Case No. 70164

In the Supreme Court of Nevada

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FIRST TRANSIT, INC.; AND JAY FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; AND ELAINE CHERNIKOFF,

Respondents.

APPEAL

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellants First Transit, Inc. and Jay Farrales petition for rehearing of the Court's Order of Affirmance, filed September 11, 2020. NRAP 40(a). It appears the Court may have overlooked or misapprehended three points of law or fact:

Exclusion of the Decedent's Comparative Negligence

Issue One: The Court has held that a decedent's comparative negligence may not be apportioned in an NRS 41.085 wrongful-death case if the decedent's estate is not a party. In so doing, did the Court misapprehend how NRS 41.085 divides a decedent's damages between the estate and heirs, and overlook that NRS 41.085(4) allots the "damages for pain, suffering or disfigurement of the decedent" to the heirs, not the estate? (See AOB at 16; ARB at 5-7.)

The Common Carrier Jury Instructions

On appeal, First Transit has argued it was reversible error to instruct the jury about heightened standards of care imposed on common carriers, specifically that those heightened standards are not relevant in this case because Harvey's *injury did not result from* the performance of a task that common carriers—*qua* common carriers—

have a duty to perform with special care. (AOB at 31-37, ARB at 20-26.) The Court has avoided the issue by finding First Transit waived any challenges to the jury instructions:

> 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. * * * 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 common carrier.

(Order of Affirmance at 2-3.)

Issue Two: In characterizing the basis for First Transit's objection as "whether the common carrier instruction applied, not . . . about the duty owed by a common carrier," has the Court misapprehended the gravamen of First Transit's objection, which was that the heightened standards do not apply *because* the special duties owed by a common carrier are limited in scope?

Issue Three: Has the Court misapplied the doctrine of invited error and overlooked the ramifications of a waiver rule that penalizes attorneys for attempting to cooperate with the trial court after an adverse ruling so as to avoid compounding the error?

STATEMENT OF THE CASE

The decedent Harvey Chernikoff was a high-functioning mentally handicapped adult who, according to plaintiffs, choked to death[1] on insufficiently chewed food while riding in a paratransit bus operated by appellant-defendant First Transit. Harvey's parents, respondent-plaintiffs Jack and Elaine Chernikoff, sued First Transit alleging the driver was negligent for not preventing him from eating, as well as for how the driver administered aid after he noticed Harvey was in distress.

[1] At trial, First Transit disputed that Harvey necessarily choked, and contended that he just as likely suffered a heart attack and stopped chewing because of that. But First Transit also argued, assuming Harvey did choke, that it was not their fault. (AOB at 21.)

The Common Carrier Instructions

Plaintiffs-respondents contend that Harvey choked on his food. But—even with benefit of video footage—there was no evidence or allegation that he choked because of a danger particular to travelling with a common carrier. For instance, Harvey did not choke because the bus driver swerved erratically, hit a bump, accelerated quickly or braked abruptly. Harvey did not choke because he fell while boarding, leaving, or moving from his seat. Nor did First Transit expose him to a third party who slapped him on the back or otherwise induced the choking. Rather, Harvey just happened to be on the (smoothly traveling) bus when he swallowed without chewing. (*See* AOB at 2-5.)

When settling jury instructions, First Transit objected to the Court instructing the jury *at all* regarding a common carrier's heightened standards of care, arguing they did not apply because Harvey's injury did not result from failure to perform the kind of task a common carrier has a duty to undertake with special care:

> THE COURT: Okay. So what is the objection? Why don't you think First Transit is a common carrier?
>
> MS. HYSON: So the common carrier standard applies for the transportation of individuals. What's at issue in

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

(7 App. 1577:21.) Defense counsel then noted, in the alternative, that First Transit had provided the Court *contingently* a common-carrier instruction that was more fairly worded than one proposed by plaintiffs, "if Your Honor determines that a common carrier instruction would be relevant in this case." (7 App. 1578:7-12.) The district court overruled First Transit's objection on the tautological basis that First Transit's status of common carrier was relevant because it was a common carrier:

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

(7 App. at 1578:13.)

[2] The transcript states "What's at issue in this case is actually the boarding and alighting..." (7 App. 1577.) Defense counsel appears either to have spoken too softly or misspoken. But the context of the comment as a whole, as well as the surrounding conversation, makes clear defense counsel's point.

Although some evidence might have supported a theory that First Transit assumed a duty to prevent Harvey from eating, Plaintiffs never proposed any jury instruction on that concept. *Whether First Transit did* assume such an duty would need to have been resolved by the jury, applying the elements of that legal doctrine[3] to the facts. First Transit certainly disputes it.[4] (*See, e.g.*, 8 App. 1823 (pamphlet discussing policies relating to "personal care attendants" and "unattended passengers").

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[3] *See Wiseman v. Hallahan*, 113 Nev. 1266, 1270-01, 945 P.2d 945, 947-48 (1997) (adopting RESTATEMENT (SECOND) OF TORTS § 323 (1695)) ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.").

[4] Even if First Transit had assumed a duty to prevent Harvey from eating—which would be beyond the responsibilities imposed because First Transit is a common carrier—the *standard of care* for discharging that assumed duty would be the same required of any other ordinary and prudent person or business. Plaintiffs present no authority to the contrary.

Decedent's Comparative Negligence Excluded from Apportionment

First Transit pleaded Harvey's comparative negligence as an affirmative defense. Evidence was sufficient to allow a reasonable jury to find that Harvey was mentally capable enough, and that eating on the bus was imprudent enough—in addition to being against express rules of First Transit—to allocate comparative negligence to Harvey. (AOB at 17-24, ARB at 18-20.) Defense counsel, therefore, moved the trial court to allow allocation of comparative negligence to Harvey on the verdict form. (7 App. 1610:1-14,1590 to 1610.) The district court excluded Harvey from the verdict form, however, because[5] the court believed (i) that Harvey lacked capacity to be responsible for his decisions and (ii) that First Transit's theory of Harvey's comparative negligence was mutually inconsistent with allocating comparative negligence to the parents based on his diminished capacity. (7 App.

[5] After trial, the judge added another reason to support her decision, that defense counsel had agreed to remove Harvey from the verdict form (7 App. 1607:19), even though the concession was retracted only minutes later (7 App. 1608:17) and the momentary stipulation did not affect her eventual ruling on the merits following lengthy debate (7 App. 1611:6, 1590 to 1610). The judge's post-trial rationalization was erroneous. (AOB at 25-28; ARB at 11-17.)

1611:6 to 1612:14.) Both rationales were incorrect, as demonstrated in First Transit's opening brief. (AOB 17-25.)

The jury awarded $7.5 million for Harvey's pain and suffering. (7 App. 1747-50.)

This Court now has upheld the exclusion on alternative grounds that Harvey's comparative negligence was irrelevant because Harvey's *estate* was not a party at the time of trial:

> We 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 to each *party* remaining in the action" (emphasis added)) . . .

(Order of Affirmance, doc. 20-33470, at 3.)

ARGUMENT

I.

A DECEDENT'S COMPARATIVE NEGLIGENCE SHOULD REDUCE AT LEAST ALL THE *DECEDENT'S* DAMAGES, EVEN IF GIVEN TO HEIRS

The Order of Affirmance upholds the district court's exclusion of the decedent's comparative negligence from the verdict form on grounds

not adopted by the district court, reasoning that the exclusion of the decedent's comparative negligence follows as a consequence of the parties' stipulation to dismiss Harvey's estate. This analysis implies that a decedent's comparative negligence is relevant in a wrongful death action under NRS 41.085 only to the ability of the estate to recover damages assigned to the estate, effectively construing the term "plaintiff's decedent" in NRS 41.141(1) to be synonymous with the *estate's* decedent. Equating the decedent's claim to the estate under NRS 41.085 is legally untenable, however. This Court appears to have misapprehended or overlooked that the ***decedent's*** claim for damages, when pursued though an NRS 41.085 wrongful death action—as opposed to an NRS 41.100(3) survival action—is ***divided*** between the estate and the heirs. Even assuming the decedent's comparative negligence does not affect the heirs' derivative damages,[6] it still would be relevant at least to the "damages for pain, suffering or disfigurement of the decedent," which NRS 41.085(4) assigns to the heirs. Thus,

[6] Under a proper construction of NRS 41.085 and NRS 41.141, the decedent's comparative negligence is imputed to the heirs in their derivative wrongful-death claims, as well. (AOB at 11-15; ARB at 2-18.)

Harvey's comparative negligence would be relevant at least to the $7.5 million that the jury awarded for *his* pain and suffering.

The relevance of the decedent's comparative negligence, at least to the damages for the decedent's pain and suffering, also follows from the general principle that the assignee of a claim takes that claim subject to the same defenses that could have been raised against the assignor. The Court also must harmonize its interpretation of NRS 41.085 with Nevada's survival statute, NRS 41.100; had the damages for Harvey's pain and suffering been pursued through a survival action—as opposed to being joined with the heirs' wrongful death claims in the NRS 41.085 action—Harvey's comparative negligence would reduce any award for that pain and suffering.

A. In a Wrongful Death Action, the Estate Is Not the Sole Proxy of the Decedent Because NRS 41.085 Assigns Part of the Decedent's Claim to the Heirs

It appears the Court may has misapprehended how NRS 41.085 divides a decedent's claim between the estate and heirs, and overlooked that "damages for pain, suffering or disfigurement of the decedent" are assigned to the heirs pursuant to NRS 41.085(4), not to the estate. The Court certainly is aware "NRS 41.085 is bifurcated" and "separately

describes the types of damages available to the heirs and the estate respectively." *See Alsenz v. Clark County School Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993), *abrogated by statute on other grounds*. But the Court may have lost sight of a peculiarity in that division: that the heirs may recover the decedent's pain-and-suffering damages to the exclusion of the estate.

It is easy to overlook that peculiar division. For context, when a decedent's estate elects to pursue a claim for the damages incurred by the decedent before the death through a survival action under NRS 41.100(a), the estate will recover damages for the decedent's pain and suffering along with the decedent's special damages and any punitive damages:

> [W]hen a person who has a cause of action dies before judgment, the damages recoverable by the decedent's executor or administrator include … *damages for pain, suffering or disfigurement* . . . .

NRS 41.100(3). That makes sense because the decedent's pain and suffering is, by definition, "damages which the decedent incurred or sustained before the decedent's death." *Id.*

That survival claim for the decedent's damages "may be joined" in a wrongful-death lawsuit brought by heirs of the decedent (for their own

grief or sorrow, loss of probable support, companionship, society, comfort and consortium) and by the estate for the damages arising from the death itself (such a funeral expenses):

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

NRS 41.085(3) (emphasis added).[7] As a peculiarity of NRS 41.085, when the survival claim is joined in the wrongful death claim, the decedent's damages are divided between estate and the heirs. The estate keeps the majority of damage items awardable to it under NRS 41.100—to wit, "any special damages, such as medical expenses, which the decedent incurred before the decedent's death" along with "any penalties, including . . . punitive damages, that the decedent would

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[7] An election must be made because the decedent's damages available through a survival claim under NRS 41.100 overlap with those available in wrongful-death action under NRS 41.085. *See* NRS 41.100(3) ("This subsection does not apply to the cause of action of a decedent brought by the decedent's personal representative for decedent's wrongful death."); *Alsenz*, 109 Nev. at 1066-67, 864 P.2d at 288 (barring a survival action under NRS 41.100 after an election had been made to pursue the same damages in a wrongful death action); *Schmutz v. Bradford*, 2013 WL 7156301, *2 (Nev. Dec. 19, 2013) ("[A]ppellants should have been permitted to plead both claims [under NRS 41.100 and NRS 41.085] *in the alternative*." (emphasis added)).

have recovered if he had lived." *Compare* NRS 41.085(5) *with* NRS 41.100(3). But, when the survival and wrongful-death claims are joined, NRS 41.085(4) assigns any award for the "damages for pain, suffering and disfigurement of the decedent" to the heirs. *Compare* NRS 41.085(4) *with* NRS 41.100(3).

Put simply, in an NRS 41.085 action, the estate is not the exclusive holder of the decedent's claims. The heirs hold an aspect of the decedent's damages. Thus, the term "plaintiff's decedent" in NRS 41.141(1) cannot be equated to either 'estate's decedent' or 'heir's decedent' in NRS 41.085. In the parlance of NRS 41.141(1), the decedent belongs to them both.

B. The Right to Recover the Decedent's Damages Must Be Subject to the Defenses the Descendent Would Have Faced, Including Comparative Negligence

The right to recover a decedent's damages cannot be separated from imposition of any reduction for the decedent's comparative negligence.

1. An assigned chose in action comes subject to the same defenses

In essence, the wrongful death statute divides the decedent's

chose in action, assigning parts of it to the estate and a part to the heirs. As a general matter, assignees take claims "subject to all the defenses, legal and equitable" that could have been raised against the assignor. *Haydon v. Nicoletti*, 18 Nev. 290, 3 P. 473, 478 (1884) ("The rule is settled, by an unbroken series of authorities, that the assignee of a thing in action not negotiable takes the interest assigned, subject to all the defenses, legal and equitable, of the debtor who issued the obligation."). "[I]t simply makes no sense that a[n] assignee could have greater rights than its assignor." *State of Mont. Dep't of Soc. & Rehab. Servs. ex rel. Riley v. Lopez*, 112 Nev. 1213, 1216, 925 P.2d 880, 881 (1996).

This is seen in survival actions, as well. In claims under NRS 41.100, the defendant may raise the decedent's comparative negligence as a defense. *Worth v. Reed*, 79 Nev. 351, 356, 384 P.2d 1017, 1019 (1963).

2. At least the award for the decedent's damages must be subject to reduction for the decedent's comparative negligence

There is no defensible reading of either NRS 41.141 or NRS 41.085 that would permit an award of the decedent's damages to be

shielded from reduction for the decedent's comparative negligence.[8]

Respectfully, the Order of Affirmance applies a strained reading of both NRS 41.141 and NRS 41.085 to conclude that only the estate in a wrongful-death case is covered by the term "plaintiff's decedent" in NRS 41.141. As the Court has explained before, when it analyzes the interaction of two statutes, this Court will "construe the language of both statutes so as to give each of them force without nullifying their manifest purpose." *Cromer v. Wilson*, 126 Nev. 106, 109-10, 225 P.3d 788, 790 (2010) (harmonizing the application of a plaintiff's comparative negligence under NRS 41.141 to a claim under NRS 41.133 that establishes the defendant's liability as a matter of law). Put simply, NRS 41.085 is silent as to the application of the various plaintiffs' comparative negligence. And NRS 41.141 is silent as to which plaintiffs in a wrongful death case it contemplates in the term "plaintiff's decedent"; it does not limit the term to either the estate or the heirs.

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[8] For purposes of this petition, appellants assume the Court has rejected their primary argument that decedent's comparative negligence will reduce *all* the damages of all plaintiffs, the estate and heirs alike, regardless of whether the estate is a party to the action, under a plain reading of NRS 41.141. (AOB at 11-15; ARB at 2-18.)

And nothing in either statute indicates that decedent's comparative negligence ought to be a defense against only the estate or the heirs even though the decedent's damages are divided between them.

Shielding the award of the decedent's pain and suffering from any reduction for the decedent's comparative negligence, merely because it is awarded to the heirs, nullifies important purposes of NRS 41.141 and NRS 41.085, and renders them inharmonious with NRS 41.100. First, the purpose of NRS 41.141(1) is make the *injured person* responsible for a fair allocation of his own negligent conduct. The express reference to "plaintiff's decedent" indicates the legislature's intent to carry forward the relevance of the injured person's culpability to "any action to recover damages for [his] death or [his] injury." NRS 41.141(1). And this Court has already recognized that damages awarded for the decedent's pain and suffering are subject to a reduction for the decedent's comparative negligence when sought by way of a survival action. *See Worth*, 79 Nev. at 356, 384 P.2d at 1019. Even assuming the meaning of "plaintiff's decedent" were ambiguous in application to NRS 41.085—rendering it susceptible to interpretations that would include the estate's claim, the heirs' claims, or any of them—this Court "must not give the statute a

meaning that will nullify its operation." Here, the Court ought not nullify the operation NRS 41.141 by shielding the damages awarded for decedent's pain and suffering from reduction for decedent's comparative negligence where NRS 41.141 is "susceptible to another reasonable interpretation"—*i.e.*, that "plaintiff" in the term "plaintiff's decedent" refers to any party pursuing damages of the decedent assigned to them.

Second, disallowing the decedent's comparative negligence to reduce the award for the decedent's general damages when they are awarded in a wrongful death case (as opposed to a survival action) nullifies NRS 41.085's purpose of melding survival actions with wrongful death claims where feasible. *See* NRS 41.085(3) ("An action brought by the heirs of decedent . . . and the cause of action of that decedent brought or maintained by the decedent's representative which arose out of the same the wrongful actor or neglect may be joined.") When those damages are sought in a survival action under NRS 41.100, they are subject to the defense of the decedent's comparative negligence. *See above*. While the legislature chose to shift that aspect of the decedent's damages from the estate to the heirs when the claims are joined under NRS 41.085, to shield them from taxation or the estate's

creditors,[9] nothing in the statute or legislative history behind NRS 41.085 suggests an intention to exempt the award of pain and suffering damages from the same reduction for comparative negligence that the estate would face in a survival action, or that the decedent would have faced in a personal injury case if he had lived. NRS 41.141(1) makes it clear that the heirs, like any assignee, take the decedent's claim for pain and suffering subject to the defense of comparative negligence, just as would the estate or the decedent.

Third, comparative negligence is specifically relevant to calculation of damages even when it is not relevant to liability. As this Court explained in *Cromer v. Wilson*, deciding that a defendant subject to liability as a matter of law under NRS 41.133 still was entitled to raise a comparative-negligence defense to dispute the amount of damages:

> In establishing damages, defenses to damages such as comparative negligence are still permitted because they do not interfere with the determination of liability, on the amount of damages recoverable.

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[9] See NRS 41.085(5)(b) ("The *proceeds of any judgment for damages awarded under this subsection* are *liable for the debts* of the decedent unless exempted by law." (emphasis added)).

Cromer v. Wilson, 126 Nev. at 111, 225 P.3d at 791. It follows that wherever the decedent's damages are awardable, the decedent's comparative negligence should be relevant.

C. The Order of Affirmance Is Dangerous Precedent

The order is problematic precedent even though it is not published, as "[a] party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016." NRAP 36(c)(3). And the order is precedent for the above propositions of law even though the order does not expressly articulate them, as they "obviously follow" from the order's conclusions in light of the summarized facts. *See* The Bluebook: A Uniform System of Citation Rule 1.2(a), at 58 (20th ed. 2019 update) (explaining that the use of the "see" introductory signal is appropriate "when the proposition is not directly stated by the cited authority but obviously follows from it").

II.

First Transit Objected to the Common Carrier Instructions on the Exact Basis Advanced on Appeal

The Court indicates that First Transit's objection to the common carrier instructions at trial are different from the arguments raised on

appeal:

> [O]ur 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 common carrier.

It seems the Court misapprehended the gravamen of First Transit's objection.

A. The Order of Affirmance Appears to Hang on a Distinction Without a Difference

The Court supposes that First Transit's objection was ***either*** that the common carrier heightened standards do not apply ***or*** "about the duty owed by a common carrier." Yet both are true. First Transit argued the special common-carrier heightened standards were irrelevant *because* of the limited scope of the special duties owed by a common carrier. (*See* above; 7 App. 1577:21.)

B. First Transit's Objection Was Succinct and Sufficient

Defense counsel stated the objection and rationale succinctly—approximately a paragraph in the transcript. (7 App. 1577:21.) There was no need to belabor the point. Rule 51(c) provides that a party objecting to an instruction must "distinctly" state the matter objected to

and the grounds for the objection. NRCP 51(c)(1). The purpose is to provide the district court a fair opportunity to avoid the error. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1001, 194 P.3d 1214, 1216-17 (2008). While the issue was important, no further "discourse on the applicable law" or "extensive legal argument" were necessary. *Cook*, 124 Nev. at 1001–02, 194 P.3d at 1216–17; *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 691 n.1, 669 P.2d 709, 710 n.1 (1983).

The objection also sufficiently articulated then the point First Transit now advances on appeal, that the heightened standards were irrelevant because Harvey's injury did not result from the performance of a task that common carriers have a special duty to perform with special care.[10] Harvey did not choke because of how the bus was driven, nor because he tripped while boarding or alighting, nor because of another passenger whom First Transit enclosed in the vehicle with him. Put simply, (1) the common carrier's special duty to exercise heightened care must be tethered to the types of their activities, and the corresponding vulnerabilities of passengers, that make common carriers

[10] *See* AOB at 31 ("Harvey's Death Did Not Result from the Type of Harm that a Common Carrier Has a Heightened Duty to Prevent").

special and distinct from other industries in the first place; and (2) there must be a causal nexus between the plaintiffs injury and one of those activities. In any other case, the defendant's status as a common carrier is happenstance.

Any slight differences in the articulations or the depth between the objection during trial and on the briefing on appeal are immaterial. "Counsel, in the heat of a trial, cannot be expected to respond with all the legal niceties and nuances of a brief writer." *Otterbeck v. Lamb*, 85 Nev. 456, 460, 456 P.2d 855, 858 (1969). Applying Rule 51, this Court avoids elevating form over substance. "Where counsel timely calls to the district court's attention the issues of law involved, a slight omission in compliance with NRCP 51 will not preclude appellate review." *Johnson v. Egtedar*, 112 Nev. 428, 434, 915 P.2d 271, 275 (1996); *see, e.g.*, *Cook*, 124 Nev. at 1002, 194 P.3d at 1217 (holding that "under NRCP 51(c), the plaintiffs' objection needed only to focus the district court's attention on the alleged error, which [statement that proffered language was 'not an appropriate [*Gunlock*] instruction'] did").

C. After Trial, the District Court Expressed No Confusion About First Transit's Objection

Perhaps most telling, First Transit filed a motion for new trial raising virtually all of the nuances, details and subpoints concerning the common-carrier instructions that it propounded in the appellate briefs. (*Compare* 10 App. 2277, 10 App. 2294, *with* AOB at 29-37 and ARB at 20-26.) Neither during the hearing nor in the order denying the motion for new trial did the judge ever say she misunderstood the gravamen of First Transit's objections or believed them to be something different. (App. 2618.) "Objections are sufficient when they serve NRCP 51(c)'s purpose to give the trial court the opportunity to correct the potential error by focusing the court's attention on the alleged error." *Cook*, 124 Nev. at 1001, 194 P.3d at 1216-17. Here, there is no reasonable doubt that the district court's attention was, in fact, focused on the alleged error.

III.

A PARTY DOES NOT WAIVE AN OBJECTION BY COOPERATING WITH THE COURT TO IMPLEMENT THE ADVERSE RULING TO PREVENT THE COURT FROM COMPOUNDING THE ERROR

The Court also applies an unworkable waiver standard: According

to the Court, after the district court ruled that it would instruct the jury regarding a common carrier's heightened standard over First Transit's objection, defense counsel waived the objection by offering an alternative instruction that complied with the court's ruling yet was more balanced than the one proposed by plaintiffs. (Order of Affirmance at 2.) Respectfully, this rationale misapplies the concept of invited error. The Court also may have overlooked a potential unintended consequence of penalizing an attorney for cooperating with the trial court to implement an adverse ruling in a manner to avoid compounding error.

A. <u>The Order Misapplies the Doctrine of Invited Error</u>

The Court appears to have misapprehended or overlooked the concept that a party does not waive an objection to a jury instruction by seeking the best alternative outcome after the district court overrules its primary threshold objection. As the California Supreme Court explained:

> An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and

> endeavoring to make the best of a bad situation for which he was not responsible.

Mary M. v. City of L.A., 814 P.2d 1341, 1346 (Cal. 1991); *quoting People v. Calio*, 724 P.2d 1162, 1164 (Cal. 1986)); *see also State v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008) (holding that invited error doctrine did not bar appellate review where trial court refused defendant's original proposed instruction and defendant "was faced with either submitting the case to the jury with no justification instruction at all, or else requesting an alternate instruction that, while inadequate, provided at least some support for his defense"). While the Court has not yet adopted this precise notion itself, it is consistent with the Court's reasonable and practical applications of issue-preservation doctrines to appellate issues concerning jury instructions. (See above.) And it is consistent with the authority cited by this Court in the Order of Affirmance regarding invited error, *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994), as that case did not involve a circumstance of a party collaborating to facilitate the implementation of an erroneous ruling after making its objection clear on the record. Nor did *Pearson* involve jury instructions.

B. <u>The Potential Unintended Consequence</u>

The Court also may have overlooked the ramifications of a waiver rule that penalizes attorneys for cooperating with the trial court following an adverse ruling to implement it in a manner that avoids compounding the error. The Court understands that erroneous jury instructions may compound prior mistakes. *See, e.g, Keys v. State*, 104 Nev. 736, 739, 766 P.3d 270, 272 (1988) (improper language of jury instruction compounds error of incorrect instruction ruling). When a party adversely affected by a ruling subsequently facilitates its implementation, that attorney serves both her client and the court. This waiver rule may encourage attorneys to withhold helpful guidance as a judge falls deeper into error to avoid diluting the purity of prior objections. That should not be a concern to officers of the court.

CONCLUSION

For the reasons above, the Court should rehear the case, reverse the judgment, and remand for a new trial.

Dated this 27th day of October, 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(a)(3), because it contains 4,664 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 27th day of October, 2020.

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I certify that on October 27, 2020, I submitted the foregoing 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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