IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; and JAY FARRALES, Appellants, vs. JACK CHERNIKOFF; and ELAINE CHERNIKOFF, Respondents.	Case No.: 70164

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MOTION TO TERMINATE APPELLATE PROCEEDINGS AND ISSUE THE REMITTITUR FORTHWITH

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MOTION TO TERMINATE APPELLATE PROCEEDINGS AND ISSUE THE REMITTITUR FORTHWITH

I. INTRODUCTION

Respondents, Jack and Elaine Chernikoff (the "Chernikoffs"), hereby move this Court to terminate the appellate proceedings and issue the remittitur forthwith. On September 28, 2020, the Clerk filed an order granting a telephonic extension until October 13, 2020 for Appellants, First Transit, Inc. and Jay Farrales (collectively "First Transit"), to file a petition for rehearing. *See* **Exhibit 1**. However, First Transit is not entitled, under NRAP 40, to initiate a second round of rehearing proceedings. The Court's order of affirmance filed on September 11, 2020 was already the product of the Chernikoffs' petition for rehearing. *See* **Exhibit 2**. Notably, First Transit already had the opportunity to argue the issues decided by the Court's order of affirmance within its answer to petition for rehearing filed on January 9, 2020 and cannot reargue the same issues in a further petition for rehearing. *See* NRAP 40(c)(1); **Exhibit 3**.

According to NRAP 41(b)(1), the filing of a petition for rehearing normally stays the remittitur. However, under the same provision, this Court has discretion to alter the normal 25 days for the remittitur to issue. Of course, if the Court determines that First Transit's forthcoming petition for rehearing is procedurally or substantively improper, there is no right to a stay of the remittitur for a fugitive

petition for rehearing. The normal time for the remittitur to issue is October 6, 2020 under NRAP 41(a)(1). Yet, even if the Court were to determine that First Transit's petition for rehearing is procedurally or substantively proper, First Transit is not entitled to a further stay of the remittitur. Thus, the Chernikoffs ask the Court to issue the remittitur forthwith, which is consistent with the normal timeline under NRAP 41(a)(1) and (b)(1). The Court can resolve this procedural matter without awaiting a response according to NRAP 27(b).

This appeal was docketed in this Court on April 15, 2016. After the completion of the principal briefing, this Court entered an order expediting this appeal on July 2, 2018. *See* **Exhibit 4**. When First Transit posted a supersedeas bond in the District Court in 2016, the amount of the bond included estimated post-judgment interest and totals $19,400,550. *See* **Exhibit 5**. However, the amended judgment upon the jury's verdict (*see* **Exhibit 6**), together with prejudgment and post-judgment interest now amounts to $20,868,256.91 as of September 11, 2020, with $2,323.82 accruing daily. *See* **Exhibit 7**. Thus, it would be prejudicial to the Chernikoffs to allow this appeal to continue. Alternatively, if the remittitur is stayed, the Chernikoffs request that First Transit be required to post a supplemental supersedeas bond to secure the full amount of the judgment. *See* NRAP 41(b)(1).

II. <u>LEGAL ARGUMENT</u>

A. NRAP 40 DOES NOT PERMIT FIRST TRANSIT TO INITIATE A SECOND ROUND OF REHEARING PROCEEDINGS.

NRAP 40 outlines the process for petitioning for this Court rehearing. According to NRAP 40(e), "[t]he full court shall consider a petition for rehearing of an en banc decision." This same provision explains, "If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case." Notably, when a petition for rehearing is granted under NRAP 40(e), there is no provision allowing for a further petition for rehearing. *Cf. Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 678 P.2d 1152 (1984) ("The right to appeal is statutory; where no statute or court rule authorizes an appeal, no right to appeal exists."); *Kokkos v. Tsalikis*, 91 Nev. 24, 530 P.2d 756 (1975). Specifically, no court rule, including NRAP 40, allows for a second round of rehearing after the full Court has already made a disposition on the initial round of rehearing. Therefore, the Court should terminate these appellate proceedings and issue the remittitur forthwith, as a matter of procedure.

B. FIRST TRANSIT ALREADY ARGUED THE IDENTICAL ISSUES IN ITS ANSWER TO THE CHERNIKOFFS' PETITION FOR REHEARING.

The Court's September 11, 2020 order of affirmance is the product of the Chernikoffs' petition for rehearing. *See* **Exhibit 2**. In its answer to the Chernikoffs' petition for rehearing, First Transit already argued against the very decisions this Court reached in the order of affirmance. *See* **Exhibit 3**. According to NRAP 40(c)(1), First Transit cannot reargue issues in its forthcoming petition for rehearing. That is, First Transit cannot refashion its answer to the Chernikoffs' petition for rehearing as its own petition for rehearing. First Transit has already been heard and is not entitled to a further petition for rehearing, just to reargue points that have already been decided. Similarly, First Transit cannot file a petition for rehearing to raise new issues. *See* NRAP 40(c)(1). Given the Court's conclusion in the order of affirmance that First Transit failed to preserve its issues presented in this appeal, the Court should not allow First Transit to prolong this case on issues that First Transit did not preserve from the outset. *See Ducksworth v. State*, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998) ("A petitioner may not reargue an issue already raised or raise a new issue not raised previously."). Therefore, the Court should terminate these appellate proceedings and issue the remittitur forthwith, as a matter of substance.

C. TERMINATION OF THESE APPELLATE PROCEEDINGS AND ISSUANCE OF THE REMITTITUR IS THE APPROPRIATE REMEDY.

Under NRAP 41(b)(1), this Court has discretion to alter the normal 25 days for the remittitur to issue. Of course, if the Court determines that First Transit's forthcoming petition for rehearing is procedurally or substantively improper, there is no right to a stay of the remittitur for a fugitive petition for rehearing. The normal time for the remittitur to issue is October 6, 2020 under NRAP 41(a)(1).

Even if the Court were to determine that First Transit's forthcoming petition for rehearing is both procedurally and substantively proper, the Court does not have to allow a further stay of the remittitur. NRAP 41(a)(1) contains the exception "unless the time is shortened or enlarged by order." NRAP 41(b)(1) contains a similar exception "unless the court orders otherwise." Since this Court has already concluded that First Transit did not preserve the issues presented in this appeal, there is no reason to allow First Transit to prolong this appeal while holding up the remittitur. *See* **Exhibit 2**. This request is especially true since the Court already determined that this appeal was expedited on July 2, 2018. *See* **Exhibit 4**. Under the circumstances of this case, the Chernikoffs urge the Court to terminate these appellate proceedings and issue the remittitur forthwith, even if the Court chooses to consider First Transit's forthcoming petition for rehearing. *See Rogers v. Heller*, 117 Nev. 169, 178 n.24, 18 P.3d 1034, 1040 n.24 (2001) (directing the Clerk to issue

the remittitur forthwith). The Chernikoffs further urge this Court to resolve this procedural matter without awaiting a response according to NRAP 27(b), especially since First Transit could extend its response time beyond the normal October 6, 2020 remittitur date.

D. ANY FURTHER DELAY IN THESE APPELLATE PROCEEDINGS WOULD PREJUDICE THE CHERNIKOFFS.

The discretionary language in NRAP 41(b)(1) allows this Court to impose conditions upon any further stay of these proceedings. This appeal has been pending before the Court for approximately 4½ years. Due to the duration of this appeal, the Chernikoffs are currently undersecured. The supersedeas bond that First Transit posted in the District Court totals $19,400,550. *See* **Exhibit 5**. However, the amended judgment upon the jury's verdict (*see* **Exhibit 6**), together with prejudgment and post-judgment interest now amounts to $20,868,256.91 as of September 11, 2020, with $2,323.82 accruing daily. *See* **Exhibit 7**. Thus, the longer this appeal goes on, while the remittitur is stayed, the more undersecured the Chernikoffs will become. As creditors, the Chernikoffs are entitled to adequate security for their judgment against First Transit. *See Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005) ("The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the

stay."). As of September 11, 2020, the Chernikoffs are undersecured in their judgment against First Transit by $1,467,706.91. Therefore, if the remittitur is stayed, the Chernikoffs request that First Transit be required to post a supplemental supersedeas bond to secure the full amount of the judgment. *See* NRAP 41(b)(1).

III. CONCLUSION

In summary, the Chernikoffs urge this Court to terminate these appellate proceedings and issue the remittitur forthwith, as a matter of both procedure and substance. Regardless of the Court's determination of the procedural and substantive nature of First Transit's forthcoming petition for rehearing, the Chernikoffs further urge the Court to order the issuance of the remittitur on the normal October 6, 2020 date, without awaiting a response from First Transit according to NRAP 27(b).

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Finally, if the Court allows a continued stay of the remittitur, the Chernikoffs ask the Court to order First Transit to post a supplemental supersedeas bond in the District Court, due to the $1,467,706.91 shortfall, as of September 11, 2020 between the Chernikoffs' judgment amount and the current supersedeas bond.

Dated this 1st day of October, 2020.

CLAGGETT & SYKES LAW FIRM

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **MOTION TO TERMINATE APPELLATE PROCEEDINGS AND ISSUE THE REMITTITUR FORTHWITH** with the Nevada Supreme Court on the 1st day of October, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as Follows:

Daniel F. Polsenberg, Esq.
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Abraham G. Smith, Esq.

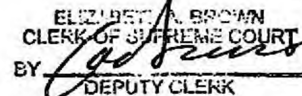
/s/ Anna Gresl
Anna Gresl, an employee of
Claggett & Sykes Law Firm

EXHIBIT 1

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; AND JAY FARRALES, Appellants, vs. JACK CHERNIKOFF; AND ELAINE CHERNIKOFF, Respondents.	No. 70164 FILED SEP 28 2020 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY [signature] DEPUTY CLERK



ORDER GRANTING TELEPHONIC EXTENSION

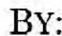
Pursuant to a telephonic request received on September 28, 2020, appellants shall have until October 13, 2020, to file and serve the petition for rehearing. *See* NRAP 26(b)(1)(B).

It is so ORDERED.

CLERK OF THE SUPREME COURT
ELIZABETH A. BROWN

BY: [signature]

cc: Lewis Roca Rothgerber Christie LLP/Las Vegas
Richard Harris Law Firm
Charles Allen Law Firm
Claggett & Sykes Law Firm



SUPREME COURT OF NEVADA

CLERK'S ORDER

(O)-1947

20-35605

EXHIBIT 2

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; AND JAY FARRALES,
Appellants,
vs.
JACK CHERNIKOFF; AND ELAINE CHERNIKOFF,
Respondents.

No. 70164

FILED

SEP 11 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended district court judgment on a jury verdict and orders resolving postjudgment motions in a tort action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

On August 1, 2019, this court issued an opinion reversing the jury verdict in favor of respondents and remanding the case back to the district court. Thereafter, respondents filed a petition for rehearing pursuant to NRAP 40. We granted rehearing and vacated the August 1, 2019, opinion on March 6, 2020, and held oral argument on July 6, 2020. Having considered those arguments, we now issue this order.

FACTS AND PROCEDURAL HISTORY

Harvey Chernikoff, a 51-year-old intellectually disabled man, choked to death on a sandwich while riding on a paratransit bus operated by appellant First Transit, Inc. Harvey's parents and heirs, respondents Jack and Elaine Chernikoff, sued First Transit and First Transit's bus driver for negligence, alleging that First Transit owed the highest degree of care to monitor and assist Harvey while he was a passenger on the bus. The Chernikoffs also claimed that the bus driver was negligent in failing to

20-33470

check on Harvey, prevent him from eating, or render proper aid once he noticed Harvey's distress. The jury ultimately awarded the Chernikoffs $15 million.

DISCUSSION

First Transit first argues that a new trial is warranted in part because the jury was erroneously instructed. The instructions told the jury that First Transit had a heightened duty of care as a common carrier (instruction 32) and that a common carrier must provide additional care to disabled passengers when aware of their disability (instruction 34).[1] The Chernikoffs claim that the instructions accurately state the law and that, regardless, First Transit waived any challenges to the jury instructions.

We agree with the Chernikoffs that First Transit waived any challenges to the jury instructions. We have held on numerous occasions that "fail[ing] to object or to request special instruction to the jury precludes appellate consideration." *Etcheverry v. State*, 107 Nev. 782, 784, 821 P.2d 350, 351 (1991) (quoting *McCall v. State*, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975)); *see also Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 613, 5 P.3d 1043, 1052 (2000) (relying on *Etcheverry* to conclude that a party that did not object or offer an alternative instruction on vicarious liability waived any challenge to the jury instruction on appeal). While First Transit initially objected to any common carrier instruction, it later proposed a common carrier instruction which the district court accepted. Having proposed instruction 32, First Transit waived any challenge to that instruction on appeal. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994) (recognizing that this court should not review errors that

[1]Instruction 33 stated that Harvey was disabled.

the complaining party induced or invited). Moreover, our careful review of the record reveals that the basis for First Transit's objection in the district court was whether the common carrier instruction applied, not, as it argues on appeal, about the duty owed by a common carrier. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (declining to consider arguments that were not made in the district court).

As to First Transit's objection to instruction 34 in the district court, it only argued that distinctions existed between two of the cases supporting the instruction. First Transit did not show that the instruction was unwarranted based on the facts or that it misstated the law such that the district court would have had reason to reject the instruction. *See Etcheverry*, 107 Nev. at 785, 821 P.2d at 351 (noting that an instruction accurately stated the law and was supported by the facts when rejecting a challenge to a jury instruction). First Transit also did not propose an alternative instruction. *See id.* at 784, 821 P.2d at 351. Under these facts, we conclude that First Transit's objection to instruction 34 was inadequate to preserve an appellate challenge to the same.

We also decline to consider whether the district court should have included Harvey on the verdict form so the jury could consider whether Harvey was negligent when apportioning fault. The parties stipulated to the dismissal of Harvey's estate with prejudice before trial such that his estate was no longer a party to the case. *See* NRS 41.141(1) (allowing a jury to consider a *plaintiff's* or a *plaintiff's decedent's* fault when apportioning liability); NRS 41.141(2)(b)(2) (providing that the verdict form in comparative fault cases shall indicate "the percentage of negligence attributable to each *party* remaining in the action" (emphasis added)); *see*

also Pearson, 110 Nev. at 297, 871 P.2d at 345-46 ("[Appellant] may not be heard to complain of the decision which resulted from her own attorney's request.").

We also affirm the jury's award and reject First Transit's request for a new trial. First Transit alleges attorney misconduct in the Chernikoffs' closing argument warrants a new trial, but First Transit did not object below, and First Transit has not shown plain error arising from that argument such that the verdict would have been different.[2] *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009) (providing that this court's review of unobjected-to attorney misconduct is essentially plain error review and reversal is not warranted unless "the misconduct amounted to 'irreparable and fundamental error . . . that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different'" (alteration in original) (quoting *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008))). And First Transit's arguments regarding the amount of the award are unavailing. The award was supported by substantial evidence, was not the result of a jury under the influence of passion or prejudice, and does not shock the conscience. *See Wells, Inc. v. Shoemake*, 64 Nev. 57, 74, 177 P.2d 451, 460 (1947) (holding that "the mere fact that the verdict is a large one is not conclusive that it is

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[2]We decline to consider First Transit's arguments regarding the lack of fault awarded to the bus driver. First Transit did not object on this basis before the jury was discharged. *See Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 272-73, 628 P.2d 681, 682 (1981); *Cramer v. Peavy*, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000) ("The efficient administration of justice requires that any doubts concerning a verdict's consistency with Nevada law be addressed before the court dismisses the jury.").

the result of caprice, passion, prejudice, sympathy or other consideration"); *see also Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) ("A jury is permitted wide latitude in awarding tort damages, and the jury's findings will be upheld if supported by substantial evidence."); *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984) (recognizing that damages for pain and suffering are peculiarly within the jury's province); *Hernandez v. City of Salt Lake*, 100 Nev. 504, 508, 686 P.2d 251, 253 (1984) (stating that reversal or reduction of a jury award is appropriate when the award was given under the influence of passion or prejudice and when it shocks the conscience).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

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[3]To the extent First Transit challenges the district court's denial of its motion for a new trial based on these same arguments, we affirm that decision. *See Grosjean*, 125 Nev. at 362, 212 P.3d at 1077 (reviewing a decision on a motion for a new trial for an abuse of discretion).

cc: Hon. Stefany Miley, District Judge
Ara H. Shirinian, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Richard Harris Law Firm
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Claggett & Sykes Law Firm
Eighth District Court Clerk

EXHIBIT 3

EXHIBIT 3

Case No. 70164

In the Supreme Court of Nevada

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Clerk of Supreme Court

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.

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[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. <u>This Court's Ruling Does Not Change the Law</u>

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)).

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[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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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3) because it contains 4,637 words.

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 9th day of January, 2020.

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Certificate of Service

I certify that on January 9, 2020, I submitted the foregoing Answer to Petition for Rehearing for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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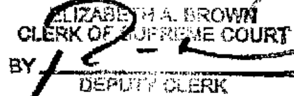
EXHIBIT 4

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST TRANSIT, INC.; AND JAY FARRALES,
Appellants,
vs.
JACK CHERNIKOFF; AND ELAINE CHERNIKOFF,
Respondents.

No. 70164



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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING MOTION

Respondents have filed a motion to expedite this appeal based on their age (both respondents are over 70). Cause appearing, we grant the unopposed motion to the following extent. This court will expedite the resolution of this appeal to the extent permitted by its docket.

It is so ORDERED.

Douglas, C.J.

cc: Lewis Roca Rothgerber Christie LLP/Las Vegas
Richard Harris Law Firm
Charles Allen Law Firm
Marquis Aurbach Coffing

18-25115

EXHIBIT 5

EXHIBIT 5

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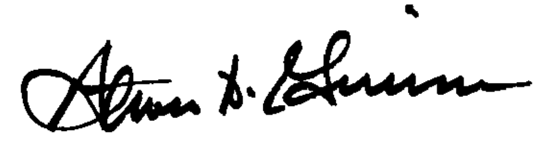


CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE CHERNIKOFF, Plaintiffs, vs. First Transit, Inc.; Jay Farrales, Defendants.	Case No. A-13-682726-C Dept. No. XXIII

SUPERSEDEAS BOND NO. 404019445

WHEREAS an "Judgment Upon Jury Verdict" was entered on March 8, 2016, against defendant First Transit, Inc., in favor of the above plaintiffs, in the aggregate principal amount of fifteen million dollars ($15,000,000); and

WHEREAS the defendant has appealed or intends to appeal this judgment and other interlocutory orders in this case to the Supreme Court of the State of Nevada:

NOW, THEREFORE, Liberty Mutual Insurance Company, a Massachusetts corporation having its principal place of business in 175 Berkeley Street, Boston, MA 02116 and being worth more than the sum in this undertaking over and above all of its debt liabilities, and duly authorized to carry on a general surety business in the State of Nevada, is held and firmly bound unto plaintiffs, obligees herein, in the sum of nineteen million, four hundred thousand, five hundred and fifty dollars ($19,400,550); to be paid for the obligation of this judgment to the obligees, their administrators, executors, successors or assigns, to which payment it binds itself, its successors and assigns firmly by these presents.

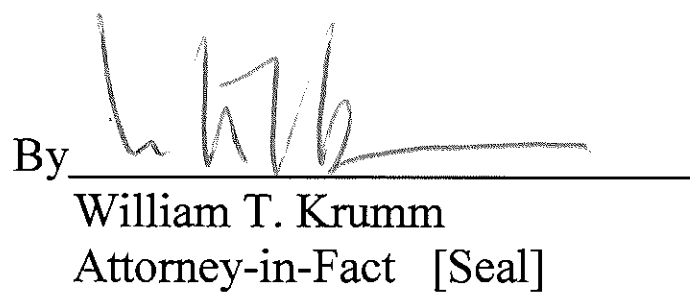
Pursuant to N.R.A.P. 8(b), Liberty Mutual Insurance Company submits itself to the

jurisdiction of this Court and irrevocably appoints the Clerk of this Court as its agent upon whom any papers affecting its liability on this bond may be served. Liberty Mutual Insurance Company's liability may be enforced on motion in this Court without the necessity of an independent action. The motion and such notice of motion as this Court prescribes may be served on the clerk of this Court, who shall forthwith mail copies to Liberty Mutual Insurance Company at the following address:

175 Berkeley Street, Boston, MA 02116

FURTHER, if the judgment and orders appealed from, or any part thereof, be affirmed, or such appeal dismissed or no appeal is taken, the defendant shall pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages, including interest and costs, which shall be awarded against any or all of them upon appeal, and that if defendant does not make such payment within thirty (30) days after the filing of the remittitur from the Supreme Court of the State of Nevada (or the Nevada Court of Appeals), or the time to appeal if no appeal is taken, judgment may be taken on motion for the plaintiffs in their favor against Liberty Mutual Insurance Company, with interest that may be due on the judgment and the damages and costs which may be awarded against defendant on the appeal, up to, but not exceeding, the sum of nineteen million, four hundred thousand, five hundred and fifty dollars ($19,400,550). If, however, the judgment is fully reversed, any contingent obligation of Liberty Mutual Insurance Company's to plaintiffs becomes null and void.

IN WITNESS WHEREOF, Liberty Mutual Insurance Company has caused this obligation to be signed by its duly authorized attorneys-in-fact and the corporate seal to be hereunto affixed at Itasca, Illinois this 22nd day of March, 2016.



By______________________
William T. Krumm
Attorney-in-Fact [Seal]

(Acknowledgment)

<u>AFFIDAVIT</u>

STATE OF ILLINOIS)
) ss.
COUNTY OF DUPAGE)

William T. Krumm, being first duly sworn, deposes and says that:

1. I am over the age of 18 and competent to make this affidavit;

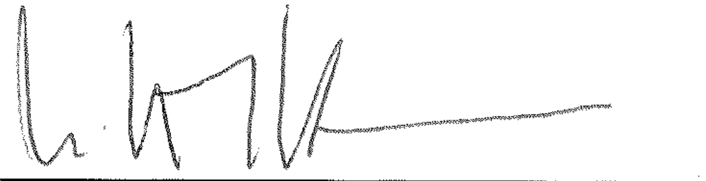
2. The facts stated herein are true and stated upon personal knowledge except as to those facts expressly stated upon knowledge or belief, and as to those facts I believe them to be true.

3. This affidavit is made in support of the foregoing surety bond and pursuant to NRS 20.010.

4. Liberty Mutual Insurance Company is an insurance company duly licensed to carry on business as an insurance company in the state of Nevada.

5. I am presently employed as the attorney-in-fact of Liberty Mutual Insurance Company.

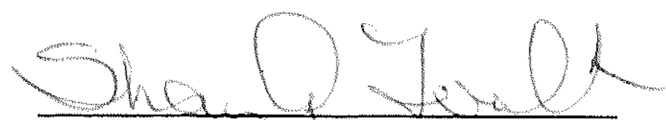
6. Liberty Mutual Insurance Company is worth **$19,400,550**, the sum specified in the bond, over and above all its just debts and liabilities exclusive of property exempt from execution.



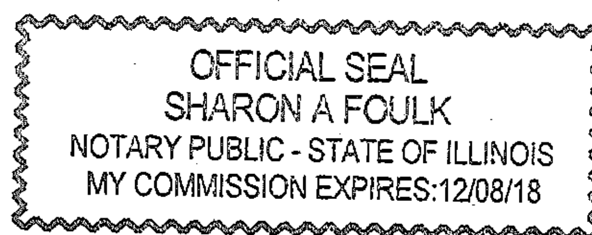
William T. Krumm

Subscribed and sworn to before me
This 22nd day of March 2016________________

Notary Public



NOTARY PUBLIC
Sharon A. Foulk



Power of Attorney verified by L. Vaquero 3/25/2016

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.
This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

Certificate No. 7199815

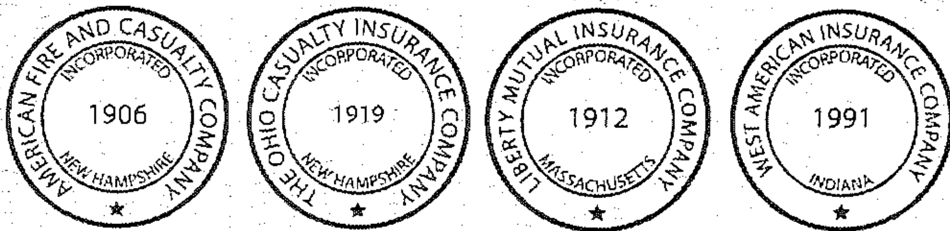
American Fire and Casualty Company
The Ohio Casualty Insurance Company
Liberty Mutual Insurance Company
West American Insurance Company

POWER OF ATTORNEY

KNOWN ALL PERSONS BY THESE PRESENTS: That American Fire & Casualty Company and The Ohio Casualty Insurance Company are corporations duly organized under the laws of the State of New Hampshire, that Liberty Mutual Insurance Company is a corporation duly organized under the laws of the State of Massachusetts, and West American Insurance Company is a corporation duly organized under the laws of the State of Indiana (herein collectively called the "Companies"), pursuant to and by authority herein set forth, does hereby name, constitute and appoint, Arlene M. Filipski; Harold Miller, Jr.; Jodie Sellers; Jon A. Schroeder; Karen E. Socha; Kathleen Weaver; Patrick Gallagher; Sharon A. Foulk; William T. Krumm

all of the city of Itasca, state of IL each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents and shall be as binding upon the Companies as if they have been duly signed by the president and attested by the secretary of the Companies in their own proper persons.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Companies and the corporate seals of the Companies have been affixed thereto this 8th day of December, 2015.



American Fire and Casualty Company
The Ohio Casualty Insurance Company
Liberty Mutual Insurance Company
West American Insurance Company

By: [signature]
David M. Carey, Assistant Secretary

STATE OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 8th day of December, 2015, before me personally appeared David M. Carey, who acknowledged himself to be the Assistant Secretary of American Fire and Casualty Company, Liberty Mutual Insurance Company, The Ohio Casualty Insurance Company, and West American Insurance Company, and that he, as such, being authorized so to do, execute the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires March 28, 2017
Member, Pennsylvania Association of Notaries

By: [signature]
Teresa Pastella, Notary Public

This Power of Attorney is made and executed pursuant to and by authority of the following By-laws and Authorizations of American Fire and Casualty Company, The Ohio Casualty Insurance Company, Liberty Mutual Insurance Company, and West American Insurance Company which resolutions are now in full force and effect reading as follows:

ARTICLE IV – OFFICERS – Section 12. Power of Attorney. Any officer or other official of the Corporation authorized for that purpose in writing by the Chairman or the President, and subject to such limitation as the Chairman or the President may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Corporation by their signature and execution of any such instruments and to attach thereto the seal of the Corporation. When so executed, such instruments shall be as binding as if signed by the President and attested to by the Secretary. Any power or authority granted to any representative or attorney-in-fact under the provisions of this article may be revoked at any time by the Board, the Chairman, the President or by the officer or officers granting such power or authority.

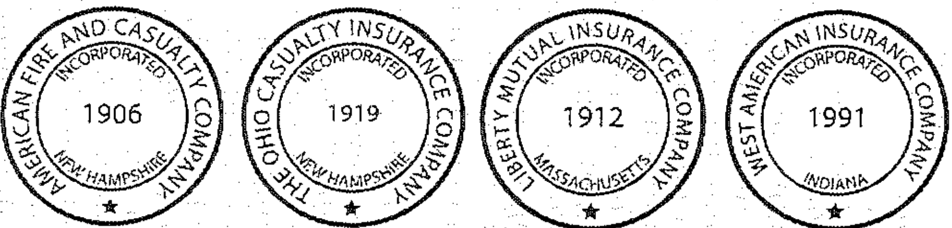
ARTICLE XIII – Execution of Contracts – SECTION 5. Surety Bonds and Undertakings. Any officer of the Company authorized for that purpose in writing by the chairman or the president, and subject to such limitations as the chairman or the president may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Company by their signature and execution of any such instruments and to attach thereto the seal of the Company. When so executed such instruments shall be as binding as if signed by the president and attested by the secretary.

Certificate of Designation – The President of the Company, acting pursuant to the Bylaws of the Company, authorizes David M. Carey, Assistant Secretary to appoint such attorneys-in-fact as may be necessary to act on behalf of the Company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

Authorization – By unanimous consent of the Company's Board of Directors, the Company consents that facsimile or mechanically reproduced signature of any assistant secretary of the Company, wherever appearing upon a certified copy of any power of attorney issued by the Company in connection with surety bonds, shall be valid and binding upon the Company with the same force and effect as though manually affixed.

I, Gregory W. Davenport, the undersigned, Assistant Secretary, of American Fire and Casualty Company, The Ohio Casualty Insurance Company, Liberty Mutual Insurance Company, and West American Insurance Company do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy of the Power of Attorney executed by said Companies, is in full force and effect and has not been revoked.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seals of said Companies this 22nd day of March, 2016.



By: [signature]
Gregory W. Davenport, Assistant Secretary

Not valid for mortgage, note, loan, letter of credit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call 1-610-832-8240 between 9:00 am and 4:30 pm EST on any business day.

EXHIBIT 6

EXHIBIT 6

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Steven D. Grierson
CLERK OF THE COURT

Richard Harris Law Firm
Benjamin P. Cloward, Esq.
Nevada Bar No. 11087
801 South, Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 385-1400
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Charles Allen Law Firm
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Atlanta, Georgia 30326
Telephone: (404) 419-6674
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callen@charlesallenlawfirm.com

Attorneys for Plaintiffs,
Jack Chernikoff and Elaine Chernikoff

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.: A682726 Dept. No.: XXIII

AMENDED JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Stefany A. Miley, District Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.[1]

[1] **Exhibit 1**: Jury Verdict.

1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE
2 CHERNIKOFF, have and recover of Defendant FIRST TRANSIT, INC. the following sums:
3

Pain and suffering by Harvey Chernikoff:	$7,500,000.00
Grief, sorrow, loss of companionship, society, Comfort, and loss of relationship suffered by Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF:	+ $7,500,000.00
Total Damages	**$15,000,000.00**

8
9 IT IS FURTHER ORDERED AND ADJUDGED that Harvey Chernikoff's past damages
10 shall bear Pre-Judgment interest in accordance with Lee v. Ball, 121 Nev. 391, 116 P.3d 64
11 (2005) and NRS 17.130 at the rate of 3.50% per annum plus 2% from the date of service of the
12 Summons and Complaint on June 7, 2013, through the entry of the Judgment on March 8, 2016:
13 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: $7,500,000.00**
14 06/07/13 through 03/08/16 = **$1,135,787.67**
15 [(1,006 days) at (prime rate (3.50%) plus 2 percent = 5.50%)]
16 [Pre-Judgment Interest is approximately $1,130.14 per day]
17 **PLAINTIFFS' TOTAL JUDGMENT**
18 Plaintiffs' total judgment is as follows:

Total Damages:	**$15,000,000.00**
Prejudgment Interest:	**$1,135,787.67**
TOTAL JUDGMENT	**$16,135,787.67**

22
23 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as
24 follows:
25 JACK CHERNIKOFF and ELAINE CHERNIKOFF are hereby awarded Sixteen Million,
26 One Hundred Third-Six Thousand, Nine Hundred Seventeen Dollars and 81/100
27 ($16,135,787.67) against Defendant FIRST TRANSIT, INC., which shall bear post-judgment
28

1 interest at the adjustable legal rate from the date of the entry of judgment (March 8, 2016) until
2 fully satisfied.[2]
3
4 Dated this 6th day of June, 2017.
5
6

DISTRICT COURT JUDGE
7
8 Respectfully submitted by:

JUDGE STEFANY A. MILEY

9 RICHARD HARRIS LAW FIRM
10

11 By______________________
Benjamin P. Cloward, Esq.
12 Nevada Bar No. 11087
801 South, Fourth Street
13 Las Vegas, Nevada 89101
Telephone: (702) 385-1400
14 Facsimile: (702) 385-9408
benjamin@richardharrislaw.com
15
CHARLES ALLEN LAW FIRM
16 Charles H. Allen, Esq.
Pro Hac Vice
17 950 East Paces Ferry Road NE., Suite 1625
Atlanta, Georgia 30326
18
Attorneys for Plaintiffs,
19 *Jack Chernikoff and Elaine Chernikoff*
20
21
22
23
24
25
26
27 [2] The legal interest rate according to NRS 17.130 was 5.50% at the time of the entry of the judgment on March 8, 2016 and has adjusted to 5.75% as of January 1, 2017.
28

Approved[3] as to form and content:

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By
Daniel F. Polsenberg, Esq.
Nevada Bar No. 2376
Joel D. Henriod, Esq.
Nevada Bar No. 8492
Abraham G. Smith, Esq.
Nevada Bar No. 13250
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996

ALVERSON, TAYLOR, MORTENSEN & SANDERS
Leann Sanders, Esq.
Nevada Bar 390
7401 W. Charleston Boulevard
Las Vegas, Nevada 89117

Attorneys for Defendants,
First Transit, Inc. and Jay Farrales

[CASE NO. A682726—AMENDED JUDGMENT UPON THE JURY VERDICT]

[3] Defendants believe that this order expresses the Court's reasoning and conclusions. However, defendants do not necessarily agree with, or acquiesce to, the reasoning, findings of fact, or conclusions of law articulated in the order.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **AMENDED JUDGMENT UPON THE JURY VERDICT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 6th day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

Benjamin P. Cloward, Esq.
bcloward@chblawyers.com
April Swanson
aswanson@charlesallenlawfirm.com
Courtney Christopher
cchristopher@alversontaylor.com
Daniel F. Polsenberg
dpolsenberg@lrrc.com
Edward Silverman
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Jessie Helm
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Kimberley Hyson
khyson@alversontaylor.com
LeAnn Sanders
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Maria Makarova
mmakarova@lrrc.com
Rosemarie Frederick
rfrederick@alversontaylor.com
Zdocteam
zdocteam@richardharrislaw.com
Yolanda Griffin
ygriffin@lrrc.com

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT 7

EXHIBIT 7

CALCULATION OF CHERNIKOFF JUDGMENT

Amended Judgment:	**$16,135,787.67** (filed June 6, 2017) includes an agreed-upon amount of prejudgment interest and states that post-judgment interest will run from the date of the entry of judgment, which was (March 8, 2016). The prejudgment interest was calculated using a single rate of interest in effect at the time the judgment was entered in accordance with *Lee v. Ball*, 121 Nev. 391, 396, 116 P.3d 64, 67 (2005) ("Under the plain language of NRS 17.130(2), the district court should have calculated prejudgment interest at the single rate in effect on the date of judgment."). Post-judgment interest runs on the entire amount of the judgment based upon the theory that "the purpose of post-judgment interest is to compensate the plaintiff for loss of the use of the money awarded in the judgment" without regard to the various elements that make up the judgment. *Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 26, 125 P.3d 1160, 1167 (2006). The post-judgment interest is calculated as "simple interest" and the rate is adjusted biannually according to NRS 17.130. *See Torres v. Goodyear Tire & Rubber Co.*, 130 Nev. 22, 26, 317 P.3d 828, 830 (2014).

Post-Judgment Interest on Amended Judgment:

March 8, 2016–June 30, 2016	115 days	5.50%	=$279,613.31
July 1, 2016–December 31, 2016	184 days	5.50%	=$447,381.29
January 1, 2017–June 30, 2017	181 days	5.75%	=$460,090.99
July 1, 2017–December 31, 2017	184 days	6.25%	=$508,387.83
January 1, 2018–June 30, 2018	181 days	6.50%	=$520,102.86
July 1, 2018–December 31, 2018	184 days	7.00%	=$569,394.37
January 1, 2019–June 30, 2019	181 days	7.50%	=$600,118.68
July 1, 2019–December 31, 2019	184 days	7.50%	=$610,065.40
January 1, 2020–June 30, 2020	182 days	6.75%	=$543,090.83
July 1, 2020–September 11, 2020	73 days	5.25%	=$169,425.77

Subtotal of Post-Judgment Interest on Amended Judgment **=$4,707,671.33 (with daily interest of $2,320.90 after September 11, 2020)**

Costs Award: **$20,290.85** (filed June 6, 2017). According to *Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 26, 125 P.3d 1160, 1167 (2006), post-judgment interest runs on all components of the judgment. And, the costs award specifically allows post-judgment interest to run on the award.

Post-Judgment Interest on Costs Award:

June 6, 2017–June 30, 2017	25 days	5.75%	=$79.91
July 1, 2017–December 31, 2017	184 days	6.25%	=$639.30
January 1, 2018–June 30, 2018	181 days	6.50%	=$654.03
July 1, 2018–December 31, 2018	184 days	7.00%	=$716.02
January 1, 2019–June 30, 2019	181 days	7.50%	=$754.65
July 1, 2019–December 31, 2019	184 days	7.50%	=$767.16
January 1, 2020–June 30, 2020	182 days	6.75%	=$682.94
July 1, 2020–September 11, 2020	73 days	5.25%	=$213.05

Subtotal of Post-Judgment Interest on Costs Award **=$4,507.06 (with daily interest of $2.92 after September 11, 2020)**

TOTALS

Amended Judgment:	=**$16,135,787.67**
Post-Judgment Interest on Amended Judgment:	**=$4,707,671.33**
Costs Award:	=**$20,290.85**
Post-Judgment Interest on Costs Award:	**=$4,507.06**

GRAND TOTAL **=$20,868,256.91 (with daily interest of $2,323.82 after September 11, 2020)**