

1 **IN THE SUPREME COURT OF NEVADA**

2
3 BOULDER CAB, INC.)

4 Petitioners,)

5 vs.)

6)

7 THE EIGHTH JUDICIAL DISTRICT)

8 COURT of the State of Nevada, in and)

9 For the County of Clark, and THE)

10 HONORABLE TIMOTHY C. WILLIAMS)

11 District Judge,)

12 Respondents,)

13 and)

14 DAN HERRING,)

15 Real party in interest)

16 **REPLY TO RESPONDING BRIEF: WRIT OF MANDAMUS**

17

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Docket No. 68949
District Court Electronically Filed
Case No.: A-11-0011 Jan 28 2016 08:33 a.m.
 Troy K. Lindeman
 Clerk of Supreme Court

1 **N.R.A.P Rule 26.1 Disclosure**

2 Pursuant to NRAP 26.1 the undersigned counsel of record certifies that
3
4 Petitioner Boulder Cab Inc., has no parent corporation and no publicly held
5 company owned 10 percent or more of its stock.

6 The undersigned counsel of record further certifies that he is the only
7
8 attorney that has appeared for Petitioner Boulder Cab, Inc. in the proceedings in
9 District Court and in this court and that he has appeared since January 8, 2014
10 through the law firm of Winner and Carson.

11
12 DATED this 27 day of January, 2016.

13 **WINNER & CARSON, P.C.**

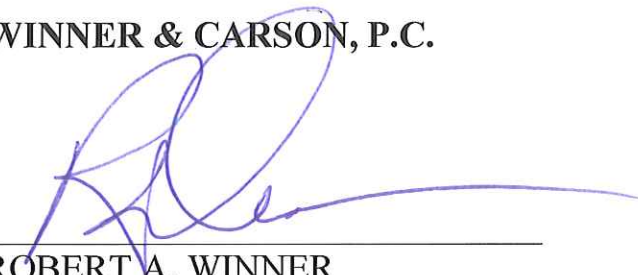
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TABLE OF AUTHORITIES

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I.

STATEMENT OF REASONING FOR THE ISSUANCE OF A WRIT

Herring raised new issues in Responding brief. In essence, Herring sets up strawman arguments, and then knocks them down. Herring seeks to divert the court's attention away from the facts.

The controlling law is Breithaupt v. USAA, 110 Nev. 31 867 P.2d 402 (1994). The case and factors enumerated in that opinion, were not even mentioned by Herring until page eight of his responding brief. The evidence before the District Court below, and in the appendix, is ignored by Herring or dismissed as "irrelevant", when the evidence demonstrates applicability of the Breithaupt factors. Finally, Herring cites Hansen v. Harrah's, 675 P. 2d 394 (Nev. 1984) for the court. A prospective application of the Thomas decision is consistent with Hansen, and would support Boulder's Petition.

Herring insults Boulder for failing to cite a case to support a non-issue. Herring claims there is no case of prospective application of an "enforcement decision", validating a statute or amendment. Herring implores the court to read the minimum wage amendment (MWA) in isolation. Herring ignores the exceptions to minimum wage under NRS 608.250. The statutes had been Nevada's law for decades. Herring further ignores the nature of the cab business. In Clark County, Nevada, all cab drivers are employees. The manner of

1 compensating cab drivers, is commission, splitting the amount on the meter. This
2 way of compensating cab drivers has been going on for decades at all cab
3 companies. A cab company has little control over a cab driver once he takes the
4 keys and is out on the roads. Commission compensation motivates drivers to book
5 money for themselves and the company.
6
7

8 It was not until the Thomas opinion was a new law declared, invalidating
9 NRS 608.250 as unconstitutional. Until that moment, NRS 608.250 was the law.
10 Boulder reasonably relied on the law. Boulder did not foresee the statute being
11 struck. Until this honorable court's ruling in Thomas, with three justices
12 dissenting, all but one of the Federal and State District judges had upheld the
13 statutory exemption.
14
15

16 It is undisputed that the minimum wage amendment made no mention of
17 statutory exemptions. Nothing in the body suggested a repeal of the statutory
18 exemptions. The unique circumstances surrounding the MWA, its enactment, and
19 this court's invalidating of the long standing statutory exemptions supports
20 prospective application of Thomas. The MWA clearly was never intended to be
21 part of the constitution.
22
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24 After the MWA, the legislature met several times, and did not repeal NRS
25 608.250. If the statutory exemptions were so clearly and obviously repealed by the
26 MWA, why didn't the legislature act? Why did the Department of Labor seem to
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28

1 be, at a minimum, confused as to whether or not the statutory exemptions had been
2 repealed? Why did five of six District Court judges rule that the statutory
3 exemptions under 608.250 were still valid?
4

5 Herring's conclusion that Boulder had advanced notice of a clear and
6 obvious repeal of the statutory exemption is baseless.
7

8 A. Breithaupt v. USAA, 110 Nev. 31 867 P.2d 402 (1994), Supports
9 Prospective Application of the New Law in Thomas
10

11 The three factors set forth for prospective application in Nevada support a
12 prospective application as requested by Boulder in the Writ.

13 Did the decision to be applied prospectively establish a new principle
14 of law, either by overruling clear past precedent on which litigants
15 may have relied, or were deciding an issue of first impression whose
16 resolution was not clearly foreshadowed?

17 Boulder relied on the Nevada legislature's decades old statute exempting cab
18 drivers from the minimum wage law. Until the Thomas decision, NRS 608.250
19 was still the law in Nevada. The nature of the taxicab business and compensation
20 by commission were clear public policy grounds for the statutory exemption.
21 Boulder Cab reasonably relied on the continued existence of the statutory
22 exemption and the evidence before the District Court demonstrates that Boulder
23 reasonably relied on the continued validity of the statutory exemptions. While the
24 minimum wage amendment did raise the minimum wage in 2006, it was not until
25 the Thomas decision the exemptions under NRS 608.250 were declared
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1 unconstitutional. Of course Boulder reasonably relied on the existing
2 “precedence” of statutes passed by the legislature.
3

4 If this was a case of first impression, it is clear the resolution was not
5 “clearly foreshadowed”. Had the minimum wage amendment declared “no
6 exceptions”, then an implied repeal of the statute would have clearly occurred. No
7 language in the minimum wage amendment suggested the existing exemptions (or
8 the statute itself) would be repealed. It was only through legal analysis by this
9 court finding an implied repeal. Respectfully, if the Department of Labor seems to
10 agree that cab drivers were still exempt after the MWA, how can it be claimed by
11 Herring that a repeal of the statute was “clearly foreshadowed”? Herring clings to
12 an AGO requested by the Department of Labor. It was not received by Boulder.
13 In fact, the evidence demonstrates the Department of Labor wasn’t persuaded by
14 the analysis of the AG opinion cited by Herring.
15

16 If five of the six District Court judges that considered the implied repeal
17 argument found there was no implied repeal of NRS 608.250, how can it be said
18 that Boulder should have foreseen such a ruling in Thomas? Respectfully, if three
19 of the seven justices that considered the issue in Thomas disagreed, how could it be
20 said that a cab owner should have foreseen such a decision? Herring’s
21 condescending insults directed at Boulder notwithstanding, the only evidence
22 demonstrates that Boulder clearly relied on the past statutory exemptions
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1 consistent with the Breithaupt factors, and a clear foreshadowing cannot be
2 concluded.

3
4 The prior history of rule in question, its purpose and effect, and
5 whether retrospective operation will further or retard its operation.

6 Here, Herring calls us “vacuous”. Herring claims the passage of the MWA
7 clearly invalidated the longstanding statutes exempting cab drivers from the
8 minimum wage requirement. The public policy behind the cab driver exemption
9 was based on the nature of the business. The new rule was announced in Thomas:
10 the exemptions under the statute were declared unconstitutional.

11
12
13 The court considers whether retroactive application could produce
14 substantial inequitable results

15 Boulder Cab’s the smallest company. The evidence demonstrates it
16 generates the least amount of revenue per shift and per medallion than other cab
17 company in Clark County. It was required by Nevada’s Taxicab Authority to
18 provide reasonably adequate service, which means putting out cabs, when its
19 certificated area did not have much business. At all relevant times Boulder Cab
20 served the southeast of the valley and could not serve the resort corridor
21 (downtown, the strip and the airport).

22
23
24 Herring doesn’t address anywhere in the brief the substantial inequitable
25 results that shall occur if the Thomas decision is applied retroactively. Boulder
26 Cab is currently facing substantial costs in merely defending the case brought by
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28

1 Herring, and the putative class. Boulder Cab faces back pay damages as well as
2 penalties, attorney fees and punitive damages.

3
4 Boulder Cab compensates its drivers by commission, like every other cab
5 company in Clark County. One of the largest is exempt from any minimum wage
6 lawsuit. The minimum wage amendment exempts employees under collective
7 bargaining. The Frias Companies (five separate cab companies) make much more
8 money than Boulder Cab, and can serve the entire county, including the resort
9 corridor. They are not subject to back pay, penalties, attorney fees and punitive
10 damages. The Frias Companies compensate their drivers in the same manner as
11 Boulder Cab and all the other companies: commission. Herring fails to mention
12 this anywhere in his response, understandably. There is no evidence to refute it. It
13 is a clear fact. There are substantial inequitable results already happening, and
14 which will compound significantly, unless the court rules the Thomas decision
15 applies prospectively.

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20 **B. Hansen v. Harrah's Supports Prospective Application**

21 Herring claims granting the Writ would conflict with Hansen v. Harrah's,
22 675 P.2d 394 (Nev. 1984). Herring, or his counsel, misreads Hansen or
23 misrepresents its findings. A true and fair reading of the Hansen decision actually
24 supports this Writ. Hansen v. Harrah's would not be affected at all by a
25 prospective application of the Thomas decision. Hansen involved Nevada's
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1 adoption of retaliatory discharge cause of action against an employer who fires a
2 worker for making a worker's compensation claim. Hansen did not reject
3 prospective application, it actually embraced it.
4

5 The first question posited by the Hansen court was whether or not Nevada
6 should adopt the public policy exception to the at will employment rule for
7 retaliatory discharge on filing a worker's comp claim. Although there had been
8 old cases acknowledged by Hansen in conflict, the Hansen court also noted that the
9 "modern trend" is to recognize a retaliatory discharge cause of action for filing a
10 workers compensation claim 675 P.2d @ 396. The Supreme Court found
11 Nevada's worker's compensation statutes reflect a "clear public policy favoring
12 economic security for employees injured". Id at 396. Indiana's Supreme Court
13 first recognized the public policy rationale for such cause of action. The modern
14 trend was to recognize the cause of action. "Many other states, as a result of
15 similar reasoning, had also adopted or recognized a public policy exception to the
16 at will rule". Id at 396 and 397. The Hansen court cited numerous cases from
17 around the country. (This is a foreshadowing)
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23 The court went on to "support the established public policy of this state
24 concerning injured workmen and adopt a narrow exception to the at will
25 employment rule". Id at 397. (emphasis added)
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1 Absent from Herring's responding brief were any of these facts. The
2 growing judicial trend was to adopt such cause of action and the Supreme Court of
3 Nevada agreed. It can be said that the growing trend among states recognizing the
4 cause of action foreshadowed that Nevada would follow this trend.
5

6 Hansen was also asked about punitive damages, as that had been claimed by
7 the Plaintiffs. The court refused to allow punitive damages. However, the court
8 noted that any such cause of action that arises subsequent to its opinion would be
9 appropriate for punitive damages. Id at 397. Clearly the Hansen court was
10 invoking prospective application for punitive damages.
11
12

13 II.

14 CONCLUSION

15
16
17 Firing an employee for seeking statutory injury compensation is offensive.
18 Paying a cab driver by commission is not. All cab drivers are paid by commission.
19 Penalizing Boulder for following the industry standard is unjust. The Frias
20 Companies are exempt, while Boulder is punished. Substantial inequities have
21 already occurred.
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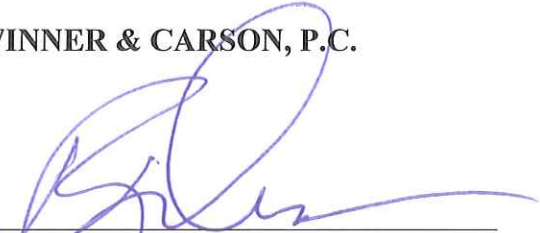
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1 Boulder prays this court stop this unfairness and respectfully request that this
2 Honorable Court grant the Petition for Writ of Mandamus.

3
4 DATED this 27 day of January, 2016.

5
6 **WINNER & CARSON, P.C.**

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STATE OF NEVADA)
COUNTY OF CLARK)ss:

1. Affiant is the Attorney for BOULDER CAB, INC., Petitioners, and testifies as follows:

FURTHER YOUR AFFIANT SAYETH NAUGHT.

SUSAN M. ADAMS
Notary Public, State of Nevada
Appointment No. 03-81035-1
My Appt. Expires Apr 9, 2019

14

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

I hereby certify that this Reply 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 type face using 14 point Times New Roman typeface in Microsoft Word 2013.

I further certify that this Reply 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 2527 words.

Finally, I hereby certify that I have read this Reply, 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 Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply 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.

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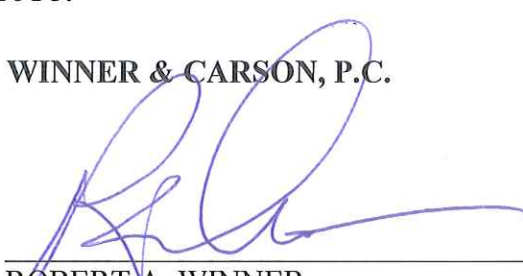
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1 I understand that I may be subject to sanctions in the event that the
2 accompanying Reply is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.
4

5 DATED this 27 day of January, 2016.

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foregoing, **REPLY TO RESPONDING BRIEF: WRIT OF**

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