IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; and JAY FARRALES, Appellants, vs. JACK CHERNIKOFF; and ELAINE CHERNIKOFF, Respondents.	Case No.: 70164 Appeal from the Eighth Judicial District Court, the Honorable Stefany Miley Presiding

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Respondents, Jack and Elaine Chernikoff ("the Chernikoffs"), are individuals.

2. The Chernikoffs are represented in the District Court and this Court by Richard Harris Law Firm, Charles Allen Law Firm, and Marquis Aurbach Coffing. The Chernikoffs were also previously represented by Cloward Hicks & Brasier, PLLC.

Dated this 7th day of March, 2018.

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II. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This is a wrongful death case in which the jury awarded the Chernikoffs $7.5 million for the "pain and suffering" of their decedent son, Harvey Chernikoff ("Harvey"), and $7.5 million for their "grief, sorrow, loss of companionship, society, comfort, and loss of relationship" (7 Appellants' Appendix ("AA") 1718–1720) against First Transit.[1] NRS 41.085(4)(**Addendum 1**). Harvey was a passenger on a First Transit paratransit bus in Las Vegas driven by Farrales on July 29, 2011. 12AA(video). Harvey had mental disabilities and was previously interviewed for approval before using First Transit's paid paratransit bus services. 4AA858. First Transit had a specific bus driver safety policy for first aid due to

[1] Appellants, First Transit, Inc. and Jay Farrales ("Farrales"), are collectively "First Transit."

choking. 4 Respondents' Appendix ("RA") 766. First Transit also had a policy for its bus drivers to scan the interior of the bus every five seconds. 3AA602. On July 29, 2011, when Harvey began to eat his lunch on the First Transit bus, Farrales did not scan the interior of the bus for several minutes. 4AA816. When Farrales realized that Harvey was non-responsive, Farrales was unable to do anything because he had not been trained on the company safety policies. 4AA810; 6AA1358–1359. Yet, Farrales did not immediately call 911. 6AA1267–1269. Due to Farrales' delays, Harvey choked to death on the First Transit bus. 1RA160. According to expert testimony, if Farrales had timely provided assistance, Harvey would not have passed away on that fateful day. 3AA687. Over the course of nine days, the parties provided testimony and evidence to the jury, which eventually found that First Transit was negligent. 7AA1718–1720.

First Transit now challenges the jury's $15 million award to the Chernikoffs based on a series of arguments that were either specifically waived or not preserved in the District Court. In post-trial proceedings, First Transit attempted to "reinvent" its case. *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437–438, 245 P.3d 542, 545 (2010)("We decline to reverse summary judgment to allow Schuck to reinvent his case on new grounds."). The District Court was not persuaded by First Transit's new arguments in post-trial proceedings and made findings on First Transit's waiver and the lack of substantive merit in

First Transit's arguments. 11AA2614–2623. This Court should now similarly reject each of First Transit's arguments and affirm the judgment upon the jury verdict (11AA2624–2631) for the following reasons:

The District Court properly rejected First Transit's argument in post-trial proceedings to include Harvey Chernikoff on the verdict form. First Transit argues in its opening brief that the verdict form used at trial should have included Harvey for purposes of comparative negligence. However, at the time the verdict form was settled, First Transit's counsel expressly agreed that the verdict form was "acceptable." 7AA1613; *Jefferes v. Cannon*, 80 Nev. 551, 554, 397 P.2d 1, 2 (1964)("Errors of the trial court cease to be such in the appellate court if invited or waived."). Additionally, the record does not contain any proposed verdict form from First Transit. 5RA1054–1066. So, First Transit's claimed error on the verdict form is not preserved for appellate review. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 321, 212 P.3d 318, 332 (2009).

Even if the Court were to reach First Transit's argument that the District Court should have included an instruction on the verdict form for Harvey's alleged comparative negligence, NRS 41.141(2)(b)(2)(**Addendum 2**) undermines First Transit's entire argument. First Transit chose to remove Harvey's estate at the outset of this litigation to avoid punitive damages under NRS 41.085(5)(b). 1RA1–72. According to NRS 41.141(2)(b)(2), there was no error in the verdict form

since Harvey's estate was no longer a party: "A special verdict indicating the percentage of negligence attributable **to each party remaining in the action**."(emphasis added); *Banks v. Sunrise Hosp.*, 120 Nev. 822, 844–845, 102 P.3d 52, 67–68 (2004). Therefore, the Court should affirm the judgment and reject First Transit's argument challenging the verdict form.

The District Court also properly rejected First Transit's argument in post-trial proceedings regarding jury instructions on duty. First Transit argues that the jury was improperly instructed with respect to two instructions on duty. However, the District Court's order denying new trial reflects that First Transit itself offered Jury Instructions Nos. 32 and 34. 1AA2618–2619; 7AA1584. Additionally, First Transit did not file any alternative proposed jury instructions to suggest that it had no duty. 5RA1054–1066. So, First Transit cannot demonstrate that its arguments regarding jury instructions are preserved for this Court's review. *Etcheverry v. State*, 107 Nev. 782, 784–785, 821 P.2d 350, 351 (1991)("This court has previously held that '[t]he failure to object or to request special instruction to the jury precludes appellate consideration.'"); NRCP 51.

Even if the Court were to consider First Transit's arguments on these two jury instructions, First Transit does not object to Jury Instruction No. 31, defining "common carrier" and concluding that First Transit is a common carrier. 8AA1752. The common carrier duty outlined in Jury Instruction No. 32

(8AA1753) is a pattern jury instruction and supported by Nevada law. NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.42 (2011 ed.); *Groomes v. Fox*, 96 Nev. 457, 458, 611 P.2d 208, 208 (1980); *Sherman v. S. Pac. Co.*, 33 Nev. 385, 111 P. 416, 424 (1910); *Forrester v. S. Pac. Co.*, 36 Nev. 247, 134 P. 753, 767 (1913). Thus, First Transit's efforts to disavow Nevada law are without merit.

Similarly, First Transit did not object to Jury Instruction No. 33, which defines "disability" and concludes that Harvey was disabled. 8AA1754. Jury Instruction No. 34 (8AA1755) is also a pattern jury instruction and is based upon *Am. President Lines, Ltd. v. Lundstrom*, 323 F.2d 817, 818 (9thCir. 1963). NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.45 (2011 ed.). Since the jury was properly instructed, this Court should affirm the judgment and reject First Transit's request for a new trial. *Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 735–736, 192 P.3d 243, 250 (2008).

The District Court also properly rejected First Transit's argument in post-trial proceedings regarding the claimed excessiveness of the jury verdict. First Transit's opening brief relies heavily upon the argument of counsel to have this Court reweigh the evidence presented to the jury. Of course, the argument of counsel is not evidence. *Jain v. McFarland*, 109 Nev. 465, 475–476, 851 P.2d 450, 457 (1993)("Arguments of counsel are not evidence and do not establish the facts of the case."). And, this Court does not reweigh evidence. *State v. Ruscetta*,

123 Nev. 299, 304, 163 P.3d 451, 455 (2007)(stating that this Court does not act as a fact-finder). Perhaps most troubling is that First Transit's opening brief attempts to present its own version of facts, while avoiding the Chernikoffs' evidence. Even though First Transit did not file an NRCP 50(a) or 50(b) motion for judgment as a matter of law, much of the opening brief is dedicated to First Transit's bare allegations that the evidence presented to the jury supposedly does not support the verdict. Appellants' Opening Brief ("AOB") 50 ("Weighing the relative fault of the persons listed on the verdict dispassionately would have resulted in some allocation to Jack and Elaine."). But, First Transit's failure to file a motion for judgment as a matter of law forecloses this entire line of reasoning. *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969)("A party may not gamble on the jury's verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it."). Additionally, First Transit did not present all the "evidence" in this case, including admitted trial exhibits, to provide an adequate record for this Court's review. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007)(citing NRAP 30(b)(3) and placing the burden on the appellant to present an adequate record).

Since the Chernikoffs prevailed at trial, they are entitled to all favorable inferences in the record. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252. But, First Transit erroneously assumes just the opposite: "[D]efendant is entitled to all

inferences from the evidence." AOB2. Since First Transit does not support this statement with any legal authority, the Court can safely ignore First Transit's improper assumption. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006)(concluding that this Court does not consider arguments that are not cogently made). Because First Transit has presented a misplaced legal framework, none of its arguments on the claimed excessiveness of the jury verdict prevail.

For example, First Transit's bare claim that the jury's award to the Chernikoffs "shocks the judicial conscience" (AOB43) is misguided because it must also challenge the sufficiency of the evidence supporting the award—which First Transit has not done. *Wyeth v. Rowatt*, 126 Nev. 446, 472, 244 P.3d 765, 783 (2010)("Based on the evidence presented to the jury, we conclude that the compensatory damages awards after remittitur are not excessive because they are supported by substantial evidence and the awards do not shock our conscience."). First Transit also suggests that this Court should grant a new trial because Harvey only allegedly suffered for "50 seconds after he allegedly began to choke," and "[a] $7.5 million award for such a short moment of time proves the jury was not thinking coolly and rationally." AOB44. Not surprisingly, First Transit offers this argument without referencing the relevant standards of review. In reality, damages for pain and suffering are peculiarly within the jury's province. *Stackiewicz v.*

Nissan Motor Corp., 100 Nev. 443, 454–455, 686 P.2d 925, 932 (1984). And, this Court does not substitute its own judgment for the trier of fact on the issue of damages. *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284–285, 646 P.2d 553, 555 (1982). As such, First Transit's excessiveness arguments are without merit.

First Transit finally argues that the Chernikoffs' counsel committed attorney misconduct during the closing argument sufficient to warrant a new trial. However, this argument, too, is without merit for a variety of reasons. First Transit never objected during the Chernikoffs' closing argument, which the District Court treated as a waiver. 11AA2619–2620. The District Court also found that First Transit could not satisfy the very high burden to demonstrate plain error. *Id.*; *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981–982 (2008). Since First Transit has not presented all the evidence from the jury trial to this Court, its own self-serving argument can never satisfy the plain error standard. In any event, when First Transit's claims of attorney misconduct are placed in context with the evidence, First Transit has not demonstrated "irreparable and fundamental error." *Lioce*, 124 Nev. at 19, 174 P.3d at 982. For example, First Transit claims that counsel for the Chernikoffs' presented an improper measure of damages based upon Harvey's life. AOB53–58. In this same argument, however, First Transit agrees that NRS 41.085 governs the measure of damages that the Chernikoffs were awarded.

AOB53. In particular, NRS 41.085(4) permitted the Chernikoffs to recover "pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent." During closing arguments, Harvey's life was discussed in the context of "the loss of companionship, for the loss of love, for the loss of relationship...," which coincides with the statutory language. 7AA1654–1655. Thus, First Transit's entire claim on the value of Harvey's life lacks foundation. Therefore, the Court should also reject First Transit's attempts to reinvent its case on the basis of attorney misconduct without ever having objected at trial or satisfying the plain error standard.

In summary, this Court should affirm the judgment on jury verdict in favor of the Chernikoffs for a variety of reasons. First Transit has not preserved its challenge to the verdict form for review by this Court. And, NRS 41.141(2)(b)(2) specifically required Harvey's estate to be omitted from the verdict form. First Transit also has not preserved its challenge to Jury Instructions Nos. 32 and 34. In any event, both jury instructions are pattern jury instructions that correctly define First Transit's duties owed. First Transit also has not preserved its argument regarding alleged attorney misconduct by failing to object at trial and cannot satisfy the plain error standard. First Transit's remaining arguments on the claimed excessiveness of the jury verdict are completely without merit. Therefore, the

Chernikoffs respectfully request that this Court affirm the judgment based upon any reason supported by the record. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981)("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

III. STANDARDS OF REVIEW

A. STANDARDS FOR REVIEWING JURY VERDICTS.

It is a basic principle of appellate review that when substantial evidence supports a jury's verdict, this Court will not disturb the result "despite suspicions and doubts based upon conflicting evidence." *Allen v. Webb*, 87 Nev. 261, 266, 485 P.2d 677, 679 (1971). The role of determining witness credibility belongs to the fact finder, and this Court will not direct that certain witnesses should or should not be believed. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487, 117 P.3d 219, 223 (2005); *Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

B. STANDARDS FOR REVIEWING FACTUAL ISSUES.

This Court will not disturb a district court's findings of fact unless they are clearly erroneous and not supported by substantial evidence. *Sheehan*, 121 Nev. at 486, 117 P.3d at 223. Waiver is generally a question of fact. *Merrill v. DeMott*, 113 Nev. 1390, 1399, 951 P.2d 1040, 1045 (1997).

C. STANDARDS FOR REVIEWING DAMAGES AWARDS.

When considering a damages award, this Court presumes that the jury believed the evidence offered by the prevailing party and any inferences derived from the evidence. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252. This Court does not substitute its own judgment for the trier of fact on the issue of damages. *Automatic Merchandisers*, 98 Nev. at 284–285, 646 P.2d at 555. "The elements of pain and suffering are wholly subjective. It can hardly be denied that, because of their very nature, a determination of their monetary compensation falls peculiarly within the province of the jury....[This Court] may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable." *Stackiewicz*, 100 Nev. at 454–455, 686 P.2d at 932.

D. STANDARDS FOR REVIEWING ORDERS DENYING NEW TRIALS.

This Court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424–425 (2007). This Court will not disturb a district court's decision resolving a motion for new trial unless there has been a "palpable" abuse of discretion. *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

E. STANDARDS FOR REVIEWING VERDICT FORMS.

This Court presumes that a jury followed the instructions given to it by the district court. *W. Techs., Inc. v. All-Am. Golf Ctr., Inc.*, 122 Nev. 869, 875, 139 P.3d 858, 862 (2006). Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 272, 628 P.2d 681, 682 (1981). A party waives a claim of inconsistent answers on a special verdict form by failing to raise it in district court before the jury is discharged. *Id.* This Court's goal of salvaging the jury's verdict requires that a party dissatisfied with the jury's verdict to timely object to the filing of the verdict or move that the case be resubmitted to the jury; otherwise, any objection to the form of the verdict is waived on appeal. *Cramer v. Peavy*, 116 Nev. 575, 582–583, 3 P.3d 665, 670 (2000).

F. STANDARDS FOR REVIEWING JURY INSTRUCTIONS.

This Court has held that a district court has broad discretion to settle jury instructions. *Skender v. Brunsonbuilt Constr. and Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). Accordingly, this Court will review a district court's decision to give a particular instruction for an abuse of discretion or judicial error. *Id.* 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. *Id.* The Court has previously held that the failure to object or to request a special instruction to the

jury precludes appellate consideration. *Etcheverry*, 107 Nev. at 784, 821 P.2d at 351. In fact, a party complaining of a jury instruction on appeal must have prepared an alternative instruction and requested the district court to give the alternative instruction. *Id.*, 107 Nev. at 785, 821 P.2d at 351.

G. STANDARDS FOR REVIEWING ALLEGATIONS OF UNOBJECTED-TO ATTORNEY MISCONDUCT.

When a party has failed to object to a purportedly improper argument, the issue is not preserved for appeal. *Lioce*, 124 Nev. at 19, 174 P.3d at 981–982. Unobjected-to misconduct may still be reviewable if there was plain error, which means that there is no reasonable explanation, other than the misconduct, for the jury's verdict. *Id.* This Court will give deference to the district court's factual findings and application of the standard to the facts. *Id.*, 124 Nev. at 20, 174 P.3d at 982.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. THE CHERNIKOFFS' COMPLAINT.

On July 29, 2011, Harvey, who had a mental disability, was a passenger on a First Transit paratransit bus with Farrales as the driver. 1AA5, ¶10. Farrales knew that Harvey had a mental disability. *Id.*, ¶13. Harvey began eating his lunch while on the bus and began choking. *Id.*, ¶11. Neither Farrales nor anyone else from First Transit assisted Harvey as he choked. *Id.*, ¶14. The Chernikoffs sued First Transit and alleged claims for (1) negligence; (2) respondeat superior; (3) negligent

hiring, retention, and supervision; and (4) punitive damages. 1AA5–12. The Estate of Harvey Chernikoff ("the Estate") was originally a named Plaintiff in the lawsuit. 1AA2. First Transit filed a motion to dismiss the Estate from the lawsuit for statutes of limitations issues. 1RA1–72. Rather than litigate these issues, the Chernikoffs opted to stipulate to dismiss the Estate. 1AA39–45. The dismissal of the Estate removed the possibility of punitive damages against First Transit that Harvey could have recovered had he lived. NRS 41.085(5)(b). As a result of the dismissal of the Estate, the parties stipulated to the removal of the Chernikoffs' punitive damages claim (1AA98–105) and any claim for funeral expenses. 1AA135–142.

B. THE JURY TRIAL.

1. Testimony of Jack Chernikoff, Harvey's Father.

Jack Chernikoff ("Jack") explained at trial that Harvey was his oldest son, and Neil Chernikoff ("Neil") was his second son. 4AA751. Although from the East Coast, Jack moved his young family (Harvey was 13 at the time) along with his wife, Elaine Chernikoff ("Elaine"), to Santa Monica, California for Harvey to receive the newest training for children with disabilities. 4AA753. After turning 18, to ensure Harvey had as normal of a life as possible, he was placed in self-dependent and semi-dependent living arrangements for disabled adults. 4AA753–755. After Harvey moved out of the house, he would continue to call home and

would call nearly every day. 4AA764. Eventually, Harvey was moved to Las Vegas to live in a house that his parents rented for him so he could be closer to them. 4AA755. Harvey had a personal care assistant, Joseph, who was from California. 4AA755–756. Harvey had participated in the Special Olympics. 4AA758; 4RA777–792. Harvey loved everyone he met and would ask about their shoe size, the car they drove, how tall they were, and he remembered the cars they drove. 4AA761. The Chernikoffs were in Maryland on vacation at the time of Harvey's death and learned of his passing from Joseph. 4AA797. Jack explained to the jury that he missed joking around with Harvey and that he had a wonderful sense of humor much like his father who was a frustrated comedian. 4AA762, 799.

Jack told stories about Harvey's youth and rituals they had at bedtime where Jack would say things like, "Harvey Parvey puddin' pie kissed all the girls and made them cry," and Harvey would ask, "Why did I make the girls cry," to which Jack couldn't explain. 4AA763. Jack also explained that sometimes Harvey surprised him and gave recent examples such as when President Obama was on TV and Jack was explaining the election process to him, and Harvey was so interested in that process. 4AA763.

2. Testimony of Elaine Chernikoff, Harvey's Mother.

Elaine testified at trial that Harvey was enrolled in a school for individuals with disabilities at a young age. 4AA830. Reviewing Harvey's childhood, Elaine explained that that he had difficulty with basic concepts like identifying the value of money. 4AA832. Harvey read at below a first-grade level. 4AA842. As Harvey grew up, he started to see differences between himself and his brother, Neil. 4AA844. Harvey previously lived in a board-and-care house but eventually returned home because he did not receive the medical care he needed. 4AA851–852. When Harvey was in his 40s, he lived away from home but often returned on the weekends. 4AA850. Eventually, Harvey received his personal care assistant, Joseph. 4AA853–854. Before Harvey could pay for the First Transit paratransit bus services, he had to be interviewed for eligibility. 4AA858. Elaine explained that Harvey loved to ride the bus and always sat in the seat right behind the driver. 4AA859. Harvey took the bus to workshops and special jobs and always had his lunch box with him. 4AA860–861. Elaine did not find out that choking was the cause of Harvey's death until she saw his death certificate. 4AA865. Without objection, Elaine testified at trial that if First Transit had done its job, Harvey would still be alive. *Id*. Because of his mental disabilities, Harvey would not have been able to read signs on a bus. 4AA901. Elaine never heard any First Transit bus drivers tell Harvey not to eat on the bus. 4AA902. Elaine told about Harvey's

girlfriend, Rosemary, a girl with disabilities he met at Opportunity Village, and how they liked bowling together. 4AA682.

3. Testimony of Neil Chernikoff, Harvey's Brother.

Neil testified at trial that although Harvey had a driver's license, he never once drove alone, and only drove the car an estimated 20 times over 20 years which was limited to parking lots that were not crowded. 5AA1051. Neil found out from his father when Harvey died and that it no longer feels like a family without Harvey. 5 AA 1065. Neil carries Harvey's picture with him. 5AA1068. Neil explained that Harvey loved watches and cowboy shirts. 5AA1073; 1075. Neil described the despair and intense grieving his parents went through after learning of Harvey's death. 5AA180.

4. Testimony of Jennifer McKibbins, First Transit Corporate Representative.

The First Transit corporate representative, Jennifer McKibbins ("McKibbins"), agreed in her trial testimony that its bus drivers are required to check their mirrors including the interior of the bus. 3AA591. In fact, McKibbins explained that First Transit had a policy in place at the time of Harvey's passing that bus drivers were to scan the interior of the bus every five seconds. 3AA602. She agreed in her trial testimony that Farrales should have checked on Harvey before driving off. 3AA613–614.

McKibbins also agreed that when Farrales helped Harvey get a drink of water on the bus, it was a violation of First Transit rules. 3AA594. But, Farrales did not tell Harvey that he could not eat on the bus. 3AA613. McKibbins explained that the First Transit rules against eating or drinking on the buses are established because someone could foreseeably choke on the bus. 3AA595. After reviewing the video of the interior of the bus (12AA), McKibbins agreed that Farrales did not check on Harvey, did not attempt the Heimlich maneuver, did not initiate CPR, and did not call 911 himself. 3AA614–615.

McKibbins elaborated that First Transit has a written safety policy in the handbook for First Transit bus drivers. 3AA619–621; 4RA764–766. Choking is specifically mentioned in the handbook because it can be serious if the driver does not act quickly. 3AA618. The safety handbook outlines the process for performing back blows and then the Heimlich maneuver to address choking. 3AA619–621; 4RA766. The policies in First Transit's safety handbook cannot be changed except in writing by Brad Thomas ("Thomas"), the president of First Transit. 3AA623–624; 4RA770. And, Thomas never changed the safety handbook in writing, so First Transit's safety policies were in effect at the time of Harvey's passing. *Id.*

5. Testimony of Dr. Kenneth A. Stein, the Chernikoffs' Medical Expert.

Dr. Stein agreed with the statement in First Transit's safety manual that choking can be a serious problem if not addressed quickly since seconds and minutes count. 3AA656–657; 4RA766. Dr. Stein explained to the jury that First Transit's safety policies outlined how to treat choking (3AA659), including getting the person to lean forward for back blows (3AA661–662), checking the mouth after back blows (3AA663–664), and performing the Heimlich maneuver. 3AA665. As Dr. Stein explained, it only takes a minute or two to get through the procedures to address choking. 3AA669–670. Within a reasonable degree of medical certainty, Dr. Stein opined that Harvey could have been saved had someone from First Transit followed its own safety procedures for choking. 3AA667, 674.

While reviewing the video (12AA), Dr. Stein explained to the jury what he saw. At 8:00:06, Harvey is starting to have some distress and is uncomfortable. 3AA676. Then, Harvey is choking. 3AA677. Harvey is then in obvious distress and starts to get weak and leans over. 3AA682. At 8:01:22, Harvey is unconscious. 3AA687. At this point, CPR still could have saved Harvey. *Id.* At 8:01:36, Dr. Stein opined to a reasonable degree of medical certainty that Harvey's brain still could have come back to where it was. 3AA695. At 8:07:02, Harvey's life still could have been saved. 3AA696. When the fire department

arrived eight minutes later, it was too late. 3AA696–697. There was simply too much delay in First Transit calling 911. 3AA710. Dr. Stein agreed with the Coroner that the cause of Harvey's death was choking. 3AA680; 1RA160. Dr. Stein did not see any indicators of a heart attack in the video and, therefore, opined that it was extremely unlikely that Harvey experienced a heart attack. 3AA705–709.

6. Testimony of Jay Farrales, First Transit Bus Driver.

Farrales explained to the jury that the First Transit handbook is a set of safety rules for bus drivers. 4AA801–803. He agreed that passengers of First Transit buses are entitled to have a bus driver who follows the company rules. 4AA804. The Chernikoffs were entitled to rely upon Farrales to follow the company rules. 4AA805. It was First Transit's responsibility to train Farrales on company policies. 4AA805–806. But, Farrales was never trained on any of the safety rules for choking found in the safety handbook. 4AA810; 4RA766. And, Farrales never received anything saying that the safety rules in the handbook should not be followed. 4AA810. Nevertheless, Farrales agreed that the safety rules are important because somebody could die. 4AA814–815. At trial, Farrales admitted that he did not look at Harvey after helping another passenger. 4AA816. Farrales explained that using the mirrors on the First Transit bus was important to make sure the passengers are safe. 4AA822–823. But, Farrales did not scan the

mirrors when Harvey was eating. 6AA1349. Farrales also knew that Harvey always carried a lunch box. 6AA1357. Once Farrales realized that Harvey was non-responsive, he pulled the bus over to the side of the road. 4AA824. Farrales expressed to the jury that he felt helpless and if he had knowledge of the First Transit safety procedures, he would have helped Harvey. 4AA824–825; 6AA1358–1359.

7. Testimony of Czarina Mendez, RTC Eligibility Specialist.

Czarina Mendez ("Mendez") works for the Regional Transportation Commission of Southern Nevada ("RTC") as an eligibility specialist. 4AA968. Mendez performed the interview for Harvey's eligibility for paratransit services, which was granted for three years. 4AA969. Harvey was allowed to travel with a personal care assistant, but was not required to have one with him. 4AA970.

8. Testimony of Dr. Daniel Lingamfelter, Medical Examiner at the Clark County Coroner's Office.

Dr. Lingamfelter prepared the Coroner's autopsy report for Harvey. 4AA988; 1RA155–176. His deposition testimony, which was read to the jury at trial, confirmed that the immediate cause of Harvey's death was choking. 4AA991. Dr. Lingamfelter explained that the autopsy was not a full autopsy but just an external examination. 5AA1010. Choking as Harvey's cause of death was very solid, and there was no need to put the family through further duress by

completing a full autopsy. 5AA1024. In fact, Dr. Lingamfelter explained that not having a full autopsy is very common. 5AA1028.

9. Testimony of Jennifer Jacobs, Senior Investigator at the Clark County Coroner's Office.

Jennifer Jacobs ("Jacobs") was a senior investigator at the Clark County Coroner's Office. 5AA1034. She testified that there was no evidence of any cause of death other than choking. *Id.*

10. Testimony of Dr. Michael MacQuarrie, First Transit's Medical Expert.

Dr. MacQuarrie, First Transit's medical expert, admitted at trial that choking is a "horrible way to die, and it is a demonstrative way to die." 5AA1197–1198.

11. Testimony of Matthew Daecher, First Transit's Transportation Safety Specialist.

Matthew Daecher ("Daecher") is a transportation safety specialist. 5AA1213. Daecher explained that Farrales did not immediately call 911. 6AA1267–1269. He also agreed that it was Farrales' responsibility to adjust the mirrors on the bus. 6AA1270. Daecher conceded that First Transit did not provide training on the policies in its own manual. 6AA1276.

12. The Jury's Verdict and First Transit's Request to Poll the Jury.

After deliberating, the jury awarded the Chernikoffs $7.5 million for Harvey's "pain and suffering" and $7.5 million for their "grief, sorrow, loss of companionship, society, comfort, and loss of relationship" against First Transit.

7AA1718–1720. First Transit asked the jury to be polled, which revealed that six jurors voted in favor of the verdict, but two jurors did not. 7AA1711–1712. The jury was then discharged without objection. 7AA1712–1715.

C. THE POST-TRIAL PROCEEDINGS.

The District Court entered judgment upon the jury verdict in the total amount of $17,149,631.70. 8AA1764–1773. After the entry of judgment, First Transit filed a motion for new trial and a separate motion to alter or amend judgment. 8AA1786–1827, 1828–1956. After briefing and oral argument, the District Court denied First Transit's motion for new trial and granted in part and denied in part the motion to alter or amend judgment on a prejudgment interest issue. 11AA2606–2623. Based upon the District Court's rulings in the post-trial proceedings, the amended judgment in favor of the Chernikoffs and against First Transit now amounts to $16,135,787.67, plus $20,290.85 in costs. 11AA2592–2623. First Transit now appeals to this Court. 8AA1957–1972; 11AA2632–2686.

V. LEGAL ARGUMENT

A. THE DISTRICT COURT PROPERLY REJECTED FIRST TRANSIT'S ARGUMENT IN POST-TRIAL PROCEEDINGS TO INCLUDE HARVEY CHERNIKOFF ON THE VERDICT FORM.

First Transit's opening brief argues that the verdict form used at trial should have included Harvey for purposes of comparative negligence. However, at the time the verdict form was settled, First Transit's counsel expressly agreed that the

verdict form was "acceptable." 7AA1613; *Jefferes*, 80 Nev. at 554, 397 P.2d at 2. Even if the Court were to reach First Transit's argument that the District Court should have included an instruction for Harvey's alleged comparative negligence on the verdict form, NRS 41.141(2)(b)(2) undermines First Transit's entire argument. Therefore, the Court should affirm the judgment and reject First Transit's argument challenging the verdict form.

1. First Transit Expressly Waived the Inclusion of Harvey on the Verdict Form When It Was Settled at Trial.

First Transit's opening brief attempts to draw in the reader to what it characterizes as an issue of first impression. AOBxvi. Only at the end of the legal argument on the verdict form does First Transit's opening brief discuss waiver. AOB25–28. In reality, waiver is a threshold issue because if First Transit waived the verdict form issue, the Court does not need to reach any of First Transit's related arguments. The District Court's determination of waiver in post-trial proceedings is a factual issue that First Transit cannot overcome, except by demonstrating that no evidence supports the District Court's decision. *Merrill*, 113 Nev. at 1399, 951 P.2d at 1045; *Sheehan*, 121 Nev. at 486, 117 P.3d at 223.

The essence of First Transit's argument on waiver of the verdict form is that while defense counsel Mr. Alverson may have waived the challenge to the verdict form, defense counsel Ms. Sanders later revived the issue. AOB25–28. Ms. Sanders' explanation is found on 7AA1608–1609. During the discussion on the

verdict form, the District Court offered to allow an updated verdict form or an explanatory jury instruction. 7AA1606. But, the record does not reflect that First Transit ever filed either. 5RA1054–1066. After a brief recess, the District Court once again checked with the attorneys on what they wanted to do with the verdict form—**after** Mr. Sanders tried to revive the waiver:

> THE COURT: Thank you everyone. And so I didn't ask you guy[s] before we started. And the verdict form you guys have both gone through and it's acceptable; correct?
>
> MR. CLOWARD: Yes.
>
> MS. HYSON [Counsel for First Transit]: Yes.
>
> MS. BRASIER: Yes, Your Honor.
>
> THE COURT: Perfect. Thank you. Have a wonderful weekend, everybody.
>
> MS. SANDERS: You too, Your Honor.
>
> MR. CLOWARD: You too, Your Honor.

7AA1613. So, after all the dust settled from the discussions on the different possible ways to present the verdict form, First Transit eventually confirmed that it wanted to go forward with the verdict form exactly as it was submitted to the jury. 7AA1718–1720. In the post-trial proceedings, First Transit tried to "reinvent" its case, but the District Court correctly found that First Transit had waived the issue. 11AA2618. This Court cannot allow First Transit to stand by and expressly agree with the verdict form on at least two occasions, only to now want to go back to a

waived position since it did not prevail at trial. *BMW v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011)("The courts cannot adopt a rule that would permit counsel to sit silently when an error is committed at trial with the hope that they will get a new trial because of that error if they lose."). Therefore, the Court should deem First Transit's entire argument challenging the verdict form as waived for failure to preserve any claim of error.

2. First Transit Has Also Failed to Include in the Record Any Competing Verdict Form.

Throughout its argument on the verdict form, First Transit argues that Harvey should have been on the verdict form. But, First Transit did not file a proposed verdict form. 5RA1054–1066. So, this Court is left to speculate what including Harvey on a verdict form would look like. Yet, Nevada law places the burden on the parties themselves to timely submit verdict forms or special interrogatories. *Miller*, 125 Nev. at 322, 212 P.3d at 332–333 ("In other words, the district court does not have a sua sponte obligation to submit its own special verdicts or interrogatories or to give improperly framed special verdicts or interrogatories."). In its opening brief, First Transit does not attempt to articulate how the comparative negligence issues should have been framed in its hypothetical proposed verdict form. Additionally, First Transit did not object in the District Court to Jury Instruction No. 27, which is also consistent with the verdict form: "As an affirmative defense, that some contributory negligence on behalf of

plaintiffs Jack and/or Elaine Chernikoff, was a proximate cause of any damage Harvey Chernikoff, Jack Chernikoff or Elaine Chernikoff may have sustained." 7AA1718–1720, 1748. First Transit also does not assign error to Jury Instruction No. 27 in its opening brief. Thus, First Transit has categorically waived any challenge to the jury being instructed on comparative negligence, without considering Harvey's alleged negligence. *Etcheverry*, 107 Nev. at 784–785, 821 P.2d at 351; NRCP 51.

First Transit's failure to object to Jury Instruction No. 27 is also consistent with its express waiver of any challenge to the verdict form that was given. In other words, First Transit's erroneous position on appeal is that the jury should have decided a comparative negligence issue in a hypothetical verdict form that was never proposed and based upon a hypothetical jury instruction that was never offered. Therefore, this Court should affirm the judgment and reject First Transit's attempt to "reinvent" its case after losing at trial. *Schuck*, 126 Nev. at 437–438, 245 P.3d at 545.

3. First Transit Removed the Estate From This Litigation and Cannot Now Complain.

Although the Estate was originally a party to this litigation, First Transit filed a motion to dismiss to remove the Estate due to statute of limitations issues, as well as the possibility of punitive damages against First Transit that Harvey could have recovered had he lived. 1AA2; 1RA1–72; NRS 41.085(5)(b). Rather

than litigate these issues, the Chernikoffs opted to stipulate to dismiss the Estate. 1AA39–45. Despite the previous order, First Transit now suggests that conceptually it should have been able to assign comparative negligence to a non-party, as if to bring the Estate back into the case. However, with the removal of the Estate, First Transit is judicially estopped from bringing the Estate back into the case. *Marcuse v. Del Webb Communities*, 123 Nev. 278, 287, 163 P.3d 462, 468–469 (2007). In its motion to dismiss the Estate, First Transit specifically asked for the relief, which was later agreed to by stipulation: "Defendants respectfully request[] that this Court dismiss any and all claims of the Estate of Harvey Chernikoff." 1RA8. The District Court later commented that "clearly there is no estate anymore" when clarifying the remaining parties for the caption. 7AA1614. Thus, First Transit is bound by its own filings removing the Estate from this litigation and cannot now complain as a matter of judicial estoppel. *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 549, 396 P.2d 850, 854 (1964) (party may be estopped merely by the fact of having alleged or admitted in his pleadings); *Williams v. Lamb*, 77 Nev. 233, 236, 361 P.2d 946, 947–948 (1961)(parties are bound by the admissions in their pleadings).

4. First Transit Has Not Identified Any Evidence in the Record to Support Its Comparative Negligence Theory as to Harvey.

In its opening brief, First Transit focuses on the academic discussion of comparative negligence but avoids the fact that it has not identified any actual evidence that Harvey was comparatively negligent. First Transit suggests that bare argument satisfies the evidentiary requirement for its comparative negligence theory: "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." AOB 6. For this argument, First Transit points only to the argument of its own counsel, which was outside the presence of the jury. 7AA1608–1612. But, the argument of counsel is not evidence. *Jain*, 109 Nev. at 475–476, 851 P.2d at 457. First Transit is not entitled to assert a comparative negligence defense as to Harvey without any supporting evidence. *Banks*, 120 Nev. at 845 n.62, 102 P.3d at 67 n.62 ("Mere assertion of comparative negligence as an affirmative defense does not, in any case, implicate the operation of NRS 41.141.")(citing *Buck v. Greyhound Lines*, 105 Nev. 756, 763–764, 783 P.2d 437, 442 (1989); *Carlton v. Manuel*, 64 Nev. 570, 576, 187 P.2d 558, 561 (1947)(noting that, although the appellant raised an affirmative defense, where the

record did not disclose any formal offer of proof regarding the affirmative defense, the affirmative defense was abandoned)).

Notably, this Court does not comb the record to find support for a party's position. *Summa Corp. v. Brooks Rent-A-Car*, 95 Nev. 779, 780, 602 P.2d 192, 193 (1979). And, First Transit cannot raise new issues for the first time in its reply brief. *LaChance v. State*, 321 P.3d 919, 929 n.7 (Nev. 2014)("Because the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief, we decline to consider this argument."); NRAP 28(c). As such, First Transit's comparative negligence argument amounts to a request for a prohibited advisory opinion, which this Court should reject. *Applebaum v. Applebaum*, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981)("This court will not render advisory opinions on moot or abstract questions.").

5. First Transit's Interpretation of NRS 41.141 Avoids the Language of the Statute Itself.

In its opening brief, First Transit argues that NRS 41.141 mandates that Harvey should have been included somewhere on the verdict form. AOB13–15. However, First Transit's citation to NRS 41.141 omits the key language of the statute. NRS 41.141(2)(b)(1) indicates that the jury shall return "[b]y general verdict the total amount of damages the plaintiff would be entitled to recover without regard to the plaintiff's comparative negligence." Then, NRS 41.141(2)(b)(2) also requires the jury to return "[a] special verdict indicating

the percentage of negligence attributable to **each party remaining in the action**." (emphasis added). Despite First Transit's contrary arguments, *Banks* supports this statutory language. In *Banks*, 120 Nev. at 844–845 n.61, 102 P.3d at 67 n.61, this Court cited *Warmbrodt v. Blanchard*, 100 Nev. 703, 709, 692 P.2d 1282, 1286 (1984), *superseded on other grounds as stated in Thitchener*, 124 Nev. at 740–743 n.39, 192 P.3d at 253–255 n.39 for the principle that the district court erred by instructing the jury to consider and apportion negligence of nonparties to the trial via special verdict. This statutory formula for the verdict form, confirmed in *Banks*, is precisely what was given to the jury in the instant case. 7AA1718–1720. Yet, First Transit asks this Court to read NRS 41.141 without considering subsection (2)(b)(2), even though neither Harvey nor the Estate is a "party remaining in the action." As such, First Transit's argument runs afoul of the ordinary rules of statutory construction that this Court "must construe statutory language to avoid absurd or unreasonable results, and, if possible [the Court] will avoid any interpretation that renders nugatory part of a statute." *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528–529 (2001); *Berkson v. LePome*, 126 Nev. 492, 497, 245 P.3d 560, 563–564 (2010)(explaining that this Court will read each sentence, phrase, and word in the statute to render it meaningful). To accept First Transit's argument would result in judicial "re-writing" of NRS 41.141(2)(b)(2), which this Court has previously declined to do. *Humphries v. Dist. Ct.*, 129 Nev.

788, 796 n.2, 312 P.3d 484, 489 n.2 (2013)("[W]e leave it to the Legislature to consider the policies behind Nevada's comparative negligence statute and alter the law if they deem it advisable to do so."). Therefore, even if the Court reaches the substance of First Transit's comparative negligence argument, the analysis should end with the plain language of NRS 41.141(2)(b)(2).

Even if the Court were to evaluate the other authorities cited by First Transit in its opening brief, none of these authorities overcome the plain language of NRS 41.141(2)(b)(2). First Transit cites RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY, § 6(a) (2000) and comment c for the notion that this Court should ignore the plain language of NRS 41.141(2)(b)(2) in favor of generalized principles. AOB13. However, comment c is prefaced with the exclusion "[u]nless otherwise provided in a wrongful-death statute…." Thus, the RESTATEMENT does not overcome the plain language of NRS 41.141(2)(b)(2). First Transit's other authorities similarly do not reconcile both the plain language of NRS 41.141(2)(b)(2) and the fact that the Estate was removed from this litigation. For example, in *Woodburn v. Manco*, 50 P.3d 997, 1001 (Idaho 2002), the applicable Idaho statute does not contain a provision similar to NRS 41.141(2)(b)(2), and the decedent's estate was a party to this litigation. Likewise, *Kelson v. Salt Lake Cty.*, 784 P.2d 1152, 1153 (Utah 1989) involved the decedent's estate and the applicable Utah statute does not contain any language

similar to NRS 41.141(2)(b)(2). So, First Transit's reliance upon short phrases taken from these cases cannot overcome the governing language in NRS 41.141(2)(b)(2). Additionally, First Transit's citation to *Fennell v. Miller*, 94 Nev. 528, 531, 583 P.2d 455, 457 (1978) is inapposite because the case admittedly pre-dates NRS 41.141 and does not attempt to apply the statute retroactively.

First Transit's reliance upon selected phrases in other authorities likewise do not overcome the plain language of NRS 41.141(2)(b)(2). First Transit's reference to *Rich v. Taser Int'l, Inc.*, 2012 WL 1080281, at *14 (D. Nev. 2012) and *Moyer v. United States*, 593 F.Supp. 145, 147 (D.Nev. 1984) is unavailing. In *Rich*, the provisions of NRS 41.141(2)(b)(2) never came into play because the decedent's estate was a party to the litigation. *Id.* at *14. *Moyer* also offers no support to First Transit's position since this case was decided in 1984 prior to the current provision "each party remaining in the action," which was added in 1987. 1987 Nev. Stats., ch. 709, S.B. 511, 1697–1698. One of the purposes of the 1987 amendment was explained in the testimony of Pat Cashill, president of the Nevada Trial Lawyers Association, at a meeting of the Senate Judiciary Committee on May 13, 1987. Mr. Cashill stated,

> The key concept is 'parties to the action' which will ultimately be dealt with later on in the bill, but the concept is that joint liability will be eliminated subject to the various exceptions…but several liability will be decided **only among the parties to the action…those who**

> **are in fact named and present in the lawsuit**. This eliminates the risk of either side being able to argue that some fault should be rested on the shoulders of a person or persons **who is not actually a party so that the jury's attention can be focused precisely on those persons who are parties**.
>
> Senator Beyer asked, "Does that eliminate the 'Does I-X' named in a lawsuit?" Mr. Cashill replied, "It will not eliminate the necessity early in a lawsuit of naming the 'Does I-X' before adequate facts may be determinable to actually place names and titles with parties, but it will eliminate the possibility that anyone **who has not been made a party to the action will be the subject of any finger pointing in the lawsuit so that only those who are there…will have their fault allocated among themselves**.

Hearing on S.B. 511 Before the Senate Judiciary Comm., 64th Leg. (Nev., May 13, 1987)(emphases added). Thus, even if the Court considers the legislative history of NRS 41.141(2)(b)(2), it completely supports the Chernikoffs' position that comparative negligence cannot extend to non-parties. In the end, First Transit cannot overcome the plain language of NRS 41.141(2)(b)(2), and this Court should affirm the judgment.

6. Due to Harvey's Mental Disabilities, He Would Not Have Been Held to the Same Standard of Care as Any Other Reasonable Person.

In the context of the verdict form, First Transit claims that Harvey should have both been included on the form and been held to the standard of an ordinary reasonable person. AOB17–19. First Transit's inquiry presents only an abstract question. *Applebaum*, 97 Nev. at 12, 621 P.2d at 1110. Notably, First Transit never presented any verdict form or jury instruction regarding the standard of care

applicable to Harvey. 5RA1054–1066. The Court should treat First Transit's failure as a waiver of this entire argument. *Banks*, 120 Nev. at 845, 102 P.3d at 67–68 (the failure to request a jury instruction or special verdict form waives the issue). And, the District Court cannot place abstract questions on a verdict form without instructing the jury. *Id.*

First Transit agrees that Harvey was disabled, which was the subject of the unopposed Jury Instruction No. 33. 8AA1754. For its standard of care argument, First Transit cites to RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM, § 11 (2010). AOB17. However, First Transit does not point to any specific portion of Section 11 of this RESTATEMENT. Section 11 is primarily concerned with individuals who are also defendants. In the context of comparative negligence, comment e of Section 11 explains, "[T]he plaintiff whose contributory negligence is in part explainable in terms of mental disability can be expected to receive an award that is larger than the awards received by other plaintiffs who engage in seemingly similar acts of contributory negligence." Comment e continues, "Indeed, if the evidence shows that the plaintiff is largely unable to appreciate risks or largely unable to control conduct in light of risk, the jury is likely to assign to the plaintiff only a small share of the overall responsibility." First Transit's citation to the RESTATEMENT (SECOND) OF TORTS, § 283B (1965) makes the same distinction between an individual defending an action or simply being accused of

comparative negligence. *Id.* ("Reporter's Notes: holding that the plaintiff's low intelligence must be taken into account in determining his contributory negligence."). So, First Transit's citation to the RESTATEMENT does not stand for the notion that disabled persons should be treated the same as ordinary persons for purposes of comparative negligence. Later in its opening brief, First Transit acknowledges this distinction, applicable to the instant case, but then changes its argument that Harvey should not have been eliminated from the verdict form due to his diminished mental capacity. AOB18. As such, First Transit's entire argument on this point is self-defeating because First Transit's argument in the opening brief was focused on the standard of care.

Further, unopposed Jury Instruction No. 33 (8AA1754) was based upon a pattern jury instruction and contains the same clarifications of which First Transit now complains:

> When a carrier is aware that a passenger is [**mentally** or physically **disabled**] [feeble or infirm] [intoxicated] [a child traveling alone] so that **the hazards of travel are increased as to [him**] [her], 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.

NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.45 (2011 ed.)(brackets in original; emphases added). Various courts have explained the standard of care relevant to disabled or impaired individuals, which are consistent with this Nevada jury instruction. *Lundstrom*, 323 F.2d at 818 ("A passenger carrier has a duty 'to

exercise extraordinary vigilance and the highest skill to secure the safe conveyance of the passengers' and if it knows that a passenger has physical disabilities it must exercise such higher degree of care—including giving special assistance—as is reasonably necessary to insure that passenger's safety in view of his disabilities."); *Kelleher v. F.M.E. Auto Leasing Corp.*, 192 A.D.2d 581, 584 (N.Y. Sup. 1993)("[T]he defendant common carrier was obligated to care for [an intoxicated passenger] as he was."); *Dokus v. Palmer*, 33 A.2d 315, 317 (Conn. 1943)("A common carrier, having upon its train a passenger who is so intoxicated as not to be able to look out for his own safety…is bound to exercise a degree of care for his protection commensurate with his inability to guard himself from danger."); *Middleton v. Whitridge*, 108 N.E. 192, 197–198 (N.Y. 1915)(conductor was found negligent who failed to assist passenger with stroke). Therefore, the Court should reject First Transit's argument that Harvey should have been included on the verdict form and that he would have been held to the same standard as any other reasonable person.

7. First Transit Cannot Demonstrate Prejudicial Error Due to the Exclusion of Harvey From the Verdict Form.

First Transit argues that it was prejudiced by not being able to present its unsupported theory of Harvey's alleged comparative negligence to the jury. AOB22. As support for this notion, First Transit suggests that Harvey was comparatively negligent in causing his own death, such that First Transit has the

right to construe all inferences from the jury's verdict in its own favor, even though First Transit did not prevail at trial. AOB2. First Transit is incorrect for several reasons. NRCP 49(a)(**Addendum 3**) outlines a process that First Transit was required to follow to remedy any claim of omitted factual issues. According to this rule, if there is an omitted fact not submitted to the jury "each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury." First Transit never demanded that any such omitted facts to be submitted to the jury. 7AA1712–1715. NRCP 49(a) then allows an aggrieved party to "demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." First Transit once again did not make any such demand on the District Court, so the entire issue of a claimed omitted fact has been waived.

First Transit's claim that it has the right as the non-prevailing party to construe all inferences from the jury's verdict in its own favor is exactly opposite of Nevada law. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252. Guided by its misguided position on reasonable inferences, First Transit's entire opening brief presents only its own theories and completely omits the Chernikoffs' evidence presented at trial, as if to retry the facts of the case before this Court. In that regard, First Transit's opening brief constitutes a very lengthy straw man argument. BLACK'S LAW DICTIONARY, 1647 (10th ed. 2014)(defining "straw man"

as "1. A fictitious person, esp. one that is weak or flawed. 2. A tenuous and exaggerated counter-argument that an advocate makes for the sole purpose of disproving it."). Since First Transit has not actually confronted all the contrary testimony and evidence presented to the jury, First Transit's hypothetical comparison of its own favorable evidence to the District Court's rulings on the verdict form can never demonstrate prejudice. Instead, the whole of First Transit's arguments do not amount to more than harmless error. NRCP 61 (**Addendum 4**). Therefore, the Chernikoffs urge this Court to affirm the judgment in its entirety.

B. THE DISTRICT COURT ALSO PROPERLY REJECTED FIRST TRANSIT'S ARGUMENT IN POST-TRIAL PROCEEDINGS REGARDING JURY INSTRUCTIONS ON DUTY.

First Transit argues that the jury was improperly instructed with respect to two instructions on duty. However, the District Court's order denying new trial reflects that First Transit itself offered Jury Instructions Nos. 32 and 34. 1AA2618–2619; 7AA1584. So, First Transit cannot demonstrate that its arguments regarding jury instructions are preserved for this Court's review. *Etcheverry*, 107 Nev. at 784–785, 821 P.2d at 351 (1991); NRCP 51.

Even if the Court were to consider First Transit's arguments on these two jury instructions, the common carrier duty outlined in Jury Instruction No. 32 (8AA1753) is a pattern jury instruction and supported by Nevada law.

NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.42 (2011 ed.); *Groomes*, 96 Nev. at 458, 611 P.2d at 208; *Sherman*, 33 Nev. at 111 P. at 424; *Forrester*, 36 Nev. 247, 134 P. at 767. Thus, First Transit's efforts to disavow Nevada law are without merit. Jury Instruction No. 34 (8AA1755) is also a pattern jury instruction and is based upon *Lundstrom*, 323 F.2d at 818. NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.45 (2011 ed.). Since the jury was properly instructed, this Court should reject First Transit's request for a new trial and affirm the judgment. *Thitchener*, 124 Nev. at 735–736, 192 P.3d at 250.

1. First Transit Itself Offered the Very Jury Instructions on Duty that It Now Claims to Challenge, Without Any Alternative Jury Instructions.

During the settling of jury instructions, the Chernikoffs offered a more stringent version of First Transit's duty as a common carrier (7AA1616–1617), which the District Court rejected:

> MS. BRASIER: So just so that I can keep things organized, we'll be using one the defense has offered.
>
> THE COURT: Yeah, so this will be plaintiffs' proposed, but not given.

7AA1584. As a matter of law, First Transit cannot object to its own proposed jury instructions, such that this entire argument in the opening brief is also waived. *Sheeketski v. Bortoli*, 86 Nev. 704, 707, 475 P.2d 675, 677 (1970)("Since appellants offered the res ipsa loquitur instruction that should not have been given, appellants may not now complain of any such inconsistency, because appellants

invited the error."); *Jefferes*, 80 Nev. at 554, 397 P.2d at 2; NRCP 51(c)(**Addendum 5**). Even if First Transit intended its own proposed jury instructions to be alternatives, no such alternative jury instructions from First Transit appear in the record. 5RA1054–1066. Therefore, the Court should refuse to consider First Transit's entire challenge to Jury Instructions Nos. 32 and 34 since it cannot overcome the District Court's finding of waiver. 11AA2618–2619.

In the District Court, First Transit suggested that it was not a common carrier. 7AA1576. But, if the District Court determined that First Transit was a common carrier, it would then accept its own proposed jury instruction on the duties owed by a common carrier. *Id.* Ultimately, the District Court accepted First Transit's proposed jury instruction on the duty of a common carrier, which was later marked as Jury Instruction No. 32. 8AA1753. Notably, however, First Transit now concedes the threshold question it presented in the District Court on whether it was a common carrier for its failure to challenge Jury Instruction No. 31 in the District Court or this Court. 8AA1752; *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada,* 97 Nev. 474, 476, 635 P.2d 276, 277 (1981)("We have therefore held that when the record does not contain the objections or exceptions to instructions given or refused, we would not consider appellant's claim of error with regard to those instructions."). Accordingly, First Transit accepts that it is a common carrier according to NRS 706.036.

With respect to Jury Instruction No. 34 (8AA1755), First Transit limited its objection by claiming that the case supporting the Nevada pattern jury instruction was distinguishable. 7AA1586; NEVADA JURY INSTRUCTIONS—CIVIL, INSTRUCTION 4NG.45 (2011 ed.)(citing *Lundstrom*, 323 F.2d at 818). According to First Transit, its duty of a common carrier was limited to only the "boarding and alighting" of passengers based upon *McBride v. Atchison, Topeka & Santa Fe Ry. Co.*, 279 P.2d 966 (Cal. 1955). 7AA1587. However, *McBride* does not limit a common carrier's duty to only the boarding and alighting. Rather, a common carrier's duty "includes" the boarding and alighting, as well as the entire period between these events. *Id.* at 968. Thus, the duty outlined in *Lundstrom*, 323 F.2d at 818 remains unchallenged. Due to its failure to even mention *Lundstrom* or *McBride* in its opening brief, First Transit has now waived any challenge to Jury Instruction No. 34. *Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006) (stating that issues not raised in an appellant's opening brief are deemed waived).

2. First Transit's Attempt to Now Seek Refuge in Newly-Raised Issues Beyond the Scope of Its District Court Position Does Not Change the Correct Jury Instructions.

Instead of abiding by its *McBride* objection in the District Court, First Transit now attempts to "reinvent" its case by discussing the scope of its duty. AOB29. However, NRCP 51(c)(1) limits the scope of an objection to what was

"distinctly" stated on the record and the "grounds of the objection." So, to preserve error, any objections to jury instructions in the District Court must be supported by some citation to authority. *Carson Ready Mix*, 97 Nev. at 476, 635 P.2d at 277. First Transit has not limited its argument in this Court to the same scope of argument in the District Court and instead attempts to draw the reader into a discussion of the scope of duties owed by a common carrier. Accordingly, the Court should first refuse to consider these issues based upon NRCP 51(c).

Tellingly, First Transit does not address in its opening brief the case law upon which Jury Instruction No. 32 was given. *Groomes*, 96 Nev. at 458, 611 P.2d at 208; *Sherman*, 33 Nev. 385, 111 P. at 424; *Forrester*, 36 Nev. 247, 134 P. at 767. Instead, First Transit discounts this law as "some turn-of-the-century Nevada cases…." AOB31. However, this Court has recently confirmed the duties owed by common carriers: "[A] common carrier of passengers is bound to use the utmost care and diligence for the safety of the passengers, and is liable for any injury to a passenger occasioned by the slightest negligence against which human prudence and foresight should have guarded." *Obenchain for Obenchain v. Outdoor Promotions, LLC*, No. 67434, 2017 WL 2813970, at *4 (Nev. June 27, 2017)(citing *Sherman*, 33 Nev. at 403–404, 111 P. at 423). Therefore, this Court should affirm the judgment in favor of the Chernikoffs because "[n]o reversal is required where, taking into consideration all of the instructions, the jury was

sufficiently and fairly instructed." *Gordon v. Hurtado*, 96 Nev. 375, 380, 609 P.2d 327, 330 (1980).

With respect to Jury Instruction No. 34, First Transit now asks this Court to treat it as a complete stranger to Harvey for purposes of the scope of its duty. But, First Transit cannot escape its duties owed as a common carrier. *Lundstrom*, 323 F.2d at 818; *Kelleher*, 192 A.D.2d at 584 ("[T]he defendant common carrier was obligated to care for [an intoxicated passenger] as he was."); *Dokus*, 33 A.2d at 317 . The RESTATEMENT (SECOND) OF TORTS, § 314A(1) (1965) also supports this established law on the scope of duties owed. Subsection 1 of the RESTATEMENT provides: "(1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others." Comment d further illustrates the duties owed: "The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door."

First Transit next cites *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001) for the notion that it did not have to render **any** assistance to Harvey.

AOB35–36. First Transit believes that since Nevada law does not impose a duty to perform the Heimlich maneuver, it did not have to do anything while Harvey died. *Id.* But, the District Court never imposed a duty upon First Transit to perform the Heimlich maneuver. Instead, the District Court ruled that *Lee* "does not stand for the proposition that First Transit could simply disregard Harvey while he died." 11AA2619. Indeed, *Lee* held that "if a legal duty exists, reasonable care under the circumstances must be exercised." *Id.*, 117 Nev. at 296, 22 P.3d at 212. *Lee* also clarified that "[w]hether a defendant's conduct was 'reasonable' under a given set of facts is generally an issue for the jury to decide." *Id.* *Lee* ultimately held that the defendant had a duty "to take 'reasonable affirmative steps' to aid patrons in need of medical attention." *Id*., 117 Nev. at 298, 22 P.3d at 213. First Transit's citation to *Campbell v. Eitak, Inc*., 893 A.2d 749 (PA. Super. 2006) and *Drew v. LeJoy's Sportsmen's Cafe, Inc*., 806 P.2d 301 (Wyo. 1991)(AOB36) actually support the Chernikoffs' position because both authorities require prompt assistance, which was not provided in this case The District Court pointed to First Transit's "policies to scan the bus regularly, and the testimony and video evidence presented at trial demonstrat[ing] that the bus was not regularly scanned." 11AA2619; 3AA602, 613–615; 4AA801–810. In other words, First Transit's safety manual did not create the duty owed, but it was evidence of First Transit's failure to act reasonably under the circumstances. *K-Mart Corp. v. Washington*,

109 Nev. 1180, 1189, 866 P.2d 274, 280 (1993)("In negligence cases, self-imposed guidelines and internal policies are often admissible as relevant on the issue of failure to exercise due care."). Thus, the law imposed a duty on First Transit to treat Harvey with the "additional care which the circumstances reasonably require" as outlined in Jury Instruction No. 34. 8AA1755.

First Transit next argues that Farrales was not aware of Harvey's situation and could not have known that Harvey was in need of assistance. AOB34. At trial, however, Farrales admitted that he did not look at Harvey after helping another passenger. 4AA816. Farrales also did not scan the mirrors when Harvey was eating, even though Farrales knew that Harvey always carried a lunch box. 6AA1349, 1357. So, Farrales "could have known" that Harvey was in need of assistance if he had followed the company policy of scanning the interior of the bus every five seconds. 3AA602. Moreover, First Transit's safety manual specifically warned against choking. 4RA766. And, Farrales knew that Harvey was disabled since approval was necessary before using the paratransit services. 4AA969. First Transit's citation to *Wash. Metro. Area Transit Auth. v. Reading*, 674 A.2d 44 (Md.App. 1996) (AOB37) is inapposite because because the disabled plaintiff's injury took place outside of the bus, and the bus driver was a substitute whowas unaware of any of the plaintiff's disability. *Id*. at 55. First Transit's reliance upon *Gray v. City of Seattle*, 187 P.2d 310, 311 (Wash. 1947)(AOB37) is

also misplaced because the jury instruction in that case required the bus driver to diagnose the plaintiff's medical condition. *Id*. at 311. But, *Gray* still required the bus driver to act reasonably according to the circumstances, which is consistent with *Lee*. *Id.* Further, 49 C.F.R. §31.123(e) merely states which persons are eligible for ADA paratransit services. This regulation does not relieve common carriers from the duties owed to aid passengers in peril, especially those who are not accompanied by a PCA or companion. *Martin v. Metropolitan Atlanta Rapid Transit Auth.*, 225 F.Supp.2d 1362, 1376 (N.D. Ga. 2002)(ADA is intended to combat not only intentional discrimination, but also neglect, apathy, and indifference so that qualified persons receive transportation services in a manner consistent with basic human dignity.) Thus, even if the Court were to address First Transit's waived jury instruction issues, they fail substantively, and this Court should affirm the judgment.

3. First Transit Failed to Object to the Chernikoffs' Illustration of the Standard of Care in Closing Argument and, Therefore, Waived the Issue Completely.

In its opening brief, First Transit suggests that the Chernikoffs should not have been able to talk about Jury Instructions Nos. 32 and 34 in closing argument. AOB39–42. Notably, First Transit does not actually allege any attorney misconduct with respect to this issue but suggests that the analogy of a well-known baseball player versus a lesser-known baseball player somehow affected the

underlying jury instructions. *Id.* The Court should first take note that First Transit did not object to the underlying jury instructions and did not object to counsel's illustration of First Transit's duties owed during closing argument. Thus, the Court should treat the entire issue as waived. *Etcheverry*, 107 Nev. at 784–785, 821 P.2d at 351; *Lioce*, 124 Nev. at 19, 174 P.3d at 981–982. In any event, the Chernikoffs' counsel was permitted to offer illustrations to help the jury understand the instructions. *Head v. State*, 575 S.E.2d 883, 888 (Ga. 2003)("Counsel's illustrations during closing argument may be as various as are the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wing to his imagination."). And, the substance of counsel's argument was to demonstrate that First Transit's duties owed as a common carrier was more than a complete stranger, which is consistent with First Transit's citation (AOB40) to *O'Leary v. Am. Airlines*, 475 N.Y.S.2d 285, 288 (N.Y.App. 1984)("However, the defendant in this case is not a private person but a common carrier…."). Accordingly, First Transit's argument that counsel's illustration of Jury Instructions Nos. 32 and 34 during closing argument somehow affected the instructions themselves is without merit.

C. THE DISTRICT COURT ALSO PROPERLY REJECTED FIRST TRANSIT'S ARGUMENT IN POST-TRIAL PROCEEDINGS REGARDING THE CLAIMED EXCESSIVENESS OF THE JURY VERDICT.

First Transit's opening brief relies heavily upon the argument of counsel to have this Court reweigh the evidence presented to the jury. *Jain*, 109 Nev. at 475–476, 851 P.2d at 457. Perhaps most troubling is that First Transit's opening brief attempts to present its own version of facts, even though the Chernikoffs, as the prevailing parties at trial, are entitled to all favorable inferences in the record. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252. Due to the misguided framework of First Transit's entire argument on excessiveness, it simply cannot overcome the very high standards to prevail under the various theories it has presented.

1. First Transit Did Not File an NRCP 50(a) or 50(b) Motion and Has Waived Any Challenge to the Sufficiency of the Evidence.

According to *Price*, 85 Nev. at 607, 460 P.2d at 841: "It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable." *Id.*; *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007)("[A] post-verdict motion under Rule 50(b) is an absolute prerequisite to any appeal based upon insufficiency of the evidence.").

Even though First Transit did not file an NRCP 50(a) or 50(b) motion, it improperly argues against the sufficiency of the evidence. For example, First

Transit argues, "[I]f that is the case then the judgment against First Transit must be vacated as a matter of law pursuant to NRCP 50(b)." AOB49. First Transit also offers the bare argument, "The allocation of fault conflicts with the evidence." AOB52. Since First Transit has waived any challenge to the sufficiency of the evidence to support the jury verdict, this Court should disregard the numerous references.

2. As the Prevailing Parties at Trial, the Chernikoffs Are Entitled to All Favorable Inferences in the Record.

To support its argument for excessiveness, First Transit presents its own version of facts as the measure by which this Court should determine if the jury verdict was excessive. Yet, the Court must look at all the evidence, which First Transit did not even provide to the Court. *Wyeth*, 126 Nev. at 472, 244 P.3d at 783. Moreover, the standards of review expressly prohibit the kind of analysis of the claimed excessiveness that First Transit proposes. *Webb*, 87 Nev. at 266, 485 P.2d at 679 (This Court will not disturb the result "despite suspicions and doubts based upon conflicting evidence."); *Automatic Merchandisers*, 98 Nev. at 284–285, 646 P.2d at 555 (This Court does not substitute its own judgment for the trier of fact on the issue of damages.); *Stackiewicz*, 100 Nev. at 454–455, 686 P.2d at 932 ("[This Court] may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable.").

When reviewing the Chernikoffs' evidence presented at trial, the Court should determine that the jury verdict was not excessive. *Thitchener*, 124 Nev. at 739, 192 P.3d at 252 (2008). For instance, First Transit's own medical expert, Dr. MacQuarrie, testified that choking is a "horrible way to die, and it is a demonstrative way to die." 5AA1197–1198. The District Court specifically relied upon Dr. MacQuarrie's trial testimony to deny First Transit's excessiveness argument. 11AA2620. Dr. Stein reviewed the video (12AA) with the jury and explained when Harvey started to have some distress and was uncomfortable (3AA676), when he was choking (3AA677), when he was in obvious distress and started to get weak and lean over (3AA682), and when he was unconscious. 3AA687. These events took place over the course of about eight minutes. So, First Transit's bare arguments claiming that Harvey did not suffer are without merit and disrespectful. AOB44–45.

With regard to its claim that the Chernikoffs' award for "grief, sorrow, loss of companionship, society, comfort, and loss of relationship" was excessive, First Transit does not offer a single legal authority. AOB45–47. Thus, the Court can safely ignore First Transit's improper arguments. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38. Instead, First Transit asks this Court to reweigh the evidence and invade the province of the jury, which this Court cannot do. Contrary to First Transit's assertions, the District Court found that "Harvey's

family members testified for long periods of time, showed pictures, and demonstrated a close family relationship." 11AA2620. Finally, First Transit's attempt to compare the jury verdict to other cases is not only incomplete (AOB43) but contrary to Nevada law. *Wyeth*, 126 Nev. at 472 n.10, 244 P.3d at 783 n.10. Therefore, First Transit simply has not demonstrated that the jury verdict is excessive.

3. First Transit Waived Its Challenge to Any Claimed Inconsistencies in the Verdict Form.

First Transit's opening brief characterizes the jury as impassioned, lawless, and out to get First Transit. AOB47–52. However, First Transit avoids the fact that two jurors actually ruled in its favor. 7AA1711–1712. Regardless, after First Transit was aware of the verdict and reviewed the verdict, it simply allowed the jury to be discharged without objection. 7AA1712–1715. First Transit's failure to object was fatal to its entire line of argument on alleged inconsistencies. *Baldwin*, 97 Nev. at 272, 628 P.2d at 682 ("Had the parties timely entered objection when the verdicts were returned, the trial court could have determined the validity of the objections. If it found merit in them, the court could have further instructed the jury and sent it back for additional deliberation."); *Cramer*, 116 Nev. at 583, 3 P.3d at 670 ("[W]e have formulated the policy that 'failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury' constitutes a waiver of the issue of an inconsistent verdict."). Yet, First Transit's claimed

inconsistencies are largely speculation of counsel and prohibited attempts to challenge the sufficiency of the evidence. *Jain*, 109 Nev. at 475–476, 851 P.2d at 457. Therefore, the Court should ignore First Transit's waived arguments regarding claimed inconsistencies in the verdict form.

4. First Transit's Argument that the Jury Manifestly Disregarded the Jury Instructions Is Wholly Without Merit.

First Transit suggests that the jury manifestly disregarded the jury instructions simply because it did not render a defense verdict. AOB50–52. The District Court considered First Transit's argument in post-trial proceedings and concluded that First Transit simply did not satisfy the very high burden under NRCP 59(a). 11AA2620. Notably, First Transit's opening brief does not even mention the standard of review for the manifest disregard analysis, even though it was stated in the District Court's order. *Id.* When determining whether to grant a new trial based on manifest disregard of the jury instructions under NRCP 59(a)(5), the question is if the jurors had properly applied the instructions of the court, it would have been impossible for them to reach the verdict that they reached. *Weaver Brothers, Ltd. v. Misskelly*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982). Once again, First Transit makes a cursory argument based on its own evidence, but does not argue that the Chernikoffs' prevailing evidence would make the jury verdict impossible to reach. Unlike the plaintiffs in *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 450–451, 514 P.2d 1180, 1182 (1973), the Chernikoffs are

husband and wife. Additionally, courts do not need to know how juries reached their verdicts, just that they could have based upon the instructions given and the evidence. *M&R Inv. Co. v. Anzalotti*, 105 Nev. 224, 226, 773 P.2d 729, 731 (1989). Therefore, First Transit's manifest disregard argument also fails as a matter of law.

5. First Transit Completely Failed to Object to Any Claimed Attorney Misconduct During Closing Argument and Cannot Demonstrate Plain Error.

First Transit completely failed to object to any claimed attorney misconduct during closing argument and cannot demonstrate plain error. *Lioce*, 124 Nev. at 19, 174 P.3d at 982. The District Court reviewed each of First Transit's claims of attorney misconduct during the closing argument and denied its motion for new trial. 11AA2619. Ultimately, the District Court found, "Having presided at the jury trial and being familiar with the evidence presented to the jury, the Court does not find that the verdict would have been different but for the claimed instances of attorney misconduct." *Id.* With this finding, the District Court also explained that First Transit did not satisfy its "burden to demonstrate plain error or irreparable and fundamental error." 11AA2619–2620. Plain error means that there is no reasonable explanation, other than the misconduct, for the jury's verdict. *Lioce*, 124 Nev. at 19, 174 P.3d at 981–982. First Transit can never satisfy the plain error standard because the reasonable explanation of the jury verdict is the Chernikoffs'

evidence, which First Transit chose to omit and ignore in its opening brief. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365–366, 212 P.3d 1068 (2009)(refusing a finding of attorney misconduct when "[b]oth Grosjean and Imperial Palace presented numerous witnesses and evidence during the trial, and credibility determinations and the weighing of evidence are left to the trier of fact).

First Transit erroneously argues that counsel for the Chernikoffs improperly asked for a measure of damages based upon Harvey's life. AOB53–58. During closing argument, counsel for the Chernikoffs stated, "In this case, the amount that we're asking for [] Harvey's life, for the loss of companionship, for the loss of love, for the loss of relationship, for the things that they destroyed is $15 to 25 million." 7AA1654–1655. The entire statement demonstrates that counsel was simply illustrating the measure of damages in NRS 41.085(4) for the person's "grief or sorrow, loss of probable support, companionship, society, comfort and consortium…." Notably, the jury did not award the Chernikoffs more than their requested damages. And, unopposed Jury Instruction No. 22 added some additional explanation to the statutory measure of damages in NRS 41.085(4). 7AA1743; *W. Techs.*, 122 Nev. at 875, 139 P.3d at 862. Likewise, unopposed Jury Instruction No. 23 gave the jury the discretion to determine an amount of damages for pain and suffering. 7AA1744. So, First Transit's argument based upon an isolated phrase simply does not satisfy the plain error standard.

Several of counsel's other statements in the closing argument were comments upon the evidence. RPC 3.4(e) specifically allows lawyers to allude to facts that are "supported by the evidence." At trial, McKibbins took the position that Farrales and First Transit had done nothing wrong. 7AA1522. First Transit also required a court order to release the video from the bus to the Chernikoffs. 5AA1054, 1058. Daecher also claimed that Farrales did everything he was supposed to do. 6AA1273. As such, the evidence demonstrated that First Transit took absolutely no responsibility for its actions.

First Transit also took the position during trial that Harvey's cause of death could not be determined because a full autopsy was not done. 3AA565. The medical examiner, Lingamfelter, explained in his testimony that Harvey's family did not want an internal autopsy for religious reasons, even though First Transit wanted one. 5AA1010–1028. Lingamfelter even commented that going through a full autopsy would only have the effect of putting Harvey's family in further duress. 5AA1024. So, the comments from counsel on First Transit's position regarding the autopsy were also based upon the evidence.

In its opening brief, First Transit suggests that counsel was commenting upon the larger social issues of whether all lives matter. AOB63–64. This statement, too, was based upon the evidence presented at trial. McKibbens, as the nationwide director of corporate safety for First Transit, testified at length that the

company is in 240 locations throughout the United States but only 10 markets have CPR, first aid, and Heimlich maneuver training. 7AA1537–1538. During this cross-examination exchange, McKibbens was asked several times why Las Vegas and why the other 229 First Transit markets did not train their drivers on these procedures, particularly since First Transit's safety manual contains information about each of these procedures. 4RA764–766. Thus, First Transit's attempt to create an issue of attorney misconduct, while disregarding the testimony of its own witnesses, is equally unavailing.

More recent case law confirms that using the phrase "send a message" while describing the evidence does not amount to jury nullification. *Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 614 (Nev. 2014). Therefore, First Transit's arguments suggesting otherwise are without merit. AOB61–62. First Transit's argument regarding the allegedly punitive nature of the jury verdict is pure speculation of counsel. AOB62. The discussion of $88.00 was comparing the relatively small cost to train each First Transit driver in comparison to the amounts of contracts First Transit had with the RTC. 7AA1658. But, First Transit consciously chose to exclude Las Vegas and most of its 240 markets from any training. 7AA1547. Counsel's remarks were once again based upon the evidence, including McKibbens' testimony. 7AA1543–1547.

Finally, First Transit's claim that counsel "vouched" for Elaine is similarly without merit. AOB64. Farrales testified that he knew Harvey always carried a lunchbox. 6AA1357. Farrales also helped Harvey drink water on the bus, which, according to First Transit, was a violation of its own rules. 3AA594. Counsel was simply commenting on First Transit's hypocrisy in trying to lay blame on Elaine for not taking action with regard to First Transit's rules when First Transit itself was not honoring those rules. Therefore, this Court should affirm the judgment because First Transit cannot demonstrate plain error to overcome the jury verdict or otherwise demonstrate that the verdict was excessive.

VI. CONCLUSION

In summary, this Court should affirm the judgment on jury verdict in favor of the Chernikoffs for a variety of reasons. First Transit has not preserved its challenge to the verdict form for review by this Court. And, NRS 41.141(2)(b)(2) specifically required Harvey's estate to be omitted from the verdict form. First Transit also has not preserved its challenge to Jury Instructions Nos. 32 and 34. In any event, both jury instructions are pattern jury instructions that correctly define First Transit's duties owed. First Transit also has not preserved its argument regarding alleged attorney misconduct by failing to object at trial and cannot satisfy the plain error standard. First Transit's remaining arguments on the claimed excessiveness of the jury verdict are completely without merit. Therefore, the

Chernikoffs respectfully request that this Court affirm the judgment based upon any reason supported by the record. *Hotel Riviera*, 97 Nev. at 403, 632 P.2d at 1158.

Dated this 7th day of March, 2018.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 13,997 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 7th day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joel D. Henriod, Esq.
Daniel F. Polsenberg, Esq.
LeAnn Sanders, Esq.
Benjamin P. Cloward, Esq.

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

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/s/ Leah Dell
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Marquis Aurbach Coffing

INDEX OF ADDENDUM TO RESPONDENTS' ANSWERING BRIEF

Addendum 1

ACTIONS FOR DEATH BY WRONGFUL ACT OR NEGLECT

NRS 41.085 Heirs and personal representatives may maintain action.

1. As used in this section, "heir" means a person who, under the laws of this State, would be entitled to succeed to the separate property of the decedent if the decedent had died intestate. The term does not include a person who is deemed to be a killer of the decedent pursuant to chapter 41B of NRS, and such a person shall be deemed to have predeceased the decedent as set forth in NRS 41B.330.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against the wrongdoer's personal representatives, whether the wrongdoer died before or after the death of the person injured by the wrongdoer. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for the wrongdoer's conduct, the action may be maintained against that other person, or if the other person is dead, against the other person's personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by the decedent's personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of the decedent's estate include:

(a) Any special damages, such as medical expenses, which the decedent incurred or sustained before the decedent's death, and funeral expenses; and

(b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if the decedent had lived,

➥ but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

(Added to NRS by 1979, 458; A 1995, 2667; 1999, 1354)

Addendum 2

COMPARATIVE NEGLIGENCE

NRS 41.141 When comparative negligence not bar to recovery; jury instructions; liability of multiple defendants.

1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or 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.

2. In those cases, the judge shall instruct the jury that:

(a) 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.

(b) If the jury determines the plaintiff is entitled to recover, it shall return:

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to the plaintiff's comparative negligence; and

(2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.

3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

4. Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

(a) Strict liability;

(b) An intentional tort;

(c) The emission, disposal or spillage of a toxic or hazardous substance;

(d) The concerted acts of the defendants; or

(e) An injury to any person or property resulting from a product which is manufactured, distributed, sold or used in this State.

6. As used in this section:

(a) "Concerted acts of the defendants" does not include negligent acts committed by providers of health care while working together to provide treatment to a patient.

(b) "Provider of health care" has the meaning ascribed to it in NRS 629.031.

(Added to NRS by 1973, 1722; A 1979, 1356; 1987, 1697; 1989, 72)

Addendum 3

NRCP 49. SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

[As amended; effective January 1, 2005.]

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

[As amended; effective January 1, 2005.]

Addendum 4

NRCP 61. HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Addendum 5

NRCP 51. INSTRUCTIONS TO JURY; OBJECTIONS; PRESERVING A CLAIM OF ERROR

(a) Written Requests; Format.

(1) A party may, at the close of the evidence or at such earlier time as the court reasonably directs, file written requests that the court instruct the jury on the law as set forth in the requests. The written requests shall be in the format directed by the court. If a party relies on statute, rule or case law to support or object to a requested instruction, the party shall provide a citation to or a copy of the precedent. An original and one copy of each instruction requested by a party shall be filed with the court. The copies shall be appropriately numbered and indicate who filed them.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

[As amended; effective January 1, 2005.]

(b) Instructions.

(1) The court:

(A) shall inform counsel of its proposed instructions and proposed action on the requests before instructing the jury and before the arguments to the jury; and

(B) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered.

(2) Whenever the court refuses to give any requested instruction, the court shall write the word "refused" in the margin of the original and initial or sign the notation. Whenever the court modifies any requested instruction, the court shall mark the same in such manner that it shall distinctly appear how the instruction has been modified and shall initial or sign the notation. The instructions given to the jury shall be firmly bound together and the court shall write the word "given" at the conclusion thereof and sign the last of the instructions. After the jury has reached a verdict and been discharged, the originals and copies of all instructions, whether given, modified or refused, shall be made part of the trial court record.

(3) The court shall instruct the jury before the parties' arguments to the jury, but this shall not prevent the giving of further instructions that may become necessary by reason of the argument. The jury shall be permitted to take to the jury room the written instructions given by the court, or a true copy thereof.

[As amended; effective January 1, 2005.]

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final arguments to the jury, as provided by Rule 51(b)(1)(A), objects at the opportunity for objection required by Rule 51(b)(1)(B); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(1)(B) objects promptly after learning that the instruction or request will be, or has been, given or refused.

[As amended; effective January 1, 2005.]

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and, if the court did not make a definitive ruling on the record rejecting the request, also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).

[As amended; effective January 1, 2005.]

(e) Scope. This rule governs instructions to the trial jury on the law that governs the verdict. Other instructions, including preliminary instructions to a venire and cautionary or limiting instructions delivered in immediate response to events at trial, are not within the scope of this rule.

[As amended; effective January 1, 2005.]