law articulated in the order.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **AMENDED JUDGMENT UPON THE JURY VERDICT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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Leah Dell, an employee of  
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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

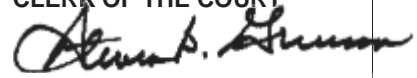
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*Jack Chernikoff and Elaine Chernikoff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
10 CHERNIKOFF,

11 Plaintiffs,

Case No.: A682726  
Dept. No.: XXIII

12 vs.

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

14 Defendants.

15 **NOTICE OF ENTRY OF ORDER**

16  
17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Granting in Part  
18 and Denying in Part Defendants' Motion to Retax Plaintiffs' Costs; Order Denying Defendants  
19 First Transit, Inc. and Jay Farrales' Motion to Strike Plaintiffs' Amended Memorandum of Costs  
20 and Disbursements, and for Sanctions; Order Denying Defendant Jay Farrales' Motion for Fees  
21 and Costs was entered in the above-captioned matter. A copy of said Order is attached hereto.

22 Dated this 7th day of June, 2017.

23 MARQUIS AURBACH COFFING

24  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7<sup>th</sup> day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

# Exhibit 1

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Attorneys for Defendants

**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

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION  
TO RETAX PLAINTIFFS' COSTS; ORDER DENYING DEFENDANTS FIRST  
TRANSIT, INC. AND JAY FARRALES' MOTION TO STRIKE PLAINTIFFS'  
AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND FOR  
SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES' MOTION FOR  
FEES AND COSTS**

WHEREAS Defendants FIRST TRANSIT, INC. and JAY FARRALES' Motion to Retax  
Plaintiffs' Costs, and Motion to Strike Plaintiffs' Amended Memorandum of Costs, came for  
hearing before the Honorable Stefany Miley on August 2, 2016 at 9:30 a.m., and Defendant JAY

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1 FARRALES' Motion for Fees and Costs came for hearing before the Honorable Stefany Miley  
 2 on August 16, 2016 at 9:30 a.m., with Plaintiffs JACK AND ELAINE CHERNIKOFF appearing  
 3 through their counsel of record BENJAMIN CLOWARD, ESQ., of CLOWARD HICKS &  
 4 BRASIER; Defendants FIRST TRANSIT, INC. and JAY FARRALES, appearing through their  
 5 counsel of record, LEANN SANDERS, ESQ., of the law firm of ALVERSON, TAYLOR,  
 6 MORTENSEN AND SANDERS, and DANIEL POLSENBERG, ESQ., of the law firm LEWIS,  
 7 ROCA, ROTHGERBER, CHRISTIE LLP; and with the Court having reviewed the pleadings,  
 8 having heard oral arguments, and having issued a minute order on September 13, 2016 rules as  
 9 follows:

10 **IT IS HEREBY ORDERED, ADJUDICATED AND DECREED** as follows:


- 11 (1) Plaintiffs requested a total of \$102,450.97 in costs based upon their March 15,  
 12 2016 memorandum of costs; their April 12, 2016 amended memorandum of costs;  
 13 and their March 15, 2016 motion for costs.
- 14 (2) Defendant JAY FARRALES requested a total of \$30,578.43 in costs and  
 15 \$189,107.50 in attorney fees based upon his March 15, 2015 memorandum of  
 16 costs and his March 31, 2016 motion for costs and attorney fees. Alternatively,  
 17 JAY FARRALES requested \$17,116.50 in costs and \$78,836.50 in costs.
- 18 (3) In the hearing on August 2, 2016, the Court awarded Plaintiffs the following  
 19 costs: (a) Clerk's Fees—\$486.90; (b) Photocopies, Fax, Telephone, and  
 20 Postage—\$533.77; (c) Copies of Medical Records—\$172.25; (d) Deposition  
 21 Transcript Fees—\$5,309.75; (e) Parking During Trial—\$332.29; and (f) Runner  
 22 Fees—\$225.54, while reserving a decision on expert fees, process service fees,  
 23 and other miscellaneous costs.
- 24 (4) FIRST TRANSIT, INC. and JAY FARRALES' Motion to Retax Plaintiffs' Costs  
 25 is **GRANTED in part and DENIED in part**. Defendants' Motion is granted  
 26 with regard to costs associated with jury consulting, post-trial juror interviews,  
 27 food, focus groups, and trial dinners, striking the same.
- 28

- (5) Per the Court's September 13, 2013 Minute Order, Plaintiffs' expert fees are capped at \$1,500.00 each, for a total of \$3,000.00. Plaintiffs are entitled reimbursement of \$433.00 for a roundtrip airline ticket between Atlanta and Las Vegas. Plaintiffs are entitled to reimbursement of \$9,797.35 paid to Litigation Services for trial support.
- (6) FIRST TRANSIT, INC. and JAY FARRALES' Motion to Strike Plaintiffs' Amended Memorandum of Cost is **DENIED**. The Court specifically allowed Plaintiffs the opportunity to supplement their memorandum of costs and considered the costs issues on the merits.
- (7) JAY FARRALES' Motion for Fees and Costs is **DENIED**. The Court determines that the joint offer of judgment issued by both Defendants was not more favorable than the jury verdict in favor of Plaintiffs. The Court also determines that JAY FARRALES was not a prevailing party, and is not entitled to an award of costs.
- (8) Plaintiffs are hereby awarded the total sum of \$20,290.85 in costs against Defendant FIRST TRANSIT, INC., with post-judgment interest running at the legal rate until fully satisfied.

Dated this 6<sup>th</sup> day of June, 2017.

  
 DISTRICT COURT JUDGE

Submitted by:  
 LEWIS ROCA ROTHGERBER CHRISTIE LLP

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14 *Attorneys for Plaintiffs*

14 [CASE NO. 682726—ORDER GRANTING IN PART AND DENYING IN PART  
15 DEFENDANTS’ MOTION TO RETAX PLAINTIFFS’ COSTS; ORDER DENYING  
16 DEFENDANTS FIRST TRANSIT, INC. AND JAY FARRALES’ MOTION TO STRIKE  
17 PLAINTIFFS’ AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND  
18 FOR SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES’ MOTION FOR  
19 FEES AND COSTS]

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO RETAX PLAINTIFFS’ COSTS; ORDER DENYING DEFENDANTS FIRST TRANSIT, INC. AND JAY FARRALES’ MOTION TO STRIKE PLAINTIFFS’ AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND FOR SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES’ MOTION FOR FEES AND COSTS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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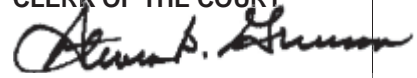
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7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
CHERNIKOFF,  
10  
11 Plaintiffs,  
12 vs.  
13 FIRST TRANSIT, INC.; JAY FARRALES;  
DOES 1-10; and ROES 1-10, inclusive,  
14 Defendants.

Case No.: A682726  
Dept. No.: XXIII

16 **NOTICE OF ENTRY OF ORDER**

17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Granting in Part  
18 and Denying in Part Defendants' Motion to Alter or Amend the Judgment was entered in the  
19 above-captioned matter. A copy of said Order is attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7<sup>th</sup> day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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Leah Dell, an employee of  
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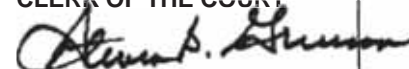
# Exhibit 1

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11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

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

18 Defendants.

Case No.: A682726  
Dept. No.: XXIII

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO ALTER OR AMEND THE  
JUDGMENT**

Hearing Date: August 16, 2016  
Hearing Time: 9:30 a.m.

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**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**

1  
2  
3 Defendants, First Transit, Inc. ("First Transit") and Jay Farrales' ("Mr. Farrales")  
4 (collectively "Defendants"), motion to alter or amend the judgment under NRCP 59(e) and the  
5 associated supplement having come before this Court on August 16, 2016, and the Court having  
6 heard and considered the arguments of counsel, pleadings and papers submitted by the parties,  
7 and good cause appearing:

8 1. IT IS HEREBY ORDERED that Defendants' motion to alter or amend the  
9 judgment is GRANTED in part and DENIED in part.

10 2. Defendants' motion to alter or amend judgment raised the following issues:  
11 (a) the \$100,000 cap on damages under NRS 41.035; and (b) prejudgment interest on Jack and  
12 Elaine Chernikoff's loss of consortium claim.

13 a. **Cap on Damages.** The Court rejects Defendants' argument that First  
14 Transit is an arm of the State of Nevada entitled to a cap on damages under NRS 41.035. Just  
15 because First Transit has contracted with the Regional Transportation Commission (RTC), a  
16 political subdivision of the state under NRS 41.0305, does not give First Transit the same rights  
17 as the RTC. The Court analyzes this issue under the three-prong test outlined in *Simonian v.*  
18 *Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.2d 1057 (2006): (1) whether First Transit was  
19 subject to the approval and control of the Governor, the legislature, and other agencies of the  
20 government; (2) whether First Transit was treated as the State or a state agency throughout the  
21 Nevada Revised Statutes; and (3) whether First Transit possessed certain sovereign powers. In  
22 applying these tests to the facts of this case, the Court concludes that First Transit does not  
23 satisfy any of these factors. In fact, the contract between First Transit and the RTC states that  
24 First Transit is an independent contractor. First Transit retained full control and supervision of  
25 the services performed. First Transit also has full control over employment and compensation.  
26 First Transit is solely responsible for wage and hour, working conditions, payment of  
27 employment taxes, etc. First Transit is solely responsible for the acts of its employees. First  
28 Transit is also required to indemnify and hold the RTC harmless. The RTC does not have to

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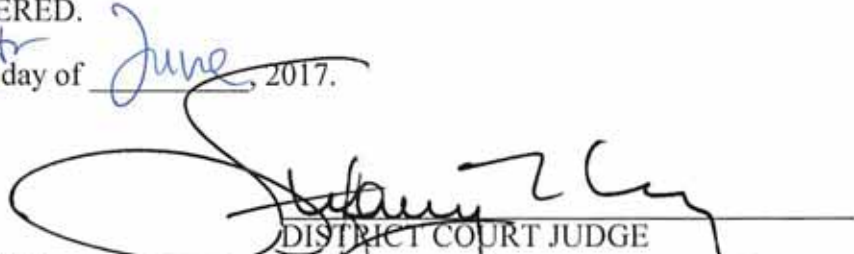


1 indemnify First Transit. The judgment against First Transit does not affect the Nevada State  
2 Treasury, which was one of the underlying legislative purposes for NRS 41.035. Therefore, the  
3 Court concludes that First Transit is not an arm of the government and is not entitled to the cap  
4 on damages outlined in NRS 41.035.

5 **b. Prejudgment Interest.** Prejudgment interest on the loss of consortium  
6 claim was not allocated between past and future damages and is, therefore, disallowed. Jury  
7 Instruction No. 22 talks about future damages, and there was testimony at trial about Harvey's  
8 mother continuing to grieve. So, there was evidence of future emotional distress. Since the jury  
9 verdict form did not distinguish between Jack and Elaine Chernikoff's past and future damages,  
10 prejudgment interest on their \$7.5 million award of damages must be eliminated. *See, e.g.,*  
11 *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005); *Stickler v. Quilici*,  
12 98 Nev. 595, 655 P.2d 527 (1982).

13 IT IS SO ORDERED.

14 Dated this 07<sup>th</sup> day of June, 2017.

15  
16   
DISTRICT COURT JUDGE  
JUDGE STEFANY A. MILEY

17 Respectfully submitted by:

18 RICHARD HARRIS LAW FIRM

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28 *Jack Chernikoff and Elaine Chernikoff*

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1 Approved<sup>1</sup> as to form and content:

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17 *Attorneys for Defendants,*  
18 *First Transit, Inc. and Jay Farrales*

19 [CASE NO. A682726—ORDER GRANTING IN PART AND DENYING IN PART  
20 DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT]  
21  
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23  
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25

26 \_\_\_\_\_  
27 <sup>1</sup> Defendants believe that this order expresses the Court's reasoning and conclusions. However,  
28 defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions  
of law articulated in the order.



**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

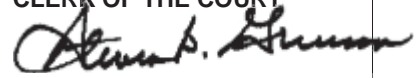
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*Jack Chernikoff and Elaine Chernikoff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
CHERNIKOFF,

A-13-682726-C

10 Plaintiffs,

Case No.: ~~A682726~~

Dept. No.: XXIII

11 vs.

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

14 Defendants.

15 **NOTICE OF ENTRY OF ORDER**

16  
17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Denying  
18 Defendants' Motion for New Trial was entered in the above-captioned matter. A copy of said  
19 Order is attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

22  
23 By /s/ Micah S. Echols

Micah S. Echols, Esq.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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Leah Dell, an employee of  
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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).



# Exhibit 1

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10 *Jack Chernikoff and Elaine Chernikoff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

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

18 Defendants.

Case No.: A682726  
Dept. No.: XXIII

**ORDER DENYING DEFENDANTS'**  
**MOTION FOR NEW TRIAL**

Hearing Date: August 16, 2016  
Hearing Time: 9:30 a.m.

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**ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL**

Defendants, First Transit, Inc. ("First Transit") and Jay Farrales' ("Mr. Farrales") (collectively "Defendants"), motion for new trial and the associated supplement having come before this Court on August 16, 2016, and the Court having heard and considered the arguments of counsel, pleadings and papers submitted by the parties, and good cause appearing:

1. IT IS HEREBY ORDERED that Defendants' motion for new trial and the associated supplement are hereby DENIED.

2. Defendants' motion for new trial raised the following issues: (a) the omission of Harvey Chernikoff on the verdict form in a comparative negligence analysis of NRS 41.141; (b) the applicable standard of care and the duty to perform the Heimlich maneuver; (c) attorney misconduct; (d) passion and prejudice as influencing the \$15 million verdict; (e) the jury's manifest disregard of the Court's instructions; and (f) alternatively, remittitur of the damages to \$100,000. The Court DENIES each of these arguments.

**a. The Verdict Form.** At the time the verdict form was settled, the Court notes that there was considerable discussion on comparative negligence and how it should be presented on the verdict form. Defense counsel initially argued that the jury should consider both Harvey's and his parents' comparative negligence, while plaintiffs argued that neither's negligence could be considered. Ultimately, the verdict form included only comparative negligence as to Harvey's parents, Jack and Elaine Chernikoff, because of Harvey's diminished capacities. Defense counsel Mr. Alverson acquiesced that both should not be on the verdict form. Although defendants assert that defense counsel Ms. Sanders then retracted that position, and this Court ruled on the merits of counsel's objection to Harvey's omission, the attempted retraction was procedurally ineffective. The Court treats Mr. Alverson's acquiescence as a waiver on the issue of whether Harvey should have been included on the verdict form. *See, e.g., Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009); *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 628 P.2d 681 (1981).

**b. The Standard of Care.** With respect to the common carrier jury instructions (Instruction Nos. 32 and 34), the Court concludes that it was appropriate to give



1 these instructions because First Transit specifically contracted to provide paratransit services.  
2 First Transit knew that it would be transporting individuals with disabilities. Although there is  
3 no duty to perform the Heimlich maneuver in Nevada, *Lee v. GNLV Corp.*, 117 Nev. 291, 22  
4 P.3d 209 (2001) does not stand for the proposition that First Transit could simply disregard  
5 Harvey while he died. Additionally, First Transit had policies to scan the bus regularly, and the  
6 testimony and video evidence presented at trial demonstrated that the bus was not regularly  
7 scanned. The Court also treats any challenge to these jury instruction issues as waived because,  
8 although the Court recognizes that defendants disagreed that there was even a basis for a  
9 common-carrier instruction, Defendants offered as an alternative to plaintiffs' common-carrier  
10 instructions the very instructions of which they now complain and have otherwise failed to  
11 properly object. See NRC 51(c); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 194  
12 P.3d 1214 (2008); *Pearson v. Pearson*, 110 Nev. 293, 871 P.2d 343 (1994).

13           **c. Attorney Misconduct.** In their motion for new trial, Defendants argued  
14 that Plaintiffs' counsel committed misconduct by (A) abusing the jury instruction on a  
15 heightened standard of care; (B) referring to this case as a multi-million dollar case in voir dire;  
16 (C) telling the jury that it was required to give Plaintiffs what they asked for; (D) arguing for  
17 recovery based upon the value of Harvey's life; (E) vilifying Defendants for defending the  
18 lawsuit; (F) requesting justice and punishment, rather than compensation; (G) playing on local  
19 prejudices; and (H) improperly appealing to the jurors' sympathies. The Court has reviewed  
20 each of the statements offered by Defendants as claimed instances of attorney misconduct under  
21 the standards in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008) and subsequent case law on  
22 attorney misconduct. The Court notes that Defendants did not contemporaneously object to any  
23 of these claimed instances of attorney misconduct, although the Court probably would have  
24 sustained an objection in some instances. The Court treats Defendants' failure to object as a  
25 waiver of the issue. Having presided at the jury trial and being familiar with the evidence  
26 presented to the jury, the Court does not find that the verdict would have been different but for  
27 the claimed instances of attorney misconduct. Defendants have not satisfied their burden to  
28



1 demonstrate plain error or irreparable and fundamental error. The Court also rejects any  
2 characterization of these claimed errors under an NRCP 59(a) new trial standard.

3 **d. Passion and Prejudice.** The Court reiterates that, having presided at the  
4 trial and being familiar with the evidence, the \$15 million verdict was not excessive. From the  
5 video shown at trial, there are at least 50 seconds where Harvey is choking and going through  
6 stages of being in distress. The expert testimony presented confirms that choking is an  
7 excruciating death, for which there is awareness, helplessness, and fear involved. Even the  
8 defense expert, Dr. MacQuarrie, testified that when someone chokes, he experiences "panic,  
9 complete panic." The Court does not find that the \$7.5 million award to Harvey was excessive.  
10 *See, e.g., Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984). The Court  
11 also does not find that the \$7.5 million award to Jack and Elaine Chernikoff was excessive.  
12 Harvey's family members testified for long periods of time, showed pictures, and demonstrated a  
13 close family relationship. The defense did not object to the content of this testimony, which the  
14 Court considers a waiver of the excessiveness arguments now presented. *See Bridges v. State*,  
15 116 Nev. 752, 6 P.3d 1000 (2000). The Court does not only consider the parents' life  
16 expectancy in evaluating the alleged excessiveness of their recovery; as people get older, the  
17 value of life becomes more important, so life expectancy is not a sole consideration.

18 **e. Jury's Manifest Disregard of the Court's Instructions.** Having  
19 reviewed Defendants' specific challenges to the Court's instructions given to the jury, the Court  
20 concludes that Defendants have not satisfied their burden under NRCP 59(a) to demonstrate that  
21 the jury manifestly disregarded the Court's instructions. Defendants cannot demonstrate that the  
22 jury disregarded the Court's instructions to the level that it would have been impossible for the  
23 jury to reach its verdict. *See Weaver Bros. v. Misskelley*, 98 Nev. 232, 645 P.2d 438 (1982);  
24 *Eikelberger v. Tolotti*, 94 Nev. 58, 574 P.2d 277 (1978); *M&R Inv. Co. v. Anzalotti*, 105 Nev.  
25 224, 773 P.2d 729 (1989).

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1 f. **Remittitur.** Since the Court has determined that the \$15 million verdict  
2 was not excessive, the Court declines to remit the jury's verdict.


3 IT IS SO ORDERED.

4  
5 Dated this 6<sup>th</sup> day of June, 2017.

6  
7   
8 DISTRICT COURT JUDGE  
9 JUDGE STEFANY A. MILEY

8 Respectfully submitted by:

9 RICHARD HARRIS LAW FIRM


10  
11 By   
12 Benjamin P. Cloward, Esq.  
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21 Approved<sup>1</sup> as to form and content:

22 LEWIS ROCA ROTHGERBER CHRISTIE LLP

23  
24 By   
25 Daniel F. Polsenberg, Esq.  
26 Nevada Bar No. 2376  
27 Joel D. Henriod, Esq.

28 <sup>1</sup> Defendants recognize that this order expresses the Court's reasoning and conclusions. However, defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions of law articulated in the order.

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7 *Attorneys for Defendants,*  
*First Transit, Inc. and Jay Farrales*  
8

9

10 [CASE NO. A682726—ORDER DENYING DEFENDANTS’ MOTION FOR NEW TRIAL]  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER DENYING DEFENDANTS’ MOTION FOR NEW TRIAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
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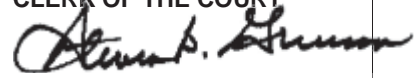
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7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
CHERNIKOFF,

11 Plaintiffs,

12 vs.

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

14 Defendants.

Case No.: A682726  
Dept. No.: XXIII

16 **NOTICE OF ENTRY OF AMENDED JUDGMENT**

17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Amended Judgment  
18 Upon the Jury Verdict was entered in the above-captioned matter. A copy of said Order is  
19 attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

23 By /s/ Micah S. Echols

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# Exhibit 1

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11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,  
15  
16 Plaintiffs,  
17 vs.  
18 FIRST TRANSIT, INC.; JAY FARRALES;  
DOES 1-10; and ROES 1-10, inclusive,  
19 Defendants.

Case No.: A682726  
Dept. No.: XXIII

20  
21 **AMENDED JUDGMENT UPON THE JURY VERDICT**

22  
23 This action came on for trial before the Court and the jury, the Honorable Stefany A.  
24 Miley, District Court Judge, presiding, and the issues having been duly tried and the jury having  
25 duly rendered its verdict.<sup>1</sup>

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28 <sup>1</sup> Exhibit 1: Jury Verdict.

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1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE  
2 CHERNIKOFF, have and recover of Defendant FIRST TRANSIT, INC. the following sums:

3	Pain and suffering by Harvey Chernikoff:	\$7,500,000.00
4	Grief, sorrow, loss of companionship, society,	
5	Comfort, and loss of relationship suffered by	
6	Plaintiffs, JACK CHERNIKOFF and ELAINE	
	CHERNIKOFF:	+ <u>\$7,500,000.00</u>
7	<b>Total Damages</b>	<b>\$15,000,000.00</b>

8  
9 IT IS FURTHER ORDERED AND ADJUDGED that Harvey Chernikoff's past damages  
10 shall bear Pre-Judgment interest in accordance with Lee v. Ball, 121 Nev. 391, 116 P.3d 64  
11 (2005) and NRS 17.130 at the rate of 3.50% per annum plus 2% from the date of service of the  
12 Summons and Complaint on June 7, 2013, through the entry of the Judgment on March 8, 2016:

13 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: \$7,500,000.00**

14 06/07/13 through 03/08/16 = \$1,135,787.67

15 [(1,006 days) at (prime rate (3.50%) plus 2 percent = 5.50%)]

16 [Pre-Judgment Interest is approximately \$1,130.14 per day]

17 **PLAINTIFFS' TOTAL JUDGMENT**

18 Plaintiffs' total judgment is as follows:

19 **Total Damages: \$15,000,000.00**

20 **Prejudgment Interest: \$1,135,787.67**

21 **TOTAL JUDGMENT \$16,135,787.67**

22  
23 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as  
24 follows:

25 JACK CHERNIKOFF and ELAINE CHERNIKOFF are hereby awarded Sixteen Million,  
26 One Hundred Third-Six Thousand, Nine Hundred Seventeen Dollars and 81/100  
27 (\$16,135,787.67) against Defendant FIRST TRANSIT, INC., which shall bear post-judgment  
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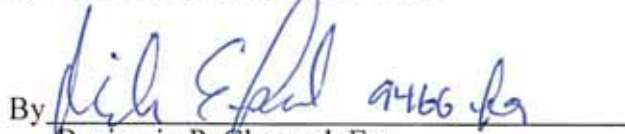


1 interest at the adjustable legal rate from the date of the entry of judgment (March 8, 2016) until  
2 fully satisfied.<sup>2</sup>

3  
4 Dated this 6<sup>th</sup> day of June, 2017.

5  
6   
DISTRICT COURT JUDGE  
7  
8 JUDGE STEFANY A. MILEY

8 Respectfully submitted by:  
9 RICHARD HARRIS LAW FIRM

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11 By   
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23 Atlanta, Georgia 30326  
24  
25 *Attorneys for Plaintiffs,*  
26 *Jack Chernikoff and Elaine Chernikoff*

27 <sup>2</sup> The legal interest rate according to NRS 17.130 was 5.50% at the time of the entry of the judgment on  
28 March 8, 2016 and has adjusted to 5.75% as of January 1, 2017.

1 Approved<sup>3</sup> as to form and content:

2 LEWIS ROCA ROTHGERBER CHRISTIE LLP

3

4 By  \_\_\_\_\_  
 Daniel F. Polsenberg, Esq.  
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 Joel D. Henriod, Esq.  
 Nevada Bar No. 8492  
 Abraham G. Smith, Esq.  
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9 ALVERSON, TAYLOR, MORTENSEN & SANDERS  
 Leann Sanders, Esq.  
 Nevada Bar 390  
 7401 W. Charleston Boulevard  
 Las Vegas, Nevada 89117

12 *Attorneys for Defendants,*  
*First Transit, Inc. and Jay Farrales*

15 [CASE NO. A682726—AMENDED JUDGMENT UPON THE JURY VERDICT]

26 \_\_\_\_\_  
 27 <sup>3</sup> Defendants believe that this order expresses the Court's reasoning and conclusions. However,  
 28 defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions  
 of law articulated in the order.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **AMENDED JUDGMENT UPON THE JURY**  
**VERDICT** was submitted electronically for filing and/or service with the Eighth Judicial  
District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall  
be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System  
consents to electronic service in accordance with NRCP 5(b)(2)(D).

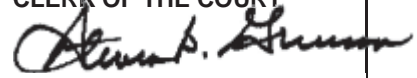
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Steven D. Grierson  
CLERK OF THE COURT



1 **ANOA**  
2 DANIEL F. POLSENBERG  
3 Nevada Bar No. 2376  
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5 Nevada Bar No. 8492  
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20 [LSanders@AlversonTaylor.com](mailto:LSanders@AlversonTaylor.com)

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  
28 Plaintiffs,  
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30 vs.  
31  
32 FIRST TRANSIT, INC.; JAY FARRALES;  
33 DOES 1-10; and ROES 1-10, inclusive,  
34  
35 Defendants.

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

**AMENDED NOTICE OF APPEAL**

36 Please take notice that defendants First Transit, Inc. and Jay  
37 Farrales hereby appeal to the Supreme Court of Nevada from:

- 38 1. All judgments and orders in this case;
- 39 2. "Judgment Upon the Jury Verdict," filed March 8, 2016, notice  
40 of entry of which was served electronically on March 9, 2016 (Exhibit A);

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1 3. "Amended Judgment Upon the Jury Verdict," filed June 6,  
2 2017, notice of entry of which was served electronically on June 7, 2017  
3 (Exhibit B);

4 4. "Order Granting in Part and Denying in Part Defendants'  
5 Motion to Retax Plaintiffs' Costs; Order Denying Defendants First  
6 Transit, Inc. and Jay Farrales' Motion to Strike Plaintiffs' Amended  
7 Memorandum of Costs and Disbursements, and for Sanctions; Order  
8 Denying Defendant Jay Farrales' Motion for Fees and Costs," filed  
9 June 6, 2017, notice of entry of which was served electronically on June 7,  
10 2017 (Exhibit C);

11 5. "Order Granting in Part and Denying in Part Defendants'  
12 Motion to Alter or Amend the Judgment," filed June 6, 2017, notice of  
13 entry of which was served electronically on June 7, 2017 (Exhibit D);

14 6. "Order Denying Defendants' Motion for New Trial," filed June  
15 6, 2017, notice of entry of which was served electronically of June 7, 2017  
16 (Exhibit E); and

17 7. All rulings and interlocutory orders made appealable by any of  
18 the foregoing.

19 Dated this 7th day of June, 2017.

20 LEWIS ROCA ROTHGERBER CHRISTIE LLP

21 BY: /s/ Joel D. Henriod

22 DANIEL F. POLSENBERG (SBN 2376)  
23 JOEL D. HENRIOD (SBN 8492)  
24 3993 Howard Hughes Pkwy, Suite 600  
25 Las Vegas, Nevada 89169  
26 (702) 949-8200

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*Attorneys for Defendants First Transit, Inc.  
and Jay Farrales*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 7th day of June, 2017, I caused a true and correct copy of the foregoing "Amended Notice of Appeal" to be served *via* the Court's electronic filing system and by courtesy email upon the following counsel of record.

BENJAMIN P. CLOWARD  
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*/s/ Yolanda Griffin*  
An Employee of Lewis Roca Rothgerber Christie LLP

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# EXHIBIT A

# EXHIBIT A

  
CLERK OF THE COURT

1 NEO  
2 BENJAMIN P. CLOWARD, ESQ.  
3 Nevada Bar No. 11087  
4 CLOWARD HICKS & BRASIER, PLLC  
5 721 South 6<sup>th</sup> Street  
6 Las Vegas, NV 89101  
7 Telephone: (702) 628-9888  
8 Facsimile: (702) 960-4118  
9 Beloward@chblawyers.com  
10 *Attorneys for Plaintiffs*

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 JACK CHERNIKOFF and ELAINE  
11 CHERNIKOFF,

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

12 Plaintiffs,

NOTICE OF ENTRY OF ORDER

13 vs.


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

17 Defendants.

18  
19 YOU WILL PLEASE TAKE NOTICE that the attached JUDGMENT UPON THE JURY  
20 VERDICT was entered by this Court in the above-entitled matter on the 8<sup>th</sup> day of March, 2016.

21 DATED THIS 9<sup>th</sup> day of March, 2016.

22  
23 CLOWARD HICKS & BRASIER, PLLC

  
24 BENJAMIN P. CLOWARD, ESQ.  
25 Nevada Bar No. 11087  
26 721 South Sixth Street  
27 Las Vegas, Nevada 89101  
28 *Attorneys for Plaintiffs*

002636

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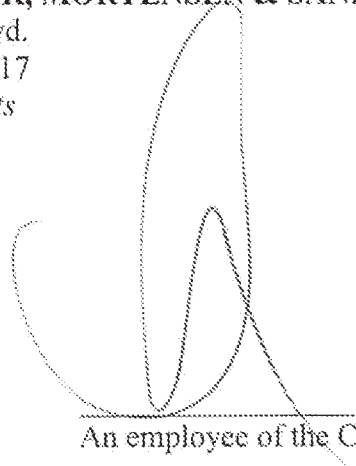
CERTIFICATE OF SERVICE

Pursuant to NRCPC 5(b), I hereby certify that I am an employee of **CLOWARD HICKS & BRASIER, PLLC** and that on the 9 day of March 2016, I caused the foregoing NOTICE OF ENTRY OF ORDER to be served as follows:

- by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or
- pursuant to EDCR 7.26, by sending it via facsimile; and/or
- pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

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



\_\_\_\_\_  
An employee of the CLOWARD HICKS & BRASIER, PLLC

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*Alison D. Shuman*  
CLERK OF THE COURT

1 **JGJV**  
 2 **BENJAMIN P. CLOWARD, ESQ.**  
 Nevada Bar No. 11087  
 3 **CLOWARD HICKS & BRASIER, PLLC**  
 721 South 6<sup>th</sup> Street  
 4 Las Vegas, NV 89101  
 Telephone: (702) 628-9888  
 5 Facsimile: (702) 960-4118  
 6 Bcloward@chblawyers.com  
 Attorneys for Plaintiffs  
 7  
 8 **CHARLES H. ALLEN, ESQ. (Pro Hac Vice)**  
 Georgia Bar No. 009883  
 9 **ALLEN LAW FIRM**  
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 10 Atlanta, GA 30308  
 Fax (866) 639-0287  
 11 Attorney for Plaintiffs

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

15 JACK CHERNIKOFF and ELAINE 16 CHERNIKOFF, 17 Plaintiffs, 18 vs. 19 20 FIRST TRANSIT, INC. JAY FARRALES; DOES 1-10, and ROES 1-10 21 inclusive, 22 Defendants. 23	CASE NO. A-13-682726-C DEPT. NO. XXIII  <u><b>JUDGMENT UPON THE JURY</b></u> <u><b>VERDICT</b></u>
---	--

24 This action came on for trial before the court and the jury, the Honorable Stefany A. Miley,  
 25 District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its  
 26 verdict.<sup>1</sup>  
 27  
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<sup>1</sup> Exhibit 1: Jury Verdict

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other - _____

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1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE  
2 CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

3	Pain and suffering, by Harvey Chernikoff:	\$7,500,000.00
4		
5	Greif, sorrow, loss of companionship, society,	
6	Comfort, and loss of relationship suffered	
7	by Plaintiffs, JACK CHERNIKOFF and	
	ELAINE CHERNIKOFF:	+ \$7,500,000.00
8	<b>Total Damages</b>	<b>\$15,000,000.00</b>

9 IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-  
10 Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum  
11 plus 2%<sup>2</sup> from the date of service of the Summons and Complaint<sup>3</sup> on June 7, 2013, through the date  
12 of the verdict on February 29, 2016, as follows:

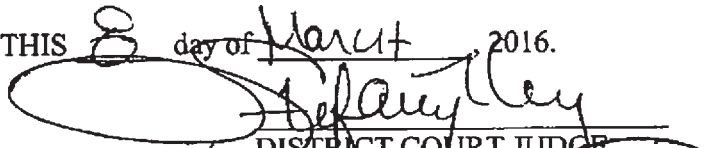
13 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00**

14  
15 06/07/13 through 02/29/16 = \$2,149,631.70  
16 [(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]  
17 [Interest is approximately \$2,156.10 per day]

18 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:

19 JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One  
20 Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 (\$17,149,631.70), which  
21 shall bear interest at the current rate of 5.25% per day, until satisfied.

22 DATED THIS 8 day of March, 2016.

23   
24 DISTRICT COURT JUDGE  
25 as JUDGE STEFANY A. MILEY

26 *Respectfully submitted:*  
27 **CLOWARD HICKS & BRASIER, PLLC**  
28   
BENJAMIN P. CLOWARD, ESQ.

<sup>2</sup> Exhibit 2: Prime Rate as of January 1, 2013  
<sup>3</sup> Exhibit 3: Affidavit of Service upon the Defendant

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# EXHIBIT “1”

DISTRICT COURT  
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE  
CHERNIKOFF,

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

Plaintiffs,

vs.

VERDICT FORM

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

Defendants.

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

FEB 29 2016

5:21 pm

BY   
KATHERINE STREUBER, DEPUTY

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VERDICT FORM

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

ANSWER: Yes  No

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

ANSWER: Yes  No

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

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

ANSWER: Yes  No

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

ANSWER: Yes  No

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

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

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

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

Dated this 29 day of FEBRUARY, 2016.

Fredy A. Acosta  
FOREPERSON

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# EXHIBIT “2”

# PRIME INTEREST RATE

NRS 99.040(1) requires:

*"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . ."*

Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%	July 1, 2014	3.25%
January 1, 2014	3.25%	July 1, 2013	3.25%
January 1, 2013	3.25%	July 1, 2012	3.25%
January 1, 2012	3.25%	July 1, 2011	3.25%
January 1, 2011	3.25%	July 1, 2010	3.25%
January 1, 2010	3.25%	July 1, 2009	3.25%
January 1, 2009	3.25%	July 1, 2008	5.00%
January 1, 2008	7.25%	July 1, 2007	8.25%
January 1, 2007	8.25%	July 1, 2006	8.25%
January 1, 2006	7.25%	July 1, 2005	6.25%
January 1, 2005	5.25%	July 1, 2004	4.25%
January 1, 2004	4.00%	July 1, 2003	4.00%
January 1, 2003	4.25%	July 1, 2002	4.75%
January 1, 2002	4.75%	July 1, 2001	6.75%
January 1, 2001	9.50%	July 1, 2000	9.50%
January 1, 2000	8.25%	July 1, 1999	7.75%
January 1, 1999	7.75%	July 1, 1998	8.50%
January 1, 1998	8.50%	July 1, 1997	8.50%
January 1, 1997	8.25%	July 1, 1996	8.25%
January 1, 1996	8.50%	July 1, 1995	9.00%
January 1, 1995	8.50%	July 1, 1994	7.25%
January 1, 1994	6.00%	July 1, 1993	6.00%
January 1, 1993	6.00%	July 1, 1992	6.50%
January 1, 1992	6.50%	July 1, 1991	8.50%
January 1, 1991	10.00%	July 1, 1990	10.00%
January 1, 1990	10.50%	July 1, 1989	11.00%
January 1, 1989	10.50%	July 1, 1988	9.00%
January 1, 1988	8.75%	July 1, 1987	8.25%
January 1, 1987	Not Available		

\* Attorney General Opinion No. 98-20:

*If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as*

# EXHIBIT “3”





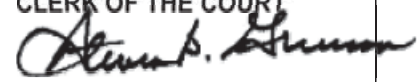
# EXHIBIT B

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# EXHIBIT B

Electronically Filed  
6/7/2017 9:58 AM  
Steven D. Grierson  
CLERK OF THE COURT



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9 *Attorneys for Plaintiffs,*  
10 *Jack Chernikoff and Elaine Chernikoff*

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
10 CHERNIKOFF,  
11  
12 Plaintiffs,  
13  
14 vs.  
15  
16 FIRST TRANSIT, INC.; JAY FARRALES;  
17 DOES 1-10; and ROES 1-10, inclusive,  
18  
19 Defendants.

Case No.: A682726  
Dept. No.: XXIII

16 **NOTICE OF ENTRY OF AMENDED JUDGMENT**

17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Amended Judgment  
18 Upon the Jury Verdict was entered in the above-captioned matter. A copy of said Order is  
19 attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

22  
23 By /s/ Micah S. Echols  
24 Micah S. Echols, Esq.  
25 Nevada Bar No. 8437  
26 10001 Park Run Drive  
27 Las Vegas, Nevada 89145  
28 *Attorneys for Plaintiffs,*  
*Jack Chernikoff and Elaine Chernikoff*

MARQUIS AURBACH COFFING

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002649

002649

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MARQUIS AURBACH COFFING  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF AMENDED JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

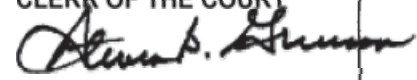
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- Zdocteam  
zdocteam@richardharrislaw.com
- Yolanda Griffin  
ygriffin@lrrc.com

/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

# Exhibit 1

Electronically Filed  
6/6/2017 3:11 PM  
Steven D. Grierson  
CLERK OF THE COURT



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9 callen@charlesallenlawfirm.com

10 *Attorneys for Plaintiffs,*  
*Jack Chernikoff and Elaine Chernikoff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,  
  
15 Plaintiffs,  
  
16 vs.  
  
17 FIRST TRANSIT, INC.; JAY FARRALES;  
18 DOES 1-10; and ROES 1-10, inclusive,  
  
19 Defendants.

Case No.: A682726  
Dept. No.: XXIII

20  
21 **AMENDED JUDGMENT UPON THE JURY VERDICT**

22  
23 This action came on for trial before the Court and the jury, the Honorable Stefany A.  
24 Miley, District Court Judge, presiding, and the issues having been duly tried and the jury having  
25 duly rendered its verdict.<sup>1</sup>

26  
27  
28 <sup>1</sup> Exhibit 1: Jury Verdict.

002652

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1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE  
2 CHERNIKOFF, have and recover of Defendant FIRST TRANSIT, INC. the following sums:

3	Pain and suffering by Harvey Chernikoff:	\$7,500,000.00
4		
5	Grief, sorrow, loss of companionship, society,	
6	Comfort, and loss of relationship suffered by	
7	Plaintiffs, JACK CHERNIKOFF and ELAINE	
8	CHERNIKOFF:	+ \$7,500,000.00
9	<b>Total Damages</b>	<b>\$15,000,000.00</b>

10 IT IS FURTHER ORDERED AND ADJUDGED that Harvey Chernikoff's past damages  
11 shall bear Pre-Judgment interest in accordance with Lee v. Ball, 121 Nev. 391, 116 P.3d 64  
12 (2005) and NRS 17.130 at the rate of 3.50% per annum plus 2% from the date of service of the  
13 Summons and Complaint on June 7, 2013, through the entry of the Judgment on March 8, 2016:

14 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: \$7,500,000.00**

15 06/07/13 through 03/08/16 = \$1,135,787.67

16 [(1,006 days) at (prime rate (3.50%) plus 2 percent = 5.50%)]

17 [Pre-Judgment Interest is approximately \$1,130.14 per day]

18 **PLAINTIFFS' TOTAL JUDGMENT**

19 Plaintiffs' total judgment is as follows:

20 **Total Damages: \$15,000,000.00**

21 **Prejudgment Interest: \$1,135,787.67**


22 **TOTAL JUDGMENT \$16,135,787.67**

23 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as  
24 follows:


25 JACK CHERNIKOFF and ELAINE CHERNIKOFF are hereby awarded Sixteen Million,  
26 One Hundred Third-Six Thousand, Nine Hundred Seventeen Dollars and 81/100  
27 (\$16,135,787.67) against Defendant FIRST TRANSIT, INC., which shall bear post-judgment  
28

1 interest at the adjustable legal rate from the date of the entry of judgment (March 8, 2016) until  
2 fully satisfied.<sup>2</sup>

3  
4 Dated this 6th day of June, 2017.

5  
6   
DISTRICT COURT JUDGE  
7  
8 JUDGE STEFANY A. MILEY

8 Respectfully submitted by:  
9 RICHARD HARRIS LAW FIRM

10  
11 By   
12 Benjamin P. Cloward, Esq.  
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19 CHARLES ALLEN LAW FIRM  
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21 Pro Hac Vice  
22 950 East Paces Ferry Road NE., Suite 1625  
23 Atlanta, Georgia 30326

24 *Attorneys for Plaintiffs,*  
25 *Jack Chernikoff and Elaine Chernikoff*

26  
27 <sup>2</sup> The legal interest rate according to NRS 17.130 was 5.50% at the time of the entry of the judgment on  
28 March 8, 2016 and has adjusted to 5.75% as of January 1, 2017.

1 Approved<sup>3</sup> as to form and content:

2 LEWIS ROCA ROTHGERBER CHRISTIE LLP

3  
4 By 

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10 Leann Sanders, Esq.  
11 Nevada Bar 390  
12 7401 W. Charleston Boulevard  
13 Las Vegas, Nevada 89117

14 *Attorneys for Defendants,*  
15 *First Transit, Inc. and Jay Farrales*

16 [CASE NO. A682726—AMENDED JUDGMENT UPON THE JURY VERDICT]  
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27 <sup>3</sup> Defendants believe that this order expresses the Court's reasoning and conclusions. However,  
28 defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions of law articulated in the order.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **AMENDED JUDGMENT UPON THE JURY VERDICT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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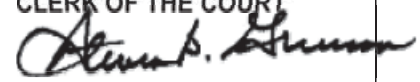
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# EXHIBIT C



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5 *Attorneys for Plaintiffs,*  
*Jack Chernikoff and Elaine Chernikoff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
CHERNIKOFF,  
10  
11 Plaintiffs,  
12  
13 vs.  
14 FIRST TRANSIT, INC.; JAY FARRALES;  
DOES 1-10; and ROES 1-10, inclusive,  
15  
16 Defendants.

Case No.: A682726  
Dept. No.: XXIII

17 **NOTICE OF ENTRY OF ORDER**

18 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Granting in Part  
19 and Denying in Part Defendants' Motion to Retax Plaintiffs' Costs; Order Denying Defendants  
20 First Transit, Inc. and Jay Farrales' Motion to Strike Plaintiffs' Amended Memorandum of Costs  
21 and Disbursements, and for Sanctions; Order Denying Defendant Jay Farrales' Motion for Fees  
and Costs was entered in the above-captioned matter. A copy of said Order is attached hereto.

22 Dated this 7th day of June, 2017.

23 MARQUIS AURBACH COFFING

24  
25 By /s/ Micah S. Echols  
26 Micah S. Echols, Esq.  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

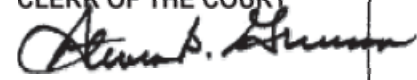
<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

# Exhibit 1

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**ORDR**

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Attorneys for Defendants

**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

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION  
TO RETAX PLAINTIFFS' COSTS; ORDER DENYING DEFENDANTS FIRST  
TRANSIT, INC. AND JAY FARRALES' MOTION TO STRIKE PLAINTIFFS'  
AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND FOR  
SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES' MOTION FOR  
FEES AND COSTS**

WHEREAS Defendants FIRST TRANSIT, INC. and JAY FARRALES' Motion to Retax  
Plaintiffs' Costs, and Motion to Strike Plaintiffs' Amended Memorandum of Costs, came for  
hearing before the Honorable Stefany Miley on August 2, 2016 at 9:30 a.m., and Defendant JAY

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1 FARRALES' Motion for Fees and Costs came for hearing before the Honorable Stefany Miley  
 2 on August 16, 2016 at 9:30 a.m., with Plaintiffs JACK AND ELAINE CHERNIKOFF appearing  
 3 through their counsel of record BENJAMIN CLOWARD, ESQ., of CLOWARD HICKS &  
 4 BRASIER; Defendants FIRST TRANSIT, INC. and JAY FARRALES, appearing through their  
 5 counsel of record, LEANN SANDERS, ESQ., of the law firm of ALVERSON, TAYLOR,  
 6 MORTENSEN AND SANDERS, and DANIEL POLSENBERG, ESQ., of the law firm LEWIS,  
 7 ROCA, ROTHGERBER, CHRISTIE LLP; and with the Court having reviewed the pleadings,  
 8 having heard oral arguments, and having issued a minute order on September 13, 2016 rules as  
 9 follows:

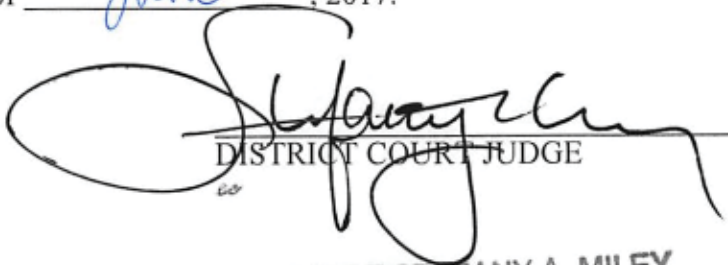
10 **IT IS HEREBY ORDERED, ADJUDICATED AND DECREED** as follows:

- 11 (1) Plaintiffs requested a total of \$102,450.97 in costs based upon their March 15,  
 12 2016 memorandum of costs; their April 12, 2016 amended memorandum of costs;  
 13 and their March 15, 2016 motion for costs.
- 14 (2) Defendant JAY FARRALES requested a total of \$30,578.43 in costs and  
 15 \$189,107.50 in attorney fees based upon his March 15, 2015 memorandum of  
 16 costs and his March 31, 2016 motion for costs and attorney fees. Alternatively,  
 17 JAY FARRALES requested \$17,116.50 in costs and \$78,836.50 in costs.
- 18 (3) In the hearing on August 2, 2016, the Court awarded Plaintiffs the following  
 19 costs: (a) Clerk's Fees—\$486.90; (b) Photocopies, Fax, Telephone, and  
 20 Postage—\$533.77; (c) Copies of Medical Records—\$172.25; (d) Deposition  
 21 Transcript Fees—\$5,309.75; (e) Parking During Trial—\$332.29; and (f) Runner  
 22 Fees—\$225.54, while reserving a decision on expert fees, process service fees,  
 23 and other miscellaneous costs.
- 24 (4) FIRST TRANSIT, INC. and JAY FARRALES' Motion to Retax Plaintiffs' Costs  
 25 is **GRANTED in part and DENIED in part**. Defendants' Motion is granted  
 26 with regard to costs associated with jury consulting, post-trial juror interviews,  
 27 food, focus groups, and trial dinners, striking the same.
- 28



- 1 (5) Per the Court's September 13, 2013 Minute Order, Plaintiffs' expert fees are
- 2 capped at \$1,500.00 each, for a total of \$3,000.00. Plaintiffs are entitled
- 3 reimbursement of \$433.00 for a roundtrip airline ticket between Atlanta and Las
- 4 Vegas. Plaintiffs are entitled to reimbursement of \$9,797.35 paid to Litigation
- 5 Services for trial support.
- 6 (6) FIRST TRANSIT, INC. and JAY FARRALES' Motion to Strike Plaintiffs'
- 7 Amended Memorandum of Cost is **DENIED**. The Court specifically allowed
- 8 Plaintiffs the opportunity to supplement their memorandum of costs and
- 9 considered the costs issues on the merits.
- 10 (7) JAY FARRALES' Motion for Fees and Costs is **DENIED**. The Court determines
- 11 that the joint offer of judgment issued by both Defendants was not more favorable
- 12 than the jury verdict in favor of Plaintiffs. The Court also determines that JAY
- 13 FARRALES was not a prevailing party, and is not entitled to an award of costs.
- 14 (8) Plaintiffs are hereby awarded the total sum of \$20,290.85 in costs against
- 15 Defendant FIRST TRANSIT, INC., with post-judgment interest running at the
- 16 legal rate until fully satisfied.

17 Dated this 6<sup>th</sup> day of June, 2017.

18 

19 \_\_\_\_\_


20 DISTRICT COURT JUDGE

21 Submitted by:

22 LEWIS ROCA ROTHGERBER CHRISTIE LLP

JUDGE STEFANY A. MILEY

23

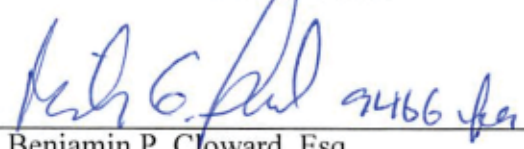
24 By 

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 Attorneys for Defendants

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**APPROVED AS TO FORM AND CONTENT:**

RICHARD HARRIS LAW FIRM

By  94166 JEC

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[CASE NO. 682726—ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS’ MOTION TO RETAX PLAINTIFFS’ COSTS; ORDER DENYING  
DEFENDANTS FIRST TRANSIT, INC. AND JAY FARRALES’ MOTION TO STRIKE  
PLAINTIFFS’ AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND  
FOR SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES’ MOTION FOR  
FEES AND COSTS]

002664

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO RETAX PLAINTIFFS’ COSTS; ORDER DENYING DEFENDANTS FIRST TRANSIT, INC. AND JAY FARRALES’ MOTION TO STRIKE PLAINTIFFS’ AMENDED MEMORANDUM OF COSTS AND DISBURSEMENTS, AND FOR SANCTIONS; ORDER DENYING DEFENDANT JAY FARRALES’ MOTION FOR FEES AND COSTS** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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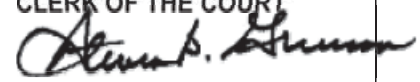
/s/ Leah Dell  
Leah Dell, an employee of  
Marquis Aurbach Coffing

# EXHIBIT D

# EXHIBIT D



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7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
10 CHERNIKOFF,

11 Plaintiffs,

Case No.: A682726  
Dept. No.: XXIII

12 vs.

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

14 Defendants.

15 **NOTICE OF ENTRY OF ORDER**

16  
17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Granting in Part  
18 and Denying in Part Defendants' Motion to Alter or Amend the Judgment was entered in the  
19 above-captioned matter. A copy of said Order is attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

22  
23 By /s/ Micah S. Echols

24 Micah S. Echols, Esq.  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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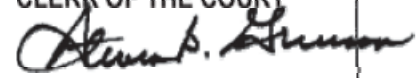
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# Exhibit 1

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9 *Attorneys for Plaintiffs,*  
10 *Jack Chernikoff and Elaine Chernikoff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

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

19 Defendants.

Case No.: A682726  
Dept. No.: XXIII

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO ALTER OR AMEND THE  
JUDGMENT**

Hearing Date: August 16, 2016  
Hearing Time: 9:30 a.m.

002671

002671

**ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**

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Defendants, First Transit, Inc. ("First Transit") and Jay Farrales' ("Mr. Farrales") (collectively "Defendants"), motion to alter or amend the judgment under NRCPC 59(e) and the associated supplement having come before this Court on August 16, 2016, and the Court having heard and considered the arguments of counsel, pleadings and papers submitted by the parties, and good cause appearing:

1. IT IS HEREBY ORDERED that Defendants' motion to alter or amend the judgment is GRANTED in part and DENIED in part.

2. Defendants' motion to alter or amend judgment raised the following issues: (a) the \$100,000 cap on damages under NRS 41.035; and (b) prejudgment interest on Jack and Elaine Chernikoff's loss of consortium claim.

**a. Cap on Damages.** The Court rejects Defendants' argument that First Transit is an arm of the State of Nevada entitled to a cap on damages under NRS 41.035. Just because First Transit has contracted with the Regional Transportation Commission (RTC), a political subdivision of the state under NRS 41.0305, does not give First Transit the same rights as the RTC. The Court analyzes this issue under the three-prong test outlined in *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.2d 1057 (2006): (1) whether First Transit was subject to the approval and control of the Governor, the legislature, and other agencies of the government; (2) whether First Transit was treated as the State or a state agency throughout the Nevada Revised Statutes; and (3) whether First Transit possessed certain sovereign powers. In applying these tests to the facts of this case, the Court concludes that First Transit does not satisfy any of these factors. In fact, the contract between First Transit and the RTC states that First Transit is an independent contractor. First Transit retained full control and supervision of the services performed. First Transit also has full control over employment and compensation. First Transit is solely responsible for wage and hour, working conditions, payment of employment taxes, etc. First Transit is solely responsible for the acts of its employees. First Transit is also required to indemnify and hold the RTC harmless. The RTC does not have to

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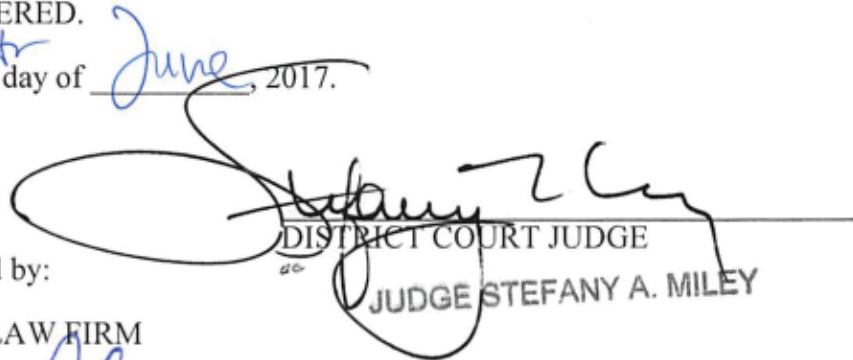


1 indemnify First Transit. The judgment against First Transit does not affect the Nevada State  
2 Treasury, which was one of the underlying legislative purposes for NRS 41.035. Therefore, the  
3 Court concludes that First Transit is not an arm of the government and is not entitled to the cap  
4 on damages outlined in NRS 41.035.

5 **b. Prejudgment Interest.** Prejudgment interest on the loss of consortium  
6 claim was not allocated between past and future damages and is, therefore, disallowed. Jury  
7 Instruction No. 22 talks about future damages, and there was testimony at trial about Harvey's  
8 mother continuing to grieve. So, there was evidence of future emotional distress. Since the jury  
9 verdict form did not distinguish between Jack and Elaine Chernikoff's past and future damages,  
10 prejudgment interest on their \$7.5 million award of damages must be eliminated. *See, e.g.,*  
11 *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005); *Stickler v. Quilici*,  
12 98 Nev. 595, 655 P.2d 527 (1982).

13 IT IS SO ORDERED.

14 Dated this 07<sup>th</sup> day of June, 2017.

15  
16   
DISTRICT COURT JUDGE  
JUDGE STEFANY A. MILEY

17 Respectfully submitted by:

18 RICHARD HARRIS LAW FIRM

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27 *Attorneys for Plaintiffs,*  
28 *Jack Chernikoff and Elaine Chernikoff*

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1 Approved<sup>1</sup> as to form and content:

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3 By 

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*Attorneys for Defendants,  
12 First Transit, Inc. and Jay Farrales*

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[CASE NO. A682726—ORDER GRANTING IN PART AND DENYING IN PART  
DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT]

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<sup>1</sup> Defendants believe that this order expresses the Court's reasoning and conclusions. However, defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions of law articulated in the order.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO ALTER OR AMEND THE JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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Leah Dell, an employee of  
Marquis Aurbach Coffing

<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

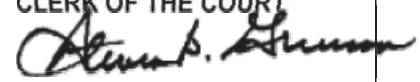
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# EXHIBIT E

# EXHIBIT E

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Steven D. Grierson  
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10 *Jack Chernikoff and Elaine Chernikoff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JACK CHERNIKOFF; and ELAINE  
10 CHERNIKOFF,

A-13-682726-C

11 Plaintiffs,

Case No.: ~~A682726~~

Dept. No.: XXIII

12 vs.

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

15 Defendants.

16 **NOTICE OF ENTRY OF ORDER**

17 PLEASE TAKE NOTICE that on the 6th day of June, 2017, an Order Denying  
18 Defendants' Motion for New Trial was entered in the above-captioned matter. A copy of said  
19 Order is attached hereto.

20 Dated this 7th day of June, 2017.

21 MARQUIS AURBACH COFFING

22 By /s/ Micah S. Echols

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

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Leah Dell, an employee of  
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<sup>1</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).



# Exhibit 1

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10 *Jack Chernikoff and Elaine Chernikoff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF; and ELAINE  
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

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

18 Defendants.

Case No.: A682726  
Dept. No.: XXIII

**ORDER DENYING DEFENDANTS'**  
**MOTION FOR NEW TRIAL**

Hearing Date: August 16, 2016  
Hearing Time: 9:30 a.m.

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**ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL**

Defendants, First Transit, Inc. ("First Transit") and Jay Farrales' ("Mr. Farrales") (collectively "Defendants"), motion for new trial and the associated supplement having come before this Court on August 16, 2016, and the Court having heard and considered the arguments of counsel, pleadings and papers submitted by the parties, and good cause appearing:

1. IT IS HEREBY ORDERED that Defendants' motion for new trial and the associated supplement are hereby DENIED.

2. Defendants' motion for new trial raised the following issues: (a) the omission of Harvey Chernikoff on the verdict form in a comparative negligence analysis of NRS 41.141; (b) the applicable standard of care and the duty to perform the Heimlich maneuver; (c) attorney misconduct; (d) passion and prejudice as influencing the \$15 million verdict; (e) the jury's manifest disregard of the Court's instructions; and (f) alternatively, remittitur of the damages to \$100,000. The Court DENIES each of these arguments.

a. **The Verdict Form.** At the time the verdict form was settled, the Court notes that there was considerable discussion on comparative negligence and how it should be presented on the verdict form. Defense counsel initially argued that the jury should consider both Harvey's and his parents' comparative negligence, while plaintiffs argued that neither's negligence could be considered. Ultimately, the verdict form included only comparative negligence as to Harvey's parents, Jack and Elaine Chernikoff, because of Harvey's diminished capacities. Defense counsel Mr. Alverson acquiesced that both should not be on the verdict form. Although defendants assert that defense counsel Ms. Sanders then retracted that position, and this Court ruled on the merits of counsel's objection to Harvey's omission, the attempted retraction was procedurally ineffective. The Court treats Mr. Alverson's acquiescence as a waiver on the issue of whether Harvey should have been included on the verdict form. *See, e.g., Allstate Ins. Co. v. Miller*, 125 Nev. 300, 212 P.3d 318 (2009); *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 628 P.2d 681 (1981).

b. **The Standard of Care.** With respect to the common carrier jury instructions (Instruction Nos. 32 and 34), the Court concludes that it was appropriate to give

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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 03:23 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 11  
PAGES 2501-2696**

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**CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX**

<b>Tab</b>	<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
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11	Notice of Entry of Stipulation and Order for Extension of Time to Complete Discovery (Second Request)	08/20/14	1	57–66
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13	Notice of Entry of Stipulation and Order to Complete Discovery (Third Request)	09/29/14	1	69–79
14	Discovery Commissioner's Report and Recommendations	12/23/14	1	80–84

15	Second Order Re-Setting Civil Jury Trial and Calendar Call	01/13/15	1	85–86
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17	Decision	01/20/15	1	96–97
18	Notice of Entry of Stipulation and Order to Dismiss Plaintiffs' Punitive Damages Claim	06/05/15	1	98–105
19	Defendants' Pre-Trial Memorandum	06/19/15	1	106–124
20	Plaintiffs' Pre-Trial Memorandum	06/19/15	1	125–132
21	Third Order Re-Setting Civil Jury Trial and Calendar Call	06/29/15	1	133–134
22	Notice of Entry of Stipulation and Order to Dismiss Plaintiffs' Claims for Funeral Expenses	06/30/15	1	135–142
23	Notice of Entry of Order Denying Defendants' Motion to Strike Plaintiffs' Passenger Transportation Expert, Carl Berkowitz Ph.D.	09/08/15	1	143–149
24	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 1 to Exclude Items Produced by Plaintiffs After the Close of Discovery	09/08/15	1	150–156
25	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 2 to Exclude Post-July 2011 Policy Documents and Any References or Testimony Related Thereto	09/08/15	1	157–164
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28	Notice of Entry of Order Deferring Ruling on Plaintiffs' Motion to Strike Impermissible Video	09/08/15	1	180-186
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30	Notice of Entry of Order Denying Plaintiffs' Motion in Limine No. 2 to Exclude Any Reference or Comments that Carl Berkowitz Utilized Ned Einstein's Report	09/08/15	1	194-200
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			10	2251–2269
5	Commissioner's Decision on Request for Exemption	07/23/13	1	28–33
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17	Decision	01/20/15	1	96–97
3	Defendants First Transit, Inc., Laidlaw Transit Services, Inc. d/b/a First Transit and Jay Farrales' Answer to Plaintiffs' Complaint	06/27/13	1	16–24
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53	Defendants' Motion to Alter or Amend the Judgment	03/23/16	8	1828–1956
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61	Defendants' Supplemented Motion to Alter or Amend the Judgment	05/25/16	10	2301–2441
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14	Discovery Commissioner's Report and Recommendations	12/23/14	1	80–84
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49	Jury Instructions	02/29/16	7	1721–1750

			8	1751–1763
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	and Denying in Part Defendants' Motion in Limine No. 1 to Exclude Items Produced by Plaintiffs After the Close of Discovery			
25	Notice of Entry of Order Granting in Part and Denying in Part Defendants' Motion in Limine No. 2 to Exclude Post-July 2011 Policy Documents and Any References or Testimony Related Thereto	09/08/15	1	157-164
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1 the highest degree of care consistent with the mode of  
2 conveyance used and the practical operation of its business as  
3 a common carrier by mode of transportation. It's failure to  
4 fulfill this duty is negligence.

5 There is a distinction between this pattern  
6 instruction and the one proposed by plaintiffs.

7 THE COURT: Can I see yours just to compare it?

8 MS. HYSON: Sure.

9 MS. BRASIER: And, Your Honor, we -- we also  
10 discussed why that pattern instruction is not appropriate, I  
11 know we've submitted a lot of bench briefs, but in our other  
12 bench brief about the jury instructions.

13 MS. HYSON: And this -- this instruction was  
14 actually recognized as an appropriate instruction in the cases  
15 that were cited by plaintiffs in their bench brief. I believe  
16 it's --

17 THE COURT: This comes out of a newer case, too.

18 MS. HYSON: No, that one actually comes out of the  
19 20 -- I'm sorry, the 1910 case that was cited by plaintiffs.

20 THE COURT: The Grooms v. Fox?

21 MS. HYSON: It's also in -- it was also accepted by  
22 Grooms v. Fox, but that specific language was also in -- I  
23 can't remember now if it was in Sherman or Forrester. It was  
24 either the 1910 or the 1913 case.

25 MS. BRASIER: Are you saying that the 1910 or 1913



1 case cited Grooms?

2 MS. HYSON: No. The language. The language in that  
3 pattern instruction was ruled to be acceptable language in the  
4 1910 or 1913 case. Specifically, actually, I found it here.  
5 In Sherman that court talks about the duty of a common carrier  
6 and that the highest degree of practical -- practicable care  
7 should be exercised that is most consistent with a mode of  
8 transportation. And that's the pertinent language in the  
9 pattern instruction that we think is important because it  
10 gives the jury a benchmark for what the highest degree of care  
11 actually means.

12 MS. BRASIER: And, Your Honor, if I may. The  
13 pattern instruction that they're citing to, it -- the -- the  
14 support for it in the new pattern instruction, which I'm not  
15 sure if Your Honor has had the same experience, but we've had  
16 the experience that some of the pattern instructions aren't  
17 actually supported by the sources that are cited in the new  
18 rule book. But the Grooms case never discusses what the  
19 appropriate language is. The Grooms case is literally three  
20 -- three paragraphs and it never talks about what the  
21 appropriate standard is. So I don't know how you could get  
22 any information from that.

23 THE COURT: Is that form that really old -- the blue  
24 soft-covered one?

25 MS. BRASIER: No, it's --

1 MS. HYSON: I don't know. I didn't get a --

2 MS. BRASIER: These are actually the newer  
3 instructions that just came out maybe two years ago that  
4 everyone is kind of having issues with.

5 MS. HYSON: But even -- I mean, that is true that it  
6 is a very short case, the Grooms case, but that specific  
7 language is supported by the Sherman case, which is the very  
8 old case back from 1910. So the same case that plaintiffs are  
9 relying on from 1910, the language in this pattern instruction  
10 does exist in that case, as well. In fact, the California  
11 case from 2005 utilizes the same language.

12 THE COURT: I can't even pull this case up it's so  
13 old.

14 MS. BRASIER: I have an extra copy of it.

15 THE COURT: I have a book.

16 MS. BRASIER: Would you like a copy?

17 MS. HYSON: Yeah, I think she attached a copy --

18 THE COURT: Yeah.

19 MS. HYSON: -- to her brief. I have a copy, as  
20 well.

21 THE COURT: Which is sitting on my desk, which I  
22 should go get.

23 THE CLERK: Do you want me to go get it for you?

24 THE COURT: Yeah, will you?

25 THE CLERK: Which one is it?

1 THE COURT: It should be a brief by them on -- it'll  
2 say common carrier.

3 MS. BRASIER: Your Honor, I have an extra -- this is  
4 an extra copy of the case.

5 THE COURT: Thank you.

6 MS. BRASIER: I just highlighted the part that I was  
7 reading to you from.

8 THE CLERK: Do you still want me --

9 THE COURT: No, thank you.

10 Okay. And then this one is also, you said, from the  
11 Sherman case?

12 MS. HYSON: Yes, and I can point you to where in the  
13 Sherman case --

14 THE COURT: Okay.

15 MS. HYSON: -- if that makes it easier.

16 THE COURT: So where is it?

17 MS. HYSON: These aren't old cases aren't page  
18 numbered quite as well as the new ones. I don't know if I can  
19 show you on that same page with the version you have, but I  
20 can show you here. Let me see if it's printed the same. On  
21 the bottom of the page.

22 THE COURT: Yeah, I see. I'm trying to --

23 MS. HYSON: I don't know if they're printed the same  
24 way.

25 (Pause in the proceedings.)

1 THE COURT: Do you have it tagged, the one she's  
2 citing, as well?

3 MS. HYSON: You mean the --

4 THE COURT: Is it -- I'm sorry.

5 MS. HYSON: -- area that she's --

6 THE COURT: Do you have it marked?

7 MS. HYSON: I don't know if I have her area marked,  
8 as well. I think I probably do.

9 THE COURT: I think maybe -- let me see if maybe I  
10 can find it. Okay. Your -- your printout is totally  
11 different.

12 MS. HYSON: We may have gotten ours from Westlaw  
13 versus Lexis.

14 MS. BRASIER: Yeah, just the formatting is  
15 different.

16 (Pause in the proceedings.)

17 THE COURT: You guys can make yourselves  
18 comfortable.

19 MS. HYSON: Thank you.

20 (Pause in the proceedings.)

21 THE COURT: Actually, I think reading the language  
22 in Sherman versus Southern Pacific, I think that the  
23 additional language in the instruction proffered by the  
24 defense is actually more accurate as to the common carrier  
25 because when you look at the language by the Supreme Court, it



1 says the many different forms or expressed using textbooks and  
2 by the courts in stating the rule as to the degree of care  
3 required of a carrier in conveying passengers all recognize  
4 substantially the same test, that is the highest degree of  
5 care, prudence, and foresight consistent with a practical  
6 operation of its road or as sometimes expressed the utmost  
7 skill, diligence, care, and foresight consistent with the  
8 business in view of the instrumentalities employed.

9           So I think the one provided by the defense is more  
10 applicable because I think the Supreme Court is trying to say  
11 that, you know, it has to be with the -- the practical  
12 operation of the business. I think this one is actually a  
13 better instruction and it's also been approved in the -- the  
14 pattern jury instructions.

15           MS. BRASIER: So for clarification, Your Honor --

16           THE COURT: The reason is I think that it is  
17 important language, you know, because the Supreme Court goes  
18 through a lot of discussion and citing from jurisdictions  
19 talking about the mode of conveyance used. So I think that is  
20 important language. So I would tend to offer the one -- I  
21 would offer the one that the defense is proposing.

22           MS. BRASIER: So just so that I can keep things  
23 organized, we'll be using the one the defense has offered.

24           THE COURT: Yeah, so this will be plaintiffs'  
25 proposed, but not given.

1 that stack of jury instructions.

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

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

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

7 (Pause in the proceedings.)

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

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

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

14 THE COURT: Well, I have one.

15 MS. HYSON: Let me get her.

16 (Pause in the proceedings.)

17 THE COURT: Ms. Sanders.

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

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



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

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

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

19 THE COURT: I actually agree with you.

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

**CERTIFICATION**

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

**AFFIRMATION**

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

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Aurora, Colorado**

  
KIMBERLY LAWSON

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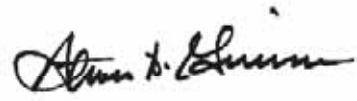
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# EXHIBIT B

002511

# EXHIBIT B

002511



CLERK OF THE COURT

TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

JACK CHERNIKOFF, )  
ELAINE CHERNIKOFF, )  
 )  
Plaintiff, )  
vs. )  
 )  
FIRST TRANSIT INC., )  
 )  
Defendant. )

CASE NO A-13-682726  
DEPT NO. XXIII

**TRANSCRIPT OF  
PROCEEDINGS**

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

**JURY TRIAL - DAY 7**

THURSDAY, FEBRUARY 25, 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 Q Was there ever a reason for you to enforce the no  
2 eating rule with Harvey Chernikoff?

3 A No. I don't have to enforce it. I never seen it.

4 Q Okay. And that was true on July 29, 2011, as well  
5 as any of the other trips that you had taken him on?

6 A That's correct.

7 Q Now, if you had seen Harvey Chernikoff eating on the  
8 bus on that day, what were you trained to do?

9 A I have to say something.

10 Q And would you have followed that training if you had  
11 seen him eating on the bus that day?

12 A Yes.

13 Q Now, in addition to the riders getting rules for  
14 what they can and can't do or should or shouldn't do on the  
15 bus, were there also signs in the bus to give them some idea  
16 about what the rules were?

17 A Yes.

18 Q And we've seen the sign that was in the bus. Let's  
19 put it up again. Is this the sign that was in the bus at the  
20 time that you transported Harvey on July 29, 2012?

21 A Yes.

22 Q What does that sign say to you in the -- it's not a  
23 very good copy -- in the circles up above?

24 A No smoking, no eating, drinking out of open cup.  
25 And this one here no playing music.



1 Q And that sign was in the bus on the day that you  
2 transported Harvey?

3 A That's correct.

4 Q Did anybody ever tell you that Harvey Chernikoff was  
5 unable to read?

6 A Nobody told me that.

7 Q Did anybody ever tell you that he was unable to look  
8 at signs and understand signs?

9 A Nobody told me that.

10 Q Now, these buses that you drove, were they owned by  
11 RTC or by First Transit?

12 A They owned by RTC.

13 Q And the signs that were in the bus, were those  
14 placed there by RTC as well?

15 A RTC.

16 Q The jury has heard that at one point during the  
17 earlier part of the trip with Harvey you -- he asked you to  
18 help him with a water bottle similar to what you've got there  
19 and you helped him to untwist that. Do you recall that?

20 A That's correct.

21 Q Okay. In your mind, was that a violation of the RTC  
22 rule against no drinking except from something that's got a  
23 covered container?

24 A No.

25 Q Were either you or Harvey Chernikoff violating the

1 RTC rule against drinking from an open container when you  
2 helped him with the lid?

3 A No.

4 Q I'd like to go through now, Jay, a little bit about  
5 the earlier part of that trip you took. The jury has seen  
6 just a limited segment of the video and I'm sorry, I'm going  
7 to be showing part of the video again. I'm not going to go  
8 through the entirety, but I am going to show you and have Jay  
9 explain to you what you're seeing at various different times  
10 here. Now 6:50:26 is right about the time that Harvey was  
11 getting on the bus for the first time. So when you see him  
12 can you kind of just explain to the jury what they're seeing?

13 (Video played)

14 A I'm there behind him.

15 Q Is there audio?

16 A Yes. I was looking at him.

17 Q And is he putting on his seatbelt right there?

18 A Yes. He said okay when I told him to put the  
19 seatbelt on.

20 Q I'm not sure that the jury heard it. What was he  
21 saying to you right there?

22 A I couldn't understand.

23 Q Was he saying that he needed you to adjust the air,  
24 that it's warm? Several times he mentioned the temperature?

25 A Yes.

1 Q We won't talk this time, we'll stop it afterwards.

2 (Video played)

3 Q You see the man that's clear in the back there, Jay?

4 A Yes.

5 Q What is he doing?

6 A Stretching his leg.

7 Q Was it unusual for people to stretch on the bus?

8 A No.

9 (Video played)

10 Q So you said that this time -- what did you hear him  
11 saying, Jay?

12 A About the temperature, he's saying cold or warm,  
13 something like that.

14 Q And I think you mentioned that --

15 A I said are you warm or cold.

16 Q And it's the end of July, so the air conditioner was  
17 running at the time?

18 A Yes.

19 Q Did you adjust the air conditioning after Harvey  
20 told you that he felt cold?

21 A Yes.

22 Q Let's go on to 7:05:38.

23 (Video played)

24 Q You did assist him by helping him untwist the bottle  
25 at that point, correct?

1 A That's correct.

2 Q Did you stop the bus first to do it?

3 A I did.

4 Q Was there anything about you assisting him by  
5 untwisting that bottle that was a violation of the RTC rule  
6 about drinking on the bus?

7 A No.

8 Q Let's go on to 7:13:46.

9 (Video played)

10 Q When you heard the coughing, were you concerned?

11 A Yes.

12 Q Was that something that was unusual as far as  
13 something that was going on with the passenger?

14 A That's like, you know, when you hear sounds like  
15 that, coughing, you get concerned and you say are you okay or  
16 something.

17 Q Check on it.

18 A Check on it.

19 Q Let's go on to 7:25:50.

20 (Video played)

21 Q What did that scene depict?

22 A I help him with the seatbelt, he couldn't put it on.

23 Q He was having trouble and so he asked you for help?

24 A Yes.

25 Q Let's go on 7:45:23.

1 (Video played)

2 Q Was this just an example of how talkative Harvey was  
3 and you had conversations with him?

4 A That's correct.

5 Q Was it fairly common on this trip as well as other  
6 trips that he would engage you in conversation?

7 A Yes.

8 Q Was he always talking or did he have periods where  
9 he was quiet as well?

10 A Yes.

11 Q Yes, he had periods where he was quiet?

12 A Yes.

13 Q Let's go to 7:48:15, please. Now this one's a  
14 little longer.

15 (Video played)

16 Q This is a little bit longer segment, but can you  
17 just explain to the jury what's happening here?

18 A He feels going to the bathroom.

19 Q Okay. And did you --

20 A And ask -- I ask him about it and I ask him if he  
21 can hold it and we went on to find a place. I said we will  
22 find a place.

23 Q Did you find a place to --

24 A We did. We moved to a place and I let him go to the  
25 restroom.



1 Q Okay. Then, let's go on to 7:53:12.

2 (Video played)

3 Q Now is this after you let him off to go to the  
4 bathroom and he's getting back on?

5 A Yes.

6 Q And you helped him with his seatbelt?

7 A I did.

8 Q Was he somebody who would ask you for help if he  
9 needed help?

10 A Yes.

11 Q Okay. And at this point before you start going  
12 again he's secured in the seatbelt?

13 A Yes.

14 Q Let's go on to 7:56:30.

15 (Video played)

16 Q Was this just one of many times or at least a few  
17 times on the bus where he mentioned to you that he was cold  
18 and asked you to adjust the air?

19 A Yes.

20 Q And did you do that when he asked?

21 A I did, yes.

22 Q Okay. Before we go on, I would like to -- before we  
23 go on to another part of the video, I'd like to talk a little  
24 bit about the mirror you used. There's been a lot of question  
25 and testimony about the mirrors in the bus. Can you just --



1 and you did testify a little bit about this a couple of days  
2 ago. But can you explain to the jury what you were trained to  
3 do as far as scanning -- first of all, adjusting the mirrors.

4 A I have to in the morning, the pretrip inspection,  
5 during the pretrip inspection you got to check everything  
6 around the bus. You do the lift, check anything that's not,  
7 like the tires and all the possibly wrong with it. Then you  
8 go in and check the dashboard and whatever it is that you need  
9 to do check and you set the mirrors and the mirror over here  
10 and you set the mirror over here and the side and the left  
11 side. There's like a knob that we would just set it on there  
12 some way that you set it on to see the back and the -- to the  
13 right and to the left and the back of the bus and the interior  
14 also.

15 Q You make all those adjustments before you start the  
16 trip?

17 A Yes.

18 Q Okay. Is there a way to, with the mirrors -- we saw  
19 this morning the kind of mirrors that were in the bus. Is it  
20 possible with those mirrors to see every single part of the  
21 interior of the bus?

22 A No.

23 Q Can you try to adjust it to see as much as you can?

24 A Yes.

25 Q But are you able to see, for example, into people's

1 laps or behind seats or on the floor or anything like that?

2 A No.

3 Q It gives you kind of a general overview of the  
4 interior of the bus?

5 A Yes.

6 Q But you can't see the nooks and crannies and the  
7 specifics.

8 A No.

9 Q Now, what is the primary concern that you as a  
10 driver are taught in adjusting and in scanning your mirrors?

11 A I look for [indiscernible] and make sure that when  
12 you're driving you're checking all the mirrors, scanning it  
13 for potential hazard that would cause an accident.

14 Q When we're talking about scanning the mirrors and we  
15 heard about scanning the mirrors every five to eight seconds,  
16 is that specifically the interior or are you scanning the  
17 exterior mirrors for what's going on outside you?

18 A It's most of the time the exterior and it kind of  
19 [indiscernible] around all the necessary areas. Depends on  
20 what the situation takes you. Like if you see some car, you  
21 know, next to you, you're not necessarily like looking over  
22 there on the other side. You have to continuously scan it.  
23 So whatever moves they would do you can recognize it and be  
24 able to maneuver on the way that it would be safe.

25 Q Is the primary thing you're taught with regard to

1 use of the mirrors to be paying attention to traffic and cars  
2 and traffic hazards, what's ahead of you, what's to the side  
3 of you as far as your driving is concerned?

4 A That's correct.

5 Q You are supposed to kind of monitor what's going on  
6 inside the bus by use of the mirrors as well, though, correct?

7 A That's correct.

8 Q What are you looking for as far as scanning the  
9 interior of the bus?

10 A If there's something like out of the ordinary that  
11 you would see it would catch your attention.

12 Q Okay. And if you see something out of the ordinary  
13 in the interior, then you'd respond to it or what?

14 A You respond to it.

15 Q But your primary job is to drive; is that right?

16 A That's correct.

17 Q And drive as safely as you can?

18 A Yes.

19 Q So is the primary purpose of the mirrors to check  
20 the outside?

21 A That's true and around the bus, whatever it is.

22 Q Now, you saw this morning that when Mr. Daecher was  
23 testifying, he indicated -- he had a couple of photographs  
24 that were put up. A19, if you'll put those up. Now, this  
25 morning Mr. Daecher explained to the jury that when he had

1 examined an exemplar bus he did it after you had already  
2 driven the bus the night before and left everything the same  
3 way that you had adjusted it. Is this kind of generally -- I  
4 know you can't remember specifically, but is this kind of  
5 generally the view that you would have had looking into the  
6 interior mirror?

7 A Correct.

8 Q Yes?

9 A Yes.

10 Q And the view that you get there is a general  
11 overview, correct?

12 A Correct.

13 Q If somebody was standing up would you be able to see  
14 that in that mirror?

15 A That's correct.

16 Q Would you be able to see somebody that is doing  
17 something down in their lap or are leaning over, anything like  
18 that?

19 A No.

20 Q That mirror depicts what? What does that show you?

21 A The back of the bus, the inside of it.

22 Q What is that mirror primarily to help you with?

23 A To check on if there's something out of the  
24 ordinary, you react to it. This is just the one over here on  
25 like the bottom before the camera. And you look at the --



1 this is how it looks like and you can just, if there's an  
2 extra out of the ordinary, like that you could see.

3 Q Okay. So the two photos that we've just seen, would  
4 that be a better representation of what you as the driver  
5 would be able to see rather than the video that we've been  
6 being shown during the rest of the trial?

7 A That's correct.

8 Q Are passengers allowed to take packages onto the bus  
9 with them, purses, bags, that kind of thing?

10 A Yes.

11 Q There's no prohibition against that?

12 A No. They are allowed to bring two bags and carry --  
13 even the PCA can have two bags with them.

14 Q Are you as a driver required to look through that  
15 bag or any bags they bring on to see if they've got any food  
16 or anything like that that they shouldn't have?

17 A No.

18 Q While passengers are on the bus, is it unusual for  
19 them to move around in their seat?

20 A They always like moving.

21 Q People don't get on the bus and just sit rigidly  
22 during the whole time, do they?

23 A No.

24 Q Are there times when passengers are talking and  
25 other times when they're quiet?

1 A Yes.

2 Q Do some of the passengers nap periodically?

3 A That's correct.

4 Q And if they're napping do sometimes they lay down in  
5 the seat or lean over in the seat?

6 A That's correct.

7 Q And is that something that is of concern?

8 A No.

9 Q Does that mean that at times they are not always in  
10 your line of vision when you're looking in the mirrors?

11 A You see some of them, like, you know, when they're  
12 moving around you can see them, like shadows of them.

13 Q If you can't see every passenger at every moment is  
14 that a cause of concern?

15 A No.

16 Q Now you told us that what you were trained to do as  
17 far as monitoring the passengers, is just kind of make a  
18 general check and if there's anything out of the ordinary,  
19 anything unusual then you would take another step and check on  
20 it more. Is that what you were trained to do?

21 A That's correct.

22 Q And is that what you did?

23 A Yes.

24 Q Let's look at the still photos that were shown this  
25 morning. This morning when Mr. Daecher was here Mr. Alverson



1 put up these photos. And these are stills that were taken  
2 from the video at about the time that -- when you were off the  
3 bus helping Ms. Kinkaid and then were just coming back on.

4 A Yes.

5 Q Now, you testified that when you came back on the  
6 bus you didn't look at Harvey. But you've also said that you  
7 were aware that he was there, that you saw him kind of in  
8 your --

9 A Peripheral vision.

10 Q -- peripheral vision. Now that you see these  
11 photographs, Jay, of course you have more information now like  
12 all of us do about what was -- what happened and what was  
13 going on. But when you look at these photographs of Harvey at  
14 the time that you were getting back on the bus, had you looked  
15 directly at him would you have noticed anything particularly  
16 unusual about him?

17 A Maybe not bending over.

18 Q I'm sorry?

19 A Maybe he's not bending over, picking up something or  
20 anything.

21 Q Does it look like he's in distress of any sort at  
22 this point?

23 A No.

24 Q Does it look like he's -- does it look like he's  
25 choking?

1 A No.

2 Q Is he making any kind of panicky gestures, anything  
3 like that --

4 A No.

5 Q -- that would have told you that he's choking at  
6 this point?

7 A No.

8 Q When you look at this picture now it looks like you  
9 said maybe he's napping or trying to pick something up?

10 A That's correct.

11 Q Would that have given you any concern at the time?

12 A No.

13 Q Now in follow up to that, counsel asked you earlier  
14 if you had been trained in what to look for with choking would  
15 you have tried to do something and I think you said yes, and  
16 probably most of us would. Was there anything, though, that  
17 you saw on the video, now you've looked at it, at any point  
18 that would have given you a clue that Harvey Chernikoff was  
19 choking?

20 A No.

21 Q Did he make any, at any time, any kind -- whether he  
22 or at any time any kind of panicky movements?

23 A No.

24 Q Did you ever hear any kind of coughing or gagging or  
25 any of the type of sounds that we've heard about that can be

1 associated with choking?

2 A No.

3 Q Did you ever see him touching his throat or doing  
4 anything like that?

5 A No.

6 Q Either at the time or in looking at the video?

7 A No.

8 Q So after looking at the video now, is there anything  
9 you think you could have or should have recognized as choking  
10 if you had seen this same kind of thing with Harvey Chernikoff  
11 at the time?

12 A No.

13 Q So in that case, would just knowing the symptoms of  
14 choking have helped you at all in assessing what was going on  
15 with him?

16 A No.

17 Q Now, you've told us many times that you did not see  
18 Harvey eating the sandwich on that day. If you would have  
19 seen him, would you have told him to stop?

20 A Yes.

21 Q Was your primary concentration on driving at the  
22 time?

23 A That's correct.

24 Q The jury hasn't really heard where you were in town  
25 as far as this, when all this is going on. Can you explain

1 what the traffic conditions were and kind of, you know, where  
2 you were in town and where you were headed to? Let's start  
3 with like right before -- during the time that maybe Harvey  
4 was eating the sandwich. Do you remember one way or the other  
5 about what your general route was?

6 A My route from, actually from where I pick him up  
7 again after the restroom.

8 Q And where were you then?

9 A We're on Desert Inn.

10 Q Okay.

11 A And we went down Desert Inn and went past two  
12 lights, then we went to the Valley View and Desert Inn going  
13 through the [indiscernible] and that area is traffic. The  
14 time normally would be very traffic and we got to go to some  
15 [indiscernible]. To go to the place where I'm dropping him  
16 off you got to do some maneuvers to it. Like if you miss it  
17 you'll end up with [indiscernible] and go all the way to the  
18 other side of it. So you got to go -- make sure that you  
19 position your bus after that Valley View light to be on the  
20 right side to make the, like an opening to get to the place,  
21 to where I'm dropping him off.

22 Q Like to get to an exit?

23 A Yeah, to an exit to make to the place. You go into  
24 that opening and then you make another left and you continue  
25 on after making a left, there's another stop sign like



1 probably 100 meters away there's another stop sign. And then  
2 after that stop sign you go down 100 meters away and then you  
3 maneuver up to check oncoming traffic and make a left turn to  
4 -- make a left turn to parking lot. And then once you go into  
5 the parking lot you got to -- before I stop I have to make  
6 another right by the door.

7 Q Okay. So this was just a little before 8:00 in the  
8 morning. Is it generally pretty heavy traffic at that time of  
9 day?

10 A That's correct.

11 Q Were you needing to really extra concentrate on your  
12 driving to be sure that there weren't any kind of extra  
13 hazards out there?

14 A That's correct.

15 Q From the video, around the same time that you were  
16 off the bus with Ms. Kinkaid is when Harvey starts to have  
17 something going on. And you heard Dr. Stein testify about  
18 this rubbing his head and this little hand movement. Do you  
19 remember him talking about that?

20 A Yes.

21 Q Now, he interpreted that as signs of distress. Were  
22 you even on the bus to see that?

23 A I'm outside.

24 Q You were helping Ms. Kinkaid. So did you see  
25 anything at all out of the ordinary with Harvey?

1 A No.

2 Q And when you came back on the bus, you said he  
3 appeared to be in the same place, correct?

4 A That's correct.

5 Q Okay. And did you notice anything at all out of the  
6 ordinary with him when you came back on the bus?

7 A No.

8 Q Now, you were off the bus for 25, 30 seconds with  
9 Ms. Kinkaid. Can you just kind of explain to the jury your  
10 perception when you came back on? You said you were aware of  
11 him, you saw him out of your peripheral. Explain what you  
12 mean by that.

13 A When I got into the bus I could tell that he still  
14 there, the certain place. And I'm aware that he's there and  
15 there's nothing out of the ordinary that I have to be  
16 concerned about.

17 Q And you had just --

18 A And then I went on --

19 Q I'm sorry?

20 A And then I went to my --

21 Q You had just helped him with his seatbelt a couple  
22 of minutes earlier when he got back on the bus after going to  
23 the bathroom?

24 A I did.

25 Q And I think you told us that if Harvey needed



1 something or wanted something he generally would tell you.

2 A Yes.

3 Q And you didn't hear anything from him indicating he  
4 had any kind of problem?

5 A That's correct.

6 Q We know that you got in the seat and you drove on  
7 and a few minutes later is when you stopped. Do you feel like  
8 you can watch the video and kind of walk the jury through what  
9 -- I know it's hard for you -- what you were doing at that  
10 particular time?

11 A Sure.

12 Q Would you pull up 8:03:09? Before you do that, can  
13 you just tell the jury after you dropped off Ms. Kinkaid,  
14 where were you going next and what was the traffic like?

15 A The front, when we start moving, I have to make  
16 another left out of the parking space, then make another left  
17 to go to the road and then another, like a few, probably 50  
18 meters away, make another right to go to the [indiscernible]  
19 Road and then I went on all the way straight. It's not that  
20 traffic area once you go in there, but you just have to do  
21 some maneuvers.

22 Q To get out there.

23 A To get out there.

24 Q Okay. What I'm going to be asking you, Jay, is as  
25 we're going through the video what is it that kind of first --

1 as you recall it, what is it that first kind of caught your  
2 attention that there was maybe something you needed to check  
3 on with Harvey?

4 A He wasn't --

5 Q Let's wait until the video gets up so you can show  
6 the jury.

7 (Video played)

8 Q Are you stopped at a stoplight or a stop sign at  
9 this point?

10 A That's correct.

11 (Video played)

12 Q Before you called out to Harvey for the first time,  
13 explain to the jury what you remember about what made you  
14 check on him to begin with? What happened?

15 A He was quiet, wasn't saying anything. When we got  
16 to the stoplight I look and check the mirror. I couldn't see  
17 him. So I was thinking that he must be napping and he must be  
18 on, leaning towards the seat.

19 Q The side wall of the bus you mean?

20 A Yeah, the side wall of the bus. So I, what I did  
21 was I look to the left to see whether there's a sign of him  
22 and I did this and I couldn't see any sign of him. And then I  
23 move to the side, to the other side and looked this way and I  
24 could like, a shadow of him. And then I, after that, I move  
25 forward and then check on the -- and it was going on through

1 my mind like what is he doing when I move up like this.

2 Q Are you looking in the mirror at that point or what  
3 are you looking up for?

4 A Yeah, I was looking at the mirror. And then I  
5 wasn't really sure. I double check it again, kind of like do  
6 that and I saw him like slumped on the floor and then I did  
7 this and I start calling.

8 Q Were you first kind of aware like a shadow or  
9 something, is that what you said when you looked?

10 A Yes, when I did this. Like there's somebody that  
11 you can [indiscernible] even though we cannot figure out what  
12 it was. So that triggers me to check it and then do that to  
13 make sure I see him and I saw him.

14 Q From the time that you got back on the bus and  
15 started driving after dropping off Ms. Kinkaid until you  
16 stopped and started looking, did you ever see Harvey before  
17 that in that time frame? I didn't ask a very good question.  
18 I'm sorry. You got back on the bus and started driving again  
19 after you dropped off Ms. Kinkaid. And until this point when  
20 you stopped and were checking on him, did you ever see Harvey  
21 in between that time?

22 A No.

23 Q Let's go on just a little bit further here.

24 (Video played)

25 Q Is that you touching him there?

1 A Yes. I went to do this.

2 (Video played)

3 Q At this point you're moving over to the side,  
4 correct?

5 A That's correct.

6 Q What was going through your head at this point?

7 A Confused.

8 Q Okay.

9 A I am really confused.

10 Q Did you have any idea what was going on with him?

11 A No, I don't have any idea.

12 Q During the time that you were driving after dropping  
13 off Ms. Kinkaid until you noticed Harvey, were you  
14 concentrating on your driving?

15 A That's correct.

16 Q Were you checking your mirrors periodically as you  
17 were trained to do?

18 A Yes.

19 Q But you didn't see Harvey and I think you told us  
20 you thought he was maybe napping?

21 A Yes.

22 Q Now why is it that you pulled the bus over to the  
23 side of the road?

24 A We're in the middle of the road and I just reacted  
25 to the situation. I just reacted to the situation and I know



1 there are cars behind. It's safety too. I went on to go to  
2 the corner.

3 Q You want to go ahead and start again, please?

4 (Video played)

5 Q We heard a little beep there. Maybe back it up so  
6 they can hear the beep. But what was that beep that we heard?

7 A That's when you call the dispatch.

8 Q Okay. So as soon as you stopped the bus you pushed  
9 the button to call dispatch?

10 A That's correct.

11 Q Did you already know you had some kind of an  
12 emergency that you needed help with?

13 A Yes. Know something's wrong.

14 Q Something's wrong.

15 A Going on, but I'm not sure.

16 Q Did everybody on the jury hear it or should we back  
17 it up so you can hear it again? Let's back it up a little  
18 bit.

19 (Video played)

20 Q At this point, do you have any idea what's going on  
21 with Harvey Chernikoff?

22 A I have no idea.

23 Q Did it even cross your mind that maybe he had  
24 choked?

25 A No.

1 Q Did you -- Dr. Stein testified last week that you  
2 probably should have been able to smell peanut butter. Did  
3 you smell anything at all when you went to check on Harvey?

4 A No.

5 Q Did you even see the lunchbox that was supposedly  
6 open and with wrappers coming out of it?

7 A I wasn't paying attention to that.

8 Q Were you paying attention to Harvey directly at that  
9 point?

10 A Yes.

11 Q Did you ever see any food coming out of his mouth at  
12 any of the time when you were still on the bus?

13 A No.

14 (Video played)

15 Q What is that noise, Jay, that we're hearing?

16 A Calling me back.

17 Q That's dispatch calling you back?

18 A Yes.

19 (Video played)

20 Q Did you not want to let loose of him again?

21 A Yeah.

22 (Video played)

23 Q Jay, when you called dispatch to report an emergency  
24 and asked for 9-1-1 assistance, were you following the  
25 training that you had received with First Transit?



**CERTIFICATION**

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

**AFFIRMATION**

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

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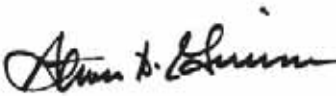
  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

JACK CHERNIKOFF 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

**REPLY BRIEF ON MOTION TO  
ALTER OR AMEND THE JUDGMENT**

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

Nothing in plaintiffs' opposition supports their suggestion that First Transit should be denied the protections of an arm of the state or that prejudgment interest is appropriate.

**I.**

**FIRST TRANSIT IS AN ARM OF THE STATE**

Plaintiffs do not dispute that if First Transit is what the common law calls an "arm of the state," then First Transit is entitled to the \$100,000 cap on

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1 tort damages. As discussed in defendants’ motion, First Transit is an arm of  
2 the state because it fulfilled Nevada’s sovereign function of providing para-  
3 transit services, as required by the Americans with Disabilities Act.

4 **A. This is an Issue of First Impression; Persuasive Cases**  
5 **Treat Entities Like First Transit as Arms of the State**

6 Plaintiffs’ primary argument against treating First Transit as an arm of  
7 the state is that the Nevada Supreme Court has never addressed the issue.  
8 (Opp. 2–3.) Plaintiffs criticize defendants for citing the limited Nevada case  
9 law, then distort the principles in those cases.

10 For example, plaintiffs draw a false comparison to Nevada’s community-  
11 college system, summarizing three paragraphs of the Court’s opinion in *Simon-*  
12 *ian* as requiring “pervasive legislative control.” (Opp. 3:1–2.) But that was not  
13 the test at all. The Court there considered three nonexclusive factors, two of  
14 which favor First Transit, and none of which require “pervasive legislative con-  
15 trol.”<sup>1</sup>

16 As for *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891  
17 (1991) (plurality opinion), and *Filarsky v. Delia*, 132 S Ct. 1657, 1665–66 (2012),  
18 two persuasive decisions that favor First Transit’s position, the best plaintiffs  
19 can muster is to say that this Court is not “bound” by a plurality of the Nevada  
20 Supreme Court or by the U.S. Supreme Court on matters of state law. (Opp.

21 \_\_\_\_\_  
22 <sup>1</sup> Like the community-college system, First Transit is subject to the state’s con-  
23 trol in its paratransit operations, and those operations are an exercise of sover-  
24 eign power under the ADA. Compare to *Simonian v. Univ. & Cmty. Coll. Sys.*,  
25 122 Nev. 187, 194, 128 P.3d 1057, 1062 (2006). The entity’s treatment “as a  
26 state entity within the Nevada Revised Statutes,” *id.*, a factor absent here, is  
27 possibly the least important. While the Legislature’s “clear[]” direction would  
28 presumably be dispositive, see *N. Nev. Ass’n of Injured Workers v. Nev. State*  
*Indus. Sys.*, 107 Nev. 108, 113, 807 P.2d 728, 731 (1991), the *Simonian* Court  
extended immunity to the community-college system that the Legislature “in  
some limited fashion” treated as a state entity, 122 Nev. 187, 194, 128 P.3d  
1057, 1062 (2006). Here the Legislature is simply silent on the issue.

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1 3:3–9.) Plaintiffs offer no alternative analysis, however, so discrediting the au-  
2 thorities that are available is facile but unhelpful.

3 **B. The State Does Not Have to Indemnify**  
4 **Every Arm of the State**

5 Plaintiffs similarly twist the *Gordon* decision, which extended sovereign  
6 immunity to First Transit’s subsidiary in Connecticut. *Gordon v. H.N.S. Mgmt.*  
7 *Co., Inc.*, 861 A.2d 1160, 1174–75 (2004). Plaintiffs seem to think that First  
8 Transit cannot be an arm of the state here because Nevada is not directly liable  
9 for the judgment (Opp. 4:8–10), a fact defendants acknowledged (at Supp. Mot.  
10 5:14–18). But Nevada’s federal courts “reject the argument that financial liabil-  
11 ity of the State is a prerequisite to state agency for the purposes of sovereign  
12 immunity.” *Cane v. Nev. State Bd. of Accountancy*, 3:15-cv-00569-RCJ-WGC,  
13 2016 WL 593563, at \*2 (D. Nev. Feb. 12, 2016). Plaintiffs do not address the  
14 argument that the massive judgment here, by harming First Transit’s ability to  
15 provide paratransit services for the state, interferes with the state’s ADA obli-  
16 gations. (*See generally* Supp. Mot. 5:24–26.)

17 **II.**

18 **PREJUDGMENT INTEREST IS IMPROPER**

19 Plaintiffs do not dispute that the jury was instructed that it could award  
20 damages for future loss of consortium (*see* Instruction No. 22), and that nothing  
21 in the verdict shows that the jury rejected that claim. The law is clear that in  
22 this situation “a trial court cannot award prejudgment interest.” *Shuette v.*  
23 *Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549-50 (2005).  
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**CONCLUSION**

Defendants' motion to amend the judgment should be granted to apply the statutory damages cap and vacate the award of prejudgment interest for loss of consortium.

Dated this 26th day of July, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/Abraham G. Smith

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CERTIFICATE OF SERVICE

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I certify that on July 26, 2016, I served the foregoing "Reply Brief on Motion to Alter or Amend the Judgment" through the Court's electronic filing system and by courtesy e-mail to the following counsel:

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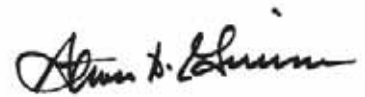
/s/ Abraham G. Smith  
An Employee of Lewis Roca Rothgerber Christie LLP

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CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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JACK CHERNIKOFF, ET AL.,

9

Plaintiffs,

CASE NO. A-13-682726-C

10

vs.

DEPT. XXIII

11

12

FIRST TRANSIT INC., ET AL.,

13

Defendants.

14

BEFORE THE HONORABLE STEFANY MILEY, DISTRICT COURT JUDGE

15

TUESDAY, AUGUST 16, 2016

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**TRANSCRIPT OF PROCEEDINGS**

18

**DEFENDANT JAY FARRALES' MOTION FOR COSTS AND ATTORNEY'S FEES**

19

**DEFENDANTS' MOTION FOR NEW TRIAL (AND MOTION FOR LEAVE TO  
SUPPLEMENT)**

20

**DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT**

21

APPEARANCES:

22

For the Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.

23

For the Defendants:

LEANN SANDERS, ESQ.

24

DANIEL F. POLSENBERG, ESQ.

25

RECORDED BY: MARIA GARIBAY, COURT RECORDER

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1 Tuesday, August 16, 2016 at 10:00 a.m.

2  
3 THE MARSHAL: All right. Page 7, A682726, Jack Chernikoff versus First  
4 Transit.

5 THE COURT: Hi, good morning everybody.

6 MR. POLSENBERG: Good morning, Your Honor.

7 MS. SANDERS: Good morning, Your Honor.

8 MR. CLOWARD: Good morning, Your Honor.

9 THE COURT: All right, so let's just start with an issue that we left off at the  
10 last hearing, and I indicated to everyone that I wanted to do more research on the  
11 issue of what is a prevailing party especially in light of the -- the *MB America versus*  
12 *Alaska Pacific Leasing*. And I did go back and actually pulled the briefs that went up  
13 to the Supreme Court and also pulled the order from the other district court judge in  
14 *Washo* (phonetic) and I think there's an important distinction to be made.

15 A lot of the discussion had been that historically when there was an  
16 award of fees under 18.010 subsection 2(a) there was language and it's contained in  
17 *Smith versus Crown Financial Services of America* which is 111 Nevada 277, a  
18 1995 case, and it's contained in some other cases as well wherein the Supreme  
19 Court held that the recovery of a money judgment is a prerequisite to an award of  
20 attorney's fees pursuant to NRS 18.010 subsection 2(a) and that would be the -- the  
21 section which is at issue in this particular case.

22 I had concerns at the last hearing of whether there had been an  
23 evolution of an award of attorney's fees to allow it in situations where there's  
24 perhaps an argument of prevailing party without a -- a likewise award of money  
25 damages. When I looked at the briefs and everything from the *MB America versus*

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1 *Alaska Pacific* case, it dealt with a different section. It dealt with NRS 18.010  
2 subsection 1. And I think that's pretty clear when you look at the order that the  
3 appeal arose from and then the briefs that ultimately went up to the Supreme Court.

4 So with that being said, I don't find that the defendant is a prevailing  
5 party. Again, there was no award of money damages, but also when you look at the  
6 verdict form, even though they did not award any damages against Jay Farrales,  
7 they nonetheless found that him -- he was negligent and that he was the cause of --  
8 they found negligence and causation against him. And my guess is the reason they  
9 did not award attorney -- I'm sorry, damages to Farrales was because of the jury  
10 instruction with vicarious liability. But regardless of what the jury was intending, I -- I  
11 don't think that he's a prevailing party for those two reasons and I was not going to  
12 award attorney's fees finding that he is not a prevailing party. Okay? So that would  
13 be denied.

14 With that being said, we do have a lot of other issues on for today and I  
15 don't know exactly where you want to start. You want to start with the motion to  
16 alter or amend the judgment or the motion for new trial?

17 MR. POLSENBERG: Court's prerogative, Your Honor.

18 THE COURT: Oh heck, let's just start for -- with the motion for new trial.

19 MR. POLSENBERG: Very good. And the Court is right. There are a number  
20 of issues presented by this, but I think it's clear from the briefs that I think that there  
21 is one issue that -- that's overwhelming and presents an issue of law, and that is the  
22 exclusion of the plaintiffs' decedent from the allocation by the jury, and the argument  
23 made at the -- at the -- at the time of trial was well under *Banks* (phonetic) you can't  
24 have a nonparty on the allocation because 41.141 in it -- since it's 1987 amendment  
25 says that the jury allocates all the parties remaining at trial.

1 But that misses the 1979 amendment. 1979 subsection 1 was  
2 amended the same time the legislature passed the wrongful death act. And the  
3 wrongful death act allowed heirs and -- and estates to recover -- heirs would recover  
4 their own damages, the estate would ultimately as it applies in this case recover only  
5 medical expenses, funeral cost, penalties and late -- even later punitive damages.

6 So essentially and as we've pointed out, this -- this is like a -- there --  
7 there are two types of wrongful death acts. There's the Lord Campbell Act and then  
8 there's the survival type of action. A survival type of action means you only get  
9 those things that decedent -- the decedent would have been entitled to before he  
10 died. The Lord Campbell Act suddenly creates a cause of action in the heirs. And  
11 this is all a creature of statute. The heirs can recover their own grief and sorrow.  
12 They can recover their loss of probable support in the future, they can -- and in the  
13 past, they can recover in Nevada also the decedent's conscious pain and suffering.  
14 So we almost have like a combination of a survival act and a Lord Campbell Act. So  
15 really the heirs have the claim for the wrongful death action.

16 Note, and I'm going to come back to it later, this isn't a cause of action  
17 for the loss of the decedent's life. The jury doesn't value what that life was worth.  
18 The statute clearly sets out the elements of damage and there aren't any more than  
19 that.

20 And when the Nevada legislature in '79 created the wrongful death act,  
21 they also amended 41.141, because it used to say in an action for damages for  
22 injury to a person, the jury has to consider the comparative fault of the plaintiff.  
23 Actually way back then it was the contributory fault. And in '79 they amended that to  
24 add the language is, an action to recover damages for death or injury; that the jury  
25 has to consider the comparative fault of the plaintiff or his decedent. And that



1 makes sense.

2           It's -- it's silly to think that the estate has to be the party in here if you're  
3 going to allocate fault to the decedent, because the estate's recovery is really  
4 minimal. The -- the bulk of the recovery under Nevada's wrongful death action is --  
5 is by the heirs themselves. And so how do you allocate the fault of the -- of the  
6 decedent through whom vicariously the heirs bring the action? Well you would  
7 figure out -- just as the statute says, you allocate fault in the heirs' claim. And this  
8 makes sense.

9           Let -- let's say you had a husband and a wife and -- and a -- and a  
10 husband was injured but he was primarily at fault in his own injury and if the wife  
11 only brought -- now the wife has a vicarious claim just like heirs do and the wife  
12 brings a claim for loss of consortium, but the husband doesn't bring a claim in the  
13 hypothetical we have in the briefs because he was drunk when he was driving and  
14 injured himself and he's theoretically 99 percent at fault. Could the wife then, if  
15 she's the only one who sues, come in and say to the jury or say to the court that the  
16 jury can't allocate fault of the husband because the husband isn't a party? That  
17 wouldn't make any sense.

18           So when somebody's recovering vicariously -- I say the reasonable rule  
19 is when the -- when the -- somebody is recovering vicariously through somebody  
20 else, that person's fault has to be allocated to the plaintiff who's recovering. But I  
21 don't need to have my hifalutin theoretical argument because the statute actually  
22 sets out that that's the way we're supposed to do things.

23           Now, *Banks* is a different case. *Banks* sets out -- and *Banks* is not  
24 unusual. *Banks* set out that if you -- you -- jury cannot allocate fault of a nonparty.  
25 Well that's not the first Nevada case to say that. *Warmbrodt versus Blanchard*,

1 W-a-r-m-b-r-o-d-t versus Blanchard is -- is a case early on where -- where the --  
2 there was a case where somebody sued accountants and lawyers and some of the  
3 defendants got out on summary judgment and some of them were still in trial and  
4 the jury allocated fault to the parties who were out and the parties who were in and  
5 the Supreme Court said -- I think it would have been easier -- Supreme Court could  
6 have just said look, those parties already had judgment entered in their favor, they're  
7 not liable as a matter of law, you can't allocate fault to them, but instead the court  
8 said no, under our statute you can only allocate fault among parties remaining in the  
9 trial.

10 That's a different situation. When you have distinct dissimilar parties,  
11 you can't just stick them on the verdict form. And -- and so *Warmbrodt versus*  
12 *Blanchard* doesn't apply, *Banks* doesn't apply. I understand the general principle,  
13 but I don't think the general principle applies here, especially when there's concrete  
14 language in the statute that says otherwise.

15 And if you look at the legislative history from 1987, it's pretty clear why  
16 this language was put in. It was almost an afterthought. I don't think this was '87  
17 amendment, it was an earlier amendment. But when this language was put in, it  
18 was clear what -- what the -- the advocates of this amendment wanted. They  
19 wanted a situation where almost every state -- let me interrupt myself. Almost every  
20 state in the country allows you to allocate fault to nonparties --

21 THE COURT: I need to ask you a question --

22 MR. POLSENBERG: Yes, Your Honor.

23 THE COURT: -- on that line. Since you've obviously read the transcript,  
24 you're going to see -- you've seen that there was a -- a lengthy discussion about the  
25 issue of comparative fault.



1 MR. POLSENBERG: Right.

2 THE COURT: And it was recognized by both parties that it was going to be  
3 on the verdict form somewhere. This was kind of a -- a little bit different than most  
4 cases because I know that you cited a lot of law saying that a -- a mentally deficient  
5 individual -- you know, that does not bar an individual from -- a jury from looking at  
6 his comparative fault.

7 The question in this case was -- and it was actually the defense who  
8 brought this up. Plaintiffs' position was hey, you know, we don't think you should  
9 consider the comparative fault of the parents and we don't think you could -- should  
10 consider it of the decedent because he had these -- the low IQ and he had a lot of  
11 mental deficiencies. And basically it was the defense who said no, you can't have it  
12 both ways.

13 And they were kind of competing schools of thought. I mean there was  
14 two arguments. Either Harvey had -- and this was brought out by the defense too,  
15 either Harvey was -- his comparative fault should be considered because Harvey  
16 had the whereforal (sic) to see the signs on the bus, to modify his behavior  
17 accordingly and failed to do so and there's an argument of comparative then, or the  
18 other -- the other school of thought that was considered was Harvey was -- and this  
19 was also argued by the defense in the alternative was Harvey was so deficient he  
20 didn't understand the signs, he was approved for a caregiver, his parents knew he  
21 was approved for the caregiver at no expense and they were deficient, they were  
22 comparatively at fault because they didn't insist on Harvey having a caregiver  
23 because they knew he didn't understand the signs, they knew he did not know the  
24 appropriate behavior on the bus, and they were competing so there was definitely  
25 extensive discussion about comparative fault, it was not just simply overlooked.

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1           And I think there's a little bit too much emphasis placed on the *Banks*  
2 case because that really came up at the end of all the discussion. It was okay, so  
3 we made a determination it's really the parents' fault we think is the -- the issue in  
4 this case because I think there was kind of an agreement at that point that Harvey's  
5 mental functioning was pretty deficient, okay? And then it was brought up by both  
6 counsel and Mr. Alverson agreed of do we still have Harvey on the verdict form?  
7 And it was Mr. Alverson who agreed that under the controlling case law -- *Banks*  
8 was just one of many -- was one of the cases that was cited -- that he -- they  
9 shouldn't both be on the verdict form. I mean so --

10           MR. POLSENBERG: Well --

11           THE COURT: -- it's not like comparative was completely overlooked in this  
12 case. There was --

13           MR. POLSENBERG: Right.

14           THE COURT: -- this kind of strategic decision on both sides about whose  
15 comparative should be considered. Because the other issue you have to consider is  
16 not only is there an argument about -- I mean if Harvey was a grown man, an adult  
17 who was capable of making his own decisions, then his name should have been on  
18 the verdict and I think that was clearly articulated in the -- the transcript.

19           So I'm -- I guess my -- let me --

20           MR. POLSENBERG: Yeah, here's what -- here's what I got --

21           THE COURT: -- ask you --

22           MR. POLSENBERG: -- from the transcript --

23           THE COURT: And maybe let me ask you and I guess I --

24           MR. POLSENBERG: All right.

25           THE COURT: -- I didn't ask my question clear enough. My question is are



1 you saying that both Harvey and the parents' comparative fault should be put on the  
2 verdict form or are you saying that instead of putting the parents' comparative fault  
3 on the verdict form, it should have instead been Harvey's?

4 MR. POLSENBERG: I'm saying both. I think that both needed to be on there  
5 and under the circumstances of this case, it would have made sense for both to be  
6 on. It's clear from the transcript that both sides were saying the other side can't  
7 have it both ways. I think in this circumstance it -- it could be both ways just for the  
8 reasons that you articulated.

9 There are some factors here that would say okay, the parents had  
10 control over this issue so the parents would have had their own element of  
11 comparative fault, but that's really unusual. That -- that's an unusual circumstance  
12 when -- when the heirs are able to, for lack of a better word, commit comparative  
13 fault. It's clearly -- I mean the only issue presented here is whether for -- in the  
14 motion for new trial is whether Harvey should have been on there and I think Harvey  
15 definitely had to be on there because the statute requires him to be on there and he  
16 is capable of comparative fault.

17 Now what the standard would be, there's a lot of briefing where we're  
18 going back and forth saying should it be the standard of the ordinary reasonable  
19 person, should it be some exceptional standard. You know, Nevada's got rid of the  
20 rules of seven which is a child under the age of seven is presumed not to be  
21 capable of negligence. From seven to 14 it's a jury question, from 14 to 21 it's -- a  
22 child is presumed to be capable of negligence and over that is capable of  
23 negligence.

24 We got rid of all that and just you look at the circumstances. I think the  
25 jury needed to look at the circumstances. Harvey had the mental capacity of an



1 eight year old. Let's assume that to be true. That would still allow the jury to decide  
2 whether he was comparatively at fault. And his -- the acts that were done that would  
3 have made him comparatively negligent are different from and would have resulted  
4 in different things from -- from the parents.

5 So, you know, being a lawyer you're going to ask me should it be one or  
6 the other. I'm going to say what the lawyer said in the transcript in their original  
7 positions and in their final positions it should be both.

8 While Mr. Alverson on page 162 of the transcript said I think that may  
9 be right, Ms. Sanders on page 163 and 164 of the transcript went on at greater  
10 length and explained how Harvey needed to be on the transcript -- or needed to be  
11 on the verdict form. And I think that's the only issue that I'm presenting here --

12 THE COURT: Okay.

13 MR. POLSENBERG: -- is that Harvey needed to be on that.

14 If I -- I think it would have been a different call if you'd put Harvey on  
15 and not put the parents on. But I think Harvey had to be on no matter what. And I  
16 concentrated on *Banks* because it looked like that was their argument, plaintiffs'  
17 argument why he couldn't be on there and -- and he repeats that argument and --  
18 and -- and so I -- I think if we try this case over again, we have a debate over what --  
19 how we instruct the jury about what the standard is for judging Harvey's conduct.  
20 But that doesn't mean -- as we say twice in our brief, that doesn't mean the jury  
21 doesn't decide the issue at all. The fact that there's an -- a debate -- an issue the  
22 jury has to decide over is mental capacity doesn't take it out of comparative  
23 negligence entirely.

24 So I -- I think he had to be on. The finer question is if he is on, are the  
25 parents also on. I think they are, but that's not the appealable issue that we're

1 presenting right now. It's just whether he needed to be on there.

2 THE COURT: Okay.

3 MR. POLSENBERG: I -- I think this -- I think this is clearly a prejudicial issue.  
4 This is an issue where the jury could have decided not only a percentage to Harvey  
5 that would have reduced the damages, the jury could have decided that he was  
6 more than 50 percent at fault, which would have affected the recovery entirely.

7 I -- we also think that there are -- that the -- the jury instructions were --  
8 if we decide the -- the verdict issue, we don't need to go any further. But if -- if you --  
9 if we don't decide that -- if you don't decide that my way, then let me address the  
10 other issues as well.

11 I've had a couple of common carrier cases before and -- and it -- it's  
12 important to understand where a common carrier's duty falls in. The problem with  
13 these jury instructions is that the jury's instructed that a common carrier owes the  
14 highest degree of care and I -- that's -- that's a problem because what -- where the  
15 higher degree of care really applies has to do with the aspect of the passenger  
16 himself where -- where the special relationship comes in, there two aspects to it.

17 One of them would be that we have a duty of care where normally we  
18 wouldn't have a duty of care. We see that in *Lee versus GNLV* where there it's a  
19 restaurant and I suppose a restaurant falls under the innkeeper standard and there's  
20 at least that special relationship the Nevada Supreme Court said and what that  
21 means is you have a duty to render care where you wouldn't otherwise have a duty  
22 to render care. There is not a general good Samaritan duty to render care to people  
23 absent -- absent a statute because I know there's a statute in one state. And the  
24 good Samaritan statute here does not impose an obligation to render care.

25 So there's a duty to render care in a special relationship, but the



1 Nevada Supreme Court was clear in *Lee versus GNLV* that that doesn't really  
2 amount to a higher degree of care as opposed to imposing a duty where there isn't  
3 care. So if somebody -- if the restaurant knows that there's somebody who is ill at  
4 the restaurant, they have a duty to render care. Supreme Court never said there's a  
5 duty to monitor patrons to see if they're ill and the Supreme Court expressly rejected  
6 the idea that there's a legal duty to administer the Heimlich maneuver.

7 So the way this jury instruction given to the jury misleads the jury is that  
8 they think that -- that common carriers have this incredible duty to do things for  
9 passengers; that they have a duty that we've compared to strict liability that if  
10 somebody is hurt and we aren't able to care for him that duty is imposed. And we  
11 see this in the closing argument where Mr. Cloward comes in and says that this is  
12 the Derek Jeter of -- of duties and that ordinary care is -- is pee wee baseball.

13 Now, in their opposition they say our argument is that Mr. Cloward  
14 abused the jury instruction. Let me address that in two ways. I don't think he  
15 abused the jury instruction. I think the jury instruction set up this argument and  
16 that's why the jury instruction is legal error because it -- it gave him the opportunity  
17 to argue what the jury instruction said that there is this higher duty that doesn't --  
18 that there's a duty to perform things that -- that it isn't there.

19 But even if it was an abuse of the jury instructions, even if it does fall  
20 under *Lioce versus Cohen*, I think I meet the plain error standard because this --  
21 they were able to argue a duty that doesn't exist and that's how the jury imposed  
22 liability.

23 I also object to instruction number 34 because --

24 THE COURT: Hold on. I got -- I have a question.

25 MR. POLSENBERG: Yes, please.

1 THE COURT: I need some clarification on your position. Okay, so in the  
2 position in your brief, I understand that you disagree with the Court's determination  
3 that a common carrier instruction would even be appropriate --

4 MR. POLSENBERG: Right.

5 THE COURT: -- but a lot of the argument is now focused on the language  
6 that was contained in the -- the jury instruction that was -- that was given and that  
7 was actually a jury instruction that was proffered by the defense --

8 MR. POLSENBERG: Proposed by the defense.

9 THE COURT: -- because they felt that the plaintiffs' proposed instruction was  
10 not within the law. Okay?

11 MR. POLSENBERG: Right.

12 THE COURT: So I need a little more clarification on your -- I get it you -- you  
13 think that it -- so you're -- you're arguing that there was no duty and that thus the  
14 common carrier --

15 MR. POLSENBERG: Right.

16 THE COURT: -- jury instruction should never have been given, but I don't  
17 really understand your argument with respect to even though you don't agree with  
18 that, the language of the instruction itself -- I mean it seems like you're arguing that  
19 the language of the instruction itself was not consistent with Nevada law, but that  
20 was a jury instruction proffered by the defense.

21 MR. POLSENBERG: Well the jury instruction that we proposed was better  
22 than the jury instruction that they proposed and -- and the Court ruled that way.

23 THE COURT: I -- I get that, but I need to understand your position better.

24 MR. POLSENBERG: Well, here's -- I -- this -- part of my -- part of my job is  
25 doing jury instructions. I sometimes do jury instructions in cases where I don't even



1 do anything else in the trial. And so I've been in many situations where I've objected  
2 to a theory going to the jury and -- and yet I -- losing that issue, I will object to their  
3 language and propose alternative language. So I can propose alternative language  
4 -- because honestly my -- my -- my first objective is to win the trial. If we win the  
5 trial, there isn't even a -- an appeal.

6 THE COURT: I think that's everyone's objective, yeah.

7 MR. POLSENBERG: Right. I mean it's -- and I always say my job is to put  
8 myself out of a job. Nobody wants an appeal. So if we propose better language  
9 and creates a -- ironically creates a smaller appellate issue, smaller in the sense of  
10 more focused, that's a better thing.

11 THE COURT: Okay, so I just want to make sure I'm clear. You're not  
12 objecting to the jury instruction itself being an incorrect recitation Nevada law, you're  
13 objecting simply to the fact that one was given at all.

14 MR. POLSENBERG: I am -- kind of both. Here's why. The -- their language  
15 was even worse. I mean, you know, Judge Gonzalez likes to tell the story about I  
16 show up with five alternative jury instructions on every issue and -- and I'll -- I'll say  
17 well if you won't give me that one, give me this one. I think this was a -- a better  
18 alternative to theirs. I still don't think it should be given.

19 THE COURT: Okay.

20 MR. POLSENBERG: And that I think ties into Rule -- or excuse me, jury  
21 instruction 34 as well where -- and it ties into the ADA issue. It's our obligation --  
22 and I think you were just touching on this. Our obligation as a common carrier only  
23 applies to aspects of them as a passenger, not a general duty of care.

24 Now I -- I think under the -- certainly under the ADA that is true. I think  
25 there may be exceptions for a common carrier when it has to do with things like



1 keeping bad people off the bus or a bad person on the bus that you have to expel.  
2 There -- there are probably duties that apply there as a common carrier, but that's  
3 irrelevant here. So we're only looking at the -- the aspects as a passenger so I don't  
4 think -- I don't think a jury instruction should have been given at all which is my  
5 argument for jury instruction 32. My argument for 34 is that the special  
6 responsibilities under the ADA, this misstates what those responsibilities are.

7 I also argue that the \$15 million is excessive and demonstrates passion  
8 and prejudice and that's one of the classic grounds for a new trial and it's set out in  
9 Rule 59(a). And there are a number of reasons that -- that I think we -- it's -- they --  
10 they point out -- plaintiffs point out the -- the case law that says it's so hard to figure  
11 out what's an excessive verdict and it's got to be one that shocks the judicial  
12 conscience, but -- but I think there are also some telltale signs of an excessive  
13 verdict.

14 You look at this verdict, it's -- it's a big round number. It's a number  
15 close -- just about what they asked for. It's a number that they indoctrinated the jury  
16 into and we have *Khoury versus Seastrand* that just came out that -- that touches  
17 upon this point and then moves on. It's -- it's a number that's divided out equally  
18 which shows very little thought on the part of the jury. The jury was only out for 30  
19 minutes as I understand it. The -- the 7.5 million for conscious pain and suffering is  
20 just exorbitant under the circumstances.

21 Now we may debate a little what Harvey experienced, but from the time  
22 the driver should have acted to the time that it was too late was a very short period  
23 of time. It -- it seems to me -- and I'm being an advocate here. It seems to me  
24 unlikely that there was any pain and suffering during that period, but we have to  
25 draw inferences in favor of plaintiff. It was still a very short period of time. We're

1 only looking at what Harvey would have experienced for that short period of time  
2 and \$7.5 million is just too much. It's higher than any amount I've -- I've ever seen.

3 I -- I had a case last year, year before where a helicopter out to Hoover  
4 Dam, it -- it -- it crashed and it -- it took a -- a minute to go down and I mean even I,  
5 a defense lawyer at the trial, admitted I mean that was a terrifying minute where all  
6 those passengers knew that they were going to die during that entire time period. I  
7 don't think this circumstance matches that circumstance and this is far in excess of  
8 that recovery and it can only be explained through -- through passion and prejudice.

9 I think the other half, the other seven and a half million to the parents is  
10 also excessive. It is -- they're in their seventies. Harvey's in his fifties. All we're  
11 looking at is the -- the balance of their life. They -- they don't -- they have I won't say  
12 a distant relationship but they don't live together all the time.

13 Seven and a half million during that time period seems to be way in  
14 excess -- seems to be reverse engineered. They wanted to get to 15 million and  
15 they just dumped seven and a half into here. And it's even more excessive when  
16 you look at their argument on prejudgment interest where they're saying no, the  
17 entire award for grief, sorrow, loss of consortium, care and companionship was in  
18 the past. So we're looking at -- the jury awarded a million dollars a year in loss of  
19 consortium and that's just excessive.

20 And there are other indicia of passion and prejudice. And I heard you  
21 speak earlier about the -- the -- the jury's allocation of fault. I think that shows  
22 passion and prejudice in the jury. I -- I think just like the jury said okay, boom, 15  
23 million just like they asked for that they said that we promised to give, boom we'll  
24 just split it out half and half, and then get to the verdict allocation form and they don't  
25 give any to the jury -- to the driver. That just doesn't make sense.



1 Now I know that Mr. Cloward is arguing well there's this one jury  
2 instruction that says any -- any liability of the driver will be the responsibility of the  
3 employer. But that -- that's -- that jury instruction is to prevent this. That jury  
4 instruction is to say to the jury don't worry about what amount you allocate to the  
5 driver because he's not going to have to pay for it. The employer is going to have to  
6 pay for it. That should have kept the jury from worrying about giving zero percent to  
7 the driver so he won't have any personal responsibility. And in despite that, despite  
8 something that should have taken their emotions down several notches, they still  
9 give zero percent to the driver and that doesn't make any sense. Even with an  
10 instruction that -- that's designed to let them be more thoughtful, their verdict actually  
11 winds up being less thoughtful.

12 And -- and I also -- if you -- if the jury doesn't have Harvey there on the  
13 verdict form, it would make sense that they would allocate something to the parents,  
14 even if some small amount. But the fact that they give zero to the parents, that they  
15 give zero to the driver, I mean this is -- and they're out for 30 minutes and they come  
16 out with this huge number, this is just a -- a jury impassioned and inflamed.

17 We give the same argument basically for -- for the -- the jury not having  
18 followed the jury instructions. And -- and one of the things that we can see that  
19 could have caused the passion and the prejudice are the -- the trial conduct. We --  
20 we've -- we've got the -- we've -- we've got several things going here. We've got  
21 plaintiffs' counsel arguing that this is the jury valuing Harvey's life. And that's not  
22 what the jury instructions say and that's not what the wrongful death statute says.  
23 This isn't a way to value or validate Harvey's life. This is just a way to allocate  
24 numbers that would go to the statutorily allowed elements of damage. You --

25 THE COURT: One of the problems is there was no contemporaneous

1 objection which did not give the Court the chance to correct the situation and as  
2 you're aware, it's going to affect the standard on review.

3 MR. POLSENBERG: I -- I -- I realize what *Lioce* talks about and the -- the two  
4 aspects to that I -- I think we can arguing for plain error under the circumstances  
5 because the jury awarded such a large amount of money and the only way to  
6 explain the large amount of money is that these arguments impassioned the jury.

7 And my other argument is the backwards of that which gives me a  
8 different standard of review. You don't need to find plain error to find excessive  
9 damages as a result of passion and prejudice under Rule 59(a) if you just say look,  
10 these numbers are too high. And I can -- and they appear to be the result of  
11 passion and prejudice and the source of that passion and prejudice are these  
12 arguments.

13 I don't need to meet the -- the *Lioce* standard. I don't need to say that  
14 it's plain error. All I need to say is that it's -- it's the source of passion and prejudice  
15 and excessive damages and I -- I think that especially applies when we're looking at  
16 the punishment aspects of their closing argument. They're coming in here and  
17 saying the reptile theory. They're saying look here -- here's this company that  
18 doesn't even take responsibility for what happened. They should have come here  
19 and said I'm sorry, how much do we owe.

20 Well no, there's no obligation for a defendant to admit liability.  
21 Defendants are allowed to contest liability, especially in a case like this where  
22 honestly it's more than a debatable point. This seems to be a case that -- that many  
23 juror -- juries would find for the defendant. But to come in here and say how dare  
24 they not value his life, how dare they disrespect his life, how dare they even  
25 exercise their right to defend, there -- that is a current theme that plaintiff's lawyers



1 around the country use; the responsibility, the reptile theory, saying these  
2 defendants they shouldn't be doing this.

3 Now do I have a legal objection to -- to -- to these arguments? Not all  
4 of them, no. I don't. I mean I think they're improper, but I don't know any judge that  
5 agrees with me. But you can see what happens when people use this, they get  
6 juries wanting to validate the plaintiffs and wanting to punish the defendants simply  
7 for defending, simply for not accepting responsibility. That is clearly a 59(a) issue  
8 instead of just a *Lioce* issue.

9 And same with the sympathy arguments. And -- and because of all  
10 those reasons, Judge, I think you should order a new trial.

11 THE COURT: Thank you.

12 MR. POLSENBERG: Thank you, Your Honor.

13 THE COURT: Mr. Cloward?

14 MR. CLOWARD: Your Honor, if I may, I kind of might just go in reverse --  
15 reverse order.

16 THE COURT: Okay.

17 MR. CLOWARD: You know, when I was a young lawyer I was taught that  
18 sometimes you can make arguments, but just because you can make an argument  
19 doesn't mean that you should. And -- and in this case there were a lot of arguments  
20 that First Transit made that quite frankly they shouldn't have -- they shouldn't have  
21 made. It wasn't hey I'm coming in here and trying to pound First Transit over the  
22 head for not taking responsibility. It was their defenses. I mean if you recall the  
23 very last thing in closing argument that was said to the jurors by First Transit through  
24 their attorney was we have no obligation to even watch our passengers. That wasn't  
25 -- that wasn't anything that I was saying. I got up in my rebuttal and said I mean



1 yeah -- I mean are -- is this really the -- the position? Like you don't even have to  
2 watch your -- watch your passengers?

3 And so to suggest that, you know, this reptile -- you know, I don't know  
4 what reptile has anything to do with it. I haven't attended a reptile seminar for four  
5 years. So I don't know what that has to do with anything. I don't personally  
6 subscribe to that theory. You know, others may. I don't. I believe in presenting  
7 arguments that should be presented.

8 And some of the defenses that were made quite simply were not -- they  
9 shouldn't have been made. I mean you have clear video evidence of a man choking  
10 to death, yet your entire case and your entire defense is that he had a heart attack?  
11 That was the defense that -- that was put on. So any claim of -- of, you know, not  
12 wanting to take responsibility, I'm just pointing out their defense. I'm simply pointing  
13 out to the jurors this -- these are the defenses that they're presenting.

14 The trial conduct. You know, Mr. Polsenberg, I have a great deal of  
15 respect for him and this is the second case we've had together and every time my  
16 trial conduct is put into question. I felt like the case was a very clean trial as  
17 evidenced by the lack of objections that were made by both -- by both parties. I  
18 mean there really were not a lot of objections from start to finish and I felt like it was  
19 a very clean, very pure case. So I don't think that's a legitimate argument.

20 One thing that Mr. Polsenberg -- First Transit just said was, you know,  
21 there's this helicopter case and in this helicopter case it was terrifying for one minute  
22 to know that you're going to die. Well, obviously, I mean it's debatable whether or  
23 not Harvey actually knew due to his reduced cognitive ability, but to know that he --  
24 he's slumping over in the aisle. There's somebody that's three feet away that is  
25 doing absolutely nothing to help him. I would imagine that that would be terrifying,

1 just like somebody coming down in a helicopter.

2 I don't think that 7.5 is outrageous for what he went through. In fact,  
3 their own expert -- if you recall Dr. MacQuarrie when he took the stand -- remember  
4 their position the entire time was that he died of a heart attack. They never  
5 acknowledged once that he choked. It was always it was a heart attack, heart  
6 attack, heart attack. But if you recall when Dr. MacQuarrie took the stand, his  
7 animations to the jurors about what it would be like if somebody was choking -- he  
8 basically said that choking is the most -- the -- the most outrageous way to die, that  
9 nobody ever wants to die from choking, and he's on the stand and he's grabbing his  
10 neck and he's jumping around in the jury box over and over and over suggesting to  
11 these jurors that choking is the absolute worst way to die but we know that Harvey  
12 didn't choke to death because he didn't jump around. That's how we know that this  
13 was a heart attack. That was the position that they took. Their own expert said it  
14 was the most severe way to die.

15 The verdict allocation regarding Jay Farrales, if -- if Your Honor recalls,  
16 I only suggested to the jurors that Mr. Farrales be awarded one percent. That was --  
17 that was my suggestion that all of the facts, all of the evidence -- ultimately it was  
18 First Transit's responsibility to train Jay Farrales and so if he is at fault, it's minimal.  
19 I only suggested one percent so for a juror -- for the jurors to -- to have awarded  
20 zero, I don't think that that's inconsistent, because they could very well have said  
21 hey, we think that he violated this rule or he violated that rule; Mr. Farrales, you  
22 should have done this or should have done that, but ultimately it falls on First Transit  
23 for not training him properly, for not requiring him to do certain things, for not  
24 following up. We had a negligent training component.

25 Moving along. There's this -- there's this entire argument and there was



1 this entire argument at the time that jury instructions were settled that we're not  
2 required to do the Heimlich maneuver. We did not propose a jury instruction saying  
3 that First Transit was required to do the Heimlich maneuver. From the moment that  
4 I signed up the case I knew that First Transit was not required to do the Heimlich  
5 maneuver. That's why our entire case -- the centerpiece of our case was what was  
6 First Transit required to do based on a multitude of factors; based on the contract  
7 between First Transit and RTC, based on the ADA regulations, based on the union  
8 contract, based on industry standards and based on their own policies and  
9 procedures.

10           And as the Court recalled, the evidence that the Chernikoffs presented  
11 was that First Transit failed in all of those areas. In every single area they failed.  
12 They failed to supervise, they failed to train, they failed to -- their driver failed to  
13 adhere to their own policies and procedures. I mean I believe that there were over  
14 100 violations of their own policies before the choking event even came into play. I  
15 mean the choking event was essentially the result of all of these failures that  
16 happened on the front end. I mean there were significant failures on the front end  
17 and then the choking event was just one other -- you know, it was -- it was another  
18 event.

19           Finally, Your Honor, regarding defendants' negligence, I -- I want to -- I  
20 think I've learned something in this -- in this case and what I learned was we -- we  
21 bought into their kind of -- the motion for new trial and our brief was really on the --  
22 on all of these issues regarding, you know, *Banks* and not having them on the -- the  
23 verdict form and -- and all of these different things, but in reality this case is really  
24 easy and it boils down to one thing and one thing only. What was the evidence of  
25 Harvey's negligence? What was the evidence of Harvey's negligence and whether

1 or not a jury instruction would even have been appropriate to begin with, even a  
2 reasonable person standard or a standard for someone with reduced capacity. It  
3 was not appropriate in any circumstance.

4           The reason that it wasn't appropriate is in jury -- or in jury instructions  
5 Ms. Sanders argued and I'm going to quote here: It's two independent acts of  
6 negligence. He was eating a sandwich in violation of the rule and the parents didn't  
7 warn him about it; tell him the rules. Tell him what he needed to do as far as riding  
8 the bus. They didn't provide a PCA.

9           So at the end of the day the only negligence that First Transit proffered  
10 was that Harvey ate a sandwich in violation of RTC slash First Transit's rule, but  
11 when you go a little bit further, that's just the argument that was advanced. When  
12 you actually look at the facts and the evidence that was developed, keep in mind,  
13 Your Honor, their entire defense was based on him having a heart attack. That was  
14 the evidence that was presented by First Transit was he didn't choke.

15           Well if your entire case is geared to presenting evidence that this man  
16 had a heart attack, how can you then argue for a jury instruction of comparative  
17 negligence, because certainly he wouldn't have been negligent for having a heart  
18 attack. But that argument would be what you're base -- I mean you're basing your  
19 evidence or your -- your jury instruction -- request for a jury instruction on that  
20 evidence because you spent the entire trial focused on him having a heart attack.  
21 You wouldn't even concede that he choked. You wouldn't even concede that he  
22 choked. In fact, you have your expert come up here with a bolus of food and talk to  
23 them about the bolus of food and then go through all of his medical records to show  
24 that he has, you know, this significant heart issue and -- and family history and --  
25 and different things like that.



1           So that's the first thing. The second thing is let's assume for a moment  
2 that First Transit had spent the time to develop evidence that Harvey was negligent  
3 or that he did choke. Okay? The only thing that -- that was argued at the time of  
4 settlement of jury instructions was that hey he -- he ate a sandwich in violation of the  
5 rule. That's it.

6           Well when you -- when you drill down and you look at that, even an  
7 argument for a jury instruction based on that alone is insufficient because the Rule  
8 30(b)(6) Jennifer McKibbins for First Transit took the stand -- actually it was in her  
9 deposition and then at trial, so both times and then the story changed, was that the  
10 question at the deposition was if somebody assisted a passenger, if somebody  
11 assisted Harvey in drinking, would it be reasonable for him to think that it was okay  
12 to eat on the bus and she said yes.

13           And as the Court recalls, there was a -- that was -- that was what the  
14 objection was over because, you know, first off when we have her on in our case in  
15 chief she says yeah, that would be -- someone could assume that, it would be  
16 assumed, but then she tries to change her story and say well, I thought assisting  
17 meant actually putting the water bottle up to his mouth in the deposition. I thought  
18 that that's what it meant when -- when we were assisting. And so I don't know if it's  
19 reasonable or not to -- to suggest.

20           So I think it's entirely reasonable for a jury -- this is assuming arguendo  
21 that a jury verdict was given for Harvey. I think it's -- the fact that one was not is  
22 completely harmless because all they have to hang their hat on is this one thing of  
23 him eating the sandwich and there's testimony from the Rule 30(b)(6) in deposition  
24 and first when she's taken the stand that it was reasonable for someone to suggest  
25 that if he's assisted in drinking that it's okay to eat. Okay? But then obviously the



1 story changed as -- as things progressed.

2 So that was the facts, that was the evidence that any request for this  
3 jury instruction would have been based. So I don't think that the Court needs to look  
4 at *Banks*, I don't think the Court needs to look at all of these other analysis. I mean  
5 the Court can, but in reality there was no evidence that was developed to even  
6 support a jury instruction to begin with.

7 And even if -- now let's talk about the reduced -- you know, the jury  
8 instruction that would have been given for somebody with a disability. Again, you go  
9 back to Ms. McKibbins' testimony. Number one, it's reasonable to suggest that if  
10 he's being assisted with drinking that it's okay to eat. That negates any  
11 responsibility that he may have.

12 Second, both the Rule 30(b)(6) Ms. McKibbins and Mr. Farrales  
13 testified under oath that the reason that they have this policy is because they know  
14 that folks with disabilities eat and drink on the bus. So they know that. So they  
15 know that every other person in Harvey's shoes, assuming you're -- you're using a  
16 reduced comparative instruction, the argument to the jurors would be yeah -- I mean  
17 that's really hard to sustain, that's really hard for them to prevail. To stand up there  
18 and say yeah, as a -- as a company, we know that our passengers choke, as a -- as  
19 a company that -- that -- you know, that transports folks with disabilities, we know  
20 that they choke and that's why we have the policy, but we want you to hold him  
21 accountable for doing what every other person that we transport does even though  
22 we have this policy. I mean not having Harvey on the -- on the verdict form is  
23 completely harmless because there's absolutely no evidence that he did anything  
24 wrong. And this -- anyway.

25 THE COURT: The other issue was the common carrier?

1 MR. CLOWARD: Oh yes, the common carrier. Your Honor, the common  
2 carrier instruction is directly out of the *Forester* case. The -- the -- the way that the  
3 instructions were used were also in -- in conjunction with the documents that First  
4 Transit proffered. I think I had them admitted, but they were documents that First  
5 Transit proffered. Number one, the ADA regulations; number two, the contract  
6 between RTC and First Transit; and number three, I believe the union contract.

7 But all of those things required a well-trained workforce. That's what  
8 the -- that's what the -- the negligence is and if -- if you're a -- if you're a common  
9 carrier, you have a heightened obligation to have a well-trained workforce and you --  
10 and you have an individual who doesn't even have the training to identify so you  
11 take -- you take the UNLV the -- the Lee or GNLV versus Lee, you take that case,  
12 you've got an individual who doesn't even know how to recognize whether  
13 someone's in peril to -- to call for assistance.

14 Even though you have page 70 which trains on how to identify whether  
15 somebody's choking or -- and page 71 whether they're -- or 69 whether they're  
16 having a heart attack and 68 whether they're having a -- a stroke and I don't know if  
17 the pages line up. I know it was 68, 69 and 70 that were claimed, you know, didn't  
18 apply here in Las Vegas but -- you have this training and -- and your driver doesn't  
19 even know how to identify what's wrong to summon help.

20 So I think that if the Court wanted to look at the analysis of, you know,  
21 the Heimlich maneuver and -- and that standard, first off we're -- we never said that.  
22 We've never said that. We said they have to do these certain things and here are  
23 the -- the hundred failures that they did. But even if -- if the Court looks at this issue,  
24 they still failed under that case law because they didn't have the adequate training to  
25 identify that he was in trouble to call for assistance.



1           And I know I kind of got sidetracked there and combined those -- those  
2 two topics so I apologize. Is there anything else the Court would like me to  
3 address?

4           THE COURT: I think you've covered everything.

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

6           THE COURT: Mr. Polsenberg.

7           MR. POLSENBERG: Thank you, Your Honor. Let me try to do it in roughly  
8 the reverse order which is roughly the order I had originally.

9           How could we argue in the alternative to the jury -- when we think this  
10 was a heart attack, how could we argue comparative negligence in -- if it's a choking  
11 case? Well, that's not hard. Let me read to you from page 7 and 8 of our amended  
12 motion: The hazard of choking after failing to adequately chew food is obvious.  
13 Based on the size of the bolus, b-o-l-u-s, in Harvey's throat, Harvey must have been  
14 gobbling on the sandwich and Harvey did so rapidly and while hunched over in the  
15 seat based on the video image from an onboard camera. He must have done this to  
16 evade the driver's vision because he was aware of the rule prohibiting food on the  
17 bus. Regardless of his motive, however, his crouch position hindered any chance  
18 the driver may have had to see him eating and remind him that it was disallowed,  
19 assuming the driver even had a duty to do so. And then we say the jury must  
20 compare any responsibility by the driver and First Transit to render aid against  
21 Harvey's responsibility for his own predicament.

22           Now their response to that in the briefs was to raise the medical  
23 malpractice line of cases that say well a doctor isn't excused because a patient put  
24 himself in his own medical state. The drunk driver example again. Guy's driving  
25 drunk, he crashes into a tree, he winds up at the hospital, the doctor performs the

1 wrong procedure and causes harm. The doctor doesn't have a defense that he was  
2 driving drunk and that's how he got in his original condition, but he's responsible for  
3 the difference between his original condition and his further harm from the  
4 malpractice.

5 That's what they're arguing applies here. That -- that position only  
6 applies -- that legal doctrine only applies in malpractice. We're trying to figure out  
7 right now on this bus who's responsible for Harvey's death. Is it Harvey for hunching  
8 down and gobbling the sandwich real fast or is it the driver for not noticing what he's  
9 doing when he's trying to hide the behavior?

10 Now, early I said I have to give them the inferences on some issues,  
11 but I get the inferences on this because our claim of comparative negligence was  
12 essentially dismissed. So I'm entitled to every inference, and we could have argued  
13 that to a jury and the jury could have -- they could have decided some degree of  
14 comparative negligence and maybe even more than 50 percent.

15 Their argument is that we're not entitled to comparative fault because  
16 we know passengers eat on the bus. Well we know people drive drunk and -- but  
17 that's not any kind of defense anywhere outside of medical malpractice to say well,  
18 there's no liability on the part of drunk drivers because we know they're going to  
19 drive drunk. There's -- there's no comparative fault on the part of Harvey because --  
20 because we know people are going to sneak a sandwich and -- and perhaps gobble  
21 it real fast. No, the -- the jury should have weighed the comparative fault of those  
22 two parties.

23 Common carrier. Their argument is that we have the obligation to have  
24 a well-trained workforce. I -- I don't think so, I don't think that's -- that's a common  
25 carrier argument. I -- I think they could have made that argument under ordinary



1 care. Look at *Lee versus GNLV* that -- that is a heightened standard of care, that is  
2 a innkeeper standard which is like a common carrier standard and there they said  
3 there's no duty to monitor, you just have to -- you have the duty to provide care, but  
4 it's a standard of ordinary course when and how.

5 And -- and -- and they came -- they came in remember and they argued  
6 Derek Jeter. Right now on post trial review, we're looking at this situation and  
7 they're saying well we didn't really argue this -- this -- this big a standard of care.  
8 No, they argued that this was a Derek Jeter standard of care, which probably means  
9 less this year than it did last year. Course A-Rod probably means even less.

10 They argue vicarious liability here. They're saying well, the jury verdict  
11 makes sense because the jury was instructed on vicarious liability. No. Vicarious  
12 liability means the driver's a hundred percent at fault and the employer is liable for  
13 that. But that doesn't change the fact that you allocate a hundred percent to the  
14 driver.

15 They're coming in and saying well we had a negligent training claim.  
16 No, a negligent training -- negligent hiring, training and -- and retention claims are  
17 direct liability claims that only apply where you don't have vicarious liability. For  
18 example, I have a security guard and he does something that he shouldn't do at all,  
19 he -- you know, the -- the -- he assaults -- we have a line of cases of this in Nevada,  
20 he assaults a -- a patron. That's outside the course and scope of his employment.  
21 The employer is not liable for that at all, but you could have a direct way of getting  
22 liability against an employer for negligent hiring, training and retention.

23 That's not the principle we're talking about here. The jury was  
24 instructed on vicarious liability. If the driver is negligent in doing something, the jury  
25 should apportion fault to that and we're liable. If the driver's negligent in not doing