IN THE SUPREME COURT OF THE

STATE OF NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated. Appellant, v. HENDERSON TAXI, Respondent.	SUPREME COURT NO. 70837 District Court Case No. A714136

Appeal from the Eighth Judicial District Court, State of Nevada, County of Clark, The Honorable Michael P. Villani, District Court Judge

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RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this court may evaluate possible disqualification or recusal.

Respondent Henderson Taxi has no parent corporations.

Respondent Henderson Taxi has only been represented by one law firm in this case: Holland & Hart LLP.

DATED this 11th day of April, 2017

HOLLAND & HART LLP

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NRAP RULE 17 ROUTING STATEMENT

Henderson concurs with Sargeant's position that assignment of this appeal to the Nevada Supreme Court is desirable given its relationship to the fully briefed prior appeal in this case under Supreme Court case number 69773. But Henderson disagrees with the remainder of Sargeant's routing statement. This appeal does not involve any questions of first impression. Sargeant would like the Court to believe that this appeal involves questions of first impression involving Article 15, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA"). But this case really only involves well settled principles of law, including agency and the doctrine of accord and satisfaction. That the doctrine of accord and satisfaction is being applied to a new set of facts under the MWA does not render it an issue of first impression. By way of example, while the legal sale of medical marijuana is new in Nevada, a breach of contract claim between a supplier and a newly licensed marijuana company is not novel—it is still just a breach of contract case. Therefore, while Henderson joins in Sargeant's position that this case should be assigned to the Nevada Supreme Court for consistency purposes, it disagrees with the remainder of Sargeant's routing statement.

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STATEMENT OF JURISDICTION

Defendant Henderson Taxi ("Henderson") adopts Sargeant's jurisdictional statement.

STANDARD OF REVIEW

The Nevada Supreme Court reviews the district court's decision regarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton*, 120 Nev. __, 319 P.3d 606, 615 (2014); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). When awarding attorney fees, the district court considers the following factors: (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).

ISSUES ON REVIEW

1. Did the District Court act within its discretion in finding that an award of attorney fees and costs was warranted after Sargeant continued to

maintain this case after the Court's October 8, 2015 Order holding that Plaintiff and the punitive class had no viable claim?

STATEMENT OF THE CASE

I. Minimum Wage History.

Historically, Nevada exempted limousine and taxicab drivers from minimum wage and overtime. *See* NRS 608.018(3)(j); NRS 608.250(2)(e). In 2006, Nevada voters amended the state constitution to add the MWA, Section 16 of Article 15 of the Nevada Constitution. The MWA did not expressly repudiate minimum wage exemptions in NRS 608.250. *Compare* MWA, *with* NRS 608.250(2). Nevada state and federal district courts, thus, repeatedly held that limousine and cab drivers remained exempt from minimum wage requirements. *See, e.g.*, *Lucas v. Bell Trans*, No. 2:08-cv-01792-RCJ-RJ, 2009 WL 2424557 (D. Nev. June 24, 2009). Specifically, *Lucas* held that the MWA "did not repeal NRS 608.250 or its exceptions." *Id.* at *8 (citing NRS 608.250(2)(e)). Other courts followed this analysis. *See, e.g.*, Respondent's Appendix ("RA") 1-12;[1] RA 13-17. Given Henderson's executives' experience with *Lucas*,[2] the pay methodology negotiated directly in the collective bargaining agreements ("CBA") (which may override

[1] Sargeant's counsel failed to confer with Henderson' counsel in an "attempt to reach agreement concerning a possible joint appendix" as required by NRAP 30(a).

[2] Brent Bell, the president of Henderson, is the president of Presidential Limousine and Bell Trans, defendants in the *Lucas* case. RA 221, ¶ 1. Bell became intimately familiar with the *Lucas* decision in this role. *Id.*, ¶ 2.

state minimum wage), and knowledge of cases following *Lucas*, Henderson maintained its policy of paying federal minimum wage. RA 221-222 ¶¶ 2-3.

II. The Grievance and Settlement With the Union.

In June 2014, this Court issued *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev., Adv. Op. 52, 327 P.3d 518 (2014) ("*Yellow Cab*"). The Court held the MWA impliedly repealed all minimum wage exemptions not included therein, including the cab driver exemption. *Id.* at 521. After *Yellow Cab*, and "[o]n behalf of all affected drivers" the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), the exclusive representative for Henderson drivers, grieved Henderson's alleged "failure to pay at least the minimum wage under the amendments to the Nevada Constitution ...." RA 247 (the "Grievance"). The Union filed the Grievance pursuant to the collective bargaining agreement between Henderson and the Union, which specifically cover driver wages. *See* RA 249-281 ("2009 CBA"); RA 283-316 ("2013 CBA") (jointly, "CBAs"). Further, the grievance sought "back pay and an adjustment of wages going forward." *Id*.[3]

The Union and Henderson discussed the Grievance, including potential remedies. *See* RA 318-324. As part of these discussions, Henderson offered to settle the Grievance by changing its pay practices going forward to pay Nevada minimum wage. RA 318-319. Henderson had hoped that paying minimum wage

[3] This Grievance clearly contemplated re-opening CBA for negotiation regarding future pay practices (e.g., "wages going forward").

going forward would resolve the Grievance. *Id*. The Union rejected this. After further discussion and negotiation with the Union regarding its Grievance, Henderson and the Union agreed the CBAs provisions covered minimum wage and that Henderson would pay its current and former drivers any wage differential between what the drivers earned and the Nevada minimum wage going back two years to resolve the Grievance, including Union members' minimum wage claims. RA 224-226, 324. Henderson and the Union memorialized this agreement of the settlement of the Grievance brought on behalf of "all affected drivers" in the "Resolution": "Accordingly, the ITPEU/OPEIU considers this matter *formally settled under the collective bargaining agreement"* and that "*this resolution is final and binding."* RA 324 (emphasis added).

The Resolution required Henderson to provide acknowledgements to the drivers confirming payment. RA 224-226, 324. Henderson created two acknowledgements: 1) if the driver agreed that Henderson's calculation was correct and 2) if the driver disagreed. RA 326-328. A substantial majority of drivers accepted these payments and acknowledged that, including the settlement payment, they had been paid minimum wage for all hours worked for the prior two years including this payment. RA 224-226, 326.

Sargeant filed the instant case on February 18, 2015, while Henderson negotiated the Grievance with the Union and six months after it had begun "working on a program [to] recalculate minimum wage rates without applying the

tip credit on a weekly basis for the two years prior to [*Yellow Cab*]." *See* AA 1-7, RA 321-322. Notwithstanding this suit, Henderson had a duty to continue negotiating with the Union, which (unlike Sargeant's counsel), was the duly elected representative of Henderson's drivers.[4] Based on the Resolution with the drivers' actual representative, Henderson was under an obligation to make these payments.

III. Sargeant Learns of the Union Settlement.

Henderson began making payments under the Resolution on April 8, 2015. *See* RA 21. After Henderson began making payments, Sargeant skipped discovery and filed a Motion for Class Certification and other relief on May 27, 2015, essentially seeking certification by sanction ("Motion for Certification"). RA 18-45. On July 8, 2015, Henderson produced its correspondence with the Union and the Grievance settlement in this litigation. RA 132-138. Shortly thereafter, Henderson opposed the Motion for Certification, in part, by explaining that it had settled Sargeant's claims. *Id.* Henderson further argued that there was no basis for certification. RA 139-216.

Despite being in possession of the Grievance settlement, Sargeant refused to withdraw his Motion for Certification and continued to argue that class certification was necessary. RA 433-549. The District Court disagreed with

[4] Failure to address the Grievance could have been an unfair labor practice under federal law and a violation of the CBA, which includes three separate steps at which it is legally required to attempt to settle or resolve grievances. RA 306-307.

Sargeant and ruled both that the "settlement agreement for the Grievance acted as a complete accord and satisfaction of the grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had" and that Sargeant had not demonstrated class certification was proper. AA 16-20. On October 8, 2015, the District Court entered its Order Denying Sargeant's Motion to Certify. *Id*.

IV. Sargeant Continues Litigating in Spite of the District Court's October 8, 2015 Order.

Despite the Court's ruling, Sargeant continued to litigate this case. On October 30, 2015, Sargeant filed a Motion for Reconsideration that, admittedly, did not request reconsideration. *See* AA 21-55; *see also* AA 23 ("Plaintiff does *not* seek rehearing on the Courts' denial of the relief plaintiff previously requested, as the Court has clearly decided not to grant such relief.") (emphasis in original). Instead, in his Motion for Reconsideration, Sargeant asked the Court to certify a new, partial class of "such persons who have not actually received the payment they are entitled to receive pursuant to such Grievance and have not executed the Acknowledgement form provided for by the Grievance" so that this new class could "prosecute claims for something *besides* the payment provided for under the Grievance resolution." AA 22-24. (emphasis in original). In the alternative, Sargeant asked the Court to award him $107.23, the amount he was due under the

Grievance settlement, in order to be a "prevailing party" entitled to an award of fees and costs pursuant to NRS 18.010(2).[5] *See* AA 24-25, 30.

Shortly after Sargeant filed his Motion for Reconsideration, Henderson filed a Motion for Summary Judgment, asking the Court to dismiss Plaintiff's claims as a matter of law. AA 42-55. Sargeant opposed Henderson's Motion for Summary Judgment without providing any substantive reason why Henderson's motion should not be granted. *See* AA 71-78. The District Court agreed with Henderson on both motions. The District Court found that Sargeant had failed to meet the standard for reconsideration and that reconsideration was not warranted, AA 94-95, and that Sargeant "lack[ed] a viable claim for minimum wage" in light of the Grievance settlement, and thus, no genuine issues remained. AA 88-93.

V. The Court Awards Henderson its Fees and Costs.

Henderson then moved for attorney fees on the basis that once Sargeant was aware of the Grievance settlement, Sargeant should have voluntarily dismissed this case. AA 96-105. Henderson argued that Sargeant's continuation of this case after being aware of the Grievance settlement or, at a minimum, after the Court's October 8, 2015 Order, constituted a basis for fees under NRS 18.010.[6] *See id*. The

[5] Although Sargeant did not specifically cite to NRS 18.010(2) in his Motion for Reconsideration, he repeatedly asked for an award of $107.23 "along with an award of attorney's fees, interest and cost." AA 25, 30/

[6] To be clear, Henderson contended that two relevant time frames could apply: (1) from July 16, 2015 (when Plaintiff learned of the Grievance settlement) onward or (2) from the District Court's October 8, 2015 Order onward.

District Court granted Henderson's motion, awarding Henderson its fees from October 8, 2015, the date of its Order on Sargeant's Motion to Certify, onward. AA 419-26. Sargeant now appeals the award of attorney fees.[7]

SUMMARY OF ARGUMENT

The fundamental question in this appeal is whether the District Court abused its discretion in finding that Sargeant unreasonably continued litigation in spite of its October 8, 2015 Order. On October 8, 2015, the District Court entered a very clear order (the "Order"), finding that Henderson's Grievance settlement "acted as a complete accord and satisfaction of the grievance and *any claims to minimum wage Henderson Taxi's cab drivers may have had*." AA 17 (emphasis added).

It is true that the Order did not enter final judgment of Sargeant's claims in the case. But final judgment had yet to be requested at that point in the case. Instead, the Order was intended to only deny Plaintiff's Motion to Certify Class. In doing so, the District Court made a finding that Henderson's settlement with the Union acted as "a complete accord and satisfaction" of any minimum wage claims by Henderson's drivers, including Sargeant.

Faced with the District Court's Order, and perhaps in recognition that there was no credible argument for his claims to proceed, Sargeant then sought reconsideration of the District Court's Order (or what he creatively called

[7] Sargeant has separately appealed the District Court's order granting Henderson summary judgment under Supreme Court Case number 69773.

"clarification"). In essence, though, Sargeant's motion for reconsideration was really a completely new motion which requested approval of a new class, for unpleaded claims. The Court saw Sargeant's tactic for what it was: a desperate attempt to re-shape his case and to be declared the prevailing party under NRS 18.010(2) so he could seek an award of fees while not actually seeking any reconsideration. The Court rightfully denied Sargeant's request and granted summary judgment in Henderson's favor.

Because Sargeant refused to accept the District Court's October 8, 2015 Order and let the District Court enter summary judgment in Henderson's favor, the Court awarded Henderson its fees from October 8, 2015 onward. The District Court's decision was not an abuse of discretion. Rather, it was in line with the Legislature's intent to have courts construe NRS 18.020(2)(b) to "all appropriate situations" and to punish for and deter frivolous claims that overburden judicial resources and increase the cost of engaging in business.

The District Court has broad discretion to award fees against a party who maintains claims without reasonable ground or for purposes of harassment. The District Court saw Sargeant's post-October 8, 2015 litigation tactics for what they were: a refusal to acknowledge that his claims should be summarily adjudicated. Nothing in Nevada law prohibited the District Court's sanction of his maintenance of this case and thus, the District Court did not abuse its discretion.

ARGUMENT

I. The District Court's October 8, 2015 Order Rendered Sargeant's Claims Frivolous.

Sargeant's appeal of the District Court's award of attorneys' fees is premised on his contention that the District Court's October 8, 2015 Order was "unclear." Op. Br. 9. Sargeant argues that because the Order was "unclear," he was justified in continuing to litigate this case. *See gen. id*. Because the only question presented to this Court is whether the District Court abused its discretion in awarding Henderson fees, the Court must accept the District Court's October 8, 2015 Order as written.

However, because Sargeant has alleged that the October 8, 2015 Order is "unclear," justifying his maintenance of this case, Henderson will first address the October 8, 2015 Order and address how it resolved Sargeant's claims. Henderson will then address why the District Court's decision to award costs from October 8, 2015 on was not an abuse of discretion in light of the October 8, 2015 Order.

A. The October 8, 2015 Order Was Unmistakable in its Holding.

The August 8, 2015 Order was clear. The District Court ruled in relevant part:

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A. Any Minimum Wage Claims were resolved by an accord and satisfaction with the Union

In June of 2014, the Nevada Supreme Court decided the case *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) and found that the Minimum Wage Amendment to Nevada's Constitution, Nev. Const. Art. 15, § 16, eliminated the exemption from minimum wage for taxicab drivers that had been provided by statute. Thereafter, the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), which the Court finds to be the exclusive representative of Henderson Taxi cab drivers as regards their employment with Henderson Taxi, grieved the issue of minimum wage to Henderson Taxi (the "Grievance"). Through negotiation, Henderson Taxi and the Union settled the Grievance by agreeing that in addition to changing pay practices going forward, Henderson Taxi would give drivers an opportunity to review Henderson Taxi's time and pay calculations and pay its current and former cab drivers the difference between what they had been paid and Nevada minimum wage over the two years prior to the *Yellow Cab* decision. This settlement agreement for the Grievance acted as a complete accord and satisfaction of the grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had.

AA 17.

The use of the words "*complete*," "*any*," and "*may have had*" unequivocally indicate that the Grievance settlement was not just an accord and satisfaction of some subset of the potential class's claim but rather a resolution of all potential claims any of Henderson's cab drivers may have had, including Sargeant. And the District Court's heading announcing that "any minimum wage claims were resolved by an accord and satisfaction" is even clearer. *Id*. In light of the Court's plain verbiage, it is inexplicable how Sargeant can credibly argue that the Order was "unclear." *See* Opening Brief ("Op. Br.") at 9.

But even worse, after the District Court directed Henderson to prepare the order on Sargeant's Motion to Certify, Henderson gave Sargeant the opportunity to approve its proposed order as to form and content.[8] Sargeant declined and submitted his own competing order with the *same, verbatim language*. RA 555.

Sargeant's decision to include the same language in his own proposed order belies his contention on appeal that the language of the Order was unclear. If Sargeant did not understand the language of Henderson's proposed order, then he would have amended the language in his proposed order. But he did not because the Order was clear on its face.[9]

In addition, further undermining his contention on appeal, Sargeant previously admitted in his Motion for Reconsideration of the Order that he

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[8] Pursuant to Eighth Judicial District Rule ("EDCR") 7.2, the District Court asked Henderson to prepare a proposed order for the Court's review and approval. This Court has previously approved the practice of prevailing parties preparing the district court's order. *Mortimer v. Pac States Sav. & Loan Co.*, 62 Nev. 142, 144, 141 P.2d 552, 552 (1943). When the district court instructs a party to prepare an order, the other party has to be given the opportunity to respond to the proposed order. This ensures that the proposed order accurately reflects the district court's findings. *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007). In the Eighth Judicial District, it is common practice to request opposing counsel's approval as to the form and content of an order. *See* STEMPEL, JEFFREY W., NEVADA CIVIL PRACTICE MANUAL (2001) § 11.17. If opposing counsel disagrees with the language of a proposed order, they are free to submit a competing proposed order which is exactly what Sargeant did in this case. *See* RA 553-561.

[9] In submitting his competing proposed order, Sargeant specifically identifies the only revision to Henderson's proposed order he made (a change at page 4, line 14 through page 6) and explicitly notes "[i]t is [the] only [ ] finding that support[s] such conclusion that vary." RA 553.

"understood] the Court's Order [of October 8, 2015] as holding that *all claims* for all minimum wages under Article 15, Section 16 of the Nevada Constitution owed to *all members* of the alleged class (defendant's taxi drivers) ha[d] been fully settled by the Grievance through an 'accord and satisfaction.'" AA 23 (emphasis in original). Sargeant's contention to the contrary before this Court is simply without merit. Put simply, both parties were aware when they received the Order that Sargeant's claims were rendered incapable of being maintained. This clear Order also explains Plaintiff's change in tactics and his attempt to certify a completely new class—a class which is premised on the Union resolution and only consisting of those that did not accept the settlement funds. This new approach is clearly based on Plaintiff's understanding of the order as rendering his original claims moot. Thus, Plaintiff's own conduct belies the argument he makes now.

B. The Fact that Henderson Prepared the Court's Order is Irrelevant.

As a backstop to his lack of clarity argument, Sargeant suggests in a mere footnote that this Court should find that Henderson was barred from requesting fees whatsoever because it drafted the "ambiguous and contradictory" language of the October 8, 2015 Order. Op. Br. 23 at n. 2. Sargeant's contention is bare, conclusory, and unsupported by any legal precedent.

It is certainly true that in the context of a contract dispute, if the contract at issue contains ambiguities that cannot be resolved by looking at the circumstances

surrounding the contract (in determining the intent of the parties), the court must construe the ambiguities against the party who drafted the contract or selected the language used. *See Davis v. Nevada Nat'l Bank*, 103 Nev. 220, 223, 737 P.2d 503, 505 (1987). But this Court has never held that this principal can be extended to the construction of court orders.[10] Nor should this Court create new law on this point.

This Court has approved of the common practice in this district of prevailing parties drafting the district court's proposed orders. *See Mortimer*, 62 Nev. at 144, 141 P.2d at 552. However, the district court retains ultimate control over its orders. The district court is free to amend a party's proposed order, adopt one proposed order over the other, or reject all proposed orders altogether.

In essence, what Sargeant is arguing is that the District Court's decision to adopt Henderson's proposed order over his should bar Henderson from any award of fees. But there is absolutely no support for this position. Henderson should not be penalized because its proposed order accurately reflected the District Court's decision and thus, did not warrant any relevant amendments by the District Court. To hold to the contrary would penalize a party for complying with the District Court's instructions to prepare a proposed order for their review and approval.

C. The Order's Failure to Include Final Judgment is Irrelevant.

Finally, in another attempt to get around the District Court's Order, Sargeant argues that he had to seek "clarification" from the District Court because the Order

[10] In fact, Sargeant cites *no* legal authority in support of his contention.

did not "contain a case dispositive recital enter[ing] final judgment." Op. Br. at 16-17. This argument is a red herring for two reasons.

First, this Court's precedent, including *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416, 418 (2000), which Plaintiff cites to in his Opening Brief makes clear that what is dispositive is "what the order or judgment actually *does*, not what it is called." 116 Nev. at 427 quoting *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994). Because Sargeant conceded that he understood the Court's Order to preclude all claims under the MWA as fully settled by the Grievance settlement, AA 23, it is irrelevant whether the Order actually included a statement of final judgment. What is important is that the parties understood that Sargeant's claims were rendered frivolous by the Court's Order. Thus, no "clarification" was necessary.

Second, Sargeant is essentially contending that Henderson should have unilaterally included a recital of final judgment in its proposed order. At the time, neither party had sought summary judgment from the District Court summary judgment. Procedurally, all the District Court was presented with at the time was Sargeant's Motion to Certify. While the District Court's decision on Sargeant's Motion to Certify had the effect of adjudicating Sargeant's claims, it would have been improper for Henderson's counsel to unilaterally decide to include a recital of judgment in its draft order without being asked by the District Court. *See* RA 560-561 (the District Court's minutes instructed Henderson to prepare an order denying

Plaintiff's Motion to Certify for the "supporting reasons proffered to the Court in briefing" but did *not* instruct Henderson to also include a recital of judgment).

Moreover, as discussed *supra*, Sargeant submitted his own competing proposed order to the District Court for its consideration. Sargeant's own order did not include any recital of final judgment. *See* RA 554-559. So it is hard for Sargeant to claim the lack of final judgment required him to continue litigation. Put another way: If Sargeant's proposed order had been adopted by the District Court instead, Sargeant could not credibly argue that the Order justified further litigation. So Sargeant cannot now point to the missing recital of judgment as justification for his conduct.

VI. The District Court Did Not Abuse its Discretion in Concluding Sargeant's Conduct Warranted an Award of Fees Pursuant to NRS 18.010(2)(b).

The District Court awarded Henderson its fees because Sargeant continued to litigate this case after the October 8, 2015 Order. Specifically, Sargeant filed a Motion for Reconsideration on October 30, 2015 and opposed Henderson's Motion for Summary Judgment on December 14, 2015. The District Court found that in doing so, Sargeant "maintained this action 'without reasonable ground' because the Court had ruled he had no cognizable claim." AA 227. The District Court's decision was not in error and was not an abuse of discretion.

A. The District Court Acted Within its Discretion.

The District Court enjoys broad discretion in determining whether to award fees in a case. *See Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1140 (1994). In this case, the District Court determined that an award of fees was warranted pursuant to NRS 18.010(2)(b) which provides, in pertinent part:

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
>
> > (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim, or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the cost of engaging in business and providing professional services to the public.

In 2003, the Legislature amended NRS 18.010(2)(b) to specifically allow for an award of fees when a party *maintains* frivolous claims and to instruct courts to "liberally construe the provisions of [NRS 18.010(2)(b) in favor of awarding attorney's fees in all appropriate situations." *See* NRS 18.010(2) (2003); Nev. S.B. 250. The intent of the Legislature in making this amendment was "to punish for

and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the cost of engaging in business and providing professional services to the public." *See id*.

While very few cases have analyzed the statute, as amended, the District Court appropriately looked at the plain language of the statute and determined that, given the circumstances of the case,[11] Sargeant's conduct after October 8, 2015 warranted sanctions through an award of fees. Sargeant has failed to demonstrate that the District Court's decision was an abuse of discretion.

1. Sargeant's Claims Were Rendered Groundless by the Order Because There Could Be No Credible Evidence to Support His Claims. Faced With the Order, Sargeant Changed Tactics and Argued New Claims and For New Relief, Which Was Unreasonable.

When Sargeant commenced this case, he only brought two claims for relief—both related to his contention that Henderson failed to pay Sargeant (and the class) the minimum wage required by the MWA. *See gen.* AA 1-7. As discussed *supra*, the District Court's Order held that "[a]ny minimum wage claims were resolved by an accord and satisfaction with the union." AA 17. There is no dispute that a claim is rendered "frivolous or groundless" under NRS § 18.010(2)(b) when "there is no credible evidence to support it." Op. Br. at 12

[11] When a party asks the district court to award it fees under NRS 18.010(2)(b), the district court is required to look at the "actual circumstances of the case," "rather than a hypothetical set of facts favoring plaintiff's averments."

(citing *Rodriguez v. Primadonna Co. LLC*, 125 Nev. 578, 216 P.3d 793 (2009); *Key Bank v. Donnels*, 106 Nev. 49, 787 P.2d 382 (1990)). But Sargeant appears to misunderstand how that standard applies here. Sargeant's claims were rendered groundless on October 8, 2015 because the District Court's Order effectively disposed of "any minimum wage claims" that "Henderson Taxi's cab drivers may have had." *See* AA 17. Put another way: if Sargeant continued with his violation of MWA claims, there could be no credible evidence at trial to support the claims in light of the Court's Order.

Faced with the District Court's Order, Sargeant did an about-face and changed strategies. Sargeant filed a "motion for reconsideration" which did not actually seek reconsideration.[12] This Court has repeatedly recognized that a motion for reconsideration is only proper when a court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *See Sch. Dist. No. 1J v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) ("A district court may reconsider a

[12] In fact Sargeant concedes on appeal that "[h]e did not seek to burden the district court to reconsider anything it had *already* decided." Op. Bri. at 17 (emphasis in original). "Indeed, [Sargeant] expressly disavowed any such desire [for the District Court to reconsider its Order] and state that the district court should not re-examine its prior rulings, only clarify them." *Id*. Of course, the actual content of the motion directly contradicts this self-serving statement.

previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."). "*[A] litigant may not raise new legal points for the first time on rehearing*. Nor may a petition for rehearing be utilized as a vehicle to reargue matters considered and decided in the court's initial opinion. *Instead, in a concise and non-argumentative matter, such a petition should direct attention to some controlling matter which the court has overlooked or misapprehended*." *In re Ross*, 99 Nev. 657, 659, 668 P.2d 1089, 1091 (1983) (internal citations omitted) (emphasis added).

Sargeant spent his Motion for Reconsideration arguing for certification of a new class of "*just* those Henderson Taxi Cab drivers who are entitled to settlement amounts pursuant to [the Grievance settlement] but have not yet received those amounts." AA 25-30 (emphasis in original). Sargeant argued that this new, more narrow class should have a breach of contract or declaratory relief claim for the money they were due under the Grievance settlement.[13] But rather than filing a new claim for relief, he made that request through a motion for reconsideration. That conduct was entirely improper, *see In re Ross*, 99 Nev. at 659, and the District Court saw it for exactly what it was: an improper tactic to seek judgment on

[13] Sargeant did not articulate what claim this new class would have, perhaps recognizing that the new class would have distinct, unpled claims. Instead, he asked the Court to identify what relief this new class would have. *See* AA 29-30. By arguing that their claim would relate to the money they were due under the Grievance settlement, he was essentially contending there was a breach of contract claim for Henderson's failure to pay under the Grievance settlement.

unpleaded claims and certification of an unpleaded class, warranting an award of fees. *See* AA 227.[14] [15]

On appeal, Sargeant would like to convince this Court that his Motion for Reconsideration was truly a motion for "clarification" and thus is justified under *Estate of Blas ex rel. Chargualaf v. Winkler*, 792 F.2d 858 (9th Cir. 1986). Op. Br. at 7 ("He sought clarification on that point…."), 15-16. But Sargeant's contention is belied by the record. In addition, *Estate of Blas*, which Sargeant relies upon, only adds support to the District Court's decision, if applicable at all.

Sargeant conceded to the District Court that he understood the Order, AA 23, so it is hard for him to now contend there was a need for "clarification." And even assuming Sargeant needed some type of "clarification," he could have submitted a one page request, asking the Court specific questions to answer to give

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[14] Interestingly, in footnote 3 of his Opening Brief, Sargeant contends that his Motion for Reconsideration was necessary to raise issues before the District Court in order to preserve his rights on appeal. Op. Br. at 24, n. 3. In doing so, Sargeant implicitly acknowledges that his Motion for Reconsideration raised new issues because if it did not, then the issues would have already been presented to the District Court and preserved for consideration on appeal.

[15] Sargeant argues that the District Court improperly applied a "heightened or particularized pleading requirement" to his Complaint while failing to find that "any such pleading requirement existed in this case." Op. Br. at 20. Sargeant is intentionally misconstruing the District Court's decision. There was no heightened or particularized pleading requirement applied. Rather, *Sargeant did not make these claims* in his Complaint. Sargeant's Complaint only includes class claims on behalf of *all* of Henderson's taxi drivers for a violation of the MWA; not class claims of *just those taxi drivers who were not paid* under the Grievance settlement for a breach of the Grievance settlement.

Plaintiff the clarification he claimed he needed. Plaintiff chose not to do that. Plaintiff instead filed a ten page Motion for Reconsideration seeking *new* relief (as discussed *supra*) which required Henderson to incur the cost of opposing the motion. Plaintiff's decision was unreasonable and is precisely what the Legislature intended to preclude in amending NRS 18.010(2)(b). *See supra*.

Moreover, *Estate of Blas* is distinguishable from this case. *Estate of Blas* involved an application of federal law, not Nevada law. *See* 792 F.2d at 860-861 (noting that under 28 U.S.C. § 1927, a requisite showing of bad faith must be shown). Under Nevada law, the District Court's award of fees must be upheld unless Sargeant demonstrates the District Court abused its discretion. *See Thomas*, 122 Nev. at 90. This makes this case distinct from *Estate of Blas* in which the appealing party needed to show bad faith to challenge the district court's order. 792 F.2d at 861.

And, even if it could be applied, *Estate of Blas* only adds support to the District Court's award of fees in this case. In its opinion, the Ninth Circuit noted that "[a]lthough the denial of the motion to reconsider [was] not at issue [on] appeal, in judging the appropriateness of sanctions, [the court] must necessarily examine the merits of the motion." *Id*. at 860, n. 3. In this case, this Court must similarly look to the merits of Sargeant's Motion for Reconsideration in determining whether the District Court's subsequent award of fees was warranted. Because Sargeant's Motion for Reconsideration improperly sought certification of

an unplead class for unpleaded claims, *see supra*, it was not an abuse of discretion to find Sargeant's Motion for Reconsideration frivolous and deserving of an award of fees.

2. Sargeant Opposed Henderson's Motion for Summary Judgment With No Basis, Only to Increase Henderson's Expenses. This Also Warranted an Award of Fees.

Likewise, Sargeant's Opposition to Henderson's Motion for Summary Judgment was equally frivolous. As this Court is aware, when a party seeks summary judgment, once the moving party (in this case, Henderson) demonstrates that no genuine issue of material fact exists, the burden shifts to the nonmoving party (Sargeant) to "set forth specific facts demonstrating the existence of a genuine issue of trial or have summary judgment entered against him." *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

Sargeant had no basis to oppose Henderson's Motion for Summary Judgment. Yet, he opposed it regardless. Sargeant's opposition solely focused on Sargeant's lack of knowledge of the Grievance settlement at the time of filing, *see* AA 73-76, and arguing that Sargeant should receive the money due to him under the Grievance settlement, *see* AA 76-78. Both issues were irrelevant to Henderson's request for summary judgment.

When the District Court awarded Henderson its fees, it did so because it concluded that Sargeant's maintenance of the case was "without reasonable ground." Henderson respectfully submits that conclusion is supported by the

record. In amending NRS 18.010(2)(b), the Legislature specifically instructed Nevada courts to construe the statute "liberally" to "punish for and deter frivolous or vexatious claims" that "overburden limited judicial resources, hinder the timely resolution of meritorious claims, and increase the cost of engaging in business and providing professional services to the public." *See* NRS 18.010(2)(b). This is precisely the type of situation the Legislature envisioned in amending NRS 18.010(2)(b): where a litigant refuses to accept the fact that his claims have been rendered frivolous and maintains a case only to drive up the prevailing party's costs.

3. This Case Did Not Involve Novel Issues or Unsettled Issues of Nevada Law.

Finally, in a last ditch effort to justify his maintenance of the case past October 8, 2015, Sargeant argues that this case involves "many unsettled and novel legal issues," thus, precluding the District Court for sanctioning him for his maintenance of the case. Op. Br. 12, 22-24. It is true that this Court has previously held that an award of fees is not warranted when litigants present a "novel issue" or litigate "unsettled issues of Nevada law." *See Rodriguez*, 125 Nev. 578 (concluding plaintiff's civil action presented a "novel issue" regarding the potential expansion of common law liability and therefore, upholding the district court's denial of defendant's motion for attorneys' fees). But this does not save Plaintiff for two reasons: (1) this case did not involve any "novel" or "unsettled" issues; and

(2) even if it did, those issues were resolved by the Court in its October 8, 2015 Order and making the case after the Order frivolous.

To begin, Sargeant does not identify any "unsettled" or "novel" issues beyond broadly stating that "[t]he application of the MWA, which was only enacted in 2006, involves many unsettled and novel legal issues" and summarily claiming that "[t]he district court's October 8, 2015 order concerned one such unsettled, and novel, issue." Op. Br. 23. The MWA may not have been enacted until 2006 but this case involved application of a long standing doctrines of both standard principles of agency and the of accord and satisfaction. Courts in Nevada have been applying agency principles and the doctrine of accord and satisfaction for nearly a hundred years. *See e.g., State v. Cent P.P.R.,,* 9 Nev. 79 (1873); *Wolf v. Humboldt County,* 36 Nev. 26, 131 P. 964 (1913); *Strohecker v. Mutual Bldg. & Loan Ass'n*, 55 Nev. 350, 34 P.2d 1076 (1934). The fact that these principles of law are being applied to a new set of facts (here, a claim under the MWA), does not alone, render new, "novel legal issues."[16]

And even if the underlying legal issues could be deemed "novel," that still would not justify Plaintiff's maintenance of the case after August 8, 2015. If Plaintiff believed the Court's August 8, 2015 Order was in error, or failed to

[16] By way of example, while the legal sale of medical marijuana is new in Nevada, a breach of contract claim between a supplier and a newly licensed marijuana facility is not novel; it would still just be a breach of contract case.

consider "novel legal issues," he should have appealed the Order to this Court. He should not have continued litigation (including opposing Henderson's motion for summary judgment). His choice to file a Motion for Reconsideration and raise new issues was unreasonable.

This case was very simple: Sargeant filed suit against Henderson under the MWA. Henderson's Grievance settlement with the Union (the duty elected representative of the drivers) was "a complete accord and satisfaction" of Sargeant's claims, rendering his claims frivolous. And refusing to recognize that was the case, Sargeant maintained litigation without any basis. This is precisely the type of situation the Legislature intended to warrant an award of fees under NRS 18.010(2)(b) where a plaintiff will not let their claims go despite the evidence, law, and prior judicial orders against them. Because the District Court recognized Sargeant's tactics for what they were, this Court cannot find that the District Court abused its discretion in granting Henderson its fees from October 8, 2015 onward.[17]

[17] On appeal, Sargeant does not contend that the District Court erred in finding Henderson's fees reasonable and necessarily incurred. Therefore, Henderson has only address the District Court's decision to award fees and not the amount of fees awarded and deemed reasonable under *Brunzell*.

VII. Conclusion

For all the foregoing reasons, the District Court's decision to award Henderson its reasonable fees and costs from October 8, 2015 to April 27, 2016 was not an abuse of discretion and should be upheld.

DATED this 11th day of April, 2017

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CERTIFICATE OF COMPLIANCE

I certify that I have read this Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font and contains 6,510 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief—excluding those portions of the Brief excluded from the word count by NRAP 32(a)(7)(C).

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 Procedure.

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the Social Security Number of any person.

DATED this 11th day of April, 2017.

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CERTIFICATE OF SERVICE

Pursuant to N.R.A.P. 25(1)(b) and 25(1)(d), I hereby certify that on the 11th day of April, 2017, I served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** by electronic service and/or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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