Case No. 70164

In the Supreme Court of Nevada

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FIRST TRANSIT, INC.; AND JAY FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; AND ELAINE CHERNIKOFF,

Respondents.

APPEAL

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Rather than grappling with the important questions of law in the appeal, plaintiffs seek refuge in the Court's waiver doctrines. Plaintiffs' misapplication of those doctrines, however, becomes an inadvertent theme of their brief. They argue inconsistently that a party must renew an objection—and actually provide sample special verdict forms and jury instructions—after the court has ruled against the party as a matter of law, and that a party whose legal objection to a jury instruction has been rejected waives the objection by seeking an *alternative* instruction that fits the court's ruling.

In fixating on waiver, plaintiffs neglect the substantive issues. They ignore that the plain language of NRS 41.141—as confirmed by its legislative history—required that Harvey appear on the verdict form. They also ignore that any heightened standard of care for common carriers applies only to the hazards inherent in transportation, not general risks faced in everyday life. The jury went on to issue an impassioned verdict that gave equal sums—to the penny—for entirely disparate harms, following plaintiffs' counsel improper invitation to

award the value of a life rather than those categories of damages permitted by statute.

These issues, which were diligently preserved below in the same form they are now pursued on appeal, call for a new trial.

I.

UNDER NRS 41.141, THE JURY SHOULD HAVE CONSIDERED THE NEGLIGENCE OF "THE PLAINTIFF'S DECEDENT"

Plaintiffs do not dispute the cases and other authorities that say that the negligence of the decedent should be imputed to the plaintiffs in a death case. They make no attempt to argue that to do otherwise is a reasonable approach. All they do is claim that because NRS 41.141 calls for apportionment of fault only among parties to the action, the negligence of the decedent cannot be considered. This is not only illogical, it is flatly wrong because it contradicts NRS 41.141(1)'s directive to consider the negligence of the decedent.

A. Plaintiffs Ignore that NRS 41.141 Calls for the Jury to Consider the Negligence of the Decedent in a Wrongful Death Claim

1. NRS 41.141(1) Expressly Mandates that the Jury Consider the Negligence of "the Plaintiff's Decedent"

Plaintiffs' argument—that the jury cannot consider the negligence of the decedent because he and his estate are not parties—ignores the actual wording of the statute.

NRS 41.141(1) makes clear that the jury must compare the negligence of the plaintiffs' decedent to that of the defendant to determine if plaintiffs may recover, at all:

> 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***.

NRS 41.141(1) (emphasis added).

Plaintiffs never acknowledge this express wording or attempt to distinguish it or explain it in any way. They just ignore it.

2. The Evolution of NRS 41.141 and the Adoption of the Wrongful Death Statute Underscore that the Jury Consider the Negligence of the Decedent

The legislative history of NRS 41.141 gives depth to the mandate that the jury consider the negligence of the plaintiff's decedent to determine if the heirs may recover in a wrongful death case.

Upon its adoption in 1973 and again in later amendments, NRS 41.141 has had two purposes. *Café Moda, LLC v. Palma*, 128 Nev. 78, 78, 82, 272 P.3d 137, 140 (2012). The statute both abolished joint and several liability and eliminated the defense of contributory negligence, which would have denied recovery to a plaintiff who was even slightly negligent in causing his own injuries. *Id.* Instead, a partially negligent plaintiff may still recover, but only if he is not more at fault for his own injuries than the defendants. *Id.* In its original 1973 version, the statute focused only on injury claims. 1973 STAT. NEV. 1722 (SB 524).

In 1979, the Legislature adopted the wrongful death statute, NRS 41.085. 1979 STAT. NEV. 458. Along with enacting this statute, the Legislature amended NRS 41.141 to set out the application of comparative negligence to death cases. 1979 STAT. NEV. 1356. For example, section (1) of the statute was reworded to include death cases,

with the following italicized words added:

> In any action to recover damages for *death or* injury to persons … in which contributory negligence may be asserted as a defense, the contributory negligence of the plaintiff [shall] *or his decedent does* not bar a recovery if [the] *that* negligence [of the person seeking recovery] was not greater than the negligence or gross negligence of the person or persons against whom recovery is sought….

Id. This amendment makes clear that, in a death case, we are looking at the negligence of the decedent, not just that of the party "seeking recovery," that is, the named plaintiff.

B. Plaintiffs' Argument Twists the Words of the Statute that Direct that Juries Not Consider the Negligence of Non-Parties

Plaintiffs ignore the clear directive of NRS 41.141(1) and, instead, focus on other language that direct that the jury not consider the negligence of non-parties. Plaintiffs rely on only one part of that, NRS 41.141(2)(b)(2), which says that a jury shall return:

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

1987 STAT. NEV. 1697.

From this, they contend that, because the decedent and the estate were not parties at trial, the decedent's negligence should not be

considered. This argument seriously misconstrues the purpose of this language, especially when to do so they must nullify the express directive of section (1) to consider the negligence of the "plaintiff's decedent."

There are two things wrong with that argument: (1) it misapprehends the way wrongful death claims work under NRS 41.085, and; (2) it misunderstands the purpose of the 1987 amendments to all of NRS 41.141, not just section (2)(b)(2).

1. Plaintiffs' argument is Based on a Misapprehension that the Estate is a Critical Party in a Wrongful Death Claim

It seems to go without saying that the decedent will never be an actual party in a wrongful death action, because one has to be alive to be a real party in interest. See NRCP 17(a); NRCP 25(a). But the operation of such a claim is even more subtle and evolved than that because of the wrongful death statute.

NRS 41.085 sets out who may recover what. A wrongful death claim is not simply the estate suing for the harm to a decedent, as in a survival claim under NRS 41.100. Indeed, under the wrongful death statute, the estate may generally recover only special damages, such as

medical and funeral expenses, and punitive damages. NRS 41.085(5)(a) and (b). In many claims, such as for a sudden death without medical treatment, there is no need for the estate to be a party, because the special damages can be minimal (and plaintiffs do not want to anchor recovery to such low numbers) and there is not a cognizable punitive claim.

The real bulk of a death claim, by design, belongs to the heirs. They may recover for their own "grief or sorrow, loss of probable support, companionship, society, comfort and consortium," as well as for the "pain, suffering or disfigurement of the decedent." NRS 41.085(4). Although the last item seems more like the sort of survival recovery that would go to the estate, the Legislature designed the recovery this way so that these damages would not be subject to any debt of the decedent. The Legislature wanted recovery, except special and windfall damages, to bypass the estate and go directly to the heirs.

Simply put, the estate is not a necessary party to a wrongful death claim. As such, the elimination of the estate as a party would not operate to eliminate the jury's consideration of the decedent's negligence as required by NRS 41.141(1).

In this case, plaintiffs attempted to eliminate the jury's consideration of the decedent's comparative negligence simply by withdrawing the estate's minimal claims for special damages and meritless claim for punitive damages. That is too clever by half. Parties should not so blatantly be able to evade NRS 41.141(1) and the legislative intent to have a jury consider the decedent's comparative fault in causing his own death.

2. The 1987 Amendments Limiting the Jury's Consideration of Non-Parties was Directed at Settling and Other Potential Defendants, Not Plaintiff's decedents.

The added words in NRS 41.141(2)(b)(2), calling for a verdict attributing negligence to "each party *remaining in the action*," were part of a comprehensive amendment to the statute that had a purpose other than contradicting section (1)'s directive to compare the negligence of the "plaintiff's decedent." The added language in 1987 was to clarify and codify the practice of not allocating fault to tortfeasors who were not parties to the action at the time of trial, a practice that originated with *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P.2d 1282 (1984). The intent of the language was to exclude from

the verdict settling defendants,[1] immune employers, and parties that plaintiffs simply chose not to sue.[2] With this legislative change, Nevada became one of the few states that apportion fault only among parties at trial, rather than all potential tortfeasors.

And the change was effected by making amendments throughout the statute, not just in section (2)(b)(2). Section (1) also had a language change, but the critical provision was the new section (3) that explained how settlements would operate as an offset from the verdict, rather than having the jury attribute a percentage of fault to a settling defendant:

> 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.

1987 STAT. NEV. 1697. Under this provision, juries do not assess the negligence attributable to a settling defendant. Instead, the judge

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[1] *See, e.g., Banks v. Sunrise Hospital*, 120 Nev. 822, 843, 102 P.3d 52, 67 (2004).

[2] *See, e.g., Humphries v. Eighth Jud. Dist. Ct.*, 129 Nev. 788, 792, 312 P.3d 484, 487 (2013).

makes an offset for the settlement amount after the trial.

While plaintiffs quoted NTLA president Pat Cashill from the legislative history talking about section (2), at the very beginning of plaintiffs' block quote he explained that "[t]he key concept is 'parties to the action[,]' which *will ultimately be dealt with later on in the bill*." (RAB at 33; Leg. Hist at 19; 10 App. 2481. Emphasis added.) Later in the bill and later in the legislative debate, section (3), quoted above, brings that concept home. And here is how Pat Cashill explained that part of the amendment, making clear that the issue concerning the Legislature was the situation of settling defendants:

> Section 3 allows for the treatment of a ***settlement reached before trial with one of the defendants*** who is in the case. The terms of the ***settlement***...will not be placed before the jury, therefore, the jury's duty of allocating fault among those defendants and the plaintiff who are left in the case will not be skewed in any way by an ***negotiative settlement*** which occurred before trial...any ***settlement*** may be reached for any number of reasons...the liability, damages, all sorts of things enter into ***settlement***, but the ***settlement***, in our view, can only cloud the jury's ability to properly determine, as between the plaintiff and defendant, who is at fault, therefore evidence of any pre-***settlement*** is not admissible, but the trial judge is required to reduce the verdict by whatever the amount of any pre-trial settlement, therefore, the remaining defendants will be fixed with the responsibility of paying what the net then is, the net

> being the total amount of damages which the plaintiff is found to have incurred, less whatever was perceived in any ***settlement*** reached...the concept of fairness is addressed here by taking into account whatever has been paid to the plaintiff as an offset against the damage.

(Leg. Hist at 20,; 10 App. 2482. Emphasis added.)

There is nothing in the legislative history that implies that the Legislature was concerned that juries should not consider the decedent's negligence in a death case. Indeed, the legislature left in the statute the directive in section (1) that the jury consider just that.

In the district court, plaintiffs relied primarily on *Banks v. Sunrise Hospital*, *supra*, to argue that a decedent was a non-party and should not be on the verdict. But *Banks* did not involve the issue of whether a jury should consider the negligence of a decedent. Consistent with the statute's focus on how to account for settling defendants, this Court in *Banks* evaluated NRS 41.141 section (3), not section (2), in the context of a defendant who had settled. 120 Nev. at 844, 102 P.3d at 67.

C. Defendants Raised the Issue of Including Harvey on the Special Verdict

1. Defendants Expressly Asked to Put Harvey on the Special Verdict for Comparative Negligence

Defendants clearly raised the necessity of having Harvey, the

decedent, on the special verdict allocating comparative fault.

> MS. SANDERS [defense counsel]: You know, Your Honor, I – I think that Harvey has to be included on the verdict form. It's a wrongful death case. You don't have to have an estate for that, an estate in order to have that. And his negligence, if any, would be imputed to the plaintiffs.
>
> So to the extent that there is comparative for Harvey not – you know, for violating the rule about eating on the bus, his negligence is – is certainly relevant and is something that would be imputed to the plaintiffs who are suing on his behalf. There isn't a reason to let that negligence just go by when they're suing for wrongful death.

(7 App. 1608-09.)

2. In response, Plaintiffs Argued that the Jury Cannot Compare the Negligence of "a Non-Party"

At that point, along with another argument, plaintiffs raised the same argument they assert on appeal, that under *Banks v. Sunrise Hospital, supra*, "you can't argue comparative negligence for a non-party." (7 App. 1609.) The district court then rejected defendants' motion to include Harvey on the verdict form.

3. The Court Effectively Granted Judgment as a Matter of Law on the Issue of Comparative Negligence

Once the district court ruled that the issue of comparative negligence was not going to go to the jury, it was unnecessary for First Transit to propose more forms and instructions. Withholding the issue from the jury amounted to granting judgment as a matter of law on that issue. *McClure v. Biesenbach*, No. SA-04-CA-0797-RF, 2008 WL 3978067, at *2 (W.D. Tex. July 25, 2008). At that point, it became unnecessary for First Transit to object again or propose new forms and instructions, having already litigated and lost on the issue as a matter of law before the district court.

4. There is No Waiver for Agreeing that the Verdict Form was "Acceptable" to use after the Objection

In a bizarre argument, plaintiffs argue that, even though defendants expressly requested that Harvey be included on the special verdict, they "waived" that issue by agreeing that the resulting verdict form was "acceptable" to submit to the jury.

After settling some legal and verdict issues, including defendants' request that Harvey be placed on the verdict form, the district court

sent the jury home for the weekend. The court then checked with counsel on the verdict form:

(Jury recessed at 3:35 p.m.)

> THE COURT: All right. Thank you everyone. And so I didn't ask you guys before we started. And the verdict form you guys have both gone through and it's acceptable; correct?
>
> MR. CLOWARD: Yes.
>
> MS. HYSON [defense counsel]: 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.

(7 App. 1613.)

Plaintiff is actually arguing that agreeing that a verdict form is "acceptable" to be used, after the district court has heard and rejected your legal positions, is waiving every issue you ever raised. Under plaintiffs' view of trial, a lawyer could never agree to anything. Agreeing to the "form and substance" of an order or verdict would be a waiver of every legal argument one has made leading up to that

document. This position is unprincipled and opportunistic.[3]

Plaintiffs rely on *Bayerische Motoren Werke A.G. v. Roth,*[4] but that case involved the "strict standards" of *Lioce v. Cohen*[5] regarding unobjected-to violations of orders—and dealt with a situation where a party did not object to any alleged violations throughout trial until closing argument, so those acts could not be the basis for a new trial. Indeed, even the line plaintiffs quote from *BMW v. Roth* notes that "[t]he courts cannot adopt a rule that would permit counsel to sit silently when an error is committed at trial." 127 Nev. at 137, 252 P.3d at 659.

That is a waiver, when you do not raise any objection. That is not

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[3] Not even the district court thought that counsel's agreement to the form of the verdict—*after* the court made its legal rulings—amounted to a waiver. (11 App. 2681:23 (ruling based on "*Mr. Alverson's* acquiescence" before Ms. Sander's retraction, not *Ms. Hyson's* statement).) Indeed, the court expressly found that defense counsel "retracted th[e] position" that Harvey could be omitted, and the court "ruled on the merits of counsel's objection to Harvey's omission." (11 App. 2681:21–22.) Rather, the district court wrongly believed that once defense counsel had initially suggested agreement with the court's position, the "attempted retraction was procedurally ineffective." (11 App. 2681:22–23.)

[4] *Bayerische Motoren Werke A.G. v. Roth*, 127 Nev. 137, 127, 252 P.3d 649, 659 (2011) (hereinafter *BMW v. Roth)*

[5] *Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008)

the situation here. Defendants were not silent on the issue.

Instead, defendants stated a well-articulated position that Harvey be included on the verdict form because it was a death case. The district court heard and rejected the request. At that point, the court effectively ruled against the defense as a matter of law. Defendants had preserved the issue; they did not need to keep objecting after this definitive ruling. Counsel's later agreement that the verdict form was "acceptable" to use played no part in the district court's decision to exclude Harvey from the verdict form and did not constitute a waiver.

This case is closer to *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002), a case distinguished in *BMW v. Roth*. In *Richmond*, this Court adopted the common-sense rule that, if a district court has definitively ruled on an issue, another contemporaneous objection is not necessary. 59 P.3d at 1254 (where "the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal"). Under plaintiffs' approach, the task of preserving any objection to verdict forms or instructions would become a time-consuming and ridiculously redundant ordeal.

5. Clearly Requesting that Harvey be on the Verdict Form did Not Require additional Proposed Forms or Instructions

Further along their crusade to make the preservation of issues too difficult ever to accomplish, plaintiffs advocate now that a mere request to include a party on the comparative negligence special verdict is not enough. According to plaintiffs, defendants should have proposed additional forms and instructions.

Defendants' position was clear and understandable. *See Otterback v. Lamb*, 456 P.2d 855 (1969) ("Counsel, in the heat of a trial, cannot be expected to respond with all the legal niceties and nuances of a brief writer."). "Objections are sufficient when they serve [Rule 51's] purpose to give the trial court the opportunity to correct the potential error by focusing the court's attention on the alleged error." *Cook v. Sunrise Hospital*, 194 P.3d 1214. *See also, Johnson v. Egtedar*, 112 Nev. 428, 435, 915 P.2d 271, 275 (1996) (concluding that NRCP 51's requirements were satisfied when appellant's objection, respondent's initial objection to the court, and a review of the record revealed that the district court was adequately apprised of the issue of law involved and had an opportunity to correct the error); *Tidwell v. Clarke*, 84 Nev. 655, 660,

447 P.2d 493, 496 (1968) (providing that when counsel timely calls the court's attention to the issues of law, a slight omission in compliance with NRCP 51 will not preclude appellate review).

It was clear that defendants wanted Harvey on the special verdict allocating comparative fault. It takes no "speculat[ion]" to know "what including Harvey on a verdict form would look like," or how the instruction on comparative negligence would have changed. (*Contra* RAB 26–27.) His name would have appeared on the verdict just the way that his parents' did, and his name would have been added alongside his parents' in the comparative-negligence instruction. Neither plaintiffs nor the district court was confused by the lack of a proposed verdict form or jury instruction; the court simply rejected defendants' position as a matter of law. Plaintiffs should not be able to create new and onerous requirements simply to evade the issue.

D. As Discussed in the Opening Brief, Defendants Presented Evidence of Harvey's Negligence

Plaintiffs also falsely represent that defendants presented no evidence of Harvey's comparative negligence and prospectively lecture this Court about not entertaining any argument raised in a reply brief.

(RAB 29-30.)

To make this argument, plaintiffs cite to one page of the opening brief (AOB 6), ignoring the more extensive discussion under the argument heading "There is a Bona Fide Jury Question of Harvey's Comparative Negligence" (AOB 19-21). That section cites extensively to the trial record, including the testimony of Elaine Chernikoff (AOB 21 (citing 4 App. 881-81)), Jay Farrales (AOB 21 (citing 4 App. 815-18, 6 App. 1307-10, 1322-24, 1326-28, 1347-51)), plaintiffs' expert Kenneth Stein (AOB 21 (citing 3 App. 731-32)), and defense expert Matthew Daecher (AOB 21 (citing 6 App. 1260)). The video shown to the jurors and entered into the record as an exhibit also would have allowed the jurors to evaluate Harvey's conduct for themselves. (12 App.)

This Court does not have to "comb the record." (*Contra* RAB 30.) It's all there: the testimony that the rule against eating was communicated to Harvey (4 App. 881-84, 6 App. 1307-10) and that Harvey nonetheless wolfed down his sandwich (3 App. 731-32; 6 App. 1260) while hunched in his seat (12 App.), thwarting any effort to prevent his doing so and concealing his distress (4 App. 815-18; 6 App. 1322-24; 1326-28; 1347-51.). That he was hiding his misbehavior also

indicates that he knew what he was doing was wrong.

And here, where the district court effectively granted judgment as a matter of law on the question of Harvey's comparative negligence, defendants are entitled to have the inferences drawn in their favor. *See Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007). Because a reasonable juror could have considered Harvey's actions negligent in a way that at least contributed to his peril, the jury's inability to assign Harvey any comparative fault was reversible error.

II.

THE COMMON CARRIER INSTRUCTION WAS INAPPROPRIATE

A. A Common Carrier Owes a Duty of Just Reasonable Care for Harms Unrelated to the Risks of Transportation

The historical basis for a heightened standard of care on common carriers has eroded. More and more states recognize that the "reasonable person" is a standard that depends on the circumstances of the case and is flexible enough to govern common carriers. *See, e.g.*, *Nunez v. Prof. Transit Mgt. of Tucson, Inc.*, 271 P.3d 1104, 1109 (Ariz. 2012) (noting that, unlike the heightened standard of care, the reasonable person standard provides sufficient flexibility (quoting

Restatement (Second) of Torts § 283 cmt. c)); *compare* NRS 41A.015 (defining "professional negligence" as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care").

But even the antiquated, heightened standard of care for common carriers applies only to the risks inherent in transportation. *See Pac. S. S. Co. v. Holt*, 77 F.2d 192, 196 (9th Cir. 1935) ("Taking into consideration that the rule requiring carriers to exercise the highest degree of care for the safety of passengers *does not extend* to those comparatively trifling dangers which a passenger meets on a vessel or on a railway car *only in the same way and to the same extent as he meets daily in other places and from which he habitually and easily protects himself* . . . ." (emphasis added)). As to those general risks of harm, the standard remains one of reasonable care. *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 407, 282 P.3d 727, 729 (2012).

Choking is precisely the kind of generalized medical risk that is not inherent to the hazards of transportation.

B. First Transit Did Not Waive their Objection that a Heightened Standard Cannot Apply

First Transit did not invite error just because the instruction on heightened duty was one that defendants had proposed. Contrary to plaintiffs' argument (at RAB 40-42), First Transit made it clear that *no* heightened-duty instruction was appropriate:

> So the common carrier standard applies for the transportation of individuals. What's at issue in this case is[n't] actually the boarding and alighting of Mr. Chernikoff or the driving skills, the transportation of him. ***It was the recognizing of a medical event.*** And that's not what is contemplated in the common carrier instruction. So it would be our contention that ***for purposes of this case it is not actually the work of a common carrier that's at issue here***. And that's why this instruction wouldn't be relevant.

(7 App. 1577–78 (emphasis added).)

It was only ***if*** the district court ruled that the common carrier instruction should apply that First Transit requested the language ultimately given to the jury:

> *If Your Honor determines that the common carrier instruction is, in fact, relevant*, it's our contention that the way this instruction is worded isn't actually appropriate. And I can go into that discussion further if Your Honor determines that a common carrier instruction would be relevant in this case.

(7 App. 1578 (emphasis added).) First Transit offered this alternative only because the error in giving a heightened-duty instruction at all would have been compounded by the misleading language of plaintiffs' proposed instruction. *Keys v. State*, 104 Nev. 736, 739, 766 P.3d 270, 272 (1988) (improper language of jury instruction compounds error of incorrect instruction ruling).

By offering an alternative instruction to plaintiffs' proposed heightened duty instruction, yet expressly conditioning the appropriateness of that instruction on the court's decision to issue a common carrier instruction at all, First Transit preserved its objection for appeal. *See Otterbeck v. Lamb*, 85 Nev. 456, 460, 456 P.2d 855, 858 (1969) (objection to instruction preserved where counsel stated that first sentence correctly stated the law but rest of instruction did not, and that the instruction was prejudicial overall); State *v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008) (holding that invited error doctrine did not bar appellate review where trial court refused defendant's original proposed instruction and defendant "was faced with either submitting the case to the jury with no justification instruction at all, or else requesting an alternate instruction that, while inadequate, provided at

least some support for his defense").

Plaintiffs also falsely accuse defendants of not proposing an "alternative" instruction. (RAB 41.) Of course, defendants did not want *any* heightened-duty instruction, and they *did* propose an alternative to plaintiffs. It seems that plaintiffs want to manufacture waiver by virtue of having proposed an even worse proposed instruction in the first place.

C. Harvey's Impairment Did Not Require Heightened Care as to Harms About Which First Transit Was Unaware and That Were Unrelated to the Risks of Transportation.

Plaintiffs erroneously state that First Transit offered Jury Instruction 34. (RAB at 39.) Not so: this was plaintiffs' proposed instruction to which First Transit objected. (7 App. 1585–86.) The instruction stated:

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

(8 App. 1755.) First Transit's objection remains the same on appeal as it did before the district court: the scope of any heightened duties owed

by common carriers to passengers with disabilities is limited to the risks of transportation itself. *See McBride v. Atchison, Topeka & Santa Fe Ry. Co.*, 279 P.2d 966, 970 (Cal. 1955) ("Where a passenger is blind, sick, aged, very young, crippled, or infirm, and his condition is apparent or made known to the carrier, it is bound to render him the necessary assistance *in boarding or alighting from its trains or cars*." (emphasis added)). In referencing the "hazards of travel," the language of the instruction itself shows its inapplicability to this case, as choking is not an ordinary hazard of travel.

That is not to say that First Transit owed *no* duty to Harvey. First Transit does not dispute that it owed Harvey a duty of reasonable care, and that this duty arose from its special relationship with him. And *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), similarly does not stand for the proposition that First Transit did not have to render "any" assistance to Harvey. (RAB at 44–45). Rather, this Court in *Lee* recognized that a special relationship gives rise to an affirmative *duty* of reasonable care where one might not otherwise exist; but the duty calls for the exercise of reasonable care, not something more than that. 117 Nev. at 296, 22 P.3d at 212 ("The law is clear that if a legal

duty exists, reasonable care under the circumstances must be exercised."). *Lee* further confirms that the duty of reasonable care is fulfilled as a matter of law where aid that is reasonable under the circumstances is promptly rendered to the person in distress.

There is no question that First Transit did just that: once he became aware that Harvey was in distress, Farrales, like the restaurant staff in *Lee*, rendered the aid he was able and promptly called for additional help. Plaintiffs argue that Farrales would have noticed Harvey's distress sooner had he more closely adhered to First Transit's safety policies. (RAB at 46–47.) But that does not make Jury Instruction 34 any less inappropriate. Even if Farrales knew of Harvey's mental impairment, he had no reason to anticipate that Harvey was at heightened risk for choking. (6 App. 1256–57; 1294–98.)

D. Plaintiffs' Counsel Cemented the Prejudice Caused by the Erroneous Instructions.

First Transit does not argue, as plaintiffs suggest (RAB at 47–48) , that plaintiffs' counsel should not have discussed Instructions 32 and 34 in closing argument. The point is, rather, that by amplifying the improper instructions, counsel cemented the resulting prejudice,

making it all the more certain that the jury relied on these improper standards in reaching its verdict.

III.

THE VERDICT WAS EXCESSIVE AND TAINTED BY MISCONDUCT

A. An Excessive Verdict Challenge Is Not a Sufficiency of the Evidence Challenge.

NRCP 59(a)(6) lists "[e]xcessive damages appearing to have been given under the influence of passion or prejudice" as a ground for new trial. When an award is not supported by the evidence, that is indicative of it having been given under the influence of passion or prejudice, justifying a new trial. *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) ("We conclude that the award is not supported by the evidence and therefore must have been given under the influence of passion or prejudice."). By pointing out the ways in which this verdict was unsupported by the evidence, First Transit has shown that the verdict was given under the influence of passion and prejudice, rather than by the facts as developed at trial. Plaintiffs point to no authority for their unsustainable position that a Rule 59(a)(6) motion must be preceded by a motion for judgment as a matter of law

under Rule 50(b).

B. The Award for Harvey's Conscious Pain and Suffering and for Harvey's Parents Is Excessive.

1. Harvey Lost Consciousness Soon After Choking.

First Transit's opening brief explained how, even construing the evidence in the light most favorable to plaintiffs, Harvey would not have been conscious for more than 50 seconds after he began to choke. (AOB at 44–45). While not disputing that choking is terrible, First Transit's position is that a $7.5 million award for less than a minute of conscious pain and suffering is grossly excessive. While plaintiffs point to Dr. Stein's testimony to argue that Harvey choked over the course of eight minutes, Dr. Stein's testimony actually confirms that the choking lasted roughly a minute before Harvey lost consciousness. Dr. Stein testified that Harvey began to choke at the 8:00:06 mark in the video, and that he lost consciousness by 8:01:22. (11 App. 676–77, 687.)

2. Harvey's Relationship with His Parents Did Not Warrant a $7.5 Million Award.

Plaintiffs do not respond to First Transit's arguments regarding the excessiveness of the verdict to Harvey's parents, namely, that

Harvey and his parents had limited life expectancies, spent relatively little time together, and that Harvey's parents did not depend on him as a source of financial support. (AOB at 45–47.) Instead, plaintiffs point only to the district court's conclusion that Harvey enjoyed a close relationship with his family. (RAB at 51–52.) Given that such a large award was unsupported by *evidence* of extensive ties and support, it is evident the $7.5 million award to Harvey's parents was the result of passion or prejudice and was thereby excessive. *Allen*, 99 Nev. at 419, 664 P.2d at 347.

3. The Jury's Allocation of Fault is Further Indication of Passion and Prejudice.

The jury found that Farrales was negligent and that his negligence was a proximate cause of Harvey's death, yet found that 0% of the negligence in the case was attributable to him. (7 App. 1719–20.) First Transit points to this as evidence that the jury's verdict was the result of passion and prejudice. *Scott v. Cty. of Los Angeles*, 32 Cal. Rptr. 2d 643, 654 (App. 1994). First Transit is not challenging the verdict forms themselves as a basis to overturn the verdict, thus rendering irrelevant the authorities cited by plaintiffs requiring objection before discharge of the jury. (RAB at 52–53.) Rather, the

jury's allocation of zero percent fault to Farrales, together with the source of First Transit's liability as respondeat superior, indicates the jury acted with passion and prejudice in securing recovery against the deep-pocketed defendant irrespective of actual responsibility for Harvey's death.

C. Misconduct During Closing Argument

1. Plaintiffs' Counsel Impermissibly Asked the Jury to Compensate for Harvey's Life on Numerous Occasions

Plaintiffs' counsel repeatedly asked the jury to make an award reflecting the value of Harvey. (AOB 57–58.) On appeal, plaintiffs defend only a single instance, as if this were the only occasion of misconduct. (RAB at 55; 7 App. 1654–55 ("In this case, the amount that we're asking for 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.") That excerpt still shows that plaintiffs' counsel asked for the value of "Harvey's life" *in addition* to the other categories of damages that followed. And plaintiffs ignore completely the other instances where counsel asked for the value of Harvey's life. Counsel described how he met with Harvey's parents to

determine "What is the life, what is the value?" (7 App. 1655.) He asked the jury to place "the value of a human life" and "the value of Harvey" above that of sculptures and fine cars. (7 App. 1655–58). While plaintiffs point to jury instruction 22, that instruction did not instruct the jury to disregard any arguments regarding the value of a life, as plaintiffs' counsel asked the jury to do.

2. Plaintiffs Improperly Impugned the Defense.

This Court has stated unequivocally that "[d]isparaging remarks directed toward defense counsel have absolutely no place in a courtroom, and clearly constitute misconduct." *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (internal quotation marks omitted). "And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics."

Plaintiffs attempt to circumvent this principle by misconstruing Rule of Professional Conduct 3.4(e) as allowing counsel to comment upon the evidence. That provision states, in relevant part, that a lawyer shall not "[i]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." That is hardly a license for counsel to inject his

opinion on whether defendants ought to have conceded liability.

Among "legitimate defense tactics" is the right to take a case to trial when there is a genuine question of the defendant's liability or damages. "An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages." *Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983). And a "lay jury is not well-suited to evaluate the relative merits of a legal position taken by a party." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 114 Cal. Rptr. 2d 708, 731 (App. 2001). They cannot "appreciate the distinction between a merely unsuccessful and a legally untenable claim." *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 504 (Cal. 1989).

So it is the unanimous rule that counsel may *not* comment to the jury on litigation strategy.[6]

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[6] *Palmer v. Ted Stevens Honda, Inc.*, 238 Cal. Rptr. 363, 369 (App. 1987) ("Not only was admission of this evidence of defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award" because it "inflamed the jury so as to disregard the court's admonitions about its limited purpose"); *DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 719 (7th Cir. 1998) ("A court is entitled to keep the jury focused on the claim of liability that requires decision; the judge need not allow the defendant to put the plaintiff's litigation tactics on trial."); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701,

That First Transit denied liability does not open the door for plaintiffs' counsel to comment upon First Transit's *litigation* conduct in the suit, as opposed to pointing to *facts* that showed liability. (*See* 7 App. 1628 (arguing that First Transit was being disrespectful to plaintiffs' dignity by defending the suit).) And while Harvey's family did not want an autopsy, that did not grant plaintiffs' counsel permission to lambast First Transit merely for requesting one. (7 App. 1632.)

3. Plaintiffs Inflamed the Jurors' Passions

Similarly, that First Transit's nationwide director of corporate safety was asked about different safety training in different cities did not amount to testimony that not all lives matter, such that plaintiff

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703 (Fla. Dist. Ct. App. 1995) ("Evidence related to the history of pretrial discovery conduct should normally not be a matter submitted for the jury's consideration on the issues of liability."); *Palmer ex rel. Diacon v. Farmers Ins. Exch.*, 861 P.2d 895, 916-17 (Mont. 1993) (evidence of defense attorneys' role in meeting with witnesses "was prejudicial because it allowed the jury to second guess Farmers' attorney and to consider legitimate defense strategy and proper litigation tactics as evidence of bad faith"); *see also Bosack v. Soward*, 586 F.3d 1096, 1105 (9th Cir. 2009) ("Absent an abuse of process or malicious prosecution, 'a defendants trial tactics and litigation conduct may not be used to impose punitive damages in a tort action.'" (quoting *De Anza*, 114 Cal. Rptr. 2d at 730).

could ask the jury to determine "whether all lives matter in America, or just some." (7 App. 1706.) Particularly in a case that did not involve punitive damages, it was inappropriate to suggest that the jurors could base their award on First Transit's policies in general—or harm to broad swaths of the public—rather than on plaintiffs' specific injuries.

While plaintiffs cite *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Adv. Op. 9, 319 P.3d 606, 614 (2014), for the notion that counsel may ask the jury to "send a message" without that amounting to jury nullification, *Gunderson* reinforced that it is improper to ask jurors to "send a message" where doing so means making "their decision based on something other than the law and the evidence." *Id.* at 614. The wages for drivers and cost for training was neither factually nor legally relevant to plaintiffs' claims; by pointing to these costs in suggesting that First Transit was deliberately cutting corners to save money, plaintiffs necessarily were asking the jury to reach their decision based on something other than the law and the evidence.

CONCLUSION

The deck was unfairly stacked against First Transit: The jury was not allowed to consider Harvey's comparative negligence, despite

the statutory requirement that it must do so. First Transit was held to a heightened duty of care for an incident that did not implicate that duty. And following a closing argument that invited the jury to punish defendants for the value of Harvey's "life" and defendants' refusal to concede liability, the jury rushed to return a verdict that was grossly excessive and infected by passion and prejudice. Both individually and in combination, these errors deprived defendants of a fair trial. This Court should reverse and order a new trial.

DATED this 8th day of June, 2018.

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3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 8th day of June, 2018.

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