IN THE SUPREME COURT OF NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated,	Sup. Ct. No. 61681
Petitioners,	Case No.: A-12-661726-C Dept. No.: XXVIII
vs.	
NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION NEVADA STAR CAB CORPORATION	
Respondents.	

RESPONDENTS' ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal because it is an appeal of a final judgment. The Order of Dismissal constituting a final judgment was entered by the District Court in this case on August 30, 2012 and Notice of Entry of the same served by mail and filed with the District Court on September 4, 2012. The Notice of Appeal was served and filed on September 6, 2012.

STATEMENT OF THE ISSUES

This appeal presents the following issues:

(1) Whether the *Nevada Constitution, Article 15, Section 16*, requires the payment of an hourly minimum wage to employees working as taxi drivers in Nevada even though such employees are exempted from Nevada's statutory minimum wage requirement by *N.R.S. 608.250(2)(e)*[1].

STATEMENT OF THE CASE

This case was commenced on May 11, 2012 in the Eighth Judicial District Court. The appellants, Christopher Thomas and Christopher Craig (hereinafter "Appellants" or "Taxi Drivers") allege the Respondents, Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation, and Nevada Star Cab Corporation (hereinafter "Respondents" or "Yellow Checker Star") failed to pay them and a class of similarly situated Taxi Drivers the minimum hourly compensation required by Nevada's Constitution.

Yellow Checker Star moved the District Court to dismiss this case pursuant to *Nev. R. Civ. P. 12(b)(1)* and (5), for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. That motion was argued

[1] Because taxi drivers are not exempt under federal minimum wage law, Respondents pay their taxi driver employees the federal minimum wage, and are in full compliance with the Fair Labor Standards Act.

before the District Court on July 30, 2012 and, by an order signed on August 30, 2012, and entered by the Clerk of the District Court on August 31, 2012, such motion was granted.

STATEMENT OF FACTS

1. Appellants are taxicab drivers who allege they were entitled to an hourly minimum wage under Nevada state law for every hour that they worked and that they were often not paid such required minimum wages. (Appellants' Complaint paragraph 14).

2. Appellants brought their First Claim for relief pursuant to *Article 15, Section 16, of the Nevada Constitution*, which did not eliminate the current and long-standing exceptions to the minimum wage and overtime laws for various categories of workers in Nevada, more specifically, taxicab and limousine drivers. (Appellants' Complaint paragraphs 13 and 14).

STATEMENT OF THE STANDARD OF REVIEW

Appellants' constitutional claims are not founded upon rights and obligations that are independent of those set forth in the Nevada Wage and Hour Law ("NWHL"), but must be examined in light of the *Nevada Revised Statute 608.250(2)(e),* NWHL exceptions.

A motion to dismiss under *NRCP 12(b)(5)* is subject to a rigorous standard of review on appeal. "All factual allegations in the complaint are [viewed] as true, and all inferences are drawn in favor of the non-moving party." Further, "[a] complaint should only be dismissed if it appears beyond a reasonable doubt that the plaintiff could prove no set of facts, which, if true, would entitle him to relief. Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." The district court's conclusions of law are subject to de novo review.

A complaint should be dismissed if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. *NRCP 12(b)(5)*; *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Pursuant to *NRCP 12(b)(5),* a court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specifically, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (internal citation omitted).

In *Iqbal*, the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual allegations in the complaint allege a plausible claim for relief. Id. at 1950. When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiff's complaint must be dismissed. *Twombly*, 550 U.S. at 570.

ARGUMENT

A. Appellants' constitutional claims are not founded upon rights and obligations that are independent of those set forth in the Nevada Wage and Hour Law ("NWHL").

NRS 608.250 states:

> Establishment by Labor Commissioner; exceptions; penalty.
>
> 1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless the Labor Commissioner determines that those increases are contrary to the public interest.
> 2. The provisions of subsection 1 do not apply to:
>   (a) Casual babysitters.
>   (b) Domestic service employees who reside in the household where they work.
>   (c) Outside salespersons whose earnings are based on commissions.
>   (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 days of agricultural labor in any calendar quarter of the preceding calendar year.
>   **(e) Taxicab and limousine drivers.**
>   (f) Persons with severe disabilities whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.

In this case, prior to the addition of Section 16 to Article 15 of the Constitution in 2006, minimum wage obligations in Nevada were governed solely by the NWHL. The NWHL then provided, and still provides, that the state's labor commissioner "shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees[,]" and "shall prescribe increases to the minimum wage in accordance with those prescribed by federal law." The NWHL further contained, and still contains, exceptions for certain categories of employees, including limousine and taxicab drivers, from the minimum wage

protection prescribed by the Labor Commissioner. These exceptions were justified as a matter of policy by the unique nature of those occupations and industries.

Article 15, Section 16 was added to the State's Constitution as the result of a ballot initiative passed by the state's citizenry in 2006. The intent behind the initiative was to provide for a minimum wage greater than what then was prescribed under the NWHL; i.e., greater than the then existing federal minimum wage. Hence, at the time of the ballot initiative, the federal minimum wage was $5.15 per hour. The Constitutional Amendment increased the minimum wage to $6.15 per hour for employers who did not provide health benefits to their employees, and provided for an annual automatic increase equal to the greater of an increase in the federal minimum wage or the cost of living as measured by the Consumer Price Index. [2]

Neither the ballot initiative nor the resulting Constitutional Amendment made any express reference to the NWHL. The intent clearly was to revise the minimum wage portions of the NWHL, not, as Appellants suggest, supplant the entire minimum wage statutory scheme and corresponding exceptions. Consequently, all other minimum wage provisions contained in the NWHL survive the Constitutional Amendment, at least to the extent that those provisions are not in conflict and otherwise can be harmonized with the Constitutional Amendment.

Notably, the Constitutional Amendment does not speak to removing the minimum wage exceptions provided under NRS 680.250(2)(e), including the exceptions for limousine and taxicab drivers. As the federal district court (Honorable Robert Clive Jones) observed in *Lucas v. Bell Trans*, 2009 U.S. District LEXIS 72549 (D. Nev. 2009) this omission is significant because it

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[2] On January 16, 2013, Judge Douglas Herndon of Clark County also agreed with the District Court's ruling in this case and held in *Barbara Gilmore vs. Desert Cab, Inc.*, Case No. A-12-668502-C, that the constitutional amendment did not change what NRS 608.250 stands for, concluded that this same issue was raised previously in other cases and granted Desert Cab's Motion to Dismiss on identical facts. (See, Respondents' Appendix RA001.)

weakens any argument by Appellants that the Constitutional Amendment conflicts with, and therefore voids, the continued application of the statutory exceptions provided under the NWHL. See *Lucas*, at ***20** (attached as Respondents' Appendix RA008) "...the Amendment's definition of "employee" is not necessarily in conflict with NRS 608.250. The NRS 608.250 exceptions and the Amendment's definition of "employee" can happily co-exist."

B. Attorney General Opinions Are Not Binding Legal Authority

It is well established that the "opinions of the attorney general do not constitute binding legal authority or precedent." *Goldman v. Bryan*, 106 Nev. 30, 42 (1990) "The opinion of the state attorney general is advisory and not a binding interpretation of state law." *Nevada Highway Patrol Ass'n v. State*, F.2d 1549, 1554, n.6 (1990). See also *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 539 (9th Cir. 1985) *Weston v. County of Lincoln*, 98 Nev. 183 (1982) and *Cannon v. Taylor*, 88 Nev. 89 (1972)

In this case, Appellants rely on their Appendix AA14-24, Attorney General Opinion 2005-04 as the source to support their position, including the assertion that this opinion "...is well supported by precedent". Attorney General opinions are not binding legal authority and have no precedential value. Appellants' argument therefore lacks any credible, binding legal authority to support it.

C. The Article 15, Section 16 Amendment did not "impliedly repeal" the NWHL exceptions.

Among the cases which Appellants cite as support for their position that the Article 15, Section 16 Constitutional Amendment constitutes an "implied repeal" of the statutory exception for **limousine and taxicab drivers**, is *Board of Retirement v. Superior Court*, 101 Cal.App.4th 1062 (2002). Appellants' reliance on that case is curious because the court in that case rejected the very arguments

for "implied repeal" that Appellants make in the instant case; in fact, the arguments presented in that case, as with the instant case, were made in the context of a constitutional provision that purported to override or supersede a statute upon which the real party in interest relied in its defense.

In *Board of Retirement*, a retired county employee ("retiree") was receiving a monthly disability allowance under California's public employees' retirement benefits system established and maintained by statute. The statute expressly exempted "from execution or other court process the benefits under county retirement systems established [thereunder]." *101 Cal.App.4th* at 1067. The retiree was convicted of a misdemeanor and was ordered by the trial court to pay restitution to the victim out of her monthly disability allowance. The trial court's order was issued pursuant to a "victims' bill of rights" provision in the California constitution, and to an "income garnishment" statute that was established to enforce the "victims' bill of rights" provision. The appeals court set aside the trial court's order. In doing so, it found that neither the "victims' bill of rights" constitutional provision - which had been passed by initiative by the California citizenry -- nor the "income garnishment" statute that was passed to enforce that provision "repealed by implication", the statute that exempted retirement benefits from "execution or other court process."

In this case, these very same legal principles were applied by the Nevada federal district court in *Lucas v. Bell Trans*, supra. *Lucas* is one of two (2) federal decisions in Nevada that have ruled that the passage of the Constitutional Amendment to Article 15, Section 16 did not "impliedly repeal" Nevada's statutory wage and hour exceptions for limousine and taxicab drivers contained in NRS.608.250(2)(e).

The federal district court's decision in *Lucas* set forth a comprehensive and well-reasoned analysis for why no such implied repeal occurred in that case. (*Lucas* is attached as Respondents' Appendix RA002 – 012). Judge Jones said,

"The Amendment made no reference to NRS 608.250. There is no indication that when Nevada voters went to the polls, they were informed that their vote would be repealing or amending NRS 608.250 and its multiple exceptions."

The *2006 Ballot Question No. 6* asked specifically, "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" (See Respondent's Appendix RA013 - RA019.) In the explanation section of the ballot, it stated, "The proposed amendment, if passed, would create **a new** section to Article 15 of the Nevada Constitution." (See RA001). There was no mention in either the explanation or argument sections about repealing NRS 608.250. Secondly, the focus of the Constitutional Amendment was the actual minimum wage amount and was intended to supplement not supplant existing NWHL. Therefore, the only reasonable construction of the Constitutional Amendment is that it did not repeal the provisions of NRS 608.250 or its exceptions, because the NWHL expressly states that it does not apply to taxicab and limousine drivers. The Constitutional Amendment did not change any of those provisions of NRS 608.250 and hence Appellants cannot sue for a violation of the unpaid minimum wages under Nevada law.

The second decision in federal district court in Nevada that has considered and upheld the precise holding presented in this case, is *Robert A. Greene vs. Executive Coach & Carriage*, Case No. 2:09-cv-00466-RCJ-RJJ. (See Respondent's Appendix RA020 - RA031.)

D. The Decision of District Judge Kenneth Cory in the case of *Murray v. A Cab Taxi Service* Was Flawed

Appellants cite to *Murray v. A Cab Taxi Service*, Case No. A-12-669926-C in the Order filed February 11, 2013 and cited in their "Notice of Supplemental Authority" which was filed in the instant case on February 21, 2013. Unfortunately that decision did not consider one of the most important elements

when examining a Constitutional Amendment voted by the people, and that is the voter's intent when he or she read and cast the ballot. This is important because when voters went to cast their ballot in 2006 for the Amendment, they had no reason to think they were voting to repeal exceptions to the previously existing law since NRS 608.250 was not even mentioned, nor would they have any reason to consider the impact of such change when casting their ballots as outlined in *Greene*, supra. As the Court in *Greene* explained,

> "One would expect that if one of the contemplated purposes of enactment was to abolish the NWHL's exceptions that the arguments would include at least a passing reference to how such a change would affect the state. In sum, a Nevada voter who had cast her ballot in favor of the Amendment based on careful consideration of these materials would likely be surprised if someone told her that she had also voted to extend the minimum wage to casual babysitters, live-in domestic workers, limousine drivers, and other previously excluded occupations." (See Page 7 of 12 of the Order, lines 15-20 attached hereto as Respondents' Appendix RA026.)

Therefore, the decision in *Murray* to not even consider a voter's intent, when he or she went to cast the ballot in 2006 in support of the Constitutional Amendment, on an issue that was and is still governed by existing law with six (6) exceptions, was flawed.

E. There Is a Presumption against Repeal by Implication

All presumptions are against repeal by implication. "Absent an express declaration of legislative intent, we will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Board of Retirement v. Superior Court,* 101 Cal.App.4th at 1067-1068. The same standards apply in determining whether a Constitutional Amendment impliedly repealed a statutory provision.

> "[S]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, [i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first." *Board of Retirement v. Superior Court,* 101 Cal.App.4th at 1067-1068.

The legal standards upon which the court relied in *Board of Retirement* are the very same standards adopted by the Nevada courts to determining when application of the "implied repeal" doctrine is appropriate. Hence, the Nevada Supreme Court has stated that the implied repeal of a statute is "heavily disfavored;" that it "will not consider a statute to be repealed by implication unless there is no other reasonable construction of the two statutes[;]" and "the fact that a statute is enacted after another statute, but is subsequently amended without mention of the first statute, may weigh against a finding of legislative intent to repeal by implication." *Washington v. State*, supra, 117 Nev. 735, 30 P.3d 1134, 1137.

In this case, the Constitutional Amendment did not either repeal or change NRS 608.250 or its exceptions. The Constitutional Amendment never mentioned NRS 608.250 or its exceptions, which by itself heavily weighs against a finding of any intent of repeal by implication. Furthermore, the Constitutional Amendment's general definition of "employee" is not in conflict with "exceptions" contained in NRS 680.250, which included taxicab and limousine drivers.

The Constitutional Amendment only increased the minimum wage to $6.15 per hour for employers who did not provide health benefits to their employees, and provided for an annual automatic increase equal to the greater of an increase in the federal minimum wage or the cost of living as measured by the Consumer Price Index. As stated in *Greene*, "Given the presumption against implied repeal, the extrinsic evidence available is insufficient to support the conclusion that Nevada

voters intended to abolish the NWHL's exceptions by enacting Article 15, §16. Rather, the voters intended only to change the amount of the minimum wage and provide for mandatory cost-of-living increases." (See page 8 of 12 of the Order attached hereto as Respondents' Appendix RA027). It is clear, therefore, that the Constitutional Amendment did not repeal NRS 680.250 or its exceptions. Because the NWHL expressly states that it does not apply to taxicab and limousine drivers, the Appellants cannot sue for a violation of the unpaid minimum wages under Nevada law.

CONCLUSION

Based on the foregoing points and authorities, the Order and Judgment appealed from should be affirmed and upheld in its entirety.

DATED this 1st day of March, 2013.

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Certificate of Compliance With N.R.A.P. Rule 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using 14-point Times New Roman typeface in Microsoft Word 2010.

I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3,383 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedures.

Dated this 1st day of March, 2013.

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CERTIFICATE OF MAILING

The undersigned certifies that on March 1, 2013, they served the within:

RESPONDENTS' ANSWERING BRIEF
RESPONDENTS'APPENDIX

by depositing the same in the U.S. mail, first class postage, prepaid, addressed as follows:

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