Case No. 70164

In the Supreme Court of Nevada

FIRST TRANSIT, INC.; and JAY FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; and ELAINE CHERNIKOFF,

Respondents.

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APPEAL

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

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Docket 70164 Document 2017-40354

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Appellant First Transit, Inc. is a unit of FirstGroup America, Inc., which is wholly owned by FirstGroup PLC. FirstGroup PLC is a public company listed on the London Stock Exchange.

2. Jay Farrales is an individual.

3. Leann Sanders of ALVERSON, TAYLOR, MORTENSEN & SANDERS and Daniel F. Polsenberg and Joel D. Henriod of LEWIS ROCA ROTHGERBER CHRISTIE LLP have represented appellants in this litigation.

4. No publicly traded company besides FirstGroup PLC has any interest in this appeal.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 21st day of November, 2017.

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JURISDICTIONAL STATEMENT

Defendants appeal from a final judgment, entered March 9, 2016 (8 App. 1774), and an order denying defendants' post-judgment motions and related amended judgment, both entered June 6, 2017 (11 App. 2614, 2632). On June 21, 2017, this Court entered an order noting the denial of the tolling motions and confirming the Court's jurisdiction.

ROUTING STATEMENT

The Supreme Court should retain this appeal, as principal issues are questions of first impression involving common law and the interpretation of important statutes. NRAP 17(a)(10). It raises, for instance, whether heirs in a wrongful death case pursuing claims under NRS 41.085(4)—including damages for pain, suffering and disfigurement of the decedent—may avoid any reduction for "comparative negligence of . . . the plaintiff's decedent" (NRS 41.141) simply by forgoing a claim on behalf of the estate under NRS 41.085(5).

ISSUES PRESENTED

Defendants seek a new trial based principally on three issues:

1. NRS 41.141 precludes recovery in a wrongful-death action when the plaintiff's decedent is more negligent than the defendant. Is the jury nonetheless precluded from allocating fault to the decedent in

an action brought by the decedent's heirs simply because the decedent's estate is not a party?

2. Is a common carrier subject to a heightened duty of care for perils unrelated to the hazards of transport?

3. Was the $15 million verdict grossly excessive and tainted by attorney misconduct, including asking jurors to assess damages based on the value of the decedent's "life"?

STATEMENT OF THE CASE

This is an appeal from a judgment on jury verdict and the denial of a new trial. The Eighth Judicial District Court, The Honorable Stefany A. Miley, District Judge.

INTRODUCTION

Harvey Chernikoff was a high-functioning mentally handicapped adult who allegedly choked to death on insufficiently chewed food while riding in a paratransit bus operated by appellant-defendant First Transit and driven by First Transit's employee, defendant Jay Farrales.

Harvey's elderly parents, respondent-plaintiffs Jack and Elaine Chernikoff, sued First Transit and Farrales, alleging the driver was negligent in not adequately checking on Harvey and preventing him from eating, as well as for how Farrales administered aid once he noticed Harvey was in distress. Plaintiffs claim the company was negligent in training the driver. The jury found for plaintiffs and awarded $15 million, split equally between decedent's pain and suffering and the heirs' loss of consortium.

A new trial is necessary because: (1) the district court omitted Harvey from the verdict form allocating comparative fault; (2) the

district court erred in instructing the jury on the standard of care applicable to paratransit providers; and (3) the jury awarded excessive damages resulting from passion and prejudice caused by improper arguments.

STATEMENT OF FACTS

The facts demonstrate that there is an issue of fact whether Harvey Chernikoff, plaintiff's decedent, was partially at fault in causing his own death. Because the district court did not allow that issue to go to the jury, defendant is entitled to all inferences from the evidence.

A. Despite Disabilities, Harvey Chernikoff Functioned at a High Level

While 51-year-old Harvey Chernikoff had developmental disabilities, he was able in some respects to care for himself. (4 App. 828-33, 843-64.) He lived semi-independently in an apartment with a caregiver. (4 App. 754-56, 852-64, 901-02.) He had a driver's license (4 App. 872-76) and worked at Transition Services, a nonprofit that provides jobs for adults like Harvey. (4 App. 856-61, 869-71.) He also routinely rode to work by himself using the paratransit bus service provided by the Regional Transportation Commission of Southern Nevada (RTC). (4 App. 858-61, 875-81.)

B. The Paratransit Bus

A paratransit bus helps individuals with disabilities get around town. It is not medical transport. (4 App. 889; 5 App. 1227-30.) Harvey, who qualified for paratransit services based on his mental disabilities, was approved to have a "personal care assistant," or PCA, ride with him, but he often rode alone. (4 App. 858, 878-80, 968-80; 5 App. 1227-30; 6 App. 1302-03, 1310.)

C. Harvey's Death

On July 29, 2011, Harvey Chernikoff was a passenger on a paratransit bus driven by Farrales. Farrales was familiar with Harvey and had driven Harvey before, and Harvey sat behind the driver's seat and sometimes talked with Farrales. (4 App. 859; 6 App. 1303-04, 1313-14, 1357.)

Several on-board cameras captured the events of that day. One was over the driver's head facing rearward, and another was directed toward the exit to the driver's right. (12 App.; 3 App. 604; 5 App. 1235-1240, 1248-1249; 6 App. 1320, 1326-35, 1346-55; 7 App. 1512.)

At 6:50 a.m., Harvey was picked up at his home. Around 7:45, Farrales pulled over so Harvey could use the restroom. He then helped Harvey put on his seatbelt. (12 App.; 6 App. 1311-15.)

1. Harvey's Disregard of the Posted No-Eating Rule

A few minutes later, beginning at 7:57:30, Harvey started to eat a sandwich. He did so, despite a no-eating sign posted prominently in the front of the bus and a prohibition in the RTC rider's guide. He ate very quickly. Plaintiffs' own expert described it as "wolfing the sandwich down." (12 App.; 3 App. 675, 731-32; 6 App. 1260.) And Harvey was hunched over as he ate, behind the partition separating the driver from the passenger area, where the driver could not see him. (12 App.; 4 App. 815-16; 6 App. 1308-09.) Within a minute-and-a-half, Harvey finished eating and zipped his lunchbox. (3 App. 735-36.)

At 7:59:53, the driver stopped and exited the bus to help a female passenger off. As she walked to the exit, Harvey can be seen rubbing his head and raising an arm. He does not appear to be in distress and made no other movements or sounds. (12 App.; 3 App. 675-77, 732-33; 5 App. 1126-27; 6 App. 1326-1327.)

2. Harvey Slumps Over but Does Not Indicate Distress

While the driver was outside, Harvey gradually started leaning towards the side. About 30 seconds after exiting, Farrales reentered the bus, returned to his seat, and started to drive. While he didn't turn

his body to look at Harvey, the driver testified he saw Harvey in his peripheral vision and didn't notice any distress. (12 App.; 3 App. 732-36; 4 App. 815-19; 6 App. 1322-24, 1326-28, 1347-51.)

The video confirms there were no outward signs of choking. Harvey never coughed or gasped for air; he never reached for his throat; and he did not try to stand up, unbuckle his belt, or otherwise get the driver's attention. (12 App.; 3 App. 675-77, 682-687, 715-24, 727-28, 732-41; 5 App. 1132-36; 6 App. 1321-24, 1326-35, 1237-38, 1346-55.)

3. Farrales, who had been Watching the Road, Discovers Harvey and Summons Help

About three minutes after Farrales started driving again, he stopped at a stoplight. While stopped, Farrales scanned his mirror and then turned to check on Harvey, who had been quiet. (12 App.; 6 App. 1326-35, 1346-55.) At first, Farrales could not see Harvey and thought he might be napping, as Harvey mentioned he was sleepy. (12 App. at 7:45:39; 6 App. 1321-23, 1329-31, 1353-55.) Although the partition and farebox obstructed his view (12 App.; 6 App. 1270-71, 1316-20, 1326-29), Farrales eventually saw Harvey slumped over (4 App. 823-24; 6 App. 1329-30, 1352-55).

After calling out, Farrales reached back and shook Harvey's arm and then left his seat to check on Harvey but was still unable to get any response. (12 App.; 6 App. 1330-32.) Consistent with his training, Farrales pulled over and alerted First Transit's dispatch center to contact 911. (12 App.; 6 App. 1294, 1330-34.) He then went to Harvey and stayed with him until paramedics arrived about eight minutes later. A cardiac monitor showed Harvey's heart had stopped. Paramedics did not attempt resuscitative efforts. (6 App. 1263-64, 1333-36.)

D. <u>The Trial</u>

1. The Court Omits Plaintiff's Decedent, Harvey, from the Verdict Allocating Negligence

The district court placed the parents on the special verdict form allocating comparative negligence, but did not include Harvey. To support allocating fault to Harvey, defendants pointed to his violation of the no-eating rule, the negligent manner in which he ate the sandwich, and his concealment of his conduct, preventing the driver from seeing a reason to intervene or render aid. (7 App. 1608-12.)

Plaintiffs argued Harvey should not be included on the verdict based on *Banks v. Sunrise*, 120 Nev. 822, 844-45, 102 P.3d 52, 67

(2004), because *Harvey's estate* had voluntarily dismissed its claim and had not been impleaded back into the case, the jury could not apportion fault to Harvey, even though *Harvey's heirs* remained parties and Nevada law imputes the decedent's fault to the heirs. (7 App. 1592-94.)

2. The Court Instructs that Defendants Are Subject to Heightened Duties of Care

Over defendants' objections, the district court gave two instructions on heightened duties of care, one addressing the enhanced duties of a common carrier, and the other addressing the enhanced duties of a paratransit bus operator under the Americans with Disabilities Act (ADA). (7 App. 1574-90.)

Defendants objected to both instructions because any heightened duties First Transit had as a common carrier or under the ADA were not implicated in this case. They argued the manner in which Harvey allegedly died (choking on insufficiently chewed food) implicated only the duty to render emergency aid, which was an ordinary duty of reasonable care. (7 App. 1574-90.) First Transit also maintained that if Harvey did die from choking, Farrales and First Transit did not breach their duty of care. First Transit argued that the only applicable duty was to render aid to a passenger who is visibly ill, which does not

require monitoring for medical emergencies - that is what a PCA is for and why one was allowed. (4 App. 969-70, 972-73, 986; 6 App. 1254-58, 1495-97.) By calling for emergency assistance, defendants argued, Farrales satisfied his duty of reasonable care. (5 App. 1232-1254.)

The district court overruled defendants' objections and instructed the jury as follows:

> At the time of the occurrence in question, the Defendant FIRST TRANSIT was a common carrier. A common carrier has a duty to its passengers to use *the highest degree of care* consistent with the mode of transportation used and the practical operation of its business as a common carrier by paratransit bus. Its failure to fulfill this duty is negligence.

Instruction No. 32 (emphasis added). (8 App. 1753.)

> When a carrier is aware that a passenger is mentally disabled *so that hazards of travel are increased as to him*, it is the duty of the carrier to provide *that additional care which the circumstances reasonably require*. The failure of the defendant to fulfill this duty is negligence.

Instruction No. 34 (emphasis added). (8 App. 1755.)

Drawing the jury's attention to these very instructions, plaintiffs' counsel repeatedly emphasized that the standard of care governing First Transit and its drivers amounted to a super-heightened "Derek Jeter" duty, which went far beyond ordinary care. (7 App. 1647-51.)

3. The Verdict

The jury awarded $15 million, divided equally between Harvey's conscious pain and suffering and his parents' loss of consortium and sorrow. In accordance with their instructions, the jury found First Transit and its driver, Jay Farrales, breached their duty "to use *the highest degree of care*." The jury apportioned 100% of the fault to First Transit and 0% to Farrales and Harvey's parents. (7 App. 1747- 50; 8 App. 1752-53, 1765.)

SUMMARY OF ARGUMENT

Comparative Negligence of the Decedent: A new trial is required to correct the omission of decedent Harvey from the verdict form. There is no merit to plaintiffs' argument that defendants needed to implead Harvey's estate. NRS 41.141 requires the jury to consider whether "the plaintiff's decedent" bears any responsibility for his own death. The estate's dismissal has no bearing on the jury's consideration of the decedent's comparative fault for claims by heirs.

Incorrect Standard of Care Instructions: The district court erred in instructing the jury on the standard of care. A common carrier has an enhanced duty only in certain particulars, such as in transporting passengers safely, protecting them from torts of third

persons, and ensuring safe embarking and debarking. The heightened duty does not extend to preventing the possibility of choking on insufficiently chewed food. A transit company's special duty to under the ADA also did not apply, because they are limited to boarding, securing assistive devices, and disembarking. The only duty implicated under these facts is to render emergency aid to passengers in apparent distress, which is an ordinary duty of "reasonable affirmative steps" to render aid. *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001).

Excessive Damages: The evidence shows Harvey never panicked or struggled and would not have been conscious for more than 50 seconds after he began to choke, for which the jury awarded the staggering sum of $7.5 million. And the jury awarded the same amount for grief and sorrow to the parents of the 51-year-old decedent. The damage award in this case is excessive and is explained by counsel's numerous instances of misconduct.

The $15 million verdict had a legally improper basis, as plaintiffs repeatedly told the jury to award that amount for the "value of Harvey's

life." Plaintiffs vilified defendants for disputing liability, arguing that defending the case amounted to "disrespect" for Harvey's life.

Plaintiffs also requested $15 million based on ideas of punishment, rather than compensation, tapping into one of the most powerful recent messages for social change, that "[y]our job will be to determine whether all lives matter in America, or just some." They played on local prejudices, arguing defendants believed "[p]eople in Las Vegas don't matter." Counsel also made overt appeals to sympathy and vouched for witnesses. When considered in connection with the emotionally charged and inflammatory argument, the verdict is tainted and cannot stand.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN OMITTING THE DECEDENT FROM THE VERDICT APPORTIONING FAULT

A. The Jury Must Consider the Comparative Negligence of "the Plaintiff's Decedent" in a Wrongful Death Case

1. The Decedent's Negligence is Imputed to the Heirs in their Wrongful-Death Action

Under comparative negligence, a jury assesses the negligence of a plaintiff in bringing about his own injuries, if that plaintiff is still alive.

In a wrongful death action, however, it makes sense to assess the negligence of the plaintiff's decedent in bringing about his death. In such "derivative claims,"

> [w]hen a plaintiff asserts a claim that derives from the defendant's tort against a third person, negligence of the third person is imputed to the plaintiff with respect to that claim. The plaintiff's recovery is also reduced by the plaintiff's own negligence.

RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6(a) & cmt. a (2000).

Many courts articulate this rule that, in the words of the Idaho court, "[i]n an heir's action for wrongful death, the negligence of the decedent is imputed to the plaintiff." *See*, *e.g.*, *Woodburn v. Manco*, 50 P.3d 997, 1001 (Idaho 2002); *see also*, *Kelson v. Salt Lake Co.*, 784 P.2d 1152, 1155 (Utah 1989) ("Under the post-1973 law, as under the pre-1973 law, the wrongful death plaintiff was, in effect, to have imputed to him or her any negligence of the decedent.").

It makes no sense to conclude, as plaintiffs do, that an heir may recover full damages where the decedent himself was partially or primarily responsible for his own death. This Court took this approach in *Fennell v. Miller*, 94 Nev. 528, 583 P.2d 455 (1978), before the enactment of NRS 41.141, holding that an heir could not recover in a

wrongful death action where the "decedent was guilty of contributory negligence as a matter of law." This Court looked to the causative role of the decedent in bringing about his own death.

That same approach is now codified in the comparative negligence statute. While NRS 41.141 eliminated the harsh rule of contributory negligence, it maintains the rule that the decedent's negligence is imputed to the wrongful-death plaintiff.

2. NRS 41.141 Requires Consideration of the Decedent's Negligence

It is generally recognized that, "[u]nless otherwise provided in a wrongful-death statute, negligence of the decedent is imputed to the plaintiff under a wrongful-death statute." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6(a), cmt. c (2000). Nevada's statutory code goes even further, as the comparative negligence statute expressly calls for consideration of the fault of the decedent.

NRS 41.141 calls for the jury to consider the negligence of the "plaintiff's decedent":

> In any ***action to recover damages for death*** or injury to persons . . . in which comparative negligence is asserted as a defense, ***the comparative negligence of*** the plaintiff or ***the plaintiff's decedent*** does not bar a recovery if that negligence was not greater than the negligence or gross

> negligence of the parties to the action against whom recovery is sought.

NRS 41.141(1) (emphases added). The statute repeats the requirement to consider the decedent's negligence in another subsection:

> The plaintiff may not recover if the plaintiff's ***comparative negligence*** or that ***of the plaintiff's decedent*** is greater than the negligence of the defendant or the combined negligence of multiple defendants…

NRS 41.141(2)(a).

Federal courts, applying NRS 41.141 to wrongful death actions, have held that the defendant's negligence is to be compared to, and the plaintiff's recovery reduced by, "the amount of negligence attributable to the plaintiff's decedent," even when the action is brought by the decedent's parents. *Moyer v. United States*, 593 F. Supp. 145, 147 (D. Nev. 1984) ("Since Plaintiffs' decedent was 50% contributorily negligent, each of said awards [to the heirs] must be diminished by 50%."); *see also Rich v. Taser Int'l, Inc.*, 2012 WL 1080281, at *14 (D. Nev. Mar. 30, 2012) (holding that NRS 41.141 calls for the jury in a wrongful death action to assess the comparative negligence of the decedent).

This Court should make clear that a decedent's negligence in a wrongful death action is attributed to the plaintiff, and the jury has to assess the comparative negligence of the decedent under NRS 41.141(2)(b).[1] *See also* NEVADA JURY INSTRUCTIONS—CIVIL (2011 ed.) Instruction No. 4NG.21 ("The percentage of negligence attributable to the plaintiff's decedent shall reduce the amount of plaintiff's recovery . . . .")

3. **Banks** ***Does Not Preclude the Jury's Consideration of the Decedent's Fault***

While plaintiffs argued below that *Banks ex rel. Banks v. Sunrise Hospital* requires excluding Harvey from the special verdict on apportionment, that interpretation conflicts with the plain language and intent of the statute. *Banks* is not on point, as the "nonparties" in that case were settling co-defendants, and there was no argument that their negligence should be attributed to the plaintiff. 120 Nev. 822, 844-45, 102 P.3d 52, 67 (2004). There is not even dicta in the *Banks*

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[1] This Court has never had cause to rule whether a decedent's comparative negligence is attributed to the plaintiff in a wrongful-death case. *See Young's Mach. Co. v. Long*, 100 Nev. 692, 693, 692 P.2d 24, 25 (1984) (decedent's comparative negligence irrelevant in a product-defect action, an exception to NRS 41.141); *Davies v. Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979) (decedent's comparative negligence would have required apportionment but for defendant's willful and wanton misconduct).

opinion that suggests that the Supreme Court was rejecting the rule that the comparative fault of the decedent is considered in a derivative wrongful-death claim.

Plaintiffs seem to argue that only the estate is comparable to the decedent, while the heirs are not. But that betrays a misunderstanding of how a wrongful-death claim works—and how it is different from ordinary injury claims. Under the wrongful-death statute, NRS 41.085, the heirs and estate recover different elements of damage derivatively arising from the decedent's death. In a compensatory-damage claim, the estate recovers only for medical and funeral expenses while the heirs recover such derivative damages as the decedent's pain and suffering. NRS 41.085(5). In the same session as the adoption of NRS 41.085, the Legislature amended the comparative-fault statute, NRS 41.141, to include references to "death" and "decedent." 1979 Statutes of Nevada 1356. As amended, the NRS 41.141 calls for an assessment of the negligence of the plaintiff's decedent irrespective of what type of plaintiff—heir or estate—is bringing the claim. Even if there were ambiguity on this point, the legislative history of the 1979 amendment to NRS 41.141 indicates that the Legislature intended the jury to

consider the fault of the plaintiff's decedent in a wrongful death claim brought by either "the estate *or* one of the survivors." Min. Sen. Jud. Comm. at 4 (May 24, 1979). (9 App. 2083.) In a wrongful death action, "the plaintiff is someone who files on behalf of the decedent." *Id.*

As the statutory text, the legislative history, and the logic and experience of courts across the country all demonstrate, a plaintiff—any plaintiff—in a wrongful-death action may not recover if the "comparative negligence . . . of the plaintiff's decedent is greater than the negligence of the defendant." NRS 41.141(2)(a).

B. Harvey's Mental Impairment Does Not Eliminate the Bona Fide Issue of his Comparative Negligence

1. The Jury Can Allocate Fault to a Mentally Disabled Plaintiff

Harvey's mental disability did not render him incapable of comparative negligence. "An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 11 (2010); *see also* RESTATEMENT (SECOND) OF TORTS § 283B (1965).

There is no policy reason a different rule should apply when the question is a disabled person's comparative negligence rather than primary negligence. *See, e.g.*, *Jankee v. Clark County*, 612 N.W.2d 297, 319-20 (Wis. 2000) (holding mentally disabled plaintiff to standard of an ordinarily prudent person under the circumstances). Nevada has never stated that a mentally disabled person who fails to exercise reasonable care can escape a finding of comparative negligence.

Some courts hold that the plaintiff's "disability can be considered in the course of the more open-ended process of apportioning percentages of responsibility between the plaintiff and the defendant." RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 11 cmt. e (2010). But allowing the jury consider a mental disability as a factor in the apportionment of fault is a far cry from *eliminating* the jury's consideration of comparative fault altogether. *See id.*; *Miller v. Trinity Med. Ctr.*, 260 N.W.2d 4, 7 (N.D. 1977) (upholding comparative negligence finding against plaintiff whose "mental confusion did not completely interfere with his perception of danger").

Similarly, even if defendants had a heightened duty to monitor Harvey and to take precautionary measures to protect him from his own

negligence as plaintiffs contend, that "special relationship" would not preclude a comparative-fault allocation as a matter of law unless "the particular harm" were foreseeable and "the mentally disabled person is able to show that she was totally unable to appreciate the risk of harm and the duty to avoid it." *Hofflander v. St. Catherine's Hosp., Inc.*, 664 N.W.2d 545, 563–65 (Wis. 2003). Those determinations, as well, would be for the jury.

Eliminating a comparative-negligence defense whenever a plaintiff demonstrates a mental disability would also clash with Nevada's treatment of comparative negligence in children. *See Galloway v. McDonalds Restaurants of Nev., Inc.*, 102 Nev. 534, 728 P.2d 826 (1986) (quoting *Quillian v. Mathews*, 86 Nev. 200, 203–02, 467 P.2d 111, 112–13 (1970), which rejected the rule that children under seven are incapable of negligence). It is for the jury to decide whether "the particular child has the capacity to exercise that degree of care expected of children of the same age." *Id.*

2. There is a Bona Fide Jury Question of Harvey's Comparative Negligence

Here, defendants maintain that Harvey should be held to the standard of an ordinary, reasonable person, just as he would be if a

claim were asserted against him. Indeed, in settling the jury instructions, plaintiffs appeared to *agree* with defendants, stating that "[i]n the eye of the law [Harvey] is an adult no different than any other 50 year old man that's walking down the street" (7 App. 1592), and relying instead on their statutory argument for leaving Harvey off the verdict form (7 App. 1592-1593).

Nonetheless, even considering Harvey's mental disability as a factor, plaintiffs cannot take away the question of Harvey's comparative negligence as a matter of law. Plaintiffs admitted that Harvey "was sort of higher functioning" in comparison to other special-needs individuals (4 App. 830:13–15), that "[h]e didn't need somebody to take him to the bathroom and help him, or *he had those kind of skills,*" (4 App. 831:21–23 (emphasis added)), and that he could understand signs, particularly those he repeatedly encountered (4 App. 875:20–23; 879:8-10). In fact, he had sufficient capacity to work, to merit a California driver's license and drive under his parents' supervision, and to live away from his parents semi-independently. (4 App. 849-50, 872, 874.) And he routinely rode the paratransit bus without a PCA. (4 App. 875-76.)

Plaintiffs' theory of the case, moreover, rests on Harvey's having been negligent in performing the very tasks he was admittedly able to handle without assistance. Although defendants believe Harvey died of a heart attack, plaintiffs allege that Harvey died because he choked on a bolus of food. If that were the case, Harvey's death would be due at least in part to his own disregard of First Transit's rule not to eat on the bus, which was both posted prominently on the bus itself and included in the rider's guide. (4 App. 881-84; 6 App. 1307-10.)

The inherent hazard of choking after failing to adequately chew food is obvious, even to someone with Harvey's disabilities. Based on the size of the bolus in Harvey's throat, plaintiffs' own expert agreed that Harvey must have been gobbling the sandwich. (3 App. 731-32; 6 App. 1260.) And Harvey did so rapidly and while hunched over in his seat, based on the video image from an on-board camera. (12 App.) He may have done this to evade the driver's vision because he was aware of the rule prohibiting food on the bus. Regardless of his motive, his crouched position hindered any chance the driver may have had to see him eating and remind him that it was prohibited. (4 App. 815-18; 6 App. 1322-24; 1326-28; 1347-51.)

C. The Error in Excusing Harvey's Comparative Fault was Prejudicial

The error in eliminating defendants' comparative-negligence defense was not harmless. Prejudice is established "by providing record evidence that, but for the error, a different result might have been reached." *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008).

1. The Verdict might Have Been Different had Harvey Been Included

A properly instructed jury might have found that Harvey was at least partially responsible for his own death.

Even assuming Harvey died by choking, defendants did not cause Harvey to choke. That happened only because Harvey disregarded both First Transit's rule not to eat on the bus and the obvious danger from eating rapidly and without sufficiently chewing his food. (6 App. 1309-10.) The video shows Harvey hunched over in his seat behind the partition as he ate, suggesting that he was aware of the no-eating rule and negligently (perhaps intentionally) prevented the driver from noticing that he was eating or seeing a reason to render aid. (6 App. 1308-09.)

Further, any claim Harvey was "totally unable to appreciate the

risk" or to exercise self-care is inconsistent with the evidence that Harvey had been taking the bus by himself for years and that his parents never insisted he be accompanied by a caregiver. (4 App. 875-78.)

Thus, a properly instructed jury would be required to compare the negligence of the parties based on an objective standard of reasonableness. *Compare Hofflander*, 664 N.W.2d at 563–65 (holding mentally disabled plaintiff to objective duty of reasonable self-care depending on the circumstances), *with* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 & cmt. d (2000) (a "special relationship" like that of a common carrier imposes just a duty of "reasonable care" to render aid); *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) ("special relationship" of restaurant-patron imposes only a duty of "reasonable care").

Even if the jury were allowed to take Harvey's mental disability into account, the evidence that Harvey was aware he shouldn't be eating on the bus, and had apparently been counseled about eating too fast when living in a group home in California (4 App. 890-893), strongly suggests that Harvey failed to exercise that degree of care

expected of adults with the same diminished mental capacity. A properly instructed jury might find that Harvey must, in fairness, bear some responsibility for his own behavior.

2. Including Harvey's Parents is Neither a Substitute for, Nor Inconsistent with, Including Harvey Himself

The inclusion of Harvey's parents does not diminish the prejudice. The district court seemed to think that negligence in the context of mental disabilities is an either/or proposition: Harvey must have been either totally incapable of negligence or totally independent from his parents, with nothing in between. But that is not how the law treats individuals with mental illness or children. Rather, the law holds that a parent and child can each be comparatively negligent, and that the allocation of fault should go to the jury:

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

Lash v. Cutts, 943 F.2d 147, 151 (1st Cir. 1991) (combining comparative negligence of five-year-old in not exercising self-care and his mother in

failing to supervise precluded recovery); *accord Woodburn*, 50 P.3d at 1000-1002 (aggregating combined negligence of parent and child); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 illus. 5 (2000). And Nevada juries are routinely instructed to that effect. NEVADA JURY INSTRUCTIONS—CIVIL (2011 ed.) INSTRUCTION NO. 4NG.23.

Here, it was at least a fact issue whether Harvey bore some responsibility for his behavior, and the jury could have found Harvey at least partially responsible for his own predicament even if Harvey's parents also failed to discharge their duties of supervision.

D. Defendants Preserved the Error by Objecting to the Verdict Form without Harvey

The district court erred in finding after trial that defendants had waived their objection to the verdict form. As the court recognized, defendants initially argued both Harvey and his parents needed to be included in the allocation of fault. (7 App. 1591:5–10; 11 App. 2618.) Despite defendants' request, the court agreed with plaintiffs that if Harvey's parents were on the form, Harvey could not be under *Banks*. (7 App. 1607:14-20)

One of defendants' attorneys made the gratuitous comment that

he thought the court's interpretation was "probably true," which is far from a stipulation to omit Harvey. (7 App. 1607.) But before the court or the parties went any further—on the *very next page* of the transcript—another of defendants' attorneys clarified that defendants were *not* acquiescing in the court's interpretation of NRS 41.141: instead, she repeated the initial argument that Harvey needed to be included. (7 App. 1608.) The district court recognized this was an attempt to retract any perceived waiver. (11 App. 2618.) And both the parties and the court continued to debate Harvey's inclusion on the verdict form. (7 App. 1609-12; 11 App. 2618 (recognizing the retraction).) The district court ultimately ruled *on the merits* that it was overruling defense counsel's request to put Harvey on the verdict form. (7 App. 1612; 11 App. 2618:21-22.)

The district court's post-trial ruling instead rests on the misguided notion that once defense counsel ventured that the district court's interpretation was "probably true," retraction became impossible. But a waiver can always be retracted until it causes detrimental reliance. *See* 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 39:20 (4th ed. updated 2016); RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. f (1981). Since

the court and the parties had not taken any action in reliance on defense counsel's purported "waiver," defense counsel was free to retract it. Given the confusion that counsel faces in the heat of trial, a contrary ruling—binding counsel to every mistaken comment no matter how easily fixable—would make trials unworkable.

"The 'purpose of the requirement that a party object to the action of the trial court at the time it is taken is to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the objection." *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988); *see also Cook*, 124 Nev. at 1001-1002, 194 P.3d 1214, 1216-1217 (objection preserved by "focus[ing] the district court's attention on the alleged error"). Here, defense counsel LeAnn Sanders' statement that it *was necessary* to include Harvey's name on the verdict (7 App. 1608-11), coming only moments after her co-counsel (Bruce Alverson) postulated that it might not be, was more than sufficient to "allow the court to rule intelligently." *Id.* The district court "was adequately apprised of the issue of law involved and was given an opportunity to correct the error." *See Johnson v. Egtedar*, 112 Nev. 428, 432-33, 915

P.2d 271, 27 (1996); *Tidwell v. Clarke*, 84 Nev. 655, 661, 447 P.2d 493, 495 (1968) (noting that where "counsel clearly, fairly and timely calls to the attention of the trial court the issue involved," objection is sufficient).

And the district court was simply wrong that, in an appropriate case, both the heirs and the decedent should be included on an apportionment of fault. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6(a) & cmt. C and illustrations (2000).

It certainly was not too late to correct the verdict form, moreover. The final version had not even been printed. But most importantly, even if the district court is deemed to have ruled on the matter during the minutes between the statement of Mr. Alverson and the clarification of co-counsel Ms. Sanders, the district court never lost its ability and obligation to correct the legal error. *See Insurance Co. of the West v. Gibson Tile Co., Inc.*, 122 Nev. 698, 134 P.3d 698, 705 (2006) (Maupin, J., concurring) (the district court is able to "to conform its rulings to incorporate correct information at any time before it [loses] jurisdiction over the matter.").

II.

IT WAS ERROR TO INSTRUCT THE JURY REGARDING HEIGHTENED DUTIES THAT WERE IRRELEVANT TO THE INJURY

Although First Transit is a common carrier and Harvey was mentally disabled, the heightened duties of care that First Transit owes to disabled passengers were irrelevant because the harm in this case (choking) was not within the scope of risks that First Transit had a heightened duty to prevent. Moreover, even if the common-carrier status is relevant to the "special relationship" here, the alleged tortious failure to ascertain Harvey's predicament and to render aid gives rise only to the ordinary standard of reasonable care. That does not include the duty to monitor passengers and prevent choking. The instructions, therefore, misstated the standard of care and were misleading.

A trial court's decision to give a proposed jury instruction may be reviewed for an abuse of discretion or judicial error. *FGA, Inc. v. Giglio*, 128 Nev. Adv. Op. 26, 278 P.3d 490, 496 (2012). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Skender v. Brunsonbuilt Const. & Dev. Co., LLC*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). Where the district court gives jury instructions that constitute judicial error or

exceed the bounds of law and reason, reversal is warranted if the instructions "caused prejudice and but for the error, a different result may have been reached." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (internal punctuation and citations omitted).

A. The Duty Analysis Requires Courts to Identify the Specific Action the Plaintiff Claims the Defense Had a Duty to Undertake

Courts, not juries, are responsible for defining the legal standard of conduct in a negligence case, and they must do so "*in the light of the apparent risk*." *Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997) (emphasis in original). By defining the scope of duty, "the courts are making a vital 'expression of the aggregate of those policy considerations which cause the law to conclude that protection is owed.'" *Ashwood*, 113 Nev. at 85, 930 P.2d at 743.

While it is true that a common carrier transporting disabled individuals has a duty to take precautionary steps, in advance of any specific injury, to provide protections to its passengers against *certain* risks of harm, that enhanced responsibility does not apply to *all* risks that arise within a special relationship. *See, e.g.*, *Sanchez v. Independent Bus Co., Inc.*, 817 A.2d 318, 323 (N.J. Ct. App. 2003) (refusing to impose heightened duty of care on transporters "for *all*

purposes rather than for those risks associated with the conduct of the business") (emphasis added); *White v. Metro. Gov't of Nashville & Davidson Cty.*, 860 S.W.2d 49, 52 (Tenn. Ct. App. 1993) ("[C]ommon carriers are not insurers of their passengers' safety.").

B. Harvey's Death Did Not Result from the Type of Harm that a Common Carrier Has a Heightened Duty to Prevent

In light of the alleged cause of Harvey's injury, choking on a sandwich, it was error to instruct the jury that First Transit and Farrales owed Harvey "the highest degree of care." (8 App. 1753.)

1. Heightened Duty of Care Applies to the Manner of Driving, the Provision of Safe Embarking and Debarking, and Protection from Fellow Passengers

While some turn-of-the-century Nevada cases cited by plaintiffs below stated that common carriers have a heightened duty of care (4App.909-54), that early approach has been criticized. *See, e.g.*, *Nunez v. Prof. Transit Mgt. of Tucson, Inc.*, 271 P.3d 1104, 1109 (Ariz. 2012) (rejecting "highest degree of care" language and holding "the appropriate standard of care in negligence actions by passengers against common carriers is the objective, reasonable person standard").

Even when the heightened standard has been employed, courts recognize it applies only to the unique risks of harm associated with the transportation itself. *See, e.g.*, *Pac. S. S. Co. v. Holt*, 77 F.2d 192, 195 (9th Cir. 1935) ("[W]ith respect to *all special perils of transportation*, and all the instrumentalities of transportation, and their proper management, control, placing, and fitness, the strict rule of the highest degree of care obtains.") (emphasis added). That makes sense, because it is only in those activities and circumstances that the plaintiff has surrendered a degree of autonomy and control and has reason to rely on the superior position of knowledge and control of the carrier. *Id.*

2. No Heightened Duty to Prevent a Passenger from Exposing Himself to a Commonplace Risk

Undersigned counsel finds no authority that a carrier is under a heightened duty of care to prevent a passenger from exposing himself to a known, common risk, particularly one that is not unique to transportation. In fact, courts have held just the opposite—that "the rule requiring carriers to exercise the highest degree of care for the safety of passengers *does not extend* to those comparatively trifling dangers which a passenger meets on a vessel or on a railway car only in the same way and to the same extent as he meets daily in other places

and from which he habitually and easily protects himself." *Pac. S. S. Co.*, 77 F.2d at 196 (emphasis added) (citing *Pratt v. North German Lloyd S. S. Co.*, 184 F. 303 (2d Cir. 1911)); *see also Buck v. Manhattan Ry. Co.*, 10 N.Y.S. 107, 109 (N.Y. Ct. C.P. 1890) (rejecting "highest care" instruction because "[t]he collision of one person with another through carelessness is not peculiar to railway travel").

Here, the possibility of *choking on insufficiently chewed food* is universal and does not fall within the types of dangers that arise because of the mode of transportation. (4 App. 871-72; 6 App. 1275-76, 1307-08.) The carrier has no "highest duty of care" to protect the passenger from himself merely because he is in the carrier's vehicle.

3. The Duty of a Carrier to Render Emergency Aid Involves Only a Common Reasonableness Standard

While a defendant's common-carrier status establishes a "special relationship" with its passengers, which raises an affirmative duty to render aid when a passenger becomes ill or injured, that does not mean the standard of care is heightened. It only means that there *is* a duty where there otherwise would be none. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (2000). The extent of a common carrier's duty to render aid is only a "duty of reasonable

care." *Id.*; *Abraham v. Port Auth.*, 29 A.D.3d 345, 346 (N.Y. 2006) ("A common carrier is subject to the same duty of care as any other potential tortfeasor, i.e., reasonable care under the circumstances, and is not subject to a higher standard because of this status."); 13 C.J.S. *Carriers* § 520 (same).

Likewise, the duty to render aid arises only when the company's employee, in the exercise of reasonable care, knew or should have known that a passenger is in need of assistance. RESTATEMENT (SECOND) OF TORTS, § 314A cmt. f ("The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured."). As one court put it, "[a]s to the physical condition of a passenger, the operator ought to know what an ordinarily prudent person would know from what he ought to observe from obvious appearances." *Gray v. City of Seattle*, 187 P.2d 310, 311 (Wash. 1947).

Put simply, the "special relationship" does not create a heightened duty, but rather only a duty to render reasonable care. It certainly "does not extend to providing all medical care that the carrier . . . could reasonably foresee might be needed." *Lundy v. Adamar of New Jersey,*

Inc., 34 F.3d 1173, 1179 (3rd Cir. 1994); *see also L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550, 558-59 (Fla. App. 2008) (the duty to provide first aid "does not encompass the duty to perform skilled treatments, such as CPR. First aid requires no more assistance than that which can be provided by an untrained person.")

The case of *Lee v. GNLV Corp*., 117 Nev. 291, 22 P.3d 209 (2001), is particularly instructive, as it involved the duty to render aid within the analogous "special relationship" of innkeeper and patron. This Court found that the relationship between a business proprietor and its patrons justifies an exception to the general no-duty rule, but the exception is generally limited to providing basic first aid and summoning expert medical assistance to a patron in need. *Id*. at 298–99, 22 P.3d at 213–14.

Thus, in *Lee*, the Supreme Court affirmed the district court's grant of summary judgment in favor of the Golden Nugget in a case in which an inebriated restaurant ***patron choked on food and died***. 117 Nev. at 299, 22 P.3d at 214. In *Lee*, as here, the resort attended to its patron and immediately summoned an ambulance; it did not perform the Heimlich maneuver to clear the decedent's airway, an omission his

widow alleged amounted to negligence. *Id.* at 293–94, 22 P.3d at 210–11. While recognizing that "'reasonableness' is usually an issue for the jury," the Supreme Court held that, "in some clear cases, the nature and extent of the defendant's duty is properly decided by the court," *id.* at 296, 22 P.3d at 212, and that "GNLV's employees acted reasonably as a matter of law by rendering medical assistance to [the decedent] and summoning professional medical aid within a reasonable time," *id.* at 299, 22 P.3d at 214 (emphasis added). In so holding, *Lee* rejected the argument that Golden Nugget's duty required it to do more than provide basic aid and summon professional medical help: "In this case, GNLV's ***employees were under no legal duty to administer the Heimlich maneuver*** to [the decedent]." *Id.*; *see also Campbell v. Eitak, Inc.*, 2006 PA Super 26, 893 A.2d 749 (2006) (restaurant met its legal duty to choking patron when it promptly summoned medical assistance for patron); *Drew v. LeJay's Sportsmen's Cafe, Inc.*, 806 P.2d 301 (Wyo. 1991) (same).

Thus, it was error to instruct the jury on the common carrier's heightened standard of care merely because of the happenstance of First Transit's status as a common carrier. In this case, that status was

legally relevant only as a hook to bring the ordinary standard of care to bear. As this jury was misinstructed on the applicable standard of care, a new trial is necessary. *See, e.g.*, *Gray*, 187 P.2d at 311-12 (reversing for new trial because "the jury might well have felt that the operator must ascertain infirmities of his passengers by some method other than a layman's observations, such, for instance, as by asking questions of the passenger as to his condition, and that failing to do so would not constitute the highest degree of care").

C. Harvey's Impairment Did Not Warrant the Jury Instruction Regarding Additional Care to Disabled Persons

Similarly, it was also misleading, and therefore legal error, to instruct the jury on the sweeping principle that

> [w]hen a carrier is aware that a passenger is mentally disabled so that hazards of travel are increased as to him, it is the duty of the carrier to provide that additional care which the circumstances necessarily require.

(8App.1755.) Any "greater duty of care to a handicapped passenger . . . may only be imposed when the carrier knows or reasonably should know of the *particular* handicap." *Wash. Metro. Area Transit Auth. v. Reading*, 674 A.2d 44, 53–54 (Md. App. 1996) (emphasis added).

The instruction did not apply to the facts in this case. First, the danger of choking on insufficiently chewed food is universal, independent of the "hazards of travel." (4 App. 871-72; 6 App. 1259-60; 1275-76, 1307-08.) Second, even assuming Harvey's mental disability impaired his ability to eat normally, there is no evidence that Farrales knew of *that* weakness. (6 App. 1256-57, 1294-98.) In other words, the type of harm in this case (choking on a sandwich) does not derive from a hazard of travel that poses a unique danger to a typical mentally disabled person, for which the transportation company accepted a special responsibility. Importantly, plaintiffs introduced no contrary evidence.

The evidence, moreover, established that First Transit and its drivers are not social workers or caregivers. (6 App. 1256-58.) The special responsibilities imposed under the Americans with Disabilities Act are limited to the boarding, securing of assistive devices, and disembarking of paratransit buses. *See* 49 C.F.R. § 37.123(e). RTC invites riders unable to care for themselves to bring a PCA or companion. (6 App. 1256-58; 9 App. 2100.) While competent driving requires scanning mirrors, this does not create a heightened duty on the

driver to monitor for medical events. *See Boose v. Tri-Cnty. Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009) ("[C]omplementary paratransit is not intended to be a comprehensive system of transportation . . . [but] simply to provide to individuals with disabilities the same mass transportation service opportunities everyone else gets, whether they be good, bad, or mediocre." (quoting with approval 56 Fed. Reg. at 45,601 (Sept. 6, 1991))); *Gray*, 187 P.2d at 310-311. The company made clear that personal attendants are welcome to attend to a passenger's *en route* personal needs and make accommodation for them. (4 App. 969-970.) Drivers must watch the road.

D. Plaintiffs' Counsel Exacerbated the Prejudice by Abusing the Instructions to Argue that they Combined to Create a Super-Heightened "Derek Jeter" Duty

The instructions cannot be deemed harmless error. Plaintiffs' counsel repeatedly relied on the concept of heightened duty during his closing argument. Plaintiffs' counsel argued the common carrier duty of care was heightened, the equivalent of a standard major league baseball player—much better than the ordinary person, but not necessarily the best of the best. Then, however, counsel argued common carriers had a

super-heightened duty to the mentally disabled, more like Derek Jeter—the best of the best. (7 App. 1648-52.) He encouraged the jury to apply this super-heightened standard, arguing First Transit, as a common carrier, had a super-heightened duty to monitor disabled passengers while operating the bus. (*Id.*) By comparison, he argued "reasonable care" was analogous to "peewee baseball." (7 App. 1648.)

It was under this almost strict-liability standard that plaintiffs argued—and the jury apparently accepted—that First Transit's internal policies constituted special legal duties. But they did not. For instance, First Transit's rule against eating—which is merely an extension of the Regional Transit Center's rule applicable to all RTC vehicles alike—did not create a duty, much less a heightened one. That rule in all RTC vehicles is implemented for cleanliness and to prevent harm to other passengers who might slip on spilled food. (6 App. 1258-60, 1492-93.) Choking is not a particular "consequence against which the [rule] was intended to protect." *Cf. O'Leary v. Am. Airlines*, 475 N.Y.S.2d 285, 288 (N.Y. App. Div. 1984).

Nor can the inclusion of CPR instructions within employee manuals give rise to a heightened duty, "since internal rules and

manuals, to the extent they impose a higher standard of care than is imposed by law are irrelevant to establish a failure to exercise reasonable care." *Abraham v. Port Auth.*, 815 N.Y.S.2d 38, 40–41 (N.Y. App. Div. 2006); *Cooper v. Eagle River Mem'l Hosp., Inc.*, 270 F.3d 456, 462 (7th Cir. 2001) ("[T]he internal procedures of a private organization do not set the standard of care applicable in negligence cases."). "As a policy matter, it makes no sense to discourage the adoption of higher standards than the law requires by treating them as predicates for liability." *De Kwiaktowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1311 (2d Cir. 2002). Thus, even if those facts are admissible to inform the meaning of "reasonable care" under the circumstances, they do not establish any duties beyond reasonable care. (9 App. 2092.)

As a result, the jury was misled about the applicable standard of care. Because the jury's determination of liability "could have turned on the degree of care required in ascertaining the physical condition of the passenger" or in rendering aid after observing that a passenger was having a medical emergency, a new trial is required. *Gray*, 187 P.2d at 312; *cf. Nunez*, 271 P.3d at 1109 ("[By] requiring that a carrier exercise *more* care than that reasonable under the circumstances of the case, the

"highest degree of care" instruction approaches the insurance standard, as virtually every accident could be avoided if the carrier acted differently in some way.") "An erroneous instruction as to the duty or standard of care owing by one party to the other is substantial error requiring another trial." *Otterbeck v. Lamb*, 85 Nev. 456, 463, 456 P.2d 855, 860 (1969).

III.

THE $15 MILLION VERDICT IS EXCESSIVE AND DEMONSTRATES PASSION AND PREJUDICE

The $15 million verdict constitutes "excessive damages appearing to have been given under the influence of passion and prejudice." NRCP 59(a)(6). Not only is the amount unjustifiable, but the jury's apportionment of fault and the short time spent deliberating also exhibit the jury's passion, prejudice and lack of seriousness. Much of that passion, moreover, is explained by the improper arguments of plaintiffs' counsel.

Under NRCP 59(a)(6), a district court should grant a new trial when it appears that "excessive damages have been given under the influence of passion or prejudice." NRCP 59(a)(6); *see also Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993) (citing

Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 686 P.2d 925 (1984)), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999). Although "excessiveness" and "passion and prejudice" are elusive standards, *Harris v. Zee,* 87 Nev. 309, 486 P.2d 490 (1971), if the amount of the award is so great that it "shocks the judicial conscience," a new trial should be ordered. *See Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996); *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192. Among the factors this Court has considered in determining the excessiveness of an award are: (1) the reasonableness of the award in light of the evidence;[2] (2) the size of the award relative to other awards in comparable cases;[3] (3) the relationship of the special damages to the general damages;[4] and (4) inappropriate conduct at trial designed to arouse passion or prejudice in the jury favorable to the plaintiffs.[5] In determining whether an award "shocks the judicial conscience," no single factor is dispositive. The

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[2] *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196–97, 866 P.2d 274, 284–85 (1993); *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983).
[3] *Nev. Indep. Broad. Corp.*, 99 Nev. at 419, 664 P.2d at 347; *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 712-13, 542 P.2d 198, 208 (1975).
[4] *Drummond*, 91 Nev. at 713, 542 P.2d at 208.
[5] NRCP 59(a)(2); *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000).

amount of the award itself can also demonstrate passion and prejudice. *See Guar. Nat'l*, 112 Nev. at 207, 912 P.2d at 272. This Court reviews the denial of a new trial for abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 612 (2014).

A. Awarding $7.5 Million for 50 Seconds of Conscious Pain and Suffering is Outrageous

Even construed in a light most favorable to plaintiffs, the evidence shows that Harvey would not have been conscious for more the 50 seconds after he allegedly began to choke. (9 App. 2185; *see also id.* 9 App. 2167, 2203; 4 App. 816.) A $7.5 million award for such a short moment of time proves the jury was not thinking coolly and rationally.

Damages for pain and suffering are recoverable only where the victim was consciously aware of her pain and suffering. *See Banks*, 120 Nev. at 843, 102 P.3d at 66; *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991) (citing cases and predicting that "a Nevada court would follow the majority of other jurisdictions, and require pain and suffering to be consciously experienced").

Granting that the physical pain, panic, and fear involved in choking are horrible, awarding $7.5 million for 50 seconds of pain and

suffering[6] (9 App. 2185:10–19), is simply untethered from reality and justice. While courts do not apply a stop-watch approach to the length of conscious pain and suffering, there must be an appreciable time of consciousness in order to justify an award. The Ninth Circuit has held that 10 seconds of consciousness is insufficient to warrant any award. *See Ghotra ex rel. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir. 1996). Assuming one minute of pain and suffering would cross the legal threshold into a justifiable basis to award damages, it could only be nominal.[7]

B. The Award of $7.5 Million to the Parents is Also Excessive

An award of $7.5 million to elderly heirs of an adult-child decedent, who lived apart from them, and who provided them no

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[6] In fact, it is not clear that Harvey experienced any pain and suffering associated with choking. The video images do not reveal any significant struggle involving the standard signs of choking leading up to Harvey's death. Harvey does not cough, attempt to cough, try to get out of his seat, clutch his throat or panic in any way. Plaintiffs' expert Dr. Stein admitted that these signs of choking did not occur. (9 App. 2143-44.)

[7] No award of pain and suffering is appropriate at all unless the jury found that Farrales breached a duty of care *before Harvey passed out*. Plaintiffs presented two theories of duty, breach and causation. The first involved Farrales' "failure" to stop Harvey from eating or to notice any distress before he passed out. The second theory of liability criticized Farrales for not doing enough to rescue Harvey after he lost consciousness. Legally, the award of conscious pain and suffering could be justified only by the first theory.

financial support, is unprecedented. It is also unconscionable.

The award has no connection to the factors set forth in law for evaluating this element of damages, on which this Court instructed the jury—e.g., the ages of the deceased and heirs, respective life expectancies, the probability of financial support, etc. (*See* 7 App. 1743.) First, the Chernikoffs' ages limit their likely remaining time together. Jack and Elaine Chernikoff are both in their late seventies. (3 App. 739.) Harvey was in his fifties and had numerous co-morbidities, such as a history of cancer, hypertension, hypercholesterolemia, diabetes, and history of transient ischemic attack. (9 App. 2105.)

Second, while defendants do not doubt that plaintiffs had affection for Harvey, and vice-versa, they did not spend a lot of time together. Harvey did not live with his parents, and had not lived with them permanently since the age of 18. (4 App. 893:14-18.) He lived in California until 2010, while his parents lived in Nevada. (4 App. 753-55.) The parents traveled every summer without him. (4 App. 861:13–15, 894-95.)

Third, Harvey did provided no financial support. (4 App. 895:15–

22.) (That is not an aspersion on Harvey. But it must be pointed out because lost financial support is a major reason for this element of damages.)

The award is inconsistent with the evidence of the degree of grief and sorrow. There has been no psychiatric treatment, counseling, or resulting illness.

C. Other Indicators of Passion and Prejudice

1. The Jury Awarded Identical Amounts for Dissimilar Claims

The jury here did not bring real thought and individual analysis to these claims. Jurors are charged to thoughtfully, carefully and impartially consider the evidence before deciding upon a verdict. NEVADA JURY INSTRUCTIONS—CIVIL (2011 ed.) Instruction No. 11.01 ("Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court."). As this court has recognized, "[s]ince the purpose of a general damage award is to compensate the aggrieved party for damage actually sustained, an identical award to multiple plaintiffs who are dissimilarly situated is erroneous on its face." *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450-51, 514 P.2d 1180, 1182 (1973).

That claims are tried together does not make them worth the same amount.

Here, the jury awarded the same amount for Harvey's alleged pain and suffering as they did for the parents' remaining years. And there was no distinction between the parents. This identity of awards shows that the jury failed to genuinely analyze the claims.

2. The Jury's Allocation of Fault Defies the Evidence, Reflecting Passion, Prejudice and a Lack of Seriousness

The indicia of passion and prejudice may be evident in the jury's allocation of fault, as well as in the amount of the award. *See, e.g., Scott v. County of Los Angeles*, 32 Cal. Rptr.2d 643, 655 (Ca. App. 1994). In this case, the allocation is nonsensical.

The jury checked boxes on the verdict form indicating that the jurors found Farrales to be negligent and that his negligence was a cause of Harvey's death. Nevertheless, the jury then found that Farrales' negligence did not amount to even one percent among the contributing causes.

After having found that Farrales was negligent and that his negligence was a cause of the damages, the jury's allocation of 0% fault to him demonstrates either a misunderstanding of or disregard for the

instructions. Jurors cannot find one defendant to be a negligent cause but then disregard that determination to assess all liability to his co-defendant with "deep pockets." *That exemplifies prejudice*.

On the other hand, if the jurors did understand the instructions and did follow them, then they necessarily concluded that Farrales' negligence was *de minimis*—it amounted to less than one percent of all causes of Harvey's death. And, if that is the case then the judgment against First Transit must be vacated as a matter of law pursuant to NRCP 50(b). Judgment would have to be entered in favor of First Transit.

The gravamen of plaintiffs' allegation is that Farrales failed to prevent Harvey from eating his sandwich and then he came to Harvey's aid inadequately. Plaintiffs' causes of action against First Transit rest on: (1) vicarious liability for the negligent acts of Farrales *to the extent* that Farrales' omissions contributed to the death; and (2) the theory that Farrales' omissions resulted from inadequate training. If the extent of Farrales' contribution to the injury is *de minimis*, First Transit's resulting vicarious liability would be *de minimis*. And if Farrales' negligence was not a bona fide issue in the case, it does not

matter how he was trained.

3. The Allocation of Zero Fault to Jack and Elaine Chernikoff is Inconsistent with the Evidence

Weighing the relative fault of the persons listed on the verdict dispassionately would have resulted in some allocation to Jack and Elaine. They knew of Harvey's capabilities and weaknesses better than anyone. They knew he took the bus. They apparently never counseled him about the importance of following the rules of the bus, and what precautions he should take for his own safety, nor did they exercise their influence to ensure that a PCA accompany him. The jurors' choice to ignore those facts because they emotionally *wanted* to focus only on First Transit also demonstrates their passion and prejudice and dereliction of their duty to follow the law.

IV.

THE EXCESSIVE VERDICT ALSO MANIFESTS THE JURY'S DISREGARD FOR THE COURT'S INSTRUCTIONS

The verdict shows a "disregard by the jury of the instructions of the Court." NRCP 59(a)(5). That, too, calls for a new trial.

A. The Jury Disregarded the Limitation on Harvey's Damages to Conscious Pain and Suffering

Instruction No. 22 (7 App. 1743) informed the jury that it could

award for "[a]ny damages for pain, suffering, or disfigurement of the decedent." For that element of damages, the jury awarded $7.5 million for the 50 seconds that Harvey allegedly experienced pain and suffering. That exorbitant amount not only reflects the jury's passion and prejudice, it also shows a disregard of this jury instruction.

If any part of the $7.5 million relates to the alleged failures of Farrales after Harvey passed out, the judgment must be vacated and a new trial conducted. That is because we cannot know on which factual theory the jury relied in reaching its conclusions as to liability and damages. *FGA, Inc. v. Giglio*, 128 Nev. at 278 P.3d at 496 ("general verdict rule" does not apply where a party raises overlapping factual theories in support of one single claim).

B. The Jury Ignored the Factors for Evaluating the Parents' Loss of Companionship, Society, Comfort and Relationship

The award of $7.5 million to the elderly heirs also shows disregard for the factors set forth Instruction No. 22 (7 App. 1743) for evaluating an heir's claim. The amount indicates no consideration of the ages of the parents and Harvey, or of their relatively short life expectancies, or of the fact that Harvey provided no support, or the reality that Harvey and his parents had lived in different states and only saw each other

occasionally. It also appears that the jury failed to thoughtfully factor the possibility that even if Harvey had been revived, *but not within the first couple of minutes*, he would have had a serious brain injury, rendering him unable to give the degree of companionship and society that he had before.

C. The Jury Disregarded the Instructions Not to Rely on Sympathy and to Apply "Calm and Reasonable Judgment"

The Court instructed the jurors that they had to reach their awards with "calm and reasonable judgment" (7 App. 1744) and not on the basis of sympathy (7 App. 1745). The jurors manifestly disregarded that charge. They returned the verdict in less than 30 minutes. They awarded two massive, identical figures that demonstrate no regard for the finer points of the case. The allocation of fault conflicts with the evidence. And the jury gave plaintiffs the exact amount of money that plaintiffs' counsel referred to in his closing argument, $15 million. Sympathy, passion and prejudice are the only possible explanations for the award.

V.

REGARDLESS OF WHETHER THE VERDICT IS INHERENTLY EXCESSIVE, IT WOULD HAVE BEEN DIFFERENT BUT FOR COUNSEL'S MISCONDUCT

An independent, yet complementary, reason to vacate the jury's verdict is that misconduct by plaintiffs' counsel affected the verdict. *Lioce* makes clear that for unobjected-to misconduct to constitute plain error, it is not necessary that the resulting verdict be inherently excessive. 124 Nev. at 7, 174 P.3d at 974. Rather, to obtain a new trial based on the cumulative effect of attorney misconduct, the appealing party "must demonstrate that no other reasonable explanation for the verdict exists." *Grosjean v. Imperial Palace, Inc.,* 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009).

A. The Verdict Reflects Plaintiffs' Improper Argument for Recovery Based on the Value of Harvey's Life

Plaintiffs improperly argued for damages that would reflect the value of Harvey's life, basing recovery on Harvey's loss of his own life. (7 App. 1654:25–1655:1; 1657:1–2 ("Certainly the value of Harvey is worth as much as a painting or a sculpture or a car.").) The Nevada wrongful death statute, NRS 41.085, allows only particular elements of damage, such as conscious pain and suffering of the decedent or the

heir's grief and sorrow. Asking for the value of Harvey's life was improper.

1. Wrongful-Death Claims are Limited to the Statutory Items of Recovery

Recovery for wrongful death is determined by statute, and the Nevada wrongful death statute does not allow recovery of damages based on the principles argued by plaintiffs at trial.

Modern wrongful-death statutory schemes, like Nevada's, adopt the approach from England's Lord Campbell's Act. SPEISER, RECOVERY OF WRONGFUL DEATH § 1:11. Before that breakthrough, "personal actions die[d] with the person." *Id.*

As progeny of that act, wrongful death law allows recovery for two distinct types of harm: (1) the decedent's claims for the *decedent's damages* incurred *up until the time of death* (along with special damages for actual costs incurred because of the death; and (2) the harm suffered by heirs for *their* individual losses. NRS 41.085(4), (5). Those are the only recoveries contemplated by the statute.

2. The Value of the Decedent's Life is Not an Recoverable Item of Damages in a Wrongful-Death Claim

The loss of the decedent's life is not an element in either of

Nevada's wrongful-death causes of action. The Supreme Court of Pennsylvania articulated the rationale for excluding hedonic damages of the decedent in wrongful death cases:

> Unlike one who is permanently injured, one who dies as a result of injuries is not condemned to watch life's amenities pass by. Unless we are to equate loss of life's pleasures with the loss of life itself, we must view it as something that is compensable only for a living plaintiff who has suffered from that loss. It follows that [hedonic damages] that may flow from the loss of life's pleasures should only be recovered for the period of time between the accident and the decedent's death.

Willinger, 393 A.2d at 1191.

Similarly, the decedent's theoretical loss of life's pleasures is not one of the harms which the heirs suffer. STUART M. SPEISER, RECOVERY OF WRONGFUL DEATH § 6:45 (4th ed. updated July 2014). In *Brereton v. U.S.*, the court opined:

> The intrinsic value of the decedent's life is an unfit measure of the value of his relationship with the surviving plaintiffs; it is like comparing apples to oranges. To make that valuation the factfinder will need to consider the characteristics of the relationship, not the value society might place on the safety and health of a statistically average individual.

973 F. Supp. 752, 754 (E.D. Mich. 1997); *cf. Kurncz*, 166 F.R.D. 386, 388 (W.D. Mich. 1996).

The great majority of courts that have confronted this issue also interpret their wrongful death statutes to disallow damages for the loss of life itself (either by limiting them to the period between injury and death, or else properly concluding that hedonic damages as a subset of pain and suffering necessarily requires conscious awareness).[8] In other words, "the overwhelming majority of decisions . . . have rebuffed efforts to expand wrongful death damages to include loss of life's pleasures." SPEISER, *supra*, § 6:45.

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[8] *See, e.g.*, *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 931 (Miss. 2002) (gathering cases); *see also Sterner v. Wesley Coll., Inc.*, 747 F. Supp. 263, 273 (D. Del. 1990); *Brown v. Seebach*, 763 F. Supp. 574, 583 (S.D. Fla. 1991); *Kemp v. Pfizer, Inc.*, 947 F. Supp. 1139 (E.D. Mich. 1996); *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991); *Livingston v. United States*, 817 F. Supp. 601 (E.D.N.C. 1993); *Garcia v. Superior Court*, 49 Cal. Rpt. 2d 580, 581 (Cal. Ct. App. 1996); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 680 (Ind. App. 1991); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985) (evaluating "enjoyment of life" damages for wrongful death action); *Shirley v. Smith*, 933 P.2d 651, 691 (Kan. 1997) ("Loss of enjoyment of life is a component of pain and suffering but not a separate category of nonpecuniary damages"); *Phillips v. E. Me. Med. Ctr.*, 565 A.2d 306, 309 (Me. 1989); *Smallwood v. Bradford*, 720 A.2d 586 (Md. 1998); *Anderson/Couvillon v. Neb. Dep't of Soc. Servs.*, 538 N.W.2d 732, 739 (Neb. 1995); *Smith v. Whitaker*, 734 A.2d 243, 246 (N.J. 1999); *Nussbaum v. Gibstein*, 536 N.E.2d 618 (N.Y. 1989); *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 13 (N.D. 1988); *Willinger v. Mercy Catholic Med. Ctr.*, 393 A.2d 1188, 1190-91 (Pa. 1978); *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 943 (Tenn. 1994); *Bulala v. Boyd*, 389 S.E.2d 670, 677 (Va. 1990); *Tait v. Wahl*, 987 P.2d 127, 131 (Wash. Ct. App. 1999); *Prunty v. Schwantes*, 162 N.W.2d 34, 38 (Wis. 1968).

3. The Verdict for $15 Million is the Direct Result of Plaintiffs' Improper Request for that Amount as the "Value of Harvey"

Without independent evidence supporting the jury's precise award of $15 million, the only explanation for that amount is that plaintiffs' counsel asked for it, expressly because that was "the amount that we're asking for for *Harvey's life,*" among other things. (7 App. 1654:25–1655:1.) It was misconduct to encourage the jury to base their award on principles that are contrary to the law. *See Lioce*, 124 Nev. at 18, 174 P.3d at 981. And because plaintiffs' efforts at jury nullification succeeded, the misconduct rises to plain error. *Id.*

The misconduct was particularly palpable because of the vivid imagery plaintiffs' counsel used. He described pondering the question "what is the value" of Harvey's life over meals, visits, and calls with plaintiffs. (7 App. 1655:22–1656:4.) Plaintiffs' counsel catalogued the high prices paid for various sculptures, paintings, and luxury cars, and concluded:

> And I said to myself if the value of a hunk of metal is worth 48 million, if the value of a Van Gogh is worth 66, if the value of a car is worth 52, then certainly the value of a human life is worth just as much.
>
> . . . I thought to myself certainly the life of this man, of this sweet man, is worth at least half the

> value of a painting or a car or a sculpture.

(7 App. 1656-57.) He then drew an emotional picture of a firefighter in a burning museum being asked to save a valuable painting, but then seeing Harvey through the smoke:

> Who is he going to come out of the building with? That's the question that I ask. Who is he going to come out of the building with? Because I—it's not going to be the painting. It's going to be Harvey.

(7 App. 1657:25–1658:4.) Given such an emotionally charged dilemma—either to follow the law of wrongful-death damages or to award an amount to "honor" the inestimable value of a human life (*see* 7 App. 1707:11)—the jury chose to award damages based on the value of Harvey's life. Plaintiffs' counsel asked the jurors to return an award based on broad policy preferences, despite the law. And the jurors did.

B. The Verdict Reflects Plaintiffs' Efforts to Vilify Defendants for Defending the Lawsuit

Plaintiffs' counsel also vilified defendants for even raising a defense and taking the case to trial, improperly suggesting that defendants should have "ma[d]e the choice to do the right thing and to say, you know what, we made a mistake, here are all the rules that we violated, we're sorry." (7 App. 1699:2–4; *see also* 7 App. 1628:6–18 (mocking defendants for allegedly thinking "[s]afety is our core

value . . . unless you're unfortunate enough to choke to death on one of our buses. Then we're going to come into court.").) Whether defendants admitted to liability voluntarily, as opposed to requiring plaintiffs to prove their case, has no relevance to the amount of damages plaintiffs would be entitled to, so it should not have been a topic for argument. *See Young v. Ninth Judicial Dist. Court*, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991) (approving "an attorney's duty to defend his or her clients fully, vigorously, and even with arguments which might be offensive or ultimately unsuccessful" (internal quotation marks omitted)).

Plaintiffs, however, explicitly tied their request for damages to the misconception that defending the case amounted to "disrespect" for Harvey's life. In just one example, plaintiffs' counsel disparaged First Transit for even *requesting* an autopsy that would have shown the cause of death:

> You know, it's not enough to let Harvey choke to death on their bus. ***First Transmit also wanted the coroner to desecrate his body***. And if that's not enough, then they bring that witness on the stand to [imitate a response to choking]. ***Don't let them disrespect this family any more***.

(7 App. 1632:12–16.) Plaintiffs then made an improper golden-rule

argument, inviting the jurors to place themselves in plaintiffs' shoes (*see Lioce*, 124 Nev. at 22, 174 P.3d at 984):

> Use your common sense if you have kids. ***If you have kids you know what your kids do*** [when they are choking], they don't . . . go like this. Instead, what they do is their eyes go like this and they panic. . . . So please don't let them disrespect this family any more.

(7 App. 1642:20–1643:1.)[9] Plaintiffs' request for $15 million was thus framed as an opportunity for the jury to give Harvey the "respect" and "honor" that First Transit allegedly denied him in their defense of the lawsuit. (7 App. 1707:5–12.)

Because the jury's award was expressly predicated on restoring "respect" to Harvey's family based on an improper argument that a vigorous defense was "disrespectful," the verdict must be vacated. *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) ("[I]t is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics.")

[9] At another point, plaintiffs' counsel expressed shock that defendants would try to argue against the existence of a duty: "Are you kidding me? There is no duty to check on your passengers[?] I honestly—I don't believe this." (7 App. 1704:13–21.)

C. The Verdict Reflects Plaintiffs' Improper Request for "Justice" and Punishment, Rather than Compensation

The heirs in a wrongful-death suit have no claim for punitive damages. *Compare* NRS 41.085(4) *with* NRS 41.085(5)(b). Plaintiffs, nonetheless, requested a verdict of $15 million based on ideas of punishment rather than compensation. The jurors' agreement with plaintiffs' figure means that they, too, saw their verdict as a way to punish bad behavior.

Tapping into one of the most powerful recent messages for social change, plaintiffs' counsel instructed the jury that "[y]our job will be to determine whether all lives matter in America, or just some" (7 App. 1706:9–16), implying than anything less than the verdict plaintiffs requested would amount to a decision that Harvey's life did not matter. That stemwinder echoes the one deemed improper in *Lioce*, where the attorney said that "when the jury speaks through its verdict it's a reflection of our society views and beliefs and values as to what justice is or should be." 124 Nev. at 13, 174 P.3d at 978.

Plaintiffs' counsel also explicitly tied their damages request to the notion that First Transit deliberately cut corners and that the verdict needed to be large enough to send First Transit a message, lest First

Transit continue to think

> [s]afety is our core value unless somebody chokes to death on the bus and we have to create an excuse. And in that situation, then we're going to come in and we're going to tell folks that, you know what, safety is not the most important thing. We can alter it and be flexible on the rules, on the safety rules because we don't want to be responsible for the things that we do.

(7 App. 1635:23–1636:5.)

The message repeatedly referenced First Transit's income and the alleged tradeoff First Transit made between profit and safety:

> Real justice in this case would be if Harvey didn't have to die. . . .
>
> Instead we come in and we ask for money, their money. Money that they make off of people like Jay ***who they pay $11 an hour***. We call that money justice.

(7 App. 1654:9–16.) "First Transit smashed, destroyed, and crushed their relationship with their son ***over $88***." (7 App. 1658:22–23.) "Hey, we [First Transit] can't be trusted to do our job that ***we're getting paid a lot of money*** for." (7 App. 1637:15–17.) These types of accusations are proper, if at all, only in the context of a punitive-damages case. But here they provided the foundation for a punitive verdict that should have been only compensatory.

D. Plaintiffs Played on Local Prejudices

Plaintiffs' counsel injected his personal opinion about the justness of his cause by inflaming the jury's local prejudices. He repeatedly told the jury that First Transit had consciously decided:

> [I]t's the wild wild west. We can do whatever we want here. ***People in Las Vegas don't matter.*** Our neighbors to the west in California, they matter. We're going to teach those folks [in California] how to do [first aid]. But we're going to make a choice here over 88 bucks not to train our drivers.

(7 App. 1628:25–1629:19.) And he offered his personal opinion of defendants' expert that "the brutal honesty is he's paid money to save and help avoid responsibility," telling the jury "[y]ou get to consider" that defendants' expert is not from Las Vegas and is a "long time buddy of" defense counsel. (7 App. 1630:10–18.) In contrast, plaintiffs' counsel vouched for plaintiffs' expert that "[h]e has zero dog in the fight" and "[h]e lives here in Las Vegas." (7 App. 1631:2–10.)[10] The argument echoes the one found to be prejudicial misconduct in *Sipsas v. State*, where the attorney disparaged the opposing party's expert for being a "hired gun from Hot Tub Country," a reference to Marin County,

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[10] Plaintiffs also made repeated reference to "promises" First Transit made to the Las Vegas "community." (7 App. 1628:6–7; 1630:25, 1651:13–15; 1705:10–11; 1705:14–19 ("they come into our community and bid on this massive project").)

California. 102 Nev. 119, 124–25, 716 P.2d 231, 234 (1986).

This improper appeal to local prejudice cannot be disentangled from the verdict. In light of plaintiffs' theory that the $15 million verdict would be the jury's way to show that "all lives matter" (7 App. 1706:9–16), the verdict expressed the jury's local outrage at a company that would think "[p]eople in Las Vegas don't matter." (7 App. 1629:15.)

E. Plaintiffs' Counsel Improperly Appealed to the Jurors' Sympathies

Virtually plaintiffs' entire closing argument was based on sympathy toward Harvey and his parents, rather than the law and facts relevant to wrongful-death claims. That was improper. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009).

A couple examples are particularly glaring. Plaintiffs' counsel vouched that Harvey's parents could not have been negligent in putting him on a bus while knowing that he had a tendency to eat on the bus:

> They did everything for [their son]. Everything possible. They loved and cared for him and did everything possible to help him. Do you think for a second if this had been raised to Elaine that she would have done something about it? ***Absolutely she would have.***

(7 App. 1637:6–13 (emphasis added).) Plaintiffs' counsel also offered a reenactment of what Harvey and the driver Farrales supposedly

experienced and thought during Harvey's final moments:

> And I can only imagine as he is slumped over in this seat he's thinking to himself, I know that Jay, I know that you just got back on the bus, why aren't you helping me? Why aren't you helping me, Jay? I like you. You're my friend. Jay, I'm dying. Please, help me. Please help me, Jay.

(7 App. 1646:4–12.)

> [A]nd [Farrales]—he's likely in his mind thinking, Harvey, I want to help you. . . . Harvey, I just don't know how to help you because I haven't been trained by my company for $88.

(7 App. 1646:13–20.) These emotional displays colored the plaintiffs' pain-and-suffering request—"knowing that you're dying, knowing that the driver gets back on the bus and is doing nothing to help." (7 App. 1658:7–9.) The verdict of a reasonable jury would have been different but for plaintiffs' improper arguments.

CONCLUSION

Defendants did not receive a fair trial. The jurors were barred from considering Harvey's fault in causing his own death. The jurors were told that defendants had to exercise the highest degree of care in ascertaining and addressing medical emergencies not of their own making. And the jurors awarded an inflated verdict based on passion, prejudice and misapprehension of the law.

This Court should vacate the judgment and order a new trial.

DATED this 21st day of November, 2017.

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