IN THE SUPREME COURT OF NEVADA

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION' Petitioners,	Sup. Ct. No. 68975 Case No.: A-12-661726-C
vs.	Dept. No.: XXVIII
THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clark, and THE HONORABLE RONALD J. ISRAEL District Judge, Respondents,	
and	
CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Real Parties in Interest.	

PETITIONERS' REPLY

MARC C. GORDON, ESQ.
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
Nevada Bar No. 012183
YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.
5225 W. Post Road
Las Vegas, Nevada 89118
T: 702-873-6531
F: 702-251-3460
tbotros@ycstrans.com
Attorneys for Petitioners
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION
NEVADA STAR CAB CORPORATION

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I.

STATEMENT OF FACTS

1. On November 20, 2015, this matter was certified as a class action allowing Real Parties in Interest to seek damages from July 1, 2007 to October 27, 2015. See **PA 168-178**

2. Real Parties in Interest, Mr. Thomas and Mr. Craig commenced employment with YCS in 2010.

3. There are more than 5,000 potential class members that may be involved in this matter.

4. Petitioners have obtained an Affidavit from the Former Deputy Labor Commissioner, Keith Sakelhide, outlining the divergent opinions pertaining to the 2006 Minimum Wage Amendment (hereinafter "MWA") and NRS 608.250(2). See **PA 179-180**

II.

STATEMENT OF REASONING FOR THE ISSUANCE OF A WRIT

A. Prior to Thomas, a unique situation existed where employers and the Nevada Labor Commissioner logically relied on the *Lucas* decision as it was the only legal authority that had analyzed the MWA's repeal of NRS 608.250 at that time

There has been no Nevada case that involved two (2) laws dealing with the

same subject matter, yet requiring substantially different conduct for businesses to follow where implied repeal doctrine was used to invalidate the pre-existing law. Thomas v. Nevada Yellow Cab Corporation 130 Nev., Ad Op 52 (2014) for the first time decided this issue when this Honorable Court used the implied repeal doctrine to invalidate NRS 608.250(2). This Honorable 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). YCS has been in compliance with the *Thomas* decision since June 26, 2014. However, the major contention is whether that decision as specifically worded, applies retroactively. It is abundantly clear from the decision that it is designed to be only applied prospectively. It is Petitioners' position that up until *Thomas*, there was enormous confusion as what the current law was since there were two (2) laws on the same subject matter and no precedential adjudication had taken place. Real Parties in Interest contend that YCS should have known that the 2006 MWA was the only law to be followed nearly eight (8) years before this Honorable Court rendered its opinion. However, what is quite striking is that YCS was not the only entity that had a reasonable and legitimate reliance on the existing legal authority as to the current state of that law considering that Lucas v. Bell WL 2424557 (D. Nev. 2009) ruled against "implied repeal."

In fact, the decision in Lucas v. Bell also shows that there was an entirely plausible and well-reasoned alternative analysis of how the MWA did not conflict with NRS 608.250's "employee" exceptions. In *Lucas*, the court fully considered and even quoted the Nevada Attorney General's March 2005 Opinion on the MWA's effect on NRS 608.250's exceptions that Real Parties in Interest now trumpet before this Court. *Lucas* at *6. In its analysis[1], the *Lucas* Court found that the Nevada Attorney General reasoning seemed inconsistent because the Nevada Attorney General found that the MWA had a "conflict" with the NRS 608.250 exceptions even though the MWA (1) never mentions the statute NRS 608.250 and (2) never mentions any of NRS 608.250 exceptions. *Id*. at *7. Thus, instead of finding conflict between the exception categories, the district court found that both set of exceptions could "happily co-exist" as nothing in the new MWA exception of "under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days" conflicted with also having an exception for "(t)axicab and limousine drivers." *Id*.

[1] The Lucas court first noted this Court's specific holding that "[o]pinions of the Attorney General are not binding legal authority or precedent." Lucas at *6 quoting Blackjack Bonding v. City of Las Vegas Municipal Court, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000).

Additionally, the *Lucas* court noted that the Nevada Attorney General's Opinion was premised on two questionable presumptions that (1) "the voters should be presumed to know the state of the law in existence related to the subject upon which they vote" and (2) " '[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed.' " *Id*. at *6 quoting McKay v. Board of Supervisors, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). As to the first presumption, the *Lucas* court found the Nevada Attorney General's reliance on voter knowledge "not. . .strong" given that even the Nevada Attorney General conceded that the primary focus of the MWA's initiative was on "raising the current Nevada minimum wage" rather than any awareness of the "various exceptions under NRS 608.250." *Id*. at *7. In fact, the Court found that there was "no indication" that voters were informed that their vote would be repealing or amending NRS 608.250 and its multiple exceptions. *Id*. at *8.

Further, as to the second presumption, the *Lucas* court correctly pointed out that the *McKay* authority regarding an amended *statute* is not the same as the situation here where the MWA "came directly from the people of Nevada . . . in conformity with Nevada's initiative process" and did not "actually amend[ ] NRS 608.250." *Id. at *7.* Thus, the *Lucas* court vetted the Nevada Attorney General's Opinion and found it to be based on weak presumptions that were not thoroughly applied to the circumstances of the MWA's enactment through voter initiative

without reference to the existing NRS 608.250. Moreover, the *Lucas* court used the Nevada Attorney General's Opinion as a benchmark to determine whether or not a repeal of NRS 608.250 had occurred. *Id*. at *8.

None of the parties dispute that this Court's ruling in *Thomas* overrules *Lucas*. However, under the *Breithaupt* factors, this Court should consider the extensive and reasoned *Lucas* analysis that the MWA's implied repeal of the exceptions in NRS 608.250(2)(e) was "an issue of first impression whose resolution was not clearly foreshadowed." Breithaupt v. USAA Property and Casualty Insurance Company, 110 Nev. 31, 867 P.2d 402 (1994). Before *Thomas*, the only authority a legal search on the subject of the MWA's repeal of NRS 608.250(2)(e) would have brought up was *Lucas* and the Nevada Attorney General Opinion. That was the entirety of the state of the law. It is quite disingenuous for Real Parties in Interest to now tout the Nevada Attorney General's Opinion while simultaneously dismissing *Lucas* when the *Lucas* court heard the issue in a live controversy and thoroughly addressed the Nevada Attorney General Opinion's findings. Although *Lucas* was overruled by *Thomas*, this resolution was not clearly foreshadowed as the *Lucas* court was the only legal authority at that time that had taken such a detailed examination of the MWA's repeal of NRS 608.250(2)(e) and its analysis was not based in any flawed application of the law. Where the *Lucas* court differed with this Court was on whether or not a "conflict"

came about from the term "employee" or from the actual categories of excepted employees. Thus, while not reaching the same conclusion as this Court, the *Lucas* decision emphasizes that reasonable minds can disagree on the implied repeal. Accordingly, under *Breithaupt*, the implied repeal of NRS 608.250(2)(e) was not clearly foreshadowed and although not authority from this Court, the *Lucas* decision was the only legal authority upon which litigants would have relied.

In addition to the circumstances surrounding the *Lucas* decision, YCS has recently learned that there were **"divergent views"** concerning the validity of the exceptions to the minimum wage within the Nevada Department of Labor Commissioner. The Affidavit of former Deputy Labor Commissioner, Keith Sakelhide, certainly illustrates what Petitioners have outlined in their Petition. See **PA 182-183**. Importantly, after examining both the Nevada Attorney General Opinion and the *Lucas* decision, the Nevada Labor Commissioner issued a directive that taxi and limousine driver minimum wage claims should be held in abeyance until a court issued a final ruling. Thus, even the Nevada Labor Commissioner recognized that the *Lucas* rationale could mean that the MWA did not repeal NRS 608.250(2)(e) and that taxi and limousine driver claims should be stayed as the NRS 608.250(2)(e) could still be a valid defense to such claims.

Based on the reasonable "divergent views" in *Lucas* that was incorporated into a directive by the Labor Commissioner that is in charge of enforcing labor and

minimum wage laws, it is reasonable to conclude that businesses had a legitimate and reasonable reliance on the legal authority that existed and therefore it would be substantially unfair to punish YCS retroactively by finding that it is subject for potential liability for conduct that occurred from July 1, 2007. Real Parties' in Interest contention that YCS seeks to escape from liability and should have sought a "judicial declaration," after the passage of the 2006 MWA is unreasonable and nonsensical. There is no Nevada case law that Real Parties in Interest cited that stand for the proposition that a business could be held potentially liable for conduct taking place nearly eight (8) years prior to a judicial ruling when two (2) laws existed on the same subject matter and the pre-existing law was invalidated using the doctrine of implied repeal. Real Parties in Interest are attempting to benefit from the uncertainty and legitimate confusion as to the law prior to June 26, 2014. They seek to expand the *Thomas* decision by arguing that the 2006 MWA was clear without any ambiguity or uncertainty and thus retroactive application must apply as punishment to YCS for not having the foresight to know that NRS 608.250(2) would be impliedly repealed, when nothing foreshadowed the *Thomas* decision. However, the facts and evidence presented are anything but clear. First, the Labor Commissioner's office had "divergent views," about the exceptions to the minimum wage after the 2006 MWA. Second, there was no "implied repeal," until *Thomas* on June 26, 2014. Thirdly, the decision was based on a divided 4-3

court ruling, clearly evidencing that there was ambiguity, uncertainty and confusion as to NRS 608.250(2) and the 2006 MWA.

The *Thomas* decision does not mention anything about retroactive liability for conduct taking place prior to its decision. If the intention was to impose and expand the "implied repeal" doctrine of NRS 608.250(2), this Honorable Court would have certainly declared such an expansion in the decision to impose potential liability on all businesses retroactively for conduct taking place prior to June 26, 2014. However, the ruling is meticulously worded in the present tense, to convey the prospective nature of the decision, realizing that it is a landmark decision and concluded the two laws are "irreconcilably repugnant,"… such that "both cannot stand,"… and the statute **is impliedly repealed** by the constitutional amendment." (Page 6 of *Thomas* decision) The majority did not state "the statute **was** impliedly repealed." Furthermore, if this Honorable Court intended to later clarify its decision in *Thomas*, it certainly had the opportunity to do so in the Terry v. Sapphire Gentlemen's Club, 130 Nev., Advance Opinion 87 (2014) decision. However, the Court cited to *Thomas* using present tense wording that can only lead to the reasonable conclusion that the Court was reinforcing the prospective application of its decision. Real Parties in Interest have orchestrated a clever argument that, YCS must be punished for being confused on an unsettled law from the year 2007 prior to the *Thomas* decision and thus should be held liable from the

years 2007-2015. As such Real Parties in Interest have thus far been successful in getting this case certified as a class action with over 5,000 potential class members from the years 2007-2015, despite the fact that Mr. Thomas and Mr. Craig commenced employment with YCS in 2010.

B. Nevada Attorney General's Opinion and Publication by the Law Firm of Littler Mendelson Were Not Binding Legal Precedent

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).

Even if there were any alleged reliance by Real Parties in interest on Opinions by the Nevada Attorney General and published article by the law firm of Littler Mendelson, which is not the case, these publications were not binding legal precedent to be followed regarding the state of the law after passage of the 2006 MWA. These were nothing more than advisory opinions and views on an issue that had not yet been ruled upon by this Honorable Court. What Real Parties in Interest are attempting to do, is to have this Honorable Court accept as binding legal precedent, Attorney General's Opinions and opinions by law firms who provide legal views in publications on the application of certain recently passed laws, when no clear precedent existed. Furthermore, they attempt to persuade this

Honorable Court that YCS should have followed the Attorney General's Opinions despite having no binding legal authority or precedent.

C. The *Thomas* Decision Drastically Changed Nevada Law

Real Parties in Interest fail to appreciate that the *Thomas* decision changed Nevada law prospectively. NRS 608.250(2)(e) was a valid law that had not been revised by the Nevada Legislature after 2006 until June 26, 2014 decision in *Thomas*. An opinion establishes a "new rule either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Breithaupt v. USAA Property and Casualty Insurance Company, 110 Nev. 31, 867 P.2d 402 (1994); see also Bohus v. Restaurant.com No. 14-3316 (3rd Cir. April 30, 2015) at page 15.

In this case, NRS 608.250(2) contained the following exceptions to the minimum wage since 1965:

(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.

Nothing in the 2006 MWA mentioned anything about the exceptions which had existed since 1965 and which businesses legitimately relied upon. Furthermore, there were no directives after 2006 from the Nevada Labor Commissioner nor the Nevada Legislature that NRS 608.250(2) was no longer to be followed. This Honorable Court rendered its decision on an issue of first impression that was far from being clearly foreshadowed. The only case involving this issue was a 2009 federal case, Lucas v. Bell 2009 WL 2424557 (D. Nev. 2009) where the Judge ruled against "implied repeal." Based on the Affidavit of Keith Sakelhide, there were divergent views in light of the Nevada Attorney General's Opinion and the *Lucas* decision. Therefore, the *Thomas* decision constitutes a "new" rule since it was a landmark decision on the issue of minimum wage prospectively.

The problem with the reasoning of Real Parties in Interest is they fail to acknowledge that NRS 608.250(2)(e) lawfully existed after the 2006 MWA which created the uncertainty, and legitimate confusion among businesses along with the office of Nevada Labor Commissioner. Real Parties' in Interest argument is that after the 2006 MWA, the exceptions under NRS 608.250(2) were expressly and automatically repealed without any court order, and thus YCS must be held liable for eight (8) years of conduct prior to the *Thomas* decision, which neither this Honorable Court, the Legislature, nor the office of Labor Commissioner declared to be unlawful. In *Thomas*, the court found that NRS 608.250(2) is impliedly

repealed. As stated by this Honorable Court, "[s]tatutory interpretation is a question of law reviewed de novo." Construction Indus. v. Chalue, 119 Nev. 348, 351, 74 P.3d 595, 597 (2003). The *Thomas* decision involved statutory interpretation that could only have been rendered by this Court to have precedential value. "We accord the plain meaning to an unambiguous statute." *Id.* at 351-52, 74 P.3d at 597. The *Thomas* decision represented a change in Nevada law that must be applied prospectively, because it was determining an issue involving an ambiguous statute NRS 608.250(2) when read together with the 2006 MWA.

D. Real Parties In Interest Cite to Cases That Do Not Support Retroactive Application Where Implied Repeal Was Determined

In the cases cited by Real Parties in Interest, there was no ruling of an implied repeal of a prior statute which is what occurred in *Thomas* and hence the decision must be applied prospectively. Jacobson v. Estate of Clayton, 119 P.3d 132, 134 (Nev. Sup. Ct. 2005) cited by Real Parties in Interest dealt with a 1969 decision Bodine v. Stinson 85 Nev. 657, 461 P.2d 868 (1969) in which this Honorable Court determined that the probate statutes of NRS Chapter 147 provide the statutory scheme for the administration of estates and must be followed in every case regardless of the existence of insurance. In 1971, the Legislature amended NRS 140.040(3) to specifically allow suits against a special administrator, in place of probate proceedings, when the estate's sole asset is a

liability insurance policy. This Honorable Court concluded, "Therefore, NRS 140.040(3), as amended, supersedes our decision in *Bodine."* *Id*. at Page 134. However, the decision was worded in the present tense and did not indicate that claimants would be permitted to retroactively on a class action basis, file suits against special administrators for motor vehicle accidents that occurred from 1971 to 2005.

Real Parties in Interest cited to DirectTV Inc. v. Imburgia, United States Supreme Court December 14, 2015 standing for the proposition the need for courts to apply the rule of law. *Imburgia* involved a class wide arbitration waiver in a customer agreement requiring that disputes between DirectTV and its customers be resolved through binding arbitration which the California Court of Appeals ruled that it was unenforceable because the agreement was ambiguous under California law. The Court found that the state court's interpretation violated the Federal Arbitration Act's requirement that agreements to arbitrate be placed on the same footing with all other contracts. The Court followed its prior decision on a similar issue in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

In this matter, there was no Nevada Supreme Court case this Honorable Court could have used that had previously determined the minimum wage exceptions under NRS 608.250(2). YCS is in compliance with the *Thomas* decision. However, since the decision was an issue of first impression for this

Honorable Court, and Petitioners reasonably and legitimately relied on NRS 608.250(2)(e) prior to that decision, it would be unfair to punish Petitioners when there were two (2) laws and both read together created an ambiguous situation. *Concepicion* and *Imburgia* are not applicable nor helpful in assisting this Honorable Court in determining this issue since, those cases did not involve the doctrine of implied repeal. Therefore, Petitioners are seeking a ruling that the *Thomas* decision apply prospectively from June 26, 2014.

E. Granting the Writ Would Not Conflict with the Decision in Hansen v. Harrah's

Hansen v. Harrah's 675 P.2d 394 (Nev. Sup. Ct. 1984) did not involve a class action claim, as in *Thomas* where there are more than 5,000 potential class members. Further, in *Hansen*, this Court reviewed whether or not Nevada should adopt a public policy exception to the at-will employment rule and create a cause of action for retaliatory discharge for filing a workmen's compensation claim. *Hansen* at 396. Thus, *Hansen* is not analogous to this matter as the Court in *Hansen* was creating a narrow exception to common law whereas here, the Court's decision on prospective application is based on a change in law after it ruled that the MWA impliedly repealed statutory language in NRS 608.250(2)(e).

Moreover, the decision in *Hansen* was prospective in regards to punitive damages. This Honorable Court stated, "It would be unfair to punish employers for conduct which they could not have known beforehand was actionable in this

jurisdiction." *Id*. at Page 397 and "Punitive damages may be, however, appropriately awarded for any such cause of action that arises **subsequent to this opinion**." *Id*. at Page 397. Real Parties in Interest in their Answer referred to YCS' argument that *Thomas* should be applied prospectively as "absurd." See Page 4 of Answer. However, *Hansen* provides support that this Honorable Court has recognized in the past that it would be unfair to punish employers such as YCS for conduct they could not have known beforehand, especially when the doctrine of implied repeal was used to invalidate a pre-existing law that was previously relied upon.

In this case, Real Parties in Interest have alleged punitive damages despite the fact that their allegations does not "sound in tort," and is not available under Nevada law. See Sprouse v. Wentz, 105 Nev. 597, 603, 181 P.2d 1136, 1139 (1989). Furthermore, unlike in *Hansen*, in this case there were two (2) laws on the same subject matter, ambiguity as to the law, confusion in the Nevada Labor Commissioner's Office and no precedent from this Honorable Court as this was an issue of first impression. For this Honorable Court to apply its decision retroactively, would be unfair because as stated in *Hansen*, it would be punishing employers for conduct which they could not have known beforehand was actionable.

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III.

CONCLUSION

Based on the foregoing points and authorities, Petitioners respectfully request that this Honorable Court grant the Petition For Writ of Mandamus.

DATED this 27th day of January, 2016.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros

MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
ASSOCIATE COUNSEL
Nevada Bar No. 012183
5225 W. Post Road
Las Vegas, Nevada 89118
Attorneys for Petitioners

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

I hereby certify that this Petition 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 Petition 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 4,434 words.

Finally, I hereby certify that I have read this Petition, 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 Petition 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 Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of January, 2016.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros

MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
ASSOCIATE COUNSEL
Nevada Bar No. 012183
5225 W. Post Road
Las Vegas, Nevada 89118
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that on January 27th, 2016, service of the foregoing, **PETITIONERS' REPLY** was made by depositing same in the U.S. mail, first class postage, prepaid, addressed as follows:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd, Suite E4
Las Vegas, Nevada 89146
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Real Parties in Interest
CHRISTOPHER THOMAS
CHRISTOPHER CRAIG

The Honorable Ronald J. Israel
Regional Justice Center
Department 28
200 Lewis Avenue
Las Vegas, Nevada 89155
(Via-Hand Delivery)

/s/ Sheila Robertson
For **Yellow Checker Star Transportation Co. Legal Dept.**