

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

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

Plaintiffs,

vs.

JURY INSTRUCTIONS

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

Defendants.

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

FEB 29 2016

5:21 pm

BY, *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

A-13-682726-C
JI
Jury Instructions
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INSTRUCTION NO. 1

LADIES AND GENTLEMEN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the court.

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INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

INSTRUCTION NO. 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person.

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INSTRUCTION NO. 4

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4 The evidence which you are to consider in this case consists of the testimony of the witnesses,
5 the exhibits, and any facts admitted or agreed to by counsel.

6 Statements, arguments and opinions of counsel are not evidence in the case. However, if the
7 attorneys stipulate as to the existence of a fact, you must accept the stipulation as evidence and regard
8 that fact as proved.

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10 You must not speculate to be true any insinuations suggested by a question asked a witness. A
11 question is not evidence and may be considered only as it supplies meaning to the answer.

12 You must disregard any evidence to which an objection was sustained by the court and any
13 evidence ordered stricken by the court.

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15 Anything you may have seen or heard outside the courtroom is not evidence and must also be
16 disregarded.

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INSTRUCTION NO. 5

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4 You must decide all questions of fact in this case from the evidence received in this trial and
5 not from any other source. You must not make any independent investigation of the facts or the law or
6 consider or discuss facts as to which there is no evidence. This means, for example, that you must not
7 on your own visit the scene, conduct experiments, or consult reference works for additional
8 information.
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INSTRUCTION NO. 6

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3 Although you are to consider only the evidence in the case in reaching a verdict, you must
4 bring to the consideration of the evidence your everyday common sense and judgment as reasonable
5 men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify.
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7 You may draw reasonable inferences from the evidence which you feel are justified in the light of
8 common experience, keeping in mind that such inferences should not be based on speculation or
9 guess.

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11 A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision
12 should be the product of sincere judgment and sound discretion in accordance with these rules of law.
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INSTRUCTION NO: 7

One of the parties in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

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INSTRUCTION NO. 8

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4 You are not to discuss or even consider whether or not the plaintiffs were carrying insurance to
5 cover medical bills, loss of earnings, or any other damages they claim to have sustained.

6 You are not to discuss or even consider whether or not the defendants were carrying insurance
7 that would reimburse them for whatever sum of money they may be called upon to pay to the
8 plaintiffs.

9 Whether or not either party was insured is immaterial, and should make no difference in any
10 verdict you may render in this case.
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INSTRUCTION NO. 9

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4 If, during this trial, I have said or done anything which has suggested to you that I am inclined
5 to favor the claims or position of any party, you will not be influenced by any such suggestion.

6 I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to
7 which witnesses are or are not worthy of belief, what facts are or are not established, or what inference
8 should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion
9 relating to any of these matters, I instruct you to disregard it.
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INSTRUCTION NO. 10

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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INSTRUCTION NO. 11

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

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INSTRUCTION NO. 12

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

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INSTRUCTION NO. 13

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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INSTRUCTION NO. 14

Discrepancies in a witnesses testimony or between his testimony and that of others, if there was any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

INSTRUCTION NO. 15

An attorney has a right to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney and told him what he would testify to does not, by itself, reflect adversely on the truth of the testimony of the witness.

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INSTRUCTION NO: 16

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2 A person who has special knowledge, skill, experience, training or education in
3 particular science, profession or occupation may give his or her opinion as an expert as to any
4 matter in which he or she is skilled. In determining the weight to be given such opinion, you
5 should consider the qualifications and credibility of the expert and the reasons given for his or
6 her opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem
7 it entitled.
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INSTRUCTION NO. 17

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4 An expert witness has testified about his reliance upon an article and books that have not been
5 admitted into evidence. Reference by the expert witness to this material is allowed so that the expert
6 may tell you what he relied upon to form his opinions. You may not consider the material as evidence
7 in this case. Rather, you may only consider the material to determine that weight, if any, you will give
8 to the expert's opinions.
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INSTRUCTION NO. 18

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4 A hypothetical question has been asked of an expert witness. In a hypothetical question, the
5 expert witness is told to assume the truth of certain facts, and the expert witness is asked to give an
6 opinion based upon those assumed facts. You must decide if all of the facts assumed in the
7 hypothetical question have been established by the evidence. You can determine the effect of that
8 admission upon the value of the opinion.
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INSTRUCTION NO. 19

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4 Whenever in these instructions I state that the burden, or the burden of proof, rests upon a
5 certain party to prove a certain allegation made by him, the meaning of such an instruction is this: That
6 unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same
7 to be not true.

8 The term "preponderance of the evidence" means such evidence as, when weighed with that
9 opposed to it, has more convincing force, and from which it appears that the greater probability of
10 truth lies therein.
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INSTRUCTION NO. 20

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4 The preponderance, or weight of evidence, is not necessarily with the greater number of
5 witnesses.

6 The testimony of one witness worthy of belief is sufficient for the proof of any fact and would
7 justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the
8 contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the
9 various factors of evidence, you believe that there is a balance of probability pointing to the accuracy
10 and honesty of the one witness, you should accept his testimony.
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INSTRUCTION NO. 21

A proximate cause of injury, damage, loss, or harm is a cause which, in natural and continuous sequence, produces the injury, damage, loss, or harm, and without which the injury, damage, loss, or harm, would not have occurred.

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INSTRUCTION NO. 22

Plaintiffs are the heirs of the deceased, Harvey Chernikoff. In determining the amount of losses, if any, suffered by the heirs as a proximate result of the death of Harvey Chernikoff, you will decide upon a sum of money sufficient to compensate each heir for the following items:

1. The heir's loss of companionship, society, comfort, and relationship.

You may also consider:

- a) The age of the deceased and of the heir;
- b) The health of the deceased and the heir;
- c) The respective life expectancies of the deceased and of the heir;
- d) Whether the deceased was kindly, affectionate or otherwise;
- e) His or her habits of industry and thrift; and
- f) Any other facts shown by the evidence indicating what benefits the heir might reasonably have expected to receive from the deceased had he lived.

2. Any damages for pain, suffering, or disfigurement of the decedent.
3. Any grief or sorrow suffered by their heir and any grief or sorrow reasonably certain to be experienced in the future.

INSTRUCTION NO. 23

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with care and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

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INSTRUCTION NO. 24

Whether any of these elements of damage have been proven by the evidence is for you to determine. Neither sympathy nor speculation is a proper basis for determining damages. However, absolute certainty as to the damages is not required. It is only required that plaintiffs prove each item of damage by a preponderance of the evidence.

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INSTRUCTION NO. 25

The plaintiff seek to establish liability on one or more different legal bases. One of the plaintiffs' claims is negligence. I will now instruct on the law relating to this claim.

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INSTRUCTION NO.

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Negligence is the failure to exercise that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances. Ordinary care is that care which person of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. You will note that the person whose conduct we set up as a standard is not the ordinarily cautious individual, not the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be administered and encouraged, the law does not demand it as a general standard of conduct.

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INSTRUCTION NO: 27

The plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: duty, breach, causation, damages.

The defendants have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: 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.

INSTRUCTION NO: 28

The plaintiffs have the burden to prove that the plaintiffs sustained damage, that the defendants were negligent, and that such negligence was a proximate cause of the damage sustained by the plaintiffs.

The defendant has the burden of proving, as an affirmative defense, that some contributory negligence on the part of the plaintiffs themselves, was a proximate cause of any damage plaintiffs may have sustained.

INSTRUCTION NO: 29

Defendants First Transit, Inc. and Jay Farrales seek to establish that Plaintiffs Jack and Elaine Chernikoff were contributorily negligent.

Contributory negligence is negligence on the part of Plaintiffs Jack and Elaine Chernikoff which, cooperating to some degree with negligence of another, helps in proximately causing decedent Harvey Chernikoff's death.

Plaintiffs Jack and Elaine Chernikoff may not recover damages if their contributory negligence contributed more to decedent Harvey Chernikoff's death than the negligence of the Defendants First Transit, Inc. and Jay Farrales. However, if Plaintiffs Jack and Elaine Chernikoff were negligent, the Plaintiffs may still recover a reduced sum, so long as their contributory negligence was not greater than the negligence of Defendants First Transit, Inc. and Jay Farrales.

1 distress? So now, again, it's a higher standard. Now, this
2 is the -- the most important thing is when you're dealing with
3 a paratransit bus dealing with people with impairments,
4 cognitive impairments and mental disabilities, the standard
5 even goes up more.

6 So now you're not talking about regular old starter
7 Brock Holt here. You're talking about Derek Jeter, one of the
8 greatest, okay. One of the greatest baseball players,
9 all-star game. Now you're talking about Jeter, okay. A lot
10 more is expected of Jeter than it is of Brock Holt. That's
11 why Jeter gets paid the big bucks. That's why this company
12 gets paid the big bucks, okay. So let's talk about that
13 instruction.

14 This is 34. So 34, when a carrier is aware that a
15 passenger is mentally disabled, it is the duty of the carrier
16 to provide that additional care which the circumstances
17 reasonable require. Failure to do that is negligence. So the
18 standard is even higher. It's even higher.

19 And how do you look at Jay? Jay is First Transit.
20 This instruction here is basically that defendant First
21 Transit is legally responsible for the actions of its
22 employee, defendant Jay Farrales. So any conduct that Jay --
23 you know, you feel like Jay did something wrong, any conduct
24 of his, that is First Transit. Jay equals First Transit.

25 So when you analyze this situation, remember, you

1 analyze Jack and Elaine's choice. This is the standard that
2 you use, the pee-wee league baseball. Was it reasonable under
3 the same or similar circumstances for them to allow their son
4 and to trust this company that holds themselves out as
5 professionals in this industry just like the other people at
6 Transition Services was where they heard about First Transit?
7 Is it reasonable for them to have trusted this company?

8 Remember, this is the defendants' burden. They have
9 to prove that Jack and Elaine's decision, like these other
10 parents of these other folks was unreasonable. That's their
11 burden. They have to prove that. There's zero evidence that
12 his parents knew that he ate on the bus. There's zero
13 evidence that they had any reason to believe this company
14 would not come in or would not fulfill their word and keep
15 their word to this community to make safety everything.

16 So when you're -- when you're talking about what the
17 defendant has to -- the burden the defendant has to do, you
18 put the evidence on there and, guess what, there is nothing to
19 put on there. So they don't weight on that issue.

20 What about First Transit, were they negligent?
21 Remember, you're looking at the all-star standard, the Derek
22 Jeter standard, okay. So highest degree of care, additional
23 care for disabled folks. 74 times the five-second rule was
24 violated, never checked on Harvey when he got on the bus,
25 never performed CPR or Heimlich, never taught CPR or Heimlich,

1 never told Harvey not to eat, never told Harvey not to drink,
2 actually assisted Harvey to violate the rule. Is that using
3 the highest degree of care? Is that using additional care for
4 someone with a disability?

5 So on the verdict form, this is the verdict form
6 that you actually all will fill out. This is an actual copy
7 of it. You'll be given a copy. You're asked four questions
8 on the first page. Do you find from a preponderance of the
9 evidence that Defendant Jay Farrales was negligent and that
10 such negligence was a proximate cause of the death of Harvey?
11 The answer is yes.

12 When you get on the bus you have to check your
13 passengers. When you drive off, you have to check you
14 passengers. We're going to talk about how to deal with the
15 fact that he didn't know how to perform Heimlich in a minute.
16 But Jay was negligent. Jay was negligent. And we're going to
17 talk about what we do with that.

18 Do you find from a preponderance of the evidence
19 that defendant First Transit was negligent? Absolutely, yes.
20 And then you move on to 3. Do you find from a preponderance
21 -- so is Jack negligent? Was Jack negligent for trusting his
22 company to fulfill their word? No. Was Elaine negligent for
23 trusting this company? No. So two yeses, two noes on the
24 verdict form.

25 Okay. This is where we deal with the fact that they

1 did not provide Jay with training and the fact that he was
2 helpless on the bus to help Harvey. Assign 1 percent. This
3 is the next page of the verdict form. One percent because you
4 get to determine the percentages, how much is Jay, how much is
5 First Transit, 1 percent. Zero percent for Jack. Zero
6 percent for Elaine. The most important thing is that whatever
7 -- whatever it is, it has to equal 100. That's the most
8 important thing.

9 Now, they're going to try and come up here in a
10 minute and they're going to try and say that Jack and Elaine
11 should have done something differently. They shouldn't have
12 trusted the -- the bus company, okay. That's what they're
13 going to tell -- that's what they're going to tell you. They
14 can still cover, so long as their contributory negligence is
15 not greater than that of First Transit and Jay Farrales.

16 So the very most important thing, if you guys feel
17 like, hey, Jack and Elaine, you shouldn't have trusted this
18 company to keep their word, you were wrong to do that and you
19 want to give them some comparative negligence, if it's more
20 than 50 percent, they lose. So if you feel like they have --
21 you know, you have to give them some, it should be like two or
22 three or five percent at the very most.

23 So how do you -- how do you value human life? Well,
24 you value human life, there's some instructions in there.
25 There's jury instructions about what heirs are entitled to and

1 there's jury instructions about pain and suffering. There's
2 jury instructions about how to -- how to do these things. You
3 know, the only thing that you can't do is have sympathy, okay.
4 You can't have sympathy and passion and emotion and things
5 like that.

6 I want to talk to you guy about the damages in the
7 case and the part of the case that's about justice, okay.
8 Real justice in this case would be if Harvey didn't have to
9 die. That would be real justice. Real justice would be if
10 Harvey could walk through those doors into the loving arms of
11 his mom and dad and Neil if we could somehow do that.

12 But the problem is we don't have the power to do
13 that. There's no way to do that. So instead we come in and
14 we ask for money, their money. Money that they make off of
15 people like Jay who they pay \$11 an hour. We call that money
16 justice. That's the only thing that the law allows us to do.

17 If you remember when I stood here at the first of
18 this case, I told you that I was going to ask for an amount
19 into the tens of millions of dollars. I told you I would be
20 brutally honest and I asked for you to simply let me -- give
21 me the chance, give me the opportunity to prove my case. And
22 I can tell from all of the very thoughtful questions that each
23 of you asked you kept your word. You let me prove my case
24 because you asked questions to the very end.

25 In this case, the amount that we're asking for for

1 Harvey's life, for the loss of companionship, for the loss of
2 love, for the loss of relationship, for the things that they
3 destroyed is \$15 to 25 million. I know that's a huge amount.
4 It is to me. I know it's a huge amount to you. I know that
5 it is. And when we talked about it in -- in voir dire, I knew
6 that the amounts we were talking about were huge and they were
7 enormous.

8 You've given me the opportunity to prove my case. I
9 ask for the opportunity one more time for one more
10 opportunity, and that's to tell you why I came up with this
11 amount of money and why we're asking for this amount of money.
12 Do you want to know that? You want to know that?

13 You see, I remember when I met Jack and Elaine,
14 remember when they came into my conference room with their
15 son, Neil. And they told me about Harvey. They shared their
16 loss. They talked about how their lives had been turned
17 upside down, how their life is now incomplete, how the family
18 is now incomplete. They told me about how First Transit told
19 them that Harvey didn't suffer on the bus, but yet they
20 wouldn't give them the video without a court order. They told
21 me about those things.

22 And I asked them, I said, Jack and Elaine, one of my
23 jobs is going to be to ask these jurors how much money. What
24 is the life, what is the value? Their response to me is we
25 have no clue. You're the pro. You're the expert. We have no

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 Ms. Sanders, whenever you're ready.

10 Counsel, make yourselves comfortable, please.

11 MS. SANDERS: Thank you, Your Honor.

12 DEFENDANTS' CLOSING ARGUMENT

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

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

1 speak with them. It's up to them whether they wish to or not.

2 MR. CLOWARD: Perfect.

3 THE COURT: Does that work for you all?

4 MR. CLOWARD: Yes, Your Honor.

5 MS. HYSON: Yes, Your Honor.

6 MR. CLOWARD: Thank you.

7 THE COURT: I know each judge does that a little bit
8 different, but that's --

9 MR. CLOWARD: Okay.

10 (In the presence of the jury.)

11 THE COURT: Thank you. Okay. The Court will note
12 the presence of the jury and the presence of counsel and
13 clients at this juncture.

14 Ladies and gentlemen of the jury, have you selected
15 a foreperson?

16 JUROR NO. 7: Yes.

17 THE COURT: Okay. And can that foreperson please
18 hand the verdict to the marshal. The marshal will in turn to
19 me. I will in turn hand it to the clerk.

20 Thank you so very much.

21 Okay. Madame Clerk.

22 THE CLERK: District Court, Clark County, Nevada,
23 Case No. A682726, Department 23. Jack Chernikoff and Elaine
24 Chernikoff, plaintiffs, versus First Transit, Inc. and Jay
25 Farrales, defendants.

1 No. 1, do you find from a preponderance of the
2 evidence that the Defendant Jay Farrales was negligent and
3 that such negligence was a proximate cause of the death of
4 Harvey Chernikoff? Answer, yes.

5 Do you find from a preponderance of the evidence
6 that Defendant First Transit, Inc. was negligent and that such
7 negligence was a proximate cause of the death of Harvey
8 Chernikoff? Answer, yes.

9 Do you find from a preponderance of the evidence
10 that Plaintiff Jack Chernikoff was negligent and that such
11 negligence was a proximate cause of the death of Harvey
12 Chernikoff? Answer, no.

13 No. 4, do you find from a preponderance of the
14 evidence that Plaintiff Elaine Chernikoff was negligent and
15 that such negligence was a proximate cause of the death of
16 Harvey Chernikoff? Answer, no.

17 No. 5, using 100 percent as the total combined
18 negligence which acted as a proximate cause of the injuries
19 complained of by Plaintiffs Jack Chernikoff and Elaine
20 Chernikoff, what percentage of the total combined negligence
21 do you find from the evidence is attributable to: Jay
22 Farrales, zero percent; First Transit, Inc., 100 percent; Jack
23 Chernikoff, zero percent; Elaine Chernikoff, zero percent,
24 totaling 100 percent.

25 No. 7, without regard to the above answers, we find

1 that the total amount of the plaintiffs' damages are divided
2 as follows. Pain and suffering by Harvey Chernikoff, \$7.5
3 million. Grief, sorrow, loss of companionship, society,
4 conform, and loss of relationship suffered by Plaintiffs Jack
5 Chernikoff and Elaine Chernikoff, \$7.5 million. Total, \$15
6 million.

7 Dated this 29th day of February, 2006, Freddy Acuna,
8 Foreperson.

9 Ladies and gentlemen of the jury, are these your
10 verdicts as read?

11 JURY PANEL: Yes.

12 THE COURT: Okay. Do either counsel wish the jurors
13 to be individually polled?

14 MS. HYSON: Yes, Your Honor.

15 THE COURT: Okay. At this juncture, ladies and
16 gentlemen, what that means is that the clerk is going to read
17 each of your names and ask you individually if that is your
18 verdict as read. So you need to answer in some manner that
19 basically we can hear you, okay. Thank you so very much.

20 Madame Clerk.

21 THE CLERK: Juror No. 1, John Laury, are these your
22 verdicts as read?

23 JUROR NO. 1: Yes.

24 THE CLERK: Juror No. 2, Alitzah Martinez, are these
25 your verdicts as read?

1 JUROR NO. 2: Yes.

2 THE CLERK: Juror No. 3, Dexter Layola, are these
3 your verdicts as read?

4 JUROR NO. 3: Yes.

5 THE CLERK: Juror No. 4, Denise Hinds, are these
6 your verdicts as read?

7 JUROR NO. 4: No.

8 THE CLERK: Juror No. 5, Jesse Colyar, are these
9 your verdicts as read?

10 JUROR NO. 5: No.

11 THE CLERK: Juror No. 6, Sandra Perez, are these
12 your verdicts as read?

13 JUROR NO. 6: Yes.

14 THE CLERK: Juror No. 7, Freddy Acuna, are these
15 your verdicts as read?

16 JUROR NO. 7: Yes.

17 THE CLERK: Juror No. 8, Darrel Shakespear, are
18 these your verdicts as read?

19 JUROR NO. 8: Yes.

20 THE COURT: Okay. Well, ladies and gentlemen of the
21 jury, although I was not your trial judge, I have been told
22 that you all have been working incredibly diligently. And I
23 know from at least hearing, since I'm next door, that you all
24 have been working very hard throughout this whole trial. And
25 I know on behalf of Judge Miley and her staff and behalf of

1 all counsel and then clients, I want to thank you so very
2 much.

3 Your jury duty service is so very important to our
4 democratic process. Without it, we really can't have our
5 system of justice. And so I know for each and every one of
6 you this has taken time out of your personal lives. It's been
7 hard to listen to a lot of information and be here in the
8 courthouse, but we do really appreciate it. So with that, a
9 sincere thank you on behalf of everyone.

10 At this juncture, the staff has been so fantastic
11 they have already called down to jury services so that you can
12 get paid. And the good news about that is you can go down and
13 get your checks today versus having to come back and pick up
14 your checks.

15 One of the things that you'll also find down —
16 potentially down in jury services is that counsel may be
17 wishing to speak with you, okay. Now, just so that you know,
18 ladies and gentlemen, at least the protocol we do in my
19 courtroom and I know most all the judges do it the same is
20 it's really helpful for counsel to get an idea of kind of what
21 your thoughts are.

22 Because as much as we all would like to be flies on
23 the wall and know what was going on exactly, it's always very
24 helpful for people to speak with the jurors to have a better
25 understanding, you know, about what your thought are,

1 impressions, etcetera. Because we want to find out not only
2 are there things that can be done better, but also just your
3 general thoughts. So you might find counsel downstairs when
4 you're getting your checks.

5 Once again, though, it is up to you completely
6 whether or not you wish to speak to counsel. I can appreciate
7 with the late hour sometimes people are in a rush to go. At
8 the same time I can appreciate from counsels' standpoint the
9 importance of trying to speak with jurors. So at this
10 juncture, ladies and gentlemen, is there anything else from
11 counsels' perspective?

12 MR. CLOWARD: No, Your Honor.

13 MS. HYSON: No, Your Honor.

14 THE COURT: Okay. There being nothing else, then
15 thank you so very much. Your verdict is going to be entered
16 into the minute by the clerk, and we are done. Thank you so
17 much.

18 MR. CLOWARD: Thank you, Judge.

19 (Jury excused at 5:24 p.m.)

20 THE COURT: Okay. Counsel, we're still on the
21 record. I just want to make sure is there -- counsel. And I
22 appreciate that you want to do that, I just want to make sure
23 is there any other matters that Judge Miley needs to take care
24 of that I should give her a heads up on?

25 MR. CLOWARD: No, Your Honor.

1 MS. HYSON: No, Your Honor.

2 MR. CLOWARD: Thank you.

3 THE COURT: Okay. So at this juncture I'm going to
4 say thank you so very much. I mean, I know she would be
5 saying the same thing. So thank you for your professionalism.
6 I know this is one of those trials that has been very long and
7 I know that people have been working incredibly hard on
8 everybody's side. So thank you so very much. And as you
9 heard, I told the jury that you may be downstairs. And with
10 that I'm going to excuse myself and wish you all a nice rest
11 of the week. Thank you so very much.

12 MR. ALLEN: Thank you, Your Honor.

13 MS. HYSON: Thank you, Your Honor.

14 MR. CLOWARD: Thank you.

15 (Proceedings concluded at 5:25 p.m.)

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CERTIFICATION

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

AFFIRMATION

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

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


KIMBERLY LAWSON

KARR Reporting, Inc.

47

47

ORIGINAL

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

FEB 29 2016

BY, *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

DISTRICT COURT**CLARK COUNTY, NEVADA**

JACK CHERNIKOFF; ELAINE
CHERNIKOFF

CASE NO. A682726
DEPT. NO. XXIII

Plaintiff(s),**-vs-****FIRST TRANSIT, INC.****Defendant(s).****AMENDED JURY**

- | | |
|---------------------|-----------------------|
| 1. JOHN LAURY | 6. SANDRA PEREZ |
| 2. ALITZAH MARTINEZ | 7. FREDDY ACUNA |
| 3. DEXTER LAYOLA | 8. DARRELL SHAKESPEAR |
| 4. DENISE HINDS | |
| 5. JESSE COLYAR | |

ALTERNATES

1. PATRICIA CARVALHO
2. LATESHA BROWN

A - 13 - 682726 - C
 AJUR
 Amended Jury List
 4527728



48

48

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

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

Defendants.

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

VERDICT FORM

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

FEB 29 2016

3Y. *Katherine Streuber*
KATHERINE STREUBER, DEPUTY

5:21 PM

A-13-682726-C
VER
Verdict
4527729



VERDICT FORM

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

5 ANSWER: Yes ☒ No ☐

6
7 2. Do you find from a preponderance of the evidence that Defendant First Transit,
8 Inc. was negligent and that such negligence was a proximate cause of the death of Harvey
9 Chernikoff?

10 ANSWER: Yes ☒ No ☐

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

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

16 ANSWER: Yes ☐ No ☒

17
18 4. Do you find from a preponderance of the evidence that Plaintiff Elaine
19 Chernikoff was negligent and that such negligence was a proximate cause of the death of
20 Harvey Chernikoff?

21 ANSWER: Yes ☐ No ☒

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

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

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

Pain and suffering by HARVEY CHERNIKOFF \$ 7.5 million

Grief, sorrow, loss of companionship,
Society, comfort, and loss of relationship
suffered by Plaintiffs JACK CHERNIKOFF
and ELAINE CHERNIKOFF: \$ 7.5 million

TOTAL \$ 15,000,000

Dated this 29 day of FEBRUARY, 2016.

Frederick A. Gorman
FOREPERSON

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1 THE COURT: The jury is instructed that the law
2 requires a common carrier of passengers to exercise the
3 highest practicable degree of care that the human judgment and
4 foresight are capable of to make its passengers' journey safe.
5 Whoever engages in the business of a common carrier impliedly
6 promises that its passengers shall have this degree of care.
7 Failure to do so is negligence. And it comes out of Sherman
8 v. Southern Pacific.

9 MS. BRASIER: Your Honor, this is one of the
10 submissions that we submitted a bench brief on. I know there
11 was a lot submitted, but we actually attached the cases that
12 we cited to our bench brief. These are Nevada Supreme Court
13 cases. They date back to 1910 and 1913 and they're still good
14 law. The instruction that we cited is directly from the
15 instruction that was used in the Forester case.

16 THE COURT: There's nothing -- I didn't -- I read
17 the brief, but I didn't Shepardize these. There's nothing
18 more current?

19 MS. BRASIER: This is -- there might be more current
20 cases that discuss it, but this is still good law.

21 THE COURT: Okay. So what is the objection? Why
22 don't you think First Transit is a common carrier?

23 MS. HYSON: So the common carrier standard applies
24 for the transportation of individuals. What's at issue in
25 this case is actually the boarding and alighting of Mr.

1 Chernikoff or the driving skills, the transportation of him.
2 It was the recognizing of a medical event. And that's not
3 what is contemplated in the common carrier instruction. So it
4 would be our contention that for purposes of this case it is
5 not actually the work of a common carrier that's at issue
6 here. And that's why this instruction wouldn't be relevant.

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

13 THE COURT: I think that it is relevant. I think
14 that there has been evidence to support the definition of a
15 common carrier. With that being said, what do you propose as
16 a better jury instruction for the duty of care?

17 MS. HYSON: Well, there is a standard Nevada pattern
18 jury instruction.

19 THE COURT: Is it really in the pattern jury book?

20 MS. HYSON: Yes, and I have a copy of it here. It
21 is not the one that's proposed by plaintiffs. It's actually
22 -- I can read it to you. I have a copy of it. It says at the
23 time of the occurrence in question, the defendant was a common
24 carrier.

25 A common carrier has a duty to his passengers to use

1 the highest degree of care consistent with the mode of
2 conveyance used and the practical operation of its business as
3 a common carrier by mode of transportation. It's failure to
4 fulfill this duty is negligence.

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

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

8 MS. HYSON: Sure.

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

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

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

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

20 THE COURT: The Grooms v. Fox?

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

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

1 case cited Grooms?

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

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

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

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

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

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

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

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

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

15 THE COURT: I have a book.

16 MS. BRASIER: Would you like a copy?

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

18 THE COURT: Yeah.

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

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

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

24 THE COURT: Yeah, will you?

25 THE CLERK: Which one is it?

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

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

5 THE COURT: Thank you.

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

8 THE CLERK: Do you still want me --

9 THE COURT: No, thank you.

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

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

14 THE COURT: Okay.

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

16 THE COURT: So where is it?

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

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

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

25 (Pause in the proceedings.)

16 (Pause in the proceedings.)

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

19 MS. HYSON: Thank you.

20 (Pause in the proceedings.)

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Case No. 70164

In the Supreme Court of Nevada

FIRST TRANSIT, INC.; AND JAY
FARRALES,

Appellants,

vs.

JACK CHERNIKOFF ; AND
ELAINE CHERNIKOFF ,

Respondents.

Electronically Filed
Oct 01 2018 04:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

SUPPLEMENT TO APPELLANTS ' APPENDIX
VOLUME 7
PAGES 1501-1750

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