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' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR

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ARGUMENT

A. Appellants' "Motion to Correct" Is Time Barred Under NRAP 40(a)(1).

NRAP 40(a)(1) states in pertinent part:

> Unless the time is shortened or enlarged by order, a petition for rehearing may be filed **within 18 days** after the filing of the court's decision under Rule 36.

First, Appellants' "Motion to Correct," is pre-mature and inappropriate procedurally, since it is essentially requesting that this Honorable Court step into the shoes of the District Court, and determine trial court issues prior to this matter being remanded – issues that have neither been briefed, argued or ruled upon by the District Court Judge as part of the continuing litigation following remand.

Second, Appellants so-called "Motion to Correct," an unknown procedure under NRAP, is time barred. This Motion to Correct should in effect be construed as a Petition for Re-Hearing, since what Appellants are seeking would significantly alter the *Thomas* decision and thus requires a rehearing. The *Thomas* decision was rendered on June 26, 2014. Pursuant to NRAP 40(a)(1), Appellants had until July 14, 2014 to file their "Motion to Correct." Instead, Appellants filed their "Motion to Correct," on October 14, 2014 and thus are time barred. Therefore, Respondents respectfully request that this Honorable Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

B. Appellants Are Seeking to Change This Honorable Court's Opinion in ***Thomas.***

On June 26, 2014, this Honorable Court decided the *Thomas* case. The Court recognized in its decision, that at the time, there were two (2) conflicting laws regarding the same subject matter dealing with occupational exemptions, namely NRS 608.250(2) and the 2006 Constitutional Minimum Wage Amendment. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory occupational exemption for taxi and limo drivers remained in NRS 608.250(2). There was no express or implied repeal at that time and in the years following. In addition, the Nevada Labor Commissioner acted in accord with NRS 608.250(2) until June 26, 2014, by recognizing the taxi driver occupational exemption in NRS 608.250(2). Thus, until June 26, 2014, NRS 608.250(2) was the law that employers were following in Nevada, and were reasonable in doing so.

The Court then decided in *Thomas*, that from June 26, 2014 it would make clear to employers and employees in the State of Nevada what the current law on Minimum Wage occupational exemptions would be moving forward. The decision speaks for itself. Appellants now seek at this very late date to have this Court change its opinion, in order to enable Appellants and others to pursue minimum wage claims retroactively.

Thomas is a landmark decision in Nevada pertaining to minimum wage occupational exemptions. The decision as released and published several months ago, June 26, 2014, must stand with no corrections or changes, allowing this matter to be remanded to District Court for continuing proceedings (please recall that this case was dismissed at its inception pursuant to Respondents successful Motion to Dismiss - there still remains the stages of pleadings, class action certification, discovery and trial to take place in the trial court upon remand). Therefore, Respondents respectfully request the Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

C. The *Thomas* Decision Was Meant to Only Apply Prospectively, Not Retroactively.

There is nothing in the *Thomas* decision, either directly or indirectly, express or implied, that supports the proposition that a taxicab driver, or any other occupational category formerly exempt under NRS 608.250(2), can now go back years in time and pursue minimum wage claims against individual employers. Laws and court decisions are presumed to only operate prospectively, unless an intent to apply retroactively is made clear. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *PEBP*, 124 Nev. at 154, 179 P.3d at 553; *Cnty. of Clark v. Roosevelt Title Ins. Co.*, 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). (Cited in Sandpointe Apartments, LLC v. Eighth Judicial District Court, 129 Nev. Adv. Op.

87 Nov. 14, 2013); *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296, 298 (1994) ("[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied"). This presumption against retroactivity is typically explained by reference to fairness. *Landgraf*, 511 U.S. at 270.

In this case, the implications of a retroactive legal effect are profound, considering the lengthy list of occupational exemptions under NRS 608.250(2) that were completely wiped away by the *Thomas* decision. If this Honorable Court were to grant Appellants' Motion, it would mean that other previously exempt occupations such as casual babysitters, domestic service employees, outside salespersons, agricultural employees, persons with severe disabilities, and limo drivers can now go back possibly years in time and file minimum wage claims in District Court.

The *Thomas* decision provides compelling affirmative support that it was not intended to allow Appellants and other previously exempt occupations under NRS 608.250(2) to be able to go back years in time pursuing minimum wage claims. This Court ruled, "The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, **supersedes and supplants** the taxicab driver exception set out in NRS 608.250(2)." (Page 9 of *Thomas* decision, emphasis added). From the use of the present tense, the *Thomas*

decision never intended for Appellants to go back in time; otherwise, the majority of the Supreme Court would have clearly stated **"superseded and supplanted,"** the past tense, which would have entirely different implications.

NRS 608.250(2) was the law that employers were following until the *Thomas* decision issued on June 26, 2014. Following passage of the Nevada Minimum Wage Amendment in 2006, the statutory occupational exemptions for taxi and limo drivers (and others) remained on the books and effective pursuant to NRS 608.250(2). There was no express or implied repeal at that time or in the years following. In 2009, federal District Judge Robert Clive Jones was the first jurist in Nevada to weigh in on the question of "implied repeal," of NRS 608.250(2), interpreting Nevada law in the Lucas case. His decision against "implied repeal," although not binding on the Nevada Supreme Court, was nonetheless the only statement of competent judicial authority on the Nevada law question, and remained so until Thomas. All during those years from 2006 until June 26, 2014, employers and employees followed the law as interpreted by Judge Jones, and were reasonable in doing so since the Supreme Court had not spoken otherwise. Moreover, the Nevada Labor Commissioner agreed with that state of affairs, and continued to recognize the occupational exemptions of NRS 608.250(2) until *Thomas*. The Supreme Court recognized this fact in *Thomas* when it stated, "The Amendment's broad definition of employee and very specific

exemptions necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are "irreconcilably repugnant,"… such that "both cannot stand,… and the statute **is impliedly repealed** by the constitutional amendment." (Page 6 of *Thomas* decision; emphasis supplied). The majority did not state "the statute **was** impliedly repealed," in 2006 by the Nevada Minimum Wage Amendment. Thus, this Court is recognizing the legal quandary due to two (2) conflicting laws in force and in effect on the same subject matter since 2006. That quandary moved the majority in *Thomas* to issue a conclusive decision that would resolve the conflict going forward. Nothing in the language of *Thomas* indicates that it meant to grant Appellants a right to pursue minimum wage claims retroactively.

In Stokes v. Aetna Casualty and Surety Company, 232 So. 2d 328 (La.App.1970), (cited with approval in Klosterman v. Cummings, 476 P.2d 14, 86 Nev. 684 (Nev., 1970), that court said: 'We conclude, therefore, that the question of retroactive or prospective application of civil law changes must be determined in the light of (1) extent of reliance on previous legislation or judicial decision, (2) the reasonableness of such reliance, (3) the degree of hardship resulting from a retroactive application of the change, (4) the public interest in the stability of the social institutions involved, if any, and (5) the purpose and intent of both the new and old rule.'

In this case, prior to June 26, 2014, there was no Nevada Supreme Court decision on this matter and Respondents, including other employers in Nevada, were reasonably and legitimately relying on NRS 608.250(2). That reliance was reasonable, since NRS 608.250(2) remained the law until the *Thomas* decision. The degree of hardship resulting from a retroactive application will be enormous and profound, since many employment sectors listed under NRS 608.250(2) were reasonably and legitimately relying on that law during all that time.

If retroactive application were to take place, Respondents and those other employment sectors would be unjustly punished for following the same law that the Nevada Labor Commissioner was following and enforcing all those years. Instead, the *Thomas* decision rightfully and reasonably makes it clear that NRS 608.250(2) no longer applies, and hence there are no occupational exemptions under that statute in the State of Nevada after June 26, 2014.

The occupational exemptions contained in NRS 608.250(2) had been in effect in Nevada since 1965. Employers and government agencies reasonably and justifiably relied upon those occupational exemptions until *Thomas*. The intent of the *Thomas* decision was not to punish Respondents or other employers who in good faith reasonably and lawfully relied upon NRS 608.250(2). Rather, the intent of *Thomas* was to issue a conclusive opinion on minimum wage law that would

resolve the conflict between two existing laws, and apply that resolution on a going forward basis after June 26, 2014.

CONCLUSION

Based on the foregoing points and authorities, Respondents respectfully request that this Honorable Court deny Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur.

DATED this 16th day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 16th, 2014, service of the foregoing, **RESPONDENTS' OPPOSITION TO MOTION TO CORRECT OPINION OF JUNE 26, 2014 AND STAY REMITTITUR** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

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