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### First Transit v. Chernikoff, 135 Nev. Adv. Op. 32 (Aug. 1, 2019)

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Tort Law: Common Carrier Liability

**Summary**

The Court clarified that (1) the heightened duty of care by common carriers only applies to transportation-related risks, and (2) when a common carrier is aware of a passenger's disability, reasonable care includes providing safe transport that the circumstances reasonably require based on the disability.

**Background**

Harvey Chernikoff was an intellectually disabled man who choked to death while riding on a paratransit bus operated by First Transit. Harvey's parents sued First Transit for negligence. The Chernikoff's claimed First Transit owed the highest degree of care to monitor and assist Harvey while riding the bus. The Chernikoff's claimed the bus driver was negligent for failing to check in on Harvey and stop him from eating. In addition, the Chernikoff's claim the bus driver was negligent for how he rendered aid once he found out Harvey was choking.

At trial, the Chernikoff's counsel stated First Transit owed Harvey a higher standard of care than the highest standard due to Harvey's disability. The jury was instructed that First Transit had a heightened duty of care as a common carrier ("Instruction 32"). In addition, the jury was instructed that a common carrier must provide additional care to disabled passengers when the common carrier is aware of the disability ("Instruction 34").

A divided jury found for the Chernikoff's and awarded them \$15 million. First Transit appealed, arguing Instruction 32 and Instruction 34, which referenced a heightened duty of care, was improper. Furthermore, First Transit argued opposing counsel caused prejudice based on his use of the erroneous instructions during closing argument.

**Discussion**

*First Transit did not waive its objections to the jury instructions.*

The Chernikoff's argued First Transit waived the objection of Instruction 32 because First Transit proposed the instruction. The Court rejected this argument because First Transit did initially argue the common carrier instruction should not be given. However, the district court rejected First Transit's argument and allowed the instruction. The Chernikoff's then proposed an instruction which First Transit objected to and in the alternative offered the Nevada pattern jury instruction on common carrier duty.

Based on the circumstances, First Transit preserved its objection. First Transit did not waive its objection simply because it sought an alternative after the district court overruled its initial objection. Furthermore, First Transit did not waive its objection to Instruction 34 regarding additional care to disabled passengers because First Transit did not propose the instruction and properly objected when the instruction was proposed.

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<sup>1</sup> By Michael Holthus.

*The jury instructions misled the jury to rely on an inappropriate standard of care.*

Nevada case law has historically imposed a heightened duty of care on common carriers to its passengers.<sup>2</sup> However, that heightened duty of care does not extend to protecting passengers from non-transportation risks.<sup>3</sup> The Court ruled Harvey's choking was not a risk associated with transportation, therefore the heightened duty of care was not applicable. Therefore, jury instruction 32 was improper because the Chernikoffs did not allege First Transit was negligent in its transportation duties.

Furthermore, the Court ruled Instruction 32 caused prejudice because it affected the jury's ability to apply Instruction 34. Instruction 34 stated common carriers must provide the "additional care which the circumstances reasonably require" to a mentally disabled person.<sup>4</sup> While Instruction 34 correctly stated the law, the combination with Instruction 32 incorrectly led the jury to believe First Transit owed a higher duty of care than just safe transportation from one location to another. While First Transit works with the Regional Transportation Commission to accommodate disabled individuals for transport, First Transit does not owe a heightened duty to prevent medical events. Therefore, the Court ruled the coupling of Instruction 32 and Instruction 34, in addition to the Chernikoff's closing argument, misled the jury to imply First Transit had a higher standard of care than it did.

Finally, while First Transit did have a duty to render aid to Harvey, the duty was not heightened or extraordinary. There is no general duty to aid in Nevada however, common carriers have a special relationship with passengers and therefore have a duty to render aid.<sup>5</sup> However, the duty to render aid is not extraordinary.<sup>6</sup> The Court held the jury instructions improperly implied to the jury First Transit had to do more than act reasonably under the circumstances when rendering aid.

*The jury may have found for First Transit if not for the improper jury instructions.*

First Transit's liability for Harvey's death was a close issue which led to a split verdict. The jury could have possibly found First Transit not liable had the jury instructions not misled the jury to believe there was a heightened standard of care.

## **Conclusion**

Instruction 32 and Instruction 34, in addition to the Chernikoff's closing statement, misled the jury into inferring a higher standard of care than one which was owed. First Transit does not owe a heightened duty of care to passengers in non-transportation risks. Subsequently, the Court reversed the district court's ruling and remanded for a new trial.

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<sup>2</sup> See *Sherman v. S. Pac. Co.*, 111 P. 416, 424 (Nev. 1910).

<sup>3</sup> See *Rodriguez v. New Orleans Pub. Serv., Inc.*, 400 So. 2d 884, 887 (La. 1981).

<sup>4</sup> See Nevada Jury Instructions—Civil, 2011 Edition at 4.50 (citing *Am. Presidential Lines, Ltd. v. Lundstrom*, 323 F.2d 817, 818 (9th. Cir. 1963)).

<sup>5</sup> *Lee v. GNLV Corp.*, 22 P.3d 209, 212 (Nev. 2001); See RESTATEMENT (SECOND) OF TORTS § 314(1)(b) (AM. LAW INST. 2019).

<sup>6</sup> See *Id.* at cmt. F.