IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA YELLOW CAB COMPANY; NEVADA CHECKER CAB CORPORATION; and NEVADA STAR CAB CORPORATION,

Petitioners,

vs.

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.

Case No.: 74166

District Court Case No. A-12-661726-C

AMICI BRIEF OF WESTERN CAB COMPANY AND A CAB IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF MANDAMUS

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WESTERN CAB
RULE 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that Amicus Curiae Western Cab Company has no parent corporation and no publicly held company owns 10% or more of its stock.

The undersigned counsel of record further certifies that she is the only attorney who has appeared for Amicus Curiae Western Cab Company in related proceedings in the District Court and in this Court, and that she appeared since January 2105 through the law firm Hejmanowski & McCrea, LLC, and previously through the law firm Lionel Sawyer & Collins.

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A CAB
RULE 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

A Cab, LLC

A Cab, LLC Employee Leasing Company

Creighton J. Nady

Esther C. Rodriguez, Esq., or Rodriguez Law Offices, P.C.

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IDENTITY OF AMICI AND ISSUES PRESENTED

Amici Western Cab Company and A Cab, as Petitioners, have been affected by this Court's decisions on the Minimum Wage Amendment in *Thomas v. Nevada Yellow Cab Corporation,* 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), and in *Nevada Yellow Cab Corporation v. Thomas*, 132 Nev. Adv. Op. 77, 383 P.3d 246 (2016). The issues presented are whether Article 15, Section 16 of the 2006 Nevada Constitutional Minimum Wage Amendment ("MWA") imposes strict liability on Nevada employers, thereby precluding the employers from pleading and pursuing affirmative defenses, including for example, a plaintiff's lack of standing under the MWA, the employer's good faith reliance on the Nevada Labor Commissioner and other examples of the employer's reasonableness and good faith under the circumstances.

ARGUMENT

"Strict liability" has been defined by this Court as the "imposition of ... liability without regard to what the [defendant] knew ... before the injury-producing event." *San Juan v. PSC Industrial Outsourcing, Inc.*, 126 Nev. 355, 365 n. 9, 240 P.3d 1026, 1032 n. 9 (2010) (in the context of a case brought by the estate of an employee killed in an industrial explosion). "Strict liability" is not a concept naturally or ordinarily associated with actions for breaches of contract, including

employees' suits for back wages. Indeed, as explained further below, subsections (B) and (C) of Nevada's MWA envision the resolution of claims for back wages in the State's courts in accord with the Nevada Rules of Civil Procedure, including its rules of pleading. In addition, a defendant employer's presentation of affirmative defenses, including reliance on a government official's interpretation of the law, is recognized under the federal Fair Labor Standards Act and thus is hardly a concept barred as contrary to the public policy associated with the adoption and enforcement of minimum wages. Finally, by outright precluding the presentation of an employer's affirmative defenses, a district court actually relieves plaintiffs of their burden of proof.

I. THE MWA AUTHORIZES THE RESOLUTION OF DISPUTES IN NEVADA'S COURTS IN CONFORMITY WITH THE NEVADA RULES OF CIVIL PROCEDURE, WHICH AUTHORIZE DEFENDANTS TO RAISE AFFIRMATIVE DEFENSES

Section (B) of the MWA authorizes employees to bring claims for its violation in the State's courts, stating in pertinent part:

> An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

Section (C) of the MWA excepts certain persons from its scope, stating in part:

> As used in this section, 'employee' means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days.

These provisions obviously envision that a defendant employer is authorized to present and litigate defenses and denials of liability, including under NRCP 8(c):

> In pleading to a preceding pleading, a party shall set forth affirmatively, accord and satisfaction, arbitration and award, assumption of the risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

See also, NRCP 1 ("[T]hese rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

II. RELIANCE ON PUBLIC AGENCIES RESPONSIBLE FOR INTERPRETING AND ENFORCING THE LAW AT ISSUE IS PROPERLY RAISED AS A GOOD FAITH DEFENSE

In enacting the Fair Labor Standards Act ("FLSA"), the United State Congress authorized defendant employers to establish a good faith affirmative defense by showing that they "acted in: (1) reliance on; and (2) conformity with a [Wage and

Hour Division] regulation, Opinion Letter, or Administrator's Interpretation; and (3) in good faith." *Swigart v. Fifth Third Bank*, 870 F.Supp.2d 500, 509 (S.D. Ohio 2012), *citing* 29 U.S.C. §259(a), and further explaining the "good faith" defense on administrative interpretation requirement:

> This Circuit has explained that in close cases, courts should consider 'the reasonableness of the employer's actions in light of the administrative interpretation in question.' *Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234, 238 (6th Cir. 1981). However, this Court is also mindful that federal courts have noted that the 'burden of proof is a heavy one, since a defense under Section 259 would act as a bar to this proceeding, thereby absolving [the defendant] of liability and penalties for any past FLSA violations.' [Citation omitted.]

Were reliance on the administrative agency responsible for enforcing a set of laws in violation, the U.S. Congress and Federal Courts would not have authorized reliance on administrative interpretations as a good defense in FLSA cases. *See, Schneider v. City of Springfield*, 102 F.Supp.2d 827, 833 (S.D. Ohio 1999) ("'The good-faith defense exists in order to protect an employer who 'innocently and to his detriment, followed the law as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid.'" [Citations omitted.] It operates as an 'estoppel defense to protect employers from particular agencies' mistaken interpretations of particular statutory requirements; it does not come into effect until after there has been a failure to comply with the relevant statute due to an erroneous agency interpretation.' [Citation omitted.]).

III. THE DISTRICT COURT HAS WRONGFULLY DEPRIVED DEFENDANT EMPLOYERS OF THEIR DUE PROCESS RIGHTS

As set forth above, Section B to the MWA authorizes employees to bring actions for its violation. To succeed as a plaintiff, the employee thereby bears the burden of demonstrating that the employer failed to pay the minimum wage, meaning the plaintiff bears the burden of proof. By casting the employer as strictly liable, the District Court has deprived defendants of their fundamental due process under the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 8 of the Nevada Constitution.

According to this Court, these due process clauses guarantee every individual's fundamental right to be heard. *Browning v. Dixon*, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). In this case, the District Court has informed the defendant of the proceedings, but literally deprived it of the ability to contest by miscasting the defendant as "strictly liable."

CONCLUSION

Amici Western Cab and A Cab support Petitioners' request for writ relief clarifying that defendant employers in cases brought under the MWA are entitled to plead and proceed to present evidence at trial on affirmative defenses. This

clarification is necessary lest Nevada employers be unfairly burdened with the misinterpretation of the Nevada MWA as presenting a strict liability tort to which no defense is applicable.

DATED this 19th day of October, 2017.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

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

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 1,291 words excluding this certificate and 1,601 words with this certificate.

FINALLY, I HEREBY CERTIFY that I have read this BRIEF OF AMICI CURIAE and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on its to be found. I understand that I may be subject to sanctions in

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the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19th day of October, 2017.

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