Case No. 70164

In the Supreme Court of Nevada

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 JUDGE, District Judge
District Court Case No. A-13-682726-C

ANSWER TO PETITION FOR REHEARING

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ANSWER TO PETITION FOR REHEARING

This Court correctly held that a heightened standard of care applies to common carriers only when a passenger's injury arises from transportation-related risks. (Op. 1-2.) Thus, plaintiffs may not impose the heightened standard on First Transit[1] to recover for Harvey Chernikoff's non-transportation-related injury: choking on an insufficiently chewed sandwich. (*See id.*)

Plaintiffs Jack and Elaine Chernikoff contend that this Court misunderstood the law and ignored facts specific to this matter. (Pet. 1–2.) Plaintiffs are wrong.

First, plaintiffs misconstrue waiver. They seek to forbid parties from (1) participating in the crafting of a jury instruction that the district court has ruled it will give over the party's objection, or (2) supporting arguments on appeal with additional authorities. At the same time, plaintiffs disobey NRAP 40(a)(2) by raising arguments in their petition that they waived in the answering brief.

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

Second, even if the issues in the petition were properly presented, the Court's opinion is uncontroversial. The heightened standard arises from the carrier-passenger relationship and has always served to protect passengers from risks arising from that relationship—*risks related to transportation*. So this Court joins a long list of courts holding that common carriers owe a duty of just ordinary care in the non-transportation-related exigency of a passenger's becoming ill. This rule does not bolt shut the courthouse door: plaintiffs can still seek to persuade a jury that First Transit assumed a duty on which plaintiffs relied or otherwise breached its duty of ordinary care. The only thing they cannot do is say that First Transit owed the highest degree of care merely because it is a common carrier.

This Court should deny the petition.

I.

FIRST TRANSIT PRESERVED ITS OBJECTIONS

Plaintiffs regurgitate their argument that objections to Jury Instructions 32 (common carrier's heightened duty of care) and 34 (carrier's duty to disabled passengers) were waived. (*Compare* Pet. 2–6, *with* RAB 39–42.) This is untrue.

A. First Transit Did Not Invite the Error of Instructing the Jury on Heightened Duty

Plaintiffs mistakenly rely on the invited-error doctrine. (Pet. 2.) "The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which ***he himself induced or provoked*** the court or the opposite party to commit." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 AM. JUR. 2D *Appeal and Error* § 713 (1962) (emphasis added). It follows that, when a court rejects a party's position that a jury instruction is inapplicable, the party does not invite error by proposing an instruction in accordance with the court's ruling. S*ee Weaver Bros., Ltd. v. Misskelley*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982) (holding that a party did not waive its objection to the court considering juror affidavits by submitting an affidavit since the party consistently maintained that such consideration was improper).

The invited-error doctrine does not apply because First Transit proposed an alternative version of Instruction 32 only after its objection to the relevance of *any* version was overruled. First Transit explained to the district court that First Transit did not object to the common carrier definition; it objected to the application of the heightened standard of

care since "the work of a common carrier [is not] at issue here." (7 App. 1577–78.)

The district court disagreed, ruled that an instruction would issue, and asked First Transit, "[W]hat do you propose as a better jury instruction for the duty of care?" (7 App. 1578.)

Only then did First Transit propose an alternative instruction to Plaintiffs' stringent proposal. (7 App. 1578–79.) Thus, while the district court accepted the proposal (7 App. 1583–85), First Transit did not invite the error by inducing the instruction. It proceeded with trial in accordance with the court's ruling.

Plaintiffs misrepresent that the district court accepted First Transit's initial proposal. First Transit initially proposed to *not* have a heightened-standard instruction. That objection was overruled. Allowing an objection to a final instruction by a party whose initial proposal was rejected but not by a party who argued against any such instruction would simply be nonsensical.

Additionally, First Transit satisfied NRCP 51(c) because the district court understood the basis for the objection. *See Otterbeck v. Lamb*, 85 Nev. 456, 460, 456 P.2d 855, 858 (1969) (holding that an objection

was sufficient when the court indicated it understood the basis of the objection.) The court acknowledged its understanding that First Transit objected based on relevance. (7 App. 1578.)

B. First Transit Properly Challenged the Instruction on Disabled Passengers

First Transit explicitly challenged the relevance of Instruction 34 and the case law supporting the instruction. (7 App. 1585–87.) First Transit argued that Instruction 34 did not apply. (7 App. 1585.) It then argued that *American President Lines, Ltd. v. Lundstrom*, 323 F.2d 817 (9th Cir. 1963)—the supporting case "on the bottom of [the] instruction"—was distinguishable and inapplicable. (7 App. 1586–87.) Finally, it provided *McBride v. Atchison, Topeka & Santa Fe Ry. Co.*, 279 P.2d 966 (Cal. 1955) for the principle that a heightened standard, even in the context of disabled passengers, is limited in application. (7 App. 1589.)

Because First Transit objected to the relevance of the instruction at trial, First Transit properly supported that argument with additional authority on appeal. "On appeal, a party may bolster his preserved issues with additional legal authority or make further arguments within the scope of the legal theory articulated to the trial court, but may not

raise an entirely new legal theory." 4 C.J.S. *Appeal and Error* § 309 (updated Dec. 2011); *State v. Gomez*, 932 P.2d 1, 10 (N.M. 1997) ("It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief."). Failure to cite particular authority for a legal theory to the trial court is not a waiver of the theory. *See W. Techs., Inc. v. All Am. Golf Ctr.*, 122 Nev. 869, 873 n.8, 139 P.3d 858, 860 n.8 (2006) (while new issues may not be waived on appeal, additional authorities to support a preserved argument are appropriate). The rules of appellate procedure expressly allow supplementation of authorities through the time of oral argument. NRAP 31(e).

C. Plaintiffs Conflate Two Grounds That Independently Warrant A New Trial

Plaintiffs next contend that First Transit waived any challenge to plaintiffs' closing argument by not objecting at the time of the argument. (Pet. 6.) But First Transit sought a new trial, in part, under NRCP 59(a)(6) (now NRCP 59(a)(1)(F)) based on prejudice causing an excessive jury award. (AOB 42.) This ground is distinct from that of NRCP 59(a)(2) (now NRCP 59(a)(1)(B)), which allows for a new trial as a result of misconduct. This Court reversed and remanded for a new trial based on

prejudice, not misconduct. (Op. 3, 8.) Plaintiffs' argument is therefore meritless.

II.

PLAINTIFFS WAIVED THEIR ARGUMENT AGAINST THE DISTINCTION BETWEEN NON-TRANSPORTATION-RELATED AND TRANSPORTATION-RELATED RISKS

A petition for rehearing may only raise issues that were raised in the answering brief. In fact, the petitioner must cite "the page of the brief where petitioner has raised the issue." NRAP 40(a)(2).

Plaintiffs petition to argue an issue that they waived: whether the heightened standard applies to non-transportation-related risks. In their answering brief, plaintiffs ignored eleven authorities cited in First Transit's opening brief that instruct on the proper standard for non-transportation-related risks.[2] This Court cited seven of those authorities. (Op. 3, 7.) Plaintiffs address three only now that this Court has

[2] The authorities are *Buck v. Manhattan Ry. Co.*, 10 N.Y.S. 107 (N.Y. Ct. C.P. 1890); *Abraham v. Port Authority*, 815 N.Y.S.2d 38 (N.Y. App. Div. 2006); *Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173 (3rd Cir. 1994); *L.A. Fitness Int'l, LLC v. Mayer*, 980 So. 2d 550 (Fla. App. 2008); *Nunez v. Prof. Transit Mgt. of Tucson, Inc.*, 271 P.3d 1104 (Ariz. 2012); *Pac. S.S. Co. v. Holt*, 77 F.2d 192 (9th Cir. 1935); *Sanchez v. Independent Bus Co., Inc.*, 817 A.2d 318 (N.J. Ct. App. 2003); *White v. Metro. Gov't of Nashville & Davidson Cty.*, 860 S.W. 2d 49 (Tenn. Ct. App. 1993); *Boose*

clarified the limits on the heightened standard. By failing to address this issue in their answering brief, plaintiffs waived it. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (holding that an argument not addressed in an answering brief is waived).

III.

THIS COURT'S OPINION IS SOUND

This Court correctly concluded that neither the law nor the facts of this case support the application of a heightened standard of care. The applicable standard owed by a common carrier to its passengers depends on the type of risk at issue: a transportation-related risk or a non-transportation-related risk.

This is not a controversial clarification or departure from existing law. First, the heightened standard of care has never applied to all interactions within the carrier-passenger relationship, only to the actions that are unique to common carrying. The Court's opinion in this case

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v. Tri-Cnty. Metro. Transp. Dist., 587 F.3d 997 (9th Cir. 2009); RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40; and 56 Fed. Reg. at 45,601 (Sept. 6, 1991).

has been added to the many from other jurisdictions reflecting this uncontroversial point. *See* B. Finberg, Annotation, *Carrier's Duties to Passenger Who Becomes Sick or Is Injured En Route*, 92 A.L.R.2d 656 (1963) (adding this Court's opinion to a survey of cases holding that a when a passenger becomes injured or ill en route, the carrier's duty need only be "reasonable in proportion to the exigencies of the particular situation"). The Court's opinion also is harmonious with the cases subjecting common carriers to the heightened standard in protecting passengers from violent actions of other passengers, as that duty has always been associated with a *special risk*: the element of confinement that is *inherent to* common carrying and, therefore, is appropriately considered among transportation-related risks.

Second, the Court's clarification does not leave anyone without remedies. A common carrier still may be liable for negligent performance of non-transportation-related tasks. The relationship between common carrier and passenger still creates a duty (where none would otherwise exist). All that varies is the standard of care that applies to that duty. And, like anyone else, a common carrier may assume duties

that go beyond what might otherwise be required of the ordinarily prudent person, which may heighten a standard of care. But any such assumed duty and attendant standard of care would arise on a *case-by-case* basis, as opposed to automatically by virtue of the common-carrier relationship. And whether there was a voluntary undertaking or detrimental reliance is a factual question that must be found by the jury. In this case, no alternative theories were litigated below.

Thus, this Court should deny the petition and remand this matter as ordered.

A. This Court's Ruling Does Not Change the Law

A heightened duty applies only to risks inherent to transportation, while a duty of reasonable care applies to risks unrelated to the carrier-passenger relationship.

1. The Heightened Standard Applies Only to Transportation-Related Risks

The heightened standard was created to mitigate transportation-related risks; it "*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." *See Pac. S. S. Co. v. Holt*, 77 F.2d 192, 196 (9th Cir. 1935) (emphasis added).

a. ENGLISH LAW HELD COMMON CARRIERS STRICTLY LIABLE FOR PROPERTY LOSS TO PREVENT COLLUSION WITH THIEVES

The heightened standard stems from English law: To prevent undetectable collusion between carriers and thieves, English law held common carriers strictly liable for losing passengers' property. *See Chicago, R.I. & P. Ry. Co. v. Zernecke*, 183 U.S. 582, 587 (1902) (citing *Coggs v. Bernard*, (1703) 2 Ld. Raym. 909, 918 ("for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by commingling with thieves, etc., yet doing it in such a clandestine manner, as would not be possible to be discovered)); *see also* BARBARA A. CHERRY, ORIGINS OF COMMON CARRIER LIABILITY RULES AND PRACTICES (1999) ("The reason for retaining [strict] liability on innkeepers and common carriers was one of public policy . . . ."). English law did not impose strict liability on common carriers generally. Frederick Green, *High Care and Gross Negligence*, 23 ILL. L. REV. 4, 5 (1928) (citing *Aston v. Heaven*, (1796) 2 Espinasse 533 and *Christie v. Griggs*, (1809) 2 Campbell 79).

b. American Courts Expanded the Heightened Standard to Other Transportation-Related Risks

Nonetheless, relying on dicta from English cases, American courts adopted a heightened standard in carrier-passenger relationships to protect passengers from risks unique to transportation. *Stokes v. Saltonstall*, 38 U.S. 181 (1839) (adopting the heightened standard for carrier-passenger relationships); Green, *supra*, at 8 (opining that *Stokes* misunderstood *Aston* and *Christie*); *Nunez v. Prof'l Transit Mgmt. of Tucson, Inc.*, 271 P.3d 1104, 1106 (Ariz. 2012) (acknowledging that the adoption of the heightened standard responded to risks "frequently encountered in the early days of public transportation"). "The reason for the . . . rule is the notion that one who is in the business of providing transportation for a fee should be a more professional transporter than the 'reasonably prudent' driver with respect to hazards associated with the transportation of passengers." *Rodriguez v. New Orleans Pub. Serv., Inc.*, 400 So. 2d 884, 887 (La. 1981).

Beginning in the nineteenth century, the heightened standard became explicitly linked with the hazards of rail travel: the "primitive safety features" of the early railways caused "a phenomenal growth in railroad accident injuries." *Bethel v. N.Y.C. Transit Auth.*, 703 N.E.2d

1214, 1216 (N.Y. 1998). So "[w]hen carriers undertake to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that they be held to the greatest possible care and diligence . . . ." *Phila. & R.R. Co. v. Derby*, 55 U.S. 468, 486 (1852); *accord Taylor v. Grand Trunk Ry.*, 48 N.H. 304, 314 (N.H. 1869) (upholding a heightened standard "when the passengers are carried upon railroads by steam, for then in consequence of the greater speed the hazards to life are largely increased").

c. COURTS CONTINUE TO APPLY THE HEIGHTENED STANDARD TO TRANSPORTATION-RELATED RISKS

Today, the heightened standard survives for transportation-related concerns, such as boarding, alighting, and operating the conveyance. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 262 (2d ed.). Plaintiffs recognize this in four cases they cite as "the governing law." (Pet. 15.)

The first two cases involve injuries unique to transportation. In *Montgomery v. Midkiff*, a passenger was injured when the bus collided with another vehicle. 770 S.W.2d 689 (Ky. Ct. App. 1989). In *Paolone v. American Airlines, Inc.*, an airplane passenger was injured from a

change in cabin pressure. 706 F. Supp. 11, 12 (S.D.N.Y. 1989). Both injuries arose from the mode of transport and so triggered the heightened standard.

The latter two cases did not because the injuries did not arise from risks unique to transportation by common carrier. The passenger in *Heger v. Trustees of Indiana University* was hit by a car while crossing the road after the carrier-passenger relationship had ended. 526 N.E.2d 1041, 1044 (Ind. Ct. App. 1988). In *Crear v. National Fire & Marine Insurance Co.*, a passenger was hit by a car in a parking lot when walking back to reboard the bus. 469 So. 2d 329, 333 (La. Ct. App. 1985). The passenger did not have a known disability requiring assistance walking to and from the bus. *Id.* at 335–36. Because no causal nexus between the carrier-passenger relationships and the injuries in *Heger* and *Crear* existed, the heightened standard could not apply.

2. A Majority of Jurisdictions Recognize a Duty of Ordinary Care Applies to Non-Transportation-Related Risks

This Court's ruling comports with the accepted principle that a common carrier is not an insurer of its passengers' safety. *Forrester v. S. Pac. Co.*, 36 Nev. 247, 134 P. 753, 773 (1913) (a common carrier "is

not regarded as an insurer of his passenger's safety against *every possible source of danger*, but [it] is bound to use all reasonable precautions as human judgment and foresight are capable of to make [the passenger's] *journey* safe and comfortable.") (emphasis added). Passengers must exercise ordinary care for their own safety. *White*, 860 S.W.2d 49.

For this reason, most courts apply a standard of ordinary care in the absence of transportation-related risks. *See generally* B. Finberg, *supra* (a carrier owes a passenger a duty of ordinary care that is "reasonable in proportion to the exigencies of the particular situation" when a passenger becomes injured or ill en route) (collecting cases); *see also, e.g., Se. Greyhound Lines v. Burris*, 216 S.W.2d 920, 924 (Ky. 1949) ("[A] common carrier is required to exercise only ordinary care in looking after the comfort of its passengers. It is in the actual operation of the vehicle . . . that the carrier is required to exercise the highest degree of care.").

3. This Court's Opinion Is Consistent with Nevada Precedent

The Nevada cases that subject common carriers to a heightened standard all involve transportation-related risks. *E.g., Sherman v. S. Pac. Co.*, 33 Nev. 385 (1910); *Forrester*, 36 Nev. 247. *Sherman* involved

an injury from derailment. 33 Nev. at 417. In *Forrester*, a sick passenger was tortiously ejected mid-journey by the railroad's employee. 36 Nev. at 754–55. Both injuries arose from inherent hazards of rail travel.[3]

Nevada's application of the heightened standard comports with the standard's purpose: protect passengers from dangers inherent to transportation. Plaintiffs do not explain how the rationale for the rule extends to choking on an insufficiently chewed sandwich. They instead attempt to assign liability by virtue of First Transit's operating as a common carrier, undermining the principle that "[a] common carrier is not an insurer of the safety of its passengers." *Sherman*, 33 Nev. 385, 111 P. at 424–25 (quoting *Eureka Springs Ry. Co. v. Timmons*, 11 S.W. 692 (Ark. 1889)).

[3] *Forrester* does not justify departing from this rule. Indeed, far from suggesting that a common carrier owes a heightened duty in every circumstance, *Forrester* discussed the possibility of limiting it in a different case: "We need not determine whether in regard to the degree of care, it would be applicable in the case suggested in the brief of a passenger who might be injured by stumbling over a suit case in the aisle" because the standard applied under the circumstances presented. 36 Nev. 247, 134 P. at 773.

4. The Court's Opinion Does Not Contradict Case Law Applying the Heightened Standard to Passenger Attacks

Although this case does not present the question of a heightened duty to prevent passenger-on-passenger assaults, the rule on transportation-related risks is consistent with such a standard. Mass transportation is, "at the very least, conducive to outbreaks of violence between passengers." *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907 (Cal. 1985). "[P]assengers are sealed in a moving steel cocoon," which "limit the means by which passengers can protect themselves from assaults by fellow passengers." *Id.* For this reason, while common carriers must ordinarily accept passengers without discrimination, 14 AM. JUR. 2D *Carriers* § 771, carriers have a duty to exclude passengers that clearly pose a threat. *See Falzarano v. Del., L. & W. R. Co.*, 194 A. 75, 76 (N.J. 1937) (a common carrier must "maintain[] order and guard[] those they transport against violence, from whatever source arising, which might be reasonably anticipated or naturally expected to occur"). This duty comports with the purpose of the heightened standard: mitigate risks inherent to transportation by common carrier.

5. A Reasonable Care Standard Applies in This Case

The heightened standard cannot apply in this case because Harvey's injury did not arise from a risk inherent to transportation. He choked on his sandwich neither because he was in a bus nor because of how the bus was driven. He choked because he swallowed without sufficiently chewing. (*See* 12 App.; 3 App. 675, 731-32; 6 App. 1260.)

Plaintiffs cannot conjure a nexus between Harvey's injury and the mode of transportation:

Four of plaintiffs' cases concern assaults by a fellow passenger, which can be a transportation-related risk. *Rodriguez*, 400 So. 2d at 887 (refusing to apply the heightened standard to injuries "totally unconnected with the hazards generally associated with transportation."); *Lopez*, 710 P.2d 907 (holding common carriers owe a heightened duty to protect passengers from foreseeable fights); *Sanchez*, 817 A.2d 318 (N.J. 2003) (same); and *Falzarano*, 194 A. at 76 (same). *See supra* Part II.A.1.b. But Harvey's injury was not caused by such an attack. He choked on a sandwich after he failed to chew it sufficiently. His injury was therefore unconnected to the passenger-carrier relationship and the inherent risks associated with that relationship. Indeed, plaintiffs fail

to cite any case applying the heightened standard in the context of an injury resulting from a risk unrelated to the carrier-passenger relationship.

Plaintiffs' final case involved a transportation-related injury: a passenger fell when the bus began moving before she was seated. *White*, 860 S.W.2d at 51. It is no surprise that risks in boarding—including risks to the elderly and disabled—are normally subject to the heightened duty. *See* DOBBS, *supra*, § 262. But because the law "imposes on passengers the knowledge that public conveyances will start with a jerk, lurch, or other movement when they begin operation," bus drivers "may start their bus in a normal motion before all the [able-bodied] passengers are seated." 860 S.W.2d at 52. Plaintiffs latch onto the court's discussion of an operator's manual recognizing a "greater obligation" where a passenger required assistance sitting due to an apparent disability. (Pet. 14–15.) But the court did not suggest that the manual *created* that heightened duty. 860 S.W.2d at 52–53. And more important, the court did not suggest that any heightened duty extended to non-transportation-related risks. *Id.*

Moreover, the location of Harvey's accident does not transform the risk of choking into a danger incidental to travel. The risk of choking on insufficiently chewed food is the same on a bus as any other location. (4 App. 871–72; 6 App. 1259–60; 1275–76, 1307–08.) *See Holt*, 77 F.2d at 196. Without more, application of the heightened standard is not justified.

Even assuming that Harvey's disability caused him difficulty eating, there is no evidence that First Transit knew of *that* weakness. (See 6 App. 1256–57, 1294–98.) First Transit's rule against eating was an extension of the Regional Transit Center's rule applicable to all RTC vehicles and was implemented for cleanliness and to prevent harm to other passengers who might slip on spilled food. (6 App. 1258–60, 1492–93.) And although passengers may bring their own caregiver to assist during the journey, First Transit does not provide caretaking services.[4] (4 App. 969–70; 6 App. 1256–58; 9 App. 2100.)

First Transit owed Harvey an affirmative duty of care given the special carrier-passenger relationship. But in relation to choking on an

[4] Nor were they required to provide such assistance. *See, e.g.,* 49 C.F.R. § 37.123(e); *Boose*, 587 F.3d at 1005.

insufficiently chewed sandwich, First Transit owed only a duty of *reasonable* care.

B. A Carrier May Still Be Liable For Non-Transportation-Related Risks

Although a heightened standard does not apply to non-transportation-related risks, a common carrier may still be liable for non-transportation-related injuries. For example, a common carrier must exercise reasonable care. *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001); *cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (2000); B. Finberg, *supra*; *cf.* RESTATEMENT (SECOND) OF TORTS, § 314A cmt. f (1965) ("The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured."). This is because the "special relationship" between a carrier and its passengers imposes an affirmative duty on the carrier to provide aid to passengers in need of medical attention. *Lee*, 117 Nev. at 295–96. Thus, a common carrier could be liable for a passenger's non-transportation-related injury if it failed to take "reasonable affirmative steps" to aid a passenger in need of medical attention. *Id.*

Likewise, a common carrier may be liable under the theory of assumed duty. When no duty exists, a defendant may nonetheless be liable if the defendant fails to exercise reasonable care after voluntarily assuming a duty. *Wiseman v. Hallahan*, 113 Nev. 1266, 1270–73, 945 P.2d 945, 947 (1997).

With sufficient evidence of reliance, the internal policies relied on by plaintiffs might be relevant to determine whether First Transit had assumed a duty of care. *See K-Mart Corp. v. Washington*, 109 Nev. 1180, 1189, 866 P.2d 274, 280 (1993). But policies do not expand the risks subject to a heightened standard; that standard applies only to risks that are inherently transportation-related regardless of any policy. *Wal Mart Stores, Inc. v. Wittke*, 202 So. 3d 929, 930 (Fla. Dist. Ct. App. 2016) ("A party's internal rule does not itself fix the legal standard of care in a negligence action.") (internal quotation marks omitted); *see also Jones v. Nat'l R.R. Passenger Corp.*, 942 A.2d 1103, 1108 (D.C. 2008) ("[I]nternal procedures may be admissible as bearing on the standard of care, but expert testimony [is] required to establish that the internal policies embodied the national standard of care and not a

higher, more demanding one.") (internal punctuation omitted). Plaintiffs attempt to do just that in their petition. (Pet. 8–9.) First Transit's policies cannot trigger the heightened standard; the policies may only inform the extent of duties owed under the proposed alternative theories.

Plaintiffs did not litigate and the jury did not consider a theory of negligence under an alternative theory. Plaintiffs pursued the heightened standard, and the trial court misapplied it. Thus, the questions of whether First Transit breached the reasonable care standard or an assumed duty were neither posed nor answered. Remand is required.

IV.

THE INSTRUCTIONS CAUSED PREJUDICIAL ERROR

A prejudicial error is reversible. *Carver v. El-Sabawi*, 121 Nev. 11, 14–15, 107 P.3d 1283, 1285 (2005). "An erroneous instruction as to the duty or standard of care owing by one party to the other is substantial error requiring another trial." *Otterbeck*, 85 Nev. at 463, 456 P.2d at 860. Indeed, an inference of negligence is more readily drawn under a higher duty of care than under a lesser duty of care. DAN B. DOBBS,

PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 265 (2d. ed. 2011).

The district court erred by instructing the jury on the heightened standard of care when the circumstances required no more than the reasonable care standard. (7 App. 1574–90.) Plaintiffs amplified the error by emphasizing the heightened standard throughout their closing argument. (7 App. 1648–52.) And via the heightened standard in conjunction with First Transit's internal policies, plaintiffs thrust additional per se duties on First Transit. (*Id.*)

Finally, the jury did not determine the level of care owed by First Transit; the district court did. Thus, this Court reversed based on the district court's legal error, not a jury determination. Because the jury's determination of liability "could have turned on the degree of care required," a new trial is required. *Gray v. City of Seattle*, 187 P.2d 310, 312 (Wash. 1947).

CONCLUSION

For the foregoing reasons, this Court should deny the petition. But if this Court is inclined to hear the petition, this Court should rehear

the alternative arguments raised in Frist Transit's opening brief, each of which support this Court's decision to remand for a new trial.

Dated this 9th day of January, 2020.

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Dated this 9th day of January, 2020.

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