IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-TS-01089

BOYD TUNICA, INC. **APPELLANT**

VS.

RUTH BEASLEY LATTING
PREMIER TRANSPORTATION SERVICES, INC. **APPELLEES**

Appeal from the Circuit Court of Tunica County, Mississippi
No. 2005-0264

BRIEF FOR THE APPELLEE PREMIER TRANSPORTATION SERVICES, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Boyd Tunica, Inc., d/b/a Sam's Town Hotel and Gambling Hall, Defendant/Appellant;
2. Ruth Beasley Latting, Plaintiff/Appellee;
3. Premier Transportation Services, Inc., Defendant/Appellee;
4. Richard C. Williams, Jr., trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
5. Lonnie D. Bailey, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
6. Otha E. Williams, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
7. Upshaw, Williams, Biggers, Beckham & Riddick, LLP, trial counsel for Defendant/Appellant Boyd Tunica, Inc.;
8. Robert A. Miller, counsel for Defendant/Appellant Boyd Tunica, Inc.;
9. Kyle V. Miller, counsel for Defendant/Appellant Boyd Tunica, Inc.;
10. Butler, Snow, O'Mara, Stevens & Cannada, counsel for Defendant/Appellant Boyd Tunica, Inc.;
11. Richard B. Lewis, Jr., counsel for Plaintiff/Appellee Ruth Beasley Latting;
12. Daniel M. Czamanske, Jr., counsel for Plaintiff/Appellee Ruth Beasley Latting;
13. Chapman, Lewis & Swan, counsel for Plaintiff/Appellee Ruth Beasley Latting;
14. John D. Richardson, counsel for Defendant/Appellee Premier Transportation Services, Inc.;
15. Teresa A. Boyd, counsel for Defendant/Appellee Premier Transportation Services, Inc.; and
16. The Richardson Law Firm, counsel for Defendant/Appellee Premier Transportation Services, Inc.

John D. Richardson
Counsel for Defendant/Appellee Premier
Transportation Services, Inc.

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INTRODUCTORY STATEMENT

Plaintiff/Appellee Ruth Beasley Latting shall be referred to herein as "Plaintiff Beasley" or "Beasley." Defendant/Appellant Boyd Tunica, Inc. shall be referred to herein as "Defendant BTI" or "BTI." Defendant/Appellee Premier Transportation Services, Inc. shall be referred to herein as "Premier."

References made to the Court's technical record will be cited as "R." and will have a corresponding page number following, which will read as "R. at ___." References made to the trial transcript will be cited as "Tr." and will have a corresponding page number following, which will read as "Tr. at ___." References made to Boyd Tunica, Inc.'s Record Excerpts will be cited as "BRE" and will have a corresponding page number following, which will read as "BRE at ___."

STATEMENT OF THE CASE

The instant appeal arises from a personal injury action brought by the Plaintiff/Appellee Ruth Beasley Latting (hereinafter "Beasley") against the Defendant/Appellant Boyd Tunica Inc. (hereinafter "BTI") and the Defendant/Appellee Premier Transportation Services, Inc. (hereinafter "Premier"). While riding as a passenger on a Premier casino shuttle bus, Beasley was thrown from her seat when a Premier casino shuttle bus driver (Frank Weeden) was forced to slam on his brakes in order to avoid striking a white pickup truck, which was operated by a BTI employee (John Sevier), who ran or failed to heed a stop sign. The facts of this case are simple: BTI's employee, John Sevier, ran a stop sign and caused the subject accident.

On September 12, 2005, Beasley filed her Complaint in the Circuit Court of Tunica County, Mississippi. From May 5, 2008 through May 6, 2008, the instant action was tried before a jury. At the close of Beasley's case, BTI moved for directed verdict. The Circuit Court denied

BTI's Motion for Directed Verdict. On May 6, 2008, the jury reached a verdict, found BTI One Hundred Percent (100%) at fault for the subject incident and awarded Beasley $250,000.00 in damages. On May 16, 2008, the Circuit Court entered a judgment in accordance with the jury's verdict.

On May 22, 2008, BTI filed a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial. On June 6, 2008, the Circuit Court denied BTI's Motion by written order. On June 24, 2008, BTI filed its Notice of Appeal.

STATEMENT OF THE FACTS

On Tuesday, January 11, 2005 at approximately 4:45 p.m., Plaintiff Beasley was a passenger on a twenty-five (25) passenger casino shuttle bus, which was owned and operated by Premier Transportation Services, Inc. ("Premier") and was being driven by Premier employee, Frank Weeden, in the parking lot of Sam's Town Casino and Gambling Hall located in Tunica, Mississippi. (Tr. at 111:16 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7)

At the time of the subject incident, Frank Weeden was driving down the main driveway of the Sam's Town Casino parking lot when **Weeden was forced to slam on his brakes** in order to avoid being struck by a white pickup truck, which was owned and operated by Boyd Tunica, Inc. ("BTI") and was being driven by **one of BTI's employees, John Sevier, who ran a stop sign.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7)

At the time of the subject incident, Frank Weeden was acting within the course and scope of his employment with Defendant, Premier Transportation Services, Inc. ("Premier"). (Tr. at 113:2 – 116:2) At the time of the subject incident, John Sevier was acting within the course and scope of his employment with Defendant, Boyd Tunica, Inc. ("BTI"). (Tr. at 113:2 – 116:2)

Premier's employee, Frank Weeden, had the right-of-way at the intersection where the incident at issue occurred. (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7) **BTI's employee, John Sevier, who was driving the white pickup truck, had a stop sign at the intersection.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7) **When John Sevier failed to stop at the stop sign, Frank Weeden was forced to slam on his brakes in order to avoid hitting the vehicle driven by John Sevier, who ran the stop sign.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7) No contact was made between the two vehicles. (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7)

At the intersection where the incident at issue occurred, BTI's employee, **John Sevier, had a stop sign, which Sevier failed to heed.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7) At the intersection where the incident at issue occurred, **Premier's employee, Frank Weeden, had no stop sign and had the right of way.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7) **BTI's employee, John Sevier, failed to stop at the stop sign and caused the incident at issue.** (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7)

Premier owns and operates a casino shuttle bus service, which provides casino patrons shuttle bus service between and among several casinos located in Tunica, Mississippi. (Tr. at 264:20 – 264:25.) Premier charges its casino shuttle bus passengers $1.00 in order to ride the casino shuttle bus between and among several casinos located in Tunica, Mississippi. (Tr. at 264:20 – 264:25; Tr. Ex. BTI-O at 5.) Sam's Town Hotel and Gambling Hall, which is owned by BTI, is one of the casinos, which Premier provides casino shuttle bus service to and from. (Tr. at 112:19 – 112:21; Tr. at 264:20 – 264:25; Tr. at 113:2 – 116:2)

Premier's casino shuttle bus upon which the Plaintiff was riding at the time of the subject occurrence **only** provided casino shuttle bus services to the patrons of the adjacent ten casinos.

(Tr. at 264:20 – 264:25) **At the time of the subject incident, Premier was acting as a casino contract carrier to the adjacent ten casinos.** (Tr. at 264:20 – 264:25)

Premier maintains a Casino Shuttle Driver's Guide, which sets forth Premier's internal policies and procedures. (Tr. at 208:17 – 208:24; Tr. Ex. BTI-O.) With respect to Premier's internal company seatbelt policy, Premier's Casino Shuttle Driver's Guide contains the following language:

SEAT BELT POLICY

> The law requires that all front seat passengers and driver wear the seat belt while the vehicle is in motion. Wear your seat belt at all times, it's the law. Premier Transportation insists that all passengers "buckle up." Inform the company if you find anything wrong with the vehicle safety belts as you would with any other defect in the safety, comfort or operation of the vehicle.

(Tr. Ex. BTI-O; Tr. Ex. BTI-U; Tr. Ex. BTI-V).

On the day of the subject incident, Plaintiff Beasley boarded Premier's casino shuttle bus at the Hollywood Casino and seated herself on the front row of Premier's twenty-five (25) passenger casino shuttle bus. (Tr. at 91:6 – 91:13, 92:24 – 92:26, 112:5 – 112:6, B.R.E. at 61:6 – 61:13, 62:24 – 62:26, 64:5 – 64:6., 92:13 – 92:16, 103:7 – 103:15, 178:16 – 178:19, 222:15 – 222:17, B.R.E. at 62:13 – 62:16, 63:7 – 63:15, 65:16 – 65:19, 70:15 – 70:17.) **When Plaintiff Beasley first seated herself on Premier's twenty-five (25) passenger casino shuttle bus, Weeden specifically told Ms. Beasley to put on her seatbelt.** (Tr. 210:18 - 211:29) **Plaintiff Beasley refused to heed Weeden's clear, verbal instruction to put on a seatbelt.** (Tr. 210:18 – 211:29)

After Plaintiff Beasley seated herself on Premier's casino shuttle bus on the date of the subject incident, Weeden drove the casino shuttle bus from the Hollywood Casino to Sam's Town Casino and Gambling Hall. (Tr. at 112:5 – 112:21) After making a stop at Sam's Town Casino and Gambling Hall, Weeden began driving the casino shuttle bus down the main

driveway of Sam's Town Casino toward the Sam's Town Casino's parking lot exit. (Tr. at 113:2 – 116:2; Tr. Ex. PT-4; PT-5; PT-6; PT-7)

As Premier's casino shuttle bus neared an intersection in the parking lot of Sam's Town's Casino and Gambling Hall, Weeden was forced to slam on his brakes in order to avoid hitting a white pickup truck, which was owned and operated by BTI and which pulled out **suddenly and without warning** in front of Premier's casino shuttle bus. (Tr. at 113:2 – 116:2) **Because BTI's employee failed to heed the stop sign at the subject intersection and/or ran the stop sign, the incident at issue occurred.** (Tr. at 113:2 – 116:2)

BTI's employee, John Sevier, admitted that he could **not** remember whether he stopped at the stop sign at the subject intersection. (Tr. at 254:12 – 254:23) BTI's employee, John Sevier, admitted that he could **not** remember whether he looked both ways before pulling out from the stop sign at the subject intersection. (Tr. at 255:10 – 256:4) Following the subject incident, BTI's employee, John Sevier, made the following admissions to Greg Lacki, who was Sevier's work supervisor at BTI: 1) Sevier could **not** remember whether he stopped at the stop sign at the subject intersection; and 2) Sevier could **not** remember whether he looked both ways before pulling out from the stop sign at the subject intersection. (Tr. at 254:12 – 256:4)

SUMMARY OF THE ARGUMENT

The Circuit Court was correct in instructing the jury that it could **not** consider the use or non-use of seatbelts as evidence of negligence on the part of the Plaintiff Beasley and/or on the part of Defendant Premier in accordance with the clear and unambiguous statutory language contained in Mississippi Code Annotated § 63-2-3.

Mississippi Code Annotated § 63-2-3 provides that the "[f]ailure to provide and use a seat belt restraint device or system shall **not** be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual."

Evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt is **not** admissible in order to prove the negligence of the Plaintiff Beasley **or** Defendant Premier pursuant to the clear and unambiguous language contained in Mississippi Code Annotated § 63-2-3.

Because the statutory language contained in Mississippi Code Annotated § 63-2-3 is unambiguous and clear that evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt is **not** admissible in order to prove the negligence of the Plaintiff Beasley **or** Defendant Premier, the Circuit Court was correct in excluding any and all reference in this case to seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt in order to prove the negligence of the Plaintiff Beasley and Defendant Premier pursuant to the clear statutory mandate contained in Mississippi Code Annotated § 63-2-3.

The Circuit Court was correct in instructing the jury that Defendant Premier was obligated to exercise an ordinary and reasonable standard of care for the safety of Plaintiff Beasley.

The distinctive characteristic of a common carrier is that a common carrier undertakes to carry for hire for the general public. *Ohio Oil Co. v. Fowler*, 100 So.2d 128 (Miss. 1958); *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958); 9 *Am.Jur.*, Carriers, § 4; 13 *C.J.S.*, Carriers, § 3. The distinctive characteristic of a contract carrier is that a contract carrier undertakes to carry for hire those specific goods or persons for whom it has contracted to carry. *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958). It is well-settled under Mississippi law that one who is a

contract carrier is in fact **not** a common carrier. *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958).

In the instant case, it is undisputed that Defendant Premier's casino shuttle bus upon which Plaintiff Beasley was riding at the time of the subject occurrence **only** provided casino shuttle services to the **patrons of the adjacent ten casinos**. At the time of the subject occurrence, Defendant Premier's casino shuttle bus was acting as a casino **contract carrier** to the adjacent ten casinos and was **not** acting as a common carrier.

Because Defendant Premier's casino shuttle bus was acting as a casino contract carrier to the adjacent ten casinos at the time of the subject incident, the Circuit Court was correct in instructing the jury that Defendant Premier was obligated to exercise an ordinary and reasonable standard of care for the safety of Plaintiff Beasley and was **not** obligated to exercise the duty of highest care and diligence for the safety of Plaintiff Beasley.

Assuming arguendo that the trial court erred in not instructing the jury that Defendant Premier was a "common carrier," who owed Plaintiff Beasley the "duty of highest care and diligence," which Premier denies, BTI's issue on appeal that the "Circuit Court erred by refusing to instruct the jury of Premier's duty of highest care and diligence for the safety of Beasley" is **without merit** because BTI **never** submitted to the trial court a correct and proper jury charge, which was in accordance with Mississippi law, concerning common carriers and the requisite duty of care owed by a common carrier.

In its brief, BTI argues that the "Circuit Court erred by instructing the jury that it could not consider Premier's violations of its internal safety regulations as evidence of a breach of Premier's duty to Beasley." *See* page 12 of BTI's brief. This argument of BTI is also **without merit** because Premier did **not** violate its own internal safety regulations. BTI argues that Premier violated Premier's own internal safety regulations because Premier did not act to kick

off Plaintiff Beasley from the Premier casino shuttle bus due to Plaintiff Beasley's refusal to heed or obey Frank Weeden's verbal instruction to put on a seatbelt. However, BTI's argument concerning this point lacks merit because Premier's internal safety regulations do **not** require Premier shuttle bus drivers (like Frank Weeden in the instant case) to kick off a casino shuttle bus passenger from Premier's casino shuttle bus if a specific casino shuttle bus passenger refuses to heed or obey a specific verbal instruction to put on a seatbelt.

BTI has placed only two (2) jury instructions at issue with respect to BTI's appeal of the judgment of the trial court. The two jury instructions, which BTI has placed at issue concerning the instant appeal, involve one jury instruction (BTI's Proposed Jury Instruction D-1), which was **never** tendered or submitted to the trial court, and involve one other jury instruction (BTI's Proposed Jury Instruction D-2), which was tendered to the trial court by BTI but was appropriately rejected by the trial court for use because BTI's Proposed Jury Instruction D-2 contained a flawed and erroneous recitation of Mississippi law.

The Circuit Court was correct in denying Defendant BTI's Motion for New Trial as the overwhelming evidence in this case indicated that BTI was one hundred percent (100%) at fault for the subject incident. BTI's failure to stop at the stop sign at the subject intersection and BTI's act of failing to heed the stop sign at the subject intersection was the cause in fact and proximate cause for the subject incident. The jury was properly instructed on the applicable law; BTI was not unfairly prejudiced by any of the Circuit Court's rulings; and BTI was one hundred percent (100%) at fault for the subject incident. This Court should affirm the judgment of the Circuit Court.

LAW & ARGUMENT

I. THE CIRCUIT COURT WAS CORRECT IN INSTRUCTING THE JURY THAT IT COULD NOT CONSIDER THE USE OR NON-USE OF SEATBELTS AS EVIDENCE OF NEGLIGENCE IN ACCORDANCE WITH THE CLEAR AND UNAMBIGUOUS LANGUAGE CONTAINED IN MISSISSIPPI CODE ANNOTATED § 63-2-3.

Mississippi Code Annotated 63-2-3 provides that the "[f]ailure to provide and use a seat belt restraint device or system shall **not** be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual."

Evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt is **not** admissible in order to prove the negligence of the Plaintiff Beasley **or** Defendant Premier in accordance with the clear and unambiguous statutory language contained in Mississippi Code Annotated § 63-2-3. *See also Jones v. Panola County*, 725 So.2d 774 (Miss. 1998) (stating that "[c]learly the statute [M.C.A. § 63-2-3] directs that evidence of the non-use of a seatbelt shall not be presented to the jury," stating that "the jury was tainted by the evidence of seatbelt non-usage which was admitted in contravention of the statute," and holding that the trial court committed reversible error in admitting evidence of seat belt non-usage); *Roberts v. Grafe Auto Co., Inc.*, 701 So.2d 1093 (Miss. 1997) (stating that "[c]learly the statute directs that evidence of the non-use of a seatbelt shall not be presented to the jury" and holding that "[upon] remand, no statement, argument or evidence is to be presented to the jury regarding the non-use of the seatbelt.")

Because the language of Mississippi Code Annotated § 63-2-3 is unambiguous and clear that evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt is **not** admissible in order to prove the negligence of the Plaintiff Beasley **or** Defendant Premier, the Circuit Court was correct in excluding references to seatbelts, the lack of

seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt in order to prove the negligence of Plaintiff Beasley and Defendant Premier in accordance with the clear legislative mandate contained in Mississippi Code Annotated § 63-2-3.

BTI argues in its brief that "[t]hough Miss. Code Ann. § 63-2-3 mandates that failure to use a seatbelt does not constitute contributory or comparative fault, § 63-2-3 is inapplicable to the instant case – Chapter 2 of Title 63 excludes buses and passenger vehicles equipped to carry more than fifteen passengers." *See* Appellate Brief of BTI at page 11. BTI's argument concerning this point lacks merit. BTI has **failed** to cite to this Court **any** Mississippi statute or **any** Mississippi case, which stands for the proposition that evidence concerning the failure to provide or use a seatbelt may be introduced at trial in order to prove the negligence or fault of one of the parties. Mississippi case law and statutory authority are clear: Evidence concerning the failure to provide or use a seatbelt **cannot** be admitted into evidence in order to prove the negligence or fault of one of the parties. Additionally, BTI's lawyer **conceded** at trial that Mississippi Code Annotated § 63-2-3 is applicable to the facts of the instant case. *See* Tr. at 275:5 – 275:11. BTI's lawyer **conceded** at trial that Mississippi Code Annotated § 63-2-3 applies to the facts of the instant case and applies to Premier's twenty-five passenger bus. *See* Tr. at 275:5 – 275:11. Because BTI's lawyer **conceded** at trial that Mississippi Code Annotated § 63-2-3 is applicable to the facts of the instant case, BTI has **waived** any argument as to this point on appeal.

BTI has placed only two (2) jury instructions at issue with respect to BTI's appeal of the judgment of the trial court. The two jury instructions, which BTI has placed at issue concerning the instant appeal, involve one jury instruction (BTI's Proposed Jury Instruction D-1), which was **never** tendered or submitted to the trial court, and involve one other jury instruction (BTI's Proposed Jury Instruction D-2), which was tendered to the trial court by BTI but was

appropriately rejected by the trial court for use because BTI's Proposed Jury Instruction D-2 contained a flawed and erroneous recitation of Mississippi law.

BTI's two jury instructions, which BTI has placed at issue concerning the instant appeal, read as follows:

Jury Instruction No. D-[1][1]

> The Court instructs the jury that you may consider the fact that co-defendant Premier Transportation Services, Inc. **was equipped with functional seatbelts in accordance with Premier Transportation's Tunica County Casino Shuttle Driver's Guide for the purpose of determining whether Premier met its duty of care to its passenger, Ruth Beasley**. However, you may not consider plaintiff's use or non-use of **seatbelts** in determining, (1) whether the plaintiff was at fault for her own injuries and/or, (2) whether plaintiff's use or non-use of her seatbelt caused her injury.

Jury Instruction No. D-2

> The Court instructs the jury that under the laws of the State of Mississippi a carrier of passengers for hire is required to exercise the highest degree of care and diligence for the safety of its passengers. If you find by a preponderance of the evidence that Premier Transportation Services, Inc., negligently operated its shuttle bus when its driver, Frank Weeden, drove with the knowledge that **Ruth Beasley was a front seat passenger who was not wearing a seatbelt**, and that this was contrary to the Driver Guidelines of Premier Transportation Services, Inc., and that, further, by operating the vehicle while **Ruth Beasley was not wearing a seatbelt**, the Defendant Premier Transportation Services, Inc., through its driver, Frank Weeden, failed to exercise the highest degree of care and diligence for the safety of its passengers, including Ms. Beasley, you should find for the Plaintiff, Ruth Beasley, against the Defendant Premier Transportation Services, Inc.

(R. at 296, 298, B.R.E. at 26, 28.)

[1] It is **disputed** that BTI ever tendered this proposed jury instruction to the trial court. *See* the discussion contained *infra*.

Notwithstanding the fact that BTI **never** tendered or submitted BTI's Proposed Jury Instruction D-1 to the trial court for use as a proposed jury instruction, the two jury instructions, which BTI has placed at issue in the instant appeal, do **not** contain a correct recitation of Mississippi law and are in **direct conflict** with Mississippi law. The two above-quoted proposed jury instructions, which BTI has placed at issue in the instant appeal, contain **flawed and erroneous** language concerning the use and non-use of **seatbelts**, which is clearly prohibited by Mississippi Code Annotated § 63-2-3. The unambiguous language of Mississippi Code Annotated § 63-2-3 makes it clear that evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt is **not** admissible in order to prove the negligence of the Plaintiff Beasley **or** Defendant Premier.

Even if BTI had properly tendered and submitted the two above-quoted proposed jury instructions to the trial court, the two above-quoted jury instructions would have served to confuse and mislead the jury with respect to the jury's ability to consider evidence concerning seatbelts, the lack of seatbelts, the lack of use of seatbelts or the failure to provide a seatbelt because the two jury instructions violate the clear legislative mandate contained in Mississippi Code Annotated § 63-2-3 concerning the admissibility of seatbelt evidence.

On February 21, 2008, which was approximately two and one-half (2 ½) months before the jury trial of this case, BTI served upon all counsel BTI's proposed jury instructions, which were labeled and titled as follows: D-1, D-2, D-3, D-4, D-5, D-6, D-7, C-1, C-2, C-3, C-4, and C-5.

BTI has placed **two (2)** of its proposed jury instructions at issue with respect to BTI's appeal of the judgment of the trial court. BTI's proposed jury instruction D-2, which was served upon all attorneys of record in this case on February 21, 2008, contained the exact same language as has been quoted in BTI's Appellate Brief and contained the exact same language as has been

quoted *supra* in the instant Appellate Brief, which has been filed on behalf of Premier. However, interestingly, BTI's proposed jury instruction, which was labeled D-1 and which was served upon all attorneys of record in this case on February 21, 2008, does **not** contain the same language as has been quoted in BTI's Appellate Brief and does **not** contain the same language as has been quoted *supra* in the instant Appellate Brief, which has been filed on behalf of Premier. BTI's proposed jury instruction D-1, which was served upon all attorneys of record in this case on February 21, 2008, which was two and one-half months before the jury trial of this case, read as follows: **"The Court instructs the jury to find for the Defendant, Boyd Tunica, Inc, d/b/a Sam's Towns Hotel and Casino."** *See* BTI's proposed Jury Instruction **D-1**, which BTI tendered to the trial court, which has been attached hereto as **Exhibit 1**. Therefore, BTI's proposed jury instruction D-1, which was served upon all attorneys of record in this case on February 21, 2008, which was two and one-half months before the jury trial of this case, and BTI's proposed jury instruction D-1, which is referenced in BTI's Appellate Brief, are **completely and totally different proposed jury instructions.**

Because BTI has submitted **two completely different proposed jury instructions, which have been labeled as D-1,** to the trial court and to the appellate court, reference will be made to BTI's proposed jury instruction D-1, which BTI submitted to the trial court, as **"BTI's Proposed Trial Court Jury Instruction D-1"**; and reference will be made to BTI's proposed jury instruction D-1, which BTI submitted to the Appellate Court, as **"BTI's Proposed Appellate Court Jury Instruction D-1."**

The trial court refused to use BTI's Proposed Trial Court Jury Instruction D-1, which read as follows: **"The Court instructs the jury to find for the Defendant, Boyd Tunica, Inc, d/b/a Sam's Towns Hotel and Casino."** *See* BTI's Proposed Trial Court Jury Instruction **D-1,**

which BTI tendered to the trial court and which has been attached hereto as **Exhibit 1**; *see also* page 273 at line 18 of the trial transcript.

The first time that BTI's Proposed Appellate Court Jury Instruction D-1 appeared was in BTI's Motion for Judgment Notwithstanding the Verdict Or, in the Alternative, for a New Trial. *See* R. at 255, 258, 296; BRE at 296. It is worth noting that BTI's Proposed Appellate Court Jury Instruction D-1 was labeled as "**Jury Instruction No. D-__**" in BTI's Motion for Judgment Notwithstanding the Verdict Or, in the Alternative, for a New Trial. *See* BTI's Proposed Appellate Court Jury Instruction **D-___**, which BTI tendered for the first time to the trial court in BTI's Motion for Judgment Notwithstanding the Verdict Or, in the Alternative, for a New Trial and which has been attached hereto as **Exhibit 2**; *see also* See R. at 255, 258, 296; BRE at 296.

It is also worth noting that BTI's Proposed Appellate Court Jury Instruction D-1 was labeled as "**Jury Instruction No. D-[1]**" in BTI's Appellate Brief, which has been submitted to this Court. *See* Brief for the Appellant Boyd Tunica, Inc. at page 6.

Supporting the fact that BTI <u>never</u> tendered to the trial court BTI's Proposed Appellate Court Jury Instruction D-1, BTI has **<u>not</u>** submitted or tendered any document or any copy of any document, which evidences that the trial court ever received, accepted or rejected **BTI's Proposed Appellate Court Jury Instruction D-1.** The other proposed jury instructions, which are not at issue in this appeal, reflect on the faces of the tendered jury instruction documents that the trial court received, accepted or rejected the proposed jury instruction documents.

Because BTI has labeled and referenced **completely and totally different proposed jury instructions as "D-1"** during the trial phase of this case and during the appellate phase of this case, Premier respectfully submits that BTI did **<u>not</u>** submit and did **<u>not</u>** tender to the trial court BTI's proposed jury instruction labeled "D-1," which is referenced in BTI's Appellate

Brief. Therefore, because BTI has **confused** its own proposed jury instruction labeled "D-1," BTI has **waived** any argument that BTI might have had on appeal with respect to BTI's proposed jury charge labeled "D-1."

II. THE CIRCUIT COURT WAS CORRECT IN INSTRUCTING THE JURY THAT PREMIER TRANSPORTATION, INC. WAS OBLIGATED TO EXERCISE AN ORDINARY AND REASONABLE STANDARD OF CARE FOR THE SAFETY OF PLAINTIFF RUTH BEASLEY.

The Circuit Court was correct in instructing the jury that Defendant Premier was obligated to exercise an ordinary and reasonable standard of care for the safety of Plaintiff Beasley.

The distinctive characteristic of a common carrier is that a common carrier undertakes to carry for hire for the general public. *Ohio Oil Co. v. Fowler*, 100 So.2d 128 (Miss. 1958); *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958); 9 *Am.Jur.*, Carriers, § 4; 13 *C.J.S.*, Carriers, § 3. The distinctive characteristic of a contract carrier is that a contract carrier undertakes to carry for hire those specific goods or persons for whom it has contracted to carry. *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958). It is well-settled under Mississippi law that one who is a contract carrier is in fact **not** a common carrier. *Home Ins. Co. v. Riddell*, 252 F.2d 1 (5th Cir. 1958).

In the instant case, it is undisputed that Defendant Premier's casino shuttle bus upon which Plaintiff Beasley was riding at the time of the subject occurrence **only** provided casino shuttle services to the **patrons of the adjacent ten casinos.** At the time of the subject occurrence, Defendant Premier's casino shuttle bus was acting as a casino **contract carrier** to the adjacent ten casinos and was **not** acting as a common carrier.

Because Defendant Premier's casino shuttle bus was acting as a casino contract carrier to the adjacent ten casinos at the time of the subject incident, the Circuit Court was correct in instructing the jury that Defendant Premier was obligated to exercise an ordinary and reasonable standard of care for the safety of Plaintiff Beasley and was **not** obligated to exercise the duty of highest care and diligence for the safety of Plaintiff Beasley.

Assuming arguendo that the trial court erred in not instructing the jury that Defendant Premier was a "common carrier," who owed Plaintiff Beasley the "duty of highest care and diligence," which Premier denies, BTI's issue on appeal that the "Circuit Court erred by refusing to instruct the jury of Premier's duty of highest care and diligence for the safety of Beasley" is **without merit** because BTI **never** submitted to the trial court a correct and proper jury charge, which was in accordance with Mississippi law, concerning common carriers and the requisite duty of care owed by a common carrier. BTI's proposed jury instruction, which BTI submitted to the trial court, contained language concerning the "highest degree of care and diligence," which is owed by a "carrier of passengers for hire," and also contained **clearly erroneous seatbelt language**, which is **specifically excluded** by Mississippi Code Annotated § 63-2-3. BTI **failed** to submit a proper jury charge concerning common carriers and the requisite duty of care owed by a common carrier. Instead of submitting a proper jury charge concerning common carriers and the requisite duty of care owed by a common carrier, BTI submitted a flawed and erroneous jury charge, which contained the standard of care owed by a common carrier and also contained **flawed and erroneous** language concerning the use and non-use of **seatbelts**, which is clearly prohibited by Mississippi Code Annotated § 63-2-3. BTI's flawed and erroneous jury charge concerning common carriers and the requisite duty of care owed by common carriers reads as follows:

Jury Instruction No. D-2

> The Court instructs the jury that under the laws of the State of Mississippi a carrier of passengers for hire is required to exercise the highest degree of care and diligence for the safety of its passengers. If you find by a preponderance of the evidence that Premier Transportation Services, Inc., negligently operated its shuttle bus when its driver, Frank Weeden, drove with the knowledge that **Ruth Beasley was a front seat passenger who was not wearing a seatbelt**, and that this was contrary to the Driver Guidelines of Premier Transportation Services, Inc., and that, further, by operating the vehicle while **Ruth Beasley was not wearing a seatbelt**, the Defendant Premier Transportation Services, Inc., through its driver, Frank Weeden, failed to exercise the highest degree of care and diligence for the safety of its passengers, including Ms. Beasley, you should find for the Plaintiff, Ruth Beasley, against the Defendant Premier Transportation Services, Inc.

Thus, the foregoing jury charge submitted by BTI to the trial court concerning common carriers and the requisite duty of care owed by a common carrier contained **flawed and erroneous** language concerning the use and non-use of **seatbelts**, which is clearly prohibited by Mississippi Code Annotated § 63-2-3. Therefore, the trial court was correct in refusing to charge the jury with BTI's proposed jury instruction numbered D-2 because BTI's proposed jury instruction numbered D-2 contained **flawed and erroneous** language concerning the use and non-use of **seatbelts**, which is clearly prohibited by Mississippi Code Annotated § 63-2-3.

The trial court was correct in refusing to use BTI's proposed jury instruction numbered D-2 because BTI's proposed jury instruction numbered D-2 inappropriately and erroneously links and combines the duty of care that Premier allegedly owed to Plaintiff Beasley with language concerning the use and non-use of **seatbelts**, which is clearly prohibited by Mississippi Code Annotated § 63-2-3.

Assuming arguendo that Premier owed Plaintiff Beasley the "highest degree of care and precaution" if one assumes that Premier was acting as a common carrier to Plaintiff Beasley, which Premier denies, then BTI should have tendered to the trial court the Mississippi Model

Civil Jury Instruction pertaining to "Carrier of Passengers for Hire." *See* Mississippi Model Civil Jury Instruction § 8:3 entitled *General Instruction – Carrier of Passengers for Hire*, which reads as follows:

> You are instructed that a common carrier of passengers for hire is required to exercise the highest degree of care and precaution for the safety of its passengers that is consistent with the practical conduct of its business. Accordingly, if you find from a preponderance of the evidence in this case that:
>
> 1. _____[Defendant] was a common carrier of passengers;
> 2. _____[Plaintiff] was a passenger on _____[describe vehicle] owned or operated by _____[Defendant] while operating as a common carrier;
> 3. _____[Defendant] failed to exercise the highest degree of care for _____[Plaintiff's] safety consistent with the practical conduct of _____[Defendant's business]; and
> 4. _____[Defendant's] failure to exercise such care proximately caused injuries or damages to _____[Plaintiff];
>
> then your verdict shall be for the Plaintiff on this claim. However, if you find that the Plaintiff has failed to prove any of these four elements by a preponderance of the evidence in this case, your verdict shall be for the Defendant on this claim.

See Mississippi Model Civil Jury Instruction § 8:3, *General Instruction – Carrier of Passengers for Hire.*

BTI **failed** to submit to the trial court a proper jury charge concerning the duty of care owed by a common carrier; therefore, BTI's argument that the trial court failed to instruct the jury that Premier was a common carrier and/or that Premier owed a "duty of highest care" to Plaintiff Beasley is **without merit** because BTI **waived** its right to argue this point to this Court since BTI failed to submit to the trial court a proper jury charge concerning the duty of care owed by a common carrier

In its brief, BTI also argues that the "Circuit Court erred by instructing the jury that it could not consider Premier's violations of its internal safety regulations as evidence of a breach of Premier's duty to Beasley." *See* page 12 of BTI's brief. This argument of BTI is also **without merit** because Premier did **not** violate its own internal safety regulations. BTI argues

that Premier violated Premier's own internal safety regulations because Premier did not act to kick off Plaintiff Beasley from the casino shuttle bus for Plaintiff Beasley's refusal to heed or obey Frank Weeden's verbal instruction to put on a seatbelt, which was given by Frank Weeden directly to Plaintiff Beasley. However, BTI's argument concerning this point lacks merit because Premier's internal safety regulations do **not** require Premier shuttle bus drivers (like Frank Weeden in the instant case) to kick off a casino shuttle bus passenger from Premier's casino shuttle bus if a specific casino shuttle bus passenger refuses to heed or obey a specific verbal instruction to put on a seatbelt, which is given by a Premier shuttle bus driver to a casino shuttle bus passenger. Premier's internal company seatbelt policy, which is contained in Premier's Casino Shuttle Driver's Guide, reads as follows:

SEAT BELT POLICY

> The law requires that all front seat passengers and driver wear the seat belt while the vehicle is in motion. Wear your seat belt at all times, it's the law. Premier Transportation **insists** that all passengers "buckle up." Inform the company if you find anything wrong with the vehicle safety belts as you would with any other defect in the safety, comfort or operation of the vehicle.

(Tr. Ex. BTI-O). In light of the above-quoted language, which represents Premier's internal company seatbelt policy, a Premier casino shuttle bus drive (like Frank Weeden in the instant case) is **not** required to kick off a casino shuttle bus passenger from a Premier casino shuttle bus when a casino shuttle bus passenger refuses to fasten his or her seatbelt after having been given a specific verbal instruction to "buckle up" or "fasten your seatbelt" by a casino shuttle bus driver. Therefore, Premier did **not** violate its own internal company seatbelt policy by not kicking off Plaintiff Beasley from the Premier casino shuttle bus after Premier's casino shuttle bus driver, Frank Weeden, verbally instructed Plaintiff Beasley to put on a seatbelt; and, consequently, BTI's argument concerning this point is without merit.

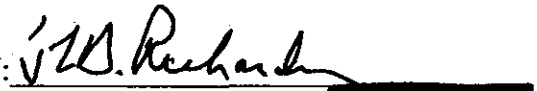
III. THE CIRCUIT COURT WAS CORRECT IN DENYING BOYD TUNICA, INC.'S MOTION FOR NEW TRIAL.

The Circuit Court was correct in denying Defendant BTI's Motion for New Trial as the overwhelming evidence in this case indicated that BTI was one hundred percent (100%) at fault for the subject incident. BTI's failure to stop at the stop sign at the subject intersection and/or BTI's act of failing to heed the stop sign at the subject intersection was the cause in fact and proximate cause for the subject incident. The jury was properly instructed on the applicable law; BTI was not unfairly prejudiced by any of the Circuit Court's rulings; and BTI was one hundred percent (100%) at fault for the subject incident. This Court should affirm the judgment of the Circuit Court.

CONCLUSION

In light of the foregoing, this Court should **affirm** the judgment of the trial court. The trial court was correct in instructing the jury that it could not consider the use or non-use of seatbelts as evidence of negligence in accordance with the clear and unambiguous language contained in Mississippi Code Annotated § 63-2-3. The trial court was correct in instructing the jury that Premier was obligated to exercise an ordinary and reasonable standard of care for the safety of Plaintiff Beasley. The trial court was correct in denying BTI's Motion for Judgment Notwithstanding the Verdict Or, in the Alternative, for a New Trial because the overwhelming evidence in this case indicated that BTI was one hundred percent (100%) at fault for the subject incident.

THE RICHARDSON LAW FIRM

BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the **Brief for the Appellee Premier Transportation Services, Inc.** to be delivered by United States Mail, postage prepaid, to the following:

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The Honorable Albert B. Smith, III
Circuit Court Judge
Tunica County, Mississippi
Post Office Drawer 478
Cleveland, MS 38732

CIRCUIT COURT JUDGE

This the 29th day of April 2009.

John D. Richardson

CERTIFICATE OF FILING

I, John D. Richardson, hereby certify that I have served via Federal Express overnight delivery the original and three copies of the Brief of the Appellee Premier Transportation Services, Inc. and an electronic diskette containing the same information on April 29, 2009, which was addressed to Ms. Betty W. Sephton, Mississippi Supreme Court Clerk, 450 High Street, Jackson, Mississippi 39201.

JOHN D. RICHARDSON

ADDENDUM

MISSISSIPPI CODE ANNOTATED § 63-2-3

This chapter shall not be construed to create a duty, standard of care, right or liability between the operator and passenger of any passenger motor vehicle which is not recognized under the laws of the State of Mississippi as such laws exist on the date of passage of this chapter or as such laws may at any time thereafter be constituted by statute or court decision. Failure to provide and use a seat belt restraint device or system shall not be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual.

IN THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

RUTH BEASLEY LATTING — PLAINTIFF

VS. — CIVIL ACTION NO. 2005-0264

BOYD TUNICA, INC., D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL, and PREMIER TRANSPORTATION SERVICES, INC. — DEFENDANTS

JURY INSTRUCTION NO. D-1

The Court instructs the jury to find for the Defendant, Boyd Tunica, Inc, d/b/a Sam's Towns Hotel and Casino.

Exhibit 1 of Premier's Appellate Brief.

IN THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

RUTH BEASLEY LATTING — PLAINTIFF

VS. — CIVIL ACTION NO. 2005-0264

BOYD TUNICA, INC., D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL, and PREMIER TRANSPORTATION SERVICES, INC. — DEFENDANTS

JURY INSTRUCTION NO. D-___

The Court instructs the jury that you may consider the fact that co-defendant Premier Transportation Services, Inc., was equipped with functional seatbelts in accordance with Premier Transportation's Tunica County Casino Shuttle Driver's Guide for the purpose of determining whether Premier met its duty of care to its passenger, Ruth Beasley. However, you may not consider plaintiff's use or non-use of seatbelts in determining, (1) whether the plaintiff was at fault for her own injuries and/or, (2) whether plaintiff's use or non-use of her seatbelt caused her injury.

Exhibit Z of Premier's Appellate Brief.

[redacted]

Estate of Hunter v. General Motors Corp., 729 So.2d 1264, 1268 (paragraph 12) (Miss. 1999).