IN THE SUPREME COURT OF THE STATE OF NEVADA

A CAB, LLC; AND A CAB SERIES, LLC, Appellants, v. MICHAEL MURRAY; AND MICHAEL RENO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Respondents.	Supreme Court No. 77050 District Court No. A-12-669926-C

APPELLANTS OPENING BRIEF

Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Esther Rodriguez (6473)
RODRIGUEZ LAW OFFICE, P.C
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

James J. Jimmerson (264)
JIMMERSON LAW FIRM
415 S 6th Street, Suite 100
Las Vegas, NV 89101

*Attorney for Appellant*s

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

A Cab, LLC, has no parent company and is not publicly traded. There is no publicly traded company that holds any ownership interest in A Cab, LLC.

A Cab Series, LLC, has no parent company and is not publicly traded. There is no publicly traded company that holds any ownership interest in A Cab Series, LLC.

The attorneys who have appeared on behalf of appellant in this Court and in district court are:

Michael K. Wall (2098)
HUTCHISON & STEFFEN, PLLC
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145

Esther Rodriguez (6473)
RODRIGUEZ LAW OFFICE, P.C
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

Jay A. Shafer (6791)
CORY READE DOWS & SHAFER
1333 North Buffalo Drive, Suite 210
Las Vegas, NV 89128

James J. Jimmerson (264)
JIMMERSON LAW FIRM
415 S 6th Street, Suite 100
Las Vegas, NV 89101

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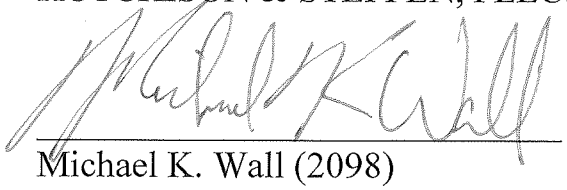
These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 5 day of August, 2020.

HUTCHISON & STEFFEN, PLLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Esther Rodriguez (6473)
RODRIGUEZ LAW OFFICE, P.C
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

James J. Jimmerson (264)
JIMMERSON LAW FIRM
415 S 6th Street, Suite 100
Las Vegas, NV 89101

Attorney for Appellants

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JURISDICTIONAL STATEMENT

Defendants, A Cab, LLC, Creighton J. Nady, and A Cab Series, LLC, appeal from the final orders of the district court entering summary judgment against appellants, entered on August 21, 2018, and the following post judgment orders:

(1) Order, October 22, 2018, amending judgment to add A Cab Series, LLC, as a party defendant.

(2) Order, December 18, 2018, granting counter-motion for judgment enforcement relief (receiver and injunction).

(3) Order, December 18, 2018, granting and denying objections to exemption from execution.

(4) Order, December 18, 2018, denying motion quash execution.

(5) Order, December 20, 2018, denying motion to dismiss for lack of subject matter jurisdiction.

(6) Order, February 4, 2019, compelling of payment of Special Master's Fees and order of contempt.

(7) Order, February 6, 2019, granting attorney's fees and costs.

(8) Order, March 4, 2019, re Special Master George C. Swarts.

(9) Order, March 5, 2019, memorializing matters resolved long before the final judgment.

(10) Order, March 5, 2019, on reconsideration.[1]

The orders are appealable under NRAP 3A(b)(1) (final judgment); NRAP 3A(b)(2) (order denying motion for new trial); NRAP 3A(b)(4) (order appointing a receiver); NRAP 3A(b)(8) (special order after final judgment). The notices of appeal are timely. NRAP 4(a).

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[1]This order denies defendants' motion for a new trial, and resolves all post-judgment tolling motions, rendering appellants first notice of appeal effective. NRAP 4(a)(6).

ROUTING STATEMENT

This case should be retained by this Court under NRAP 17(a)(11)&(12). It has statewide importance, and presents an issue of first impression. Whether summary judgment may be entered as a sanction when the defendant is unable to pay a Special Master is novel. The application and/or constitutionality of NRCP 23 as amended is also presented. This Court should retain this appeal.

STATEMENT OF THE CASE

Appeal from final judgment and post-judgment orders. Eighth Judicial District Court, Clark County, Department I, the Honorable Kenneth C. Cory, District Judge.

Following decision of these matters, Judge Cory recused himself on March 1, 2019. The case is now assigned to Judge Rob Bare.

STATEMENT OF THE ISSUES

1. Whether the district court erred in severing claims for the sole purpose of manufacturing finality.
2. Whether the district court lacked subject matter jurisdiction based on the amount in controversy.
3. Whether the district court exceeded its authority in extending the two year statute of limitations.
4. Whether the district court erred in entering summary judgment as a sanction for defendants' inability to pay for discovery not completed by plaintiffs.
5. Whether the district court erred in shifting the burdens from plaintiffs to defendants to prove the absence of liability and a non-violation of the MWA.
6. Whether the district court erred in adding A Cab Series, LLC after final judgment was entered.
7. Whether the district court abused it discretion in awarding attorney's fees and costs.

INTRODUCTION

This appeal arises from a judgment in excess of one million dollars against two corporate defendants, one of whom was never named as a defendant until post judgment. The complaint was filed by two former taxicab drivers with small value claims (approximately $130 and $1,048), the jurisdictional value of which mandated prosecution in justice court. The two drivers (Murray and Reno) alleged their former employer (A Cab) failed to pay them an hourly minimum wage, once they no longer fell within the taxi driver exemption of NRS 608.250, extinguished by the Minimum Wage Act of the Nevada Constitution ("MWA"), in 2006. The complaint details only a theory of underpayments based on fraudulent breaks drivers were forced to document, when they were actually working.

The district court never had subject matter jurisdiction due to the minimum jurisdictional amount necessary to invoke district court jurisdiction. Further, plaintiffs' second cause of action under NRS 608.040 falls within the purview of the State Labor Commissioner, and requires compliance with NAC 608.155(1).

The two plaintiffs' claims should not have survived summary judgment, much less have been a basis to certify an entire class of cab drivers. Discovery demonstrated that the two former drivers never had a basic understanding of what they were even claiming, much less any evidence of any alleged underpayment. They had no calculation of what they believed they were owed, or why they were suing. There was never evidence regarding the fraud or forced documentation of fake breaks. The district court skipped over the step of evaluating the two individual claims before jumping to certify an entire class, or evaluating the

requirements of NRCP 23, including the numerosity requirement, or the fact that fraud is not appropriate for class certification.

Once the class was certified, the district court extended the statute of limitations from two years to a unique formula resulting in five years, three months and eight days as a statute of limitations for wage claims. Further, individual driver's statute of limitations would vary depending upon whether they were employed in a particular year on July 1 or July 2, when notices of changes in the minimum wage rate were announced.

As a taxicab company regulated by the State, A Cab kept thorough documentation of each hour worked, each ride, and each fare collected on the state-required form known as a "tripsheet." NRS 706.8844. Defendants maintained from the commencement that drivers had been properly paid based on the hours hand-written by the drivers themselves. This back-up documentation was readily available for review on the tripsheets. The district court on multiple occasions determined that the tripsheets were the documents necessary to determine any alleged deficiencies in payments. Plaintiffs, however, did not want to do the work of analyzing tripsheets.

Early on, plaintiffs asked the district court to appoint a Special Master to review each of the tripsheets to determine any liability and damages to which plaintiffs would be entitled, requesting that defendants pay for the work of the Special Master. Defendants objected to financing a Special Master to search for evidence in support of plaintiffs' case, maintaining that plaintiffs had the burden of proof. While the district court agreed that the tripsheets were essential to a

determination of any underpayment, it initially refused to place the burden on defendants to finance plaintiffs' discovery.

Plaintiffs chose a different trial strategy. Rather than reviewing the tripsheets, plaintiffs repeatedly asked for numerous other items, including thousands of W4's, computer GPS tracking information which required specialized downloading, and multiple versions and specialized formatting of payroll data. Defendants maintained to the discovery commissioner and to the district court in hearing after hearing that such information was irrelevant and was sought for purposes of harassment and escalating litigation fees and costs. Nevertheless, defendants were forced to turn over all items requested by plaintiffs. At the close of discovery, plaintiffs' experts testified that they reviewed none of the items defendants were compelled to produce.

Still looking for a shortcut that would not require them to analyze the only documents that could prove any underpayment, the tripsheets, plaintiffs created a "model" excel spreadsheet based on a formula where the fact finder could take actual pay from quickbooks records and plug in an estimate of hours worked (rather than actual hours), and presumably the formula would yield an estimated underpayment. It was demonstrated repeatedly that this formula would not result in any reliable damages figure, but plaintiffs were desperate for a shortcut.

Plaintiffs submitted their model to the district court at numerous hearings, repeatedly moving for summary judgment. The district court rejected the model as unreliable, specifically indicating that the model made no sense, and that something on an evidentiary basis would be necessary to go before the jury.

As the trial date approached, as well as the threat of the expiration of the five year rule, defendants moved for dismissal, for summary judgment, and to strike plaintiffs' experts. Plaintiffs' experts opinions reflected that they were retained for the purposes of rubber-stamping the "model" excel spreadsheets created by counsel. They could offer no testimony that the formulas correctly represented actual damages. The experts could offer no testimony as to the hours actually worked or any underpayments of minimum wage. By all indications, it would be reversible error not to strike the experts.

On the hearing date to strike the experts, the district court did not entertain any argument on defendants' motion. Instead, the district court announced it had come up with its own plan. To the parties' surprise, Judge Cory indicated he would be reversing his position from prior years. If plaintiffs' counsel would orally renew his request to appoint a Special Master to be paid for by defendants, the motion would be granted. Further, no reconsideration would be entertained. The court indicated the appointment of a Special Master is the appropriate solution to determine the hours worked each pay period by each class member and the amount of minimum wages, if any, that each is owed based on A Cab's records.

The tripsheets documented the hours used to calculate pay. But plaintiffs refused to review them. Plaintiffs never put forth any calculation of damages. They had no numbers, only guesses. It was evident to the district court that plaintiffs could not bear their burdens of proofs. But instead of dismissal, the court formulated its own plan to save plaintiffs' case by having defendants fund plaintiffs' discovery to prove or disprove liability. The court vacated the jury trial,

indicating the Special Master's findings would be entered as a matter of law.

At plaintiffs' request, a California consulting firm was appointed as the Special Master. They estimated their fees would be approximately $249,480.00 to analyze the tripsheets. Defendants objected, and the district court proceeded to find defendants in contempt for their inability to pay the consultants.

Adding fuel to the fire, there was an ongoing wage case in the sister district court department before Judge Kathleen Delaney, *Dubric v. A Cab*. Judge Cory and plaintiffs perceived *Dubric* to be a competing case, and attempted in multiple ways to make sure this case would result in a judgment before *Dubric*. Plaintiffs could have consolidated the cases, but chose not to do so. Instead, plaintiffs and Judge Cory attempted to enjoin *Dubric* from moving forward in finalizing a class settlement reached through the court settlement program. This Court reversed Judge Cory's injunction on April 6, 2018, and by doing so fired the starter's gun to commence the race to judgment.

Thereafter, plaintiffs requested that Judge Cory "coordinate," not "consolidate," the two cases, asking him to essentially take control of Judge Delaney's case. At a hearing, Judge Cory entertained a presentation of the settlement reached in *Dubric* from the plaintiffs' counsel in *Dubric*, Bourassa Law Firm, who now opposed consolidation because they wanted to move forward with settlement. Judge Cory viewed plaintiffs' request as a renewed motion for injunction, which he was not willing to grant after being reversed.

Thereafter, plaintiffs re-filed their motion for partial summary judgment for a third time (which had already been denied twice), and asked for a range from

$174,839 to $274,621, utilizing the model spreadsheets and plugging in different numbers to arrive at underpayments from 2013 to 2015. Judge Cory not only granted this request, but *sua sponte* expanded the time period to include 2007 to 2012, and entered judgment for $1,033,027.81. The court then severed the claims against A Cab's owner, Nady, and stayed those claims, in a transparent attempt to create finality. Those claims remain in limbo.

Five hours after Notice of Entry of the district court's summary judgment, on August 22, 2018, plaintiffs filed a motion to amend the judgment to add a new defendant, A Cab Series, LLC. The motion was granted.

The remainder of the issues on appeal arise from the district court's disregard of the separateness and independence of these corporate entities. In transcripts and with his orders, Judge Cory made clear that he had no regard for the corporate series statutes or structures, and considered them to be a mechanism to defraud the public. As such, the post-judgment collection activity has been allowed to run wild with complete disregard for the protections offered by the statutes, until most recently this case was reassigned to Judge Rob Bare. Unfortunately, Judge Bare's hands are somewhat tied pending resolution of these appeals, and a remand to the district court.

There are too many erroneous rulings in this case to address them all in this appeal; this case is the biggest train-wreck undersigned counsel has ever seen. Only the major issues have been addressed.

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STATEMENT OF THE FACTS

A. Background

This Court is aware of the legal issues regarding how cab companies, having been informed by the State Labor Commissioner that they were not subject to the MWA based on NRS 608.250(2)(e)–exempting cab companies from the requirement to pay a minimum wage–did not pay minimum wage to their drivers before this Court declared in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 489, 327 P.3d 518, 521 (2014), that the MWA impliedly repealed NRS 608.250(2)(e). This Court has since issued a number of Opinions clarifying how the MWA applies, but has not addressed the issues presented by this appeal.

Nady is the principal of A Cab, LLC. A Cab has been sued under the MWA. AA 1. A Cab denies wrongdoing. A Cab sought out the guidance of the State Labor Commissioner to make sure it was abiding by all wage laws.[2]

In 2009, the U.S. Department of Labor ("DOL") conducted a city-wide audit of the majority of taxicab companies in Las Vegas, including A Cab, and determined that A Cab had zero wage or record keeping violations for the time period of April 2007-April 2009. AA 402. Specifically, there were no minimum

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[2]Prior to June 26, 2014, there were conflicting laws regarding the minimum wage, namely NRS 608.250(2) and the 2006 MWA. In *Thomas v. Yellow Cab*, this Court recognized that employers were put in the most impossible and unenviable position in choosing between which legal provision to follow. Following passage of the MWA, the statutory exemption for taxi and limousine drivers remained. There was no express or implied repeal at that time or in the years following. In addition, the Nevada Labor Commissioner comported with NRS 608.250(2). Up until June 26, 2014, NRS 605.250(2) was the law employers were following, and it was reasonable to do so.

wage violations, no overtime violations, and no record keeping violations. AA 305.

In 2010, the DOL conducted a second round of audits of the majority of taxicab companies in Las Vegas, including A Cab, and determined there were some wage underpayments to drivers. Without any admission of liability or further contest, A Cab agreed to pay these alleged underpayments directly to DOL for distribution to its drivers. The agreed upon amount was $139,988.80, covering October 1, 2010 to October 1, 2012. AA 285. The DOL determined an underpayment of $130.70 for Murray and $1,048.94 for Reno, which was paid in full by A Cab to DOL for distribution. AA 756; 803.

B. Procedural Facts

October 8, 2012, plaintiffs Michael Murphy and Michael Reno filed their original complaint, naming A Cab, LLC, and A Cab Taxicab Company[3] as defendants. AA 1. The complaint alleged (1) violation of the MWA, and (2) violation of NRS 608.040. *Id.* Plaintiffs did not state the amounts they were seeking or allege damages sufficient to invoke the jurisdiction of the district court, and as now specified in NRCP 8(a)(1). *Id.* From the outset, it was apparent the amount in controversy was minimal, and counsel for the class was attempting to aggrandize the case.

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[3]No such entity exists. No such entity was served with process or participated below. *See Rae v. All American Life & Cas. Co.*, 95 Nev 920, 922, 605 P.2d 196, 197 (1979) (a party must be named and served) .

On July 12, 2019, this Court dismissed this appeal as to Nady only, because no judgment has been entered against him.

On November 15, 2012, defendants moved to dismiss, arguing that the MWA did not eliminate the long-standing exemptions to the minimum wage for taxicab drivers; and the district court lacked subject matter jurisdiction over the statutory claim for relief, which falls under the jurisdiction of the Nevada Labor Commissioner. NRS 608.180. AA 09-15. An order denying the motion was entered on February 11, 2013. AA 82.

On January 30, 2013, plaintiffs filed a first amended complaint. AA 75-81. The first amended complaint is identical to the original complaint, except that it substitutes Michael Murray in the place of Michael Murphy. *Id.*

On March 25, 2013, defendants moved to strike the first amended complaint based on improper substitution of Murray as a new plaintiff, and because Murray's claim was filed after expiration of the two-year statute of limitations.[4] AA 188-92. Plaintiffs countered that they had only corrected a typographical error, and that Murphy and Murray were the same person, and assertion that is patently false. AA 202.

The district court denied the motion, relying on Ninth Circuit jurisprudence that a motion to dismiss was not a responsive pleading that would prevent plaintiffs from filing an amended complaint. AA 249 (minute order). Neither the

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[4]NRS 608.260:

> If any employer pays any employee a lesser amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage.

statute of limitations nor the district court's lack of subject matter jurisdiction was addressed. *Id.*

On June 26, 2014, this Court issued *Thomas v. Yellow Cab.*

On May 19, 2015, plaintiffs moved to certify a class of A Cab employees from November 28, 2006, through June 24, 2014. AA 257-398. Plaintiffs' motion acknowledged the importance of the tripsheets to support their claims.[5] AA 275-78. Specifically, plaintiffs admitted that hourly information was available on the tripsheets, but wanted defendants to fund the search for violations. *Id.* Plaintiffs asked the district court to appoint a Special Master "to be paid by defendants, to compile information on the hours of work of the class members as set forth in their daily trip sheets." *Id.* Basically, plaintiffs were requesting that a special master conduct a fishing expedition to ascertain within all of the records whether there were any wage violations. Opposition was filed on June 8, 2015. AA 399-446. Defendants reminded the court that plaintiffs' claims were based on fraud and fake breaks, which was not appropriate for class certification, *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 896 P.2d 1137 (1995), and questioned how a special master could determine whether breaks were fake. *Id.* Reply was filed July 13, 2015. AA 447.

On July 7, 2015, Jasminka Dubric filed an action against A Cab, on behalf

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[5]Plaintiffs argued that the DOL found that defendants did not keep sufficient records, but this was only the allegations in the DOL form complaint. There was no finding or admission of insufficient record keeping in the consent decree. *Id.*, Exhibits A&B.

of herself and a class of individuals similarly situated ("the *Dubric* action").[6] AA 1465.

On August 10, 2015, defendants filed a motion seeking a declaration that the appropriate statute of limitations was two years. AA 470. On the same date, defendants moved to dismiss the statutory claim. AA 571.

On August 19, 2015, plaintiffs filed a second amended complaint. AA 582. In this version of the complaint, plaintiffs detailed for the first time their theory of the wage underpayment. Plaintiffs' theory of the alleged underpayments was "forced fraudulent breaks." AA 586-87. The complaint does not allege a failure to pay minimum wage; it complains that plaintiffs were not paid for hours they worked. Plaintiffs alleged drivers were forced to write breaks in their "trip sheets," when they were actually working. *Id.* This complaint also added a third claim against Nady, owner of A Cab, for civil conspiracy, aiding and abetting, concert of action, and alter ego, and a fourth claim against Nady for unjust enrichment, all based on the claim that A Cab had failed to pay minimum wage. AA 590; 596.

On August 25, 2015, Reno's deposition was taken. Reno testified he had worked for various taxicab companies in town, including Frias Companies and Yellow Cab, and was suing A Cab because he made less money there than at the other companies. Reno had various complaints and was clearly upset with A Cab for its internal policies in enforcing penalties for being short on cash drops, not

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[6]The *Dubric* complaint is the only pleading from that case that has been made a part of the record in this action.

taking customer radio calls, and its strict customer service policies. His deposition lasted nearly 3 hours, with Reno addressing numerous gripes against his former employer, but with the glaring exception of any claim for minimum wage. When questioned about that issue, Reno's understanding was that the company was "stealing" from him, and the proof was in the fact that he was making less money.[7] AA 761-66.

On August 26, 2015, Murray was deposed. Murray never demonstrated any shortage of pay in his testimony, documents, or with any witnesses. He outright *refused* to answer questions as to the basis of his civil suit, asserting his Fifth Amendment privilege against self-incrimination. AA 717-19.

Relying on figures from DOL, defendants served Offers of Judgment at a value of more than 15 times the respective amount to each of these individuals on March 5, 2015.[8] Incredibly, during each of their depositions, both plaintiffs confirmed that they were completely unaware that any offer to resolve their claims had been extended to them by their former employer. Plaintiffs' counsel had not

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[7]Reno's claim was ultimately determined to be a shortage occurring in one week in which he was underpaid by a shortage in hours, not a minimum wage. It was determined to be a math error by supervisor Sam Wood, who added up 73 hours instead of 80 for that week. Per his deposition testimony, Reno never brought this error to the attention of anyone at A Cab. *Id.*

[8] The DOL determined Murray was owed $130.70, AA 756; an Offer of Judgment was extended for $7,500.00. AA 758. Reno was owed $1048.94, AA 803; an Offer of Judgment was extended to him for $15,000.00. AA 805.

communicated the offers to resolve to either client.[9] AA 794; 740-43.

On August 28, 2015, plaintiffs filed oppositions to defendants' motions, arguing for a four year statute of limitations, and that if plaintiffs were not paid for all the hours they worked, they were not paid a minimum wage. AA 600; 651. But a claim of failure to pay minimum wage is not the same as a claim that hours worked were not paid based on fraud.[10]

With seven days left in the discovery period, defendants again moved the district court for dismissal on September 21, 2015, indicating that each plaintiff must meet the minimum requirements for the district court to retain jurisdiction. AA 759; 806. It was clear the district court should dismiss for lack of subject matter jurisdiction and failure to state a claim. There was no evidence plaintiffs were owed anything; if they were owed, they had already been paid through DOL.

Responses to written discovery asking the basis of the claim merely made reference back to the complaint. In response to all the request for documents, there was never any documents to support plaintiffs' case, the responses merely stating, "the claim is up to the determination of the trier of fact." Despite being a claim for wages, plaintiffs refused to turn over any wage information or authorizations for tax or employment records. Further, there was never any

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[9]This violation of the NRPC 1.2 and 1.4, was brought to the attention of the district court. Judge Cory stated his court was not the proper forum to address attorney misconduct.

[10]If a person worked for a week and the employer refused to pay asserting the person never worked, that would not be a minimum wage claim; it would be a breach of contract claim.

calculation of damages as required by NRCP 16.1. AA 407; 446.

On December 21, 2015, the district court determined that a four-year statute of limitations arising from NRS 11.220 applied. AA 1172.

On February 10, 2016, the district court certified a class of all A Cab drivers from July 1, 2007 through December 31, 2015, although this included claims before the four year statute of limitations and 18 months after the decision in *Thomas*, which was time plaintiffs had not even requested. AA 1175. Although only claims of fraud and fraudulent break times had been asserted as the basis for the lawsuit, the district court asserted jurisdiction over the class to determine the non-existent minimum wage issue. *Id.* Also, the district court denied plaintiffs' motion to appoint a Special Master at defendants' expense, concluding, that "the underlying reasons advanced by plaintiffs [did not] provide a sufficient basis to place the entirety of the financial burden of such a process [reviewing documents to determine the amount of damages] upon the defendants." AA 1184. It was plaintiffs' burden to prove its case; a burden the district court would later impose on defendants.

In its order granting certification, the district court indicated that the consent judgment between A Cab and DOL showed that the two plaintiffs were owed unpaid wages. AA 1181. The consent judgment specifically stated no admission of liability was found or admitted; it was for settlement purposes only. AA 287. The district court also stated that the DOL had found A Cab had failed to keep records of hours worked, and had been admonished by the DOL regarding a failure to keep records. Both are incorrect statements and a misreading of the

documents in evidence. AA 1197-98. These false assertions were repeatedly flung at A Cab as findings of wrongdoing.

On February 18, 2016, the district court summarily denied defendants' motions to dismiss or for summary judgment. AA 1191-94.

On February 25, 2016, defendants moved for reconsideration of the order of certification. AA 1195-1231. The language of the order, drafted by plaintiffs' counsel, took considerable liberties with what the district court had actually ordered. AA 1242-46 (comparison of transcript to order).

In a minute order of March 28, 2016, the trial court indicated its concern that the case was 3½ years old and no discovery has been done. AA 1417. The court was clear in its assessment of the importance of calculating hours appropriately and providing proof of underpayments. *Id.* The court was also clear that it did not believe it was defendants' obligation to fund the discovery, nor to bear the burden of proof. *Id.*

On June 7, 2016, the district court denied reconsideration, and reissued its order of certification. AA 1420.

Meanwhile, the *Dubric* matter proceeded through significant discovery. On October 5, 2016, following a settlement conference before Judge Jerry A. Wiese, II, reached a proposed settlement that contemplated the certification of a class that plaintiffs believed would interfere with the class certified in this action. AA 3317.

Consequently, on October 14, 2016, plaintiffs filed a motion to enjoin the *Dubric* action. AA 1436. The motion for an injunction was not heard by the district court expeditiously, and the *Dubric* matter continued to proceed toward

settlement.

On October 27, 2016, this Court entered its decision in *Perry v. Terrible Herbst*, 132 Nev. 767, 383 P.3d 257 (2016), holding that a two year statute of limitation applies in minimum wage cases.

On November 17, 2016, following *Perry*, defendants moved for judgment on the pleadings to limit all claims to the two year statute of limitations. AA 1587. Defendants argued that plaintiffs' claims for relief prior to October 8, 2010 (two years before the complaint was filed) must be dismissed. *Id.*

In response, on December 8, 2016, plaintiffs filed a counter motion to toll the statute of limitations based upon a reading of the MWA. AA 1652. The MWA provides that "an employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin." Nev. Const. Art. 15, Sec. 16(A). Admitting that A Cab had timely provided notice of all minimum wage increases in the manner prescribed by the State Labor Commissioner, *i.e.*, by posting notice conspicuously at the place of business, plaintiffs argued that the Constitution requires personal and individual notice to each employee, which could only be satisfied by individual letters to each employee. The Constitution says nothing about the manner of giving notification, but plaintiffs argued that posting was not sufficient. *Id.*

The motion was heard on May 18, 2017. AA 3893. In its order of June 7, 2017, the district court stated that a more efficient notification process would be the process required by the State Labor Commissioner and used by defendants,

public postings. AA 4190-91. Nevertheless, Judge Cory opined the MWA is a constitutional provision that must be afforded the strictest construction. *Id.* The district court indicated it did not have liberty to rule in any other way but to find that A Cab violated the written notification requirement of the MWA by not giving individual notices to each employee. The remedy chosen was equitable tolling of the statute of limitations.[11] *Id.*

The district court ruled: "Class members who were employed on July 1st of each of the years in which a rate adjustment of the minimum wage occurred shall be afforded an equitable toll of their claims arising under the MWA from such July 1st forward. Based upon representations of counsel at the hearing, those dates were July 1st of 2007, 2008, 2009, 2010, and 2011. Defendants' motion is granted in part with respect to the claims of those class members which arose prior to October 8, 2010 and who also were not employed as taxi drivers by defendants on July 1st 2007, 2008, 2009 and/or 2010." AA 4191-92. In other words, if an employee was employed on July 1, 2007, and was not given an individual notice on that date, the statute of limitations was tolled back to July 1, 2007, and so on for each year of employment.[12]

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[11]This was based on federal cases where no notice of any kind was given, and so statutes were tolled. In this case, doing away with the statute of limitations based on the method of giving notice, where the notice given was clearly effective, hardly seems like an equitable remedy.

[12]As explained by the district court, if an employee were hired on July 2, 2007, he or she would get no tolling until July 1 of 2008, because he or she was not entitled to a notice of change in 2007 after July 1. That would mean claims for 2007 would be barred, but claims for 2008 forward would not be barred. An analysis of

Meanwhile, because of the district court's refusal to force defendants to fund the tripsheet analysis, plaintiffs chose a different route. On January 11, 2017, plaintiffs' moved for partial summary judgment for wages calculated from excel spreadsheets created by former cab driver Charles Bass at the direction of, and using numbers provided by, plaintiffs' counsel. AA 2190-2927. These spreadsheets provided a formula to plug in the estimated number of hours for each employee to be multiplied by the minimum wage to yield the amount of wages to be paid. But the numbers plugged into the formula were random, based on guesses as to hours worked, and on assumptions with no basis in fact. *Id.*

On January 12, 2017, plaintiffs moved to bifurcate the trial of the claims against Nady from claims against the other defendants. AA 2928. Bumping up against the five year deadline, and having done no discovery or work of any kind on the separate claims against Nady, plaintiffs were desperate not to lose their trial date, but to somehow maintain their claims against Nady. *Id.* On January 30, 2017, defendants opposed, because the issues of liability and damages in the claims against Nady are inextricably intertwined with the claims against the corporate defendants, citing *Verner v. Nevada Power Co.* 101 Nev. 551, 706 P.2d 147 (1985). AA 3067. Plaintiffs' motion was granted on July 17, 2017. AA 4305.

On February 2, 2017, defendants opposed plaintiffs' motion for partial summary judgment. AA 3119. Defendants included the DOL list of drivers who had already received payments of approximately $134,000, which were specific

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the hire dates of each employee is necessary to apply the district court's equitable tolling rule.

numbers, not estimates, and were not accounted for in plaintiffs' models. AA 3144. Defendants also demonstrated that the spreadsheets had no foundation; they consisted of a formula invented by plaintiffs' counsel and plugged in by a former cab driver. AA 3122. There was no one to authenticate the damages–there was no plaintiff to testify in support of the approximations, and no expert witness–only plaintiffs' counsel could serve as a witness to present these model spreadsheets to a jury, because he created them. AA 3124.

In response, plaintiffs argued that their spreadsheets "do[] not rely upon any expert opinion," and that the calculations "could have been performed by [] unskilled clerks." AA 3785. This is a Freudian admission.

On February 3, 2017, plaintiffs filed a motion to expedite issuance of an order granting their motion for an injunction of the action before Judge Delaney. AA 3194. Attached to that motion was a copy of the joint motion filed by the parties in the *Dubric* action before Judge Delaney, including a copy of the proposed settlement agreement and class certification. AA 3316-20. Judge Delaney never ruled on the fairness or validity of the settlement agreement, or on the proposed class certification, because Judge Cory derailed the action before Judge Delaney, issuing an *ultra vires* injunction against her.

Judge Cory scheduled a hearing on the motion for an injunction for February 14, 2017, at 9:00 a.m, knowing full well that Judge Delaney had scheduled a hearing on the joint motion for settlement in the *Dubric* matter for the same date and time. AA 3756.

Judge Cory expressed concerns about two class actions involving the same

class and issue before two departments of the district court at the same time, but he nevertheless recognized that he could not enjoin Judge Delaney. AA 3770. Judge Cory stated, "But I'm not going to be engaged in a road race with Judge Delaney to see who gets to have the case." AA 3777. Judge Cory stated he was not going to issue an injunction, but two days later, that is exactly what he did. On February 16, 2017, Judge Cory issued an order enjoining Judge Delaney from proceeding. AA 3775. Defendants appealed.

Plaintiffs' motion for summary judgment came before the district court on May 18, 2017. AA 3893. Plaintiffs asked the district court to accept its spreadsheets as evidence in support of alleged underpayments. *Id.* The spreadsheets were rejected by the district court as unreliable. In its order of July 14, 2017, the district court stated:

> 4. Having reviewed the materials presented, including the sample figures provided by plaintiffs' counsel allegedly showing how the damages could be calculated as a matter of mathematics, the Court concludes that it cannot grant the motion for partial summary judgment. The Court notes that from the presentation made by plaintiffs in the last letter from plaintiffs' counsel and the attachments, *the Court could not arrive at a simple calculation and could not understand how Mr. Bass' damages numbers were accomplished.* It appeared to the Court that it would require the services of an expert to help the Court or the trier of fact to understand the calculations.
>
> 5. The Court concludes that *there are genuine issues of fact remaining for trial* to a trier of fact, among other things, to determine what the correct calculation would be under any of the scenarios that have been put forward by the plaintiffs. Specifically, plaintiffs have presented numbers which plaintiffs claim can be arrived at by simple mathematics. There is dispute from defendants about whether plaintiffs can even use those numbers and arrive at correct calculations, but plaintiffs have argued that plaintiffs should not be heard to complain if plaintiffs use defendants' numbers from their own documents. But even were the Court to accept that argument, when the Court goes to the calculation, the Court cannot get from the raw numbers on the report to a final calculation. *The Court concludes that getting to a final calculation takes more in the form of an evidentiary nature, more of an evidentiary presentation than simply*

taking numbers off of this column and that column and performing simple arithmetic.

6. The Court further concludes that, *before the jury or trier of fact, plaintiffs will need to present something more than what they have presented to allow the jury to determine what the numbers mean, where plaintiffs got them, and how the damages have been calculated.*

AA 4301 (emphasis added).

The district court noted that the time for designation of experts and their reports on both sides had passed, but reopened expert discovery to provide plaintiffs yet another opportunity to designate experts and file reports. *Id.* The district court had previously extended the close of discovery two years from October 1, 2015 to September 29, 2017, and extended the expert deadlines again to June 30, 2017.[13] AA 4302. But plaintiffs had no intention of proving their damages. They wanted defendants to do (and pay for) that work.

On November 2, 2017, plaintiffs renewed their motion for partial summary judgment, still claiming they could prove damages based on alleged admissions of defendant and estimates based on excel spreadsheets. AA 4889-910. Plaintiffs asked that the burden of proving damages be placed on defendants. *Id.*

On November 3, 2017, plaintiffs filed a motion to bifurcate the issues for trial. AA 4911. Plaintiffs requested that they be allowed to use estimates instead of actual damages, and that the trial be limited to a determination of the average work shift, which could be multiplied by the number of employees, and plugged

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[13]As with every order in this case, entry of the order following the May 18, 2017 hearing was delayed until July 14, 2017. Plaintiffs were given 36 days to designate experts and file reports. *Id.*

into spreadsheets to determine damages as a matter of law. *Id.* Defendants argued that they kept records of the actual hours employees worked in the form of the tripsheets; and that evidence of approximation is inadmissible in lieu of the precise data. Opposition; AA 5123.

On November 27, 2017, defendants moved for summary judgment. AA 5031-5165. Defendants argued that plaintiffs had presented no evidence of any damages, had not proved the fraud claims alleged in their complaint, had not reviewed the tripsheets to prove any underpayments (although they had years to do so), that evidence showed A Cab had supplemented drivers' income to make sure minimum wage was always paid, and there was no class representative who had worked at A Cab during the relevant time period, among other issues.[14] *Id.*

Plaintiffs retained and disclosed two experts, Charles Bass (who plaintiffs never actually designated as an expert and admitted that he had no expert qualifications)[15] AA 5514-22, and Terrence Clauretie, and economist, who merely looked at the spreadsheets and confirmed the mathematical calculations therein were correct.[16] AA 5522. On December 22, 2017, defendants moved to strike plaintiffs' experts. AA 5510. Each expert conceded they were rubber stamping an

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[14]Murray no longer worked for A Cab after April 7, 2011; Reno's last date of employment was September 26, 2012; and Sergeant, an unnamed alleged class representative, only worked for A Cab for two months in May to July of 2014. *Id.* page 7.

[15]Bass was also a plaintiff in a similar pending action against Yellow Cab.

[16]He did not review any other documents and did not confirm that the methodology was sound, just that the multiplication had been done without error. *Id.*

opinion and a theory created by plaintiffs' counsel. *Id.* Defendants' motion to strike the experts was set for hearing on January 23, 2018. AA 5511.

On February 2, 2018, the district court entered an order granting in part plaintiffs' motion to bifurcate issues, and directing that plaintiffs did not have to prove actual damages based on the tripsheets,[17] but could instead present an approximation of damages to the jury "so long as there is a sufficient basis from which a reasonable inference of damages could be drawn." AA 6332. The court ruled that plaintiffs could not rely on the models they had previously presented. *Id.*

With the impending trial date of February 6, 2018 (and an impending expiration of the five year deadline), Judge Cory took extraordinary steps. On January 25, 2018, at the scheduled hearing for defendants' motion to strike plaintiffs' experts, Judge Cory did not hear the scheduled motion. AA 6203. Recognizing that plaintiffs could not prove their case and feeling a calling under the Constitution to rescue the plaintiffs, Judge Cory asked plaintiffs' counsel to orally renew his motion which had been denied in May 2015 for appointment of a Special Master, and granted it. AA 6205-06.

Judge Cory vacated the trial date, AA 6208, which was in two weeks, and

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[17]Although all cab companies rely on tripsheets to document time, and the district court acknowledged that the MWA "does not specify a particular medium in which employers must keep records," the district court concluded that tripsheets do not satisfy the statute because the statute "requires that employers keep a record of its employees' hours per pay period [and] trip sheets do not do so." *Id.* The tripsheets keep track of all time; that it is a big job to analyze the tripsheets does not make the method of record keeping non-compliant. This was manifest error.

appointed a Special Master to be paid by the Defendants to review the tripsheets, AA 6209, which the court determined was the only reliable way to find out what the damages were (as defendants had argued from the outset of the case). Judge Cory said he would not entertain any motion for reconsideration. AA 6210. Judge Cory stated that the claims would not require any determination by a jury, and would be conclusively established as a matter of law based upon the Special Master's analysis of the tripsheets. *Id.*

On February 7, 2018, the district court entered an order appointing a Special Master. AA 6386. Following the hearing, the project was originally assigned to a third party California firm, which estimated their analysis would cost approximately $250,000. AA 6239. Defendants objected, indicating their inability to pay this cost. AA 6385. Michael Rosten, an accountant in Las Vegas, was appointed in the Court's order, AA 6388, and defendants were ordered to make a down payment of $25,000 to begin the project. *Id.* In an order dated February 13, 2018, Ali Saad of Resolution Economics was substituted for Rosten. AA 6425.

A whirlwind of activity followed in district court, with motions and declarations[18] being filed almost daily. The upshot was that A Cab could not pay, and plaintiffs wanted to punish A Cab for not paying.

On April 6, 2018, this Court reversed Judge Cory's order enjoining Judge Delaney from moving forward with the *Dubric* settlement. Judge Cory, clearly

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[18]Plaintiffs' counsel made a practice of communicating with the court by filing improper "declarations," which because they were not motions did not get calendared for hearings and responses.

frustrated, was now in a race to judgment, which he intended to win.[19] Again the court reversed its course.

On April 17, 2018, plaintiffs moved to hold defendants in contempt for their failure to pay the Special Master.[20] AA 6681. Plaintiffs argued that A Cab was proceeding with the *Dubric* settlement, and running the clock on the five year deadline for this case, and that the court should use all of its power to stop A Cab. *Id.* On May 20, 2018, defendants responded, noting that Nady had not been personally ordered to pay the Special Master, and that A Cab was financially incapable of paying. AA 7065. At the hearing on May 23, 2018, Judge Cory denied the request to coordinate the cases, continued all other issues, and ordered that A Cab pay $41,000 to the Special Master. AA 10520

At a hearing on June 1, 2018, Judge Cory suggested the appointment of a receiver to find out whether A Cab really cannot pay, asked the parties to supply case authority regarding the appointment of receivers, and threatened to imprison Nady for A Cab's inability to pay. AA 10521.

On June 4, 2018, defendants provided cases addressing "inability to pay" as a defense to contempt, including *Rodriguez v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 120 Nev. 798, 102 P.3d 41 (2004), *Jura v. Cty. of Maui*, 582 F.

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[19]Judge Cory ultimately threatened to imprison Nady for his inability to pay the Special Master. AA 9796-97; 9819-20.

[20]Plaintiffs also sought to strike defendants answer, enter judgment by default, and to compel Judge Delaney to "coordinate" *Dubric* with this case (a thinly veiled attempt to delay *Dubric* by means other than an injunction), but having already been reversed for interfering in *Dubric*, Judge Cory declined. *Id.*

App'x 742 (9th Cir. 2014) (citing *Cutting v. Van Fleet*, 252 F. 100 (9th Cir. 1918)); *United States v. Drollinger*, 80 F.3d 389, 393 (9th cir. 1996). Defendants also supplied the case of *Hines v. Plante*, 99 Nev. 259, 661 P.2d 880 (1983), which holds that the appointment of a receiver is a harsh and extreme remedy to be used sparingly. AA 7360.

On June 5, 2018, with matters proceeding apace before Judge Delaney, Judge Cory conducted a hearing on plaintiffs' long-pending motion for partial summary judgment seeking $176,000, for the years from 2013-2015, which plaintiffs felt they could prove from their spreadsheets. AA 7386.

Judge Cory noted that he thought the motion sought $804,000 for the period from 2007 to 2012, based on the rejected excel spreadsheets, and counsel for plaintiffs told the court that "talking about anything prior to 2013 [was] getting the cart before the horse," AA 7395, because the motion did not address those issues. The district court stated that if defendants could not finance the Special Master, it was left with no choice but to enter summary judgment against defendants and to rely upon plaintiffs' spreadsheets and methodology to determine the amount of a judgment, even though it had previously deemed them unreliable and insufficient to go to a jury. AA 7397-99. Judge Cory acknowledged that the amount was not defensible, but blamed defendants because they allegedly had not kept sufficient records to make a fair determination easy for plaintiffs, and had refused to pay to prove the actual damages. AA 7398. Judge Cory asked what the evidentiary basis would be for using the spreadsheet numbers, and counsel answered that he believed that evidentiary analysis would render even larger damages. AA 7401.

So the evidentiary basis for the spreadsheets is nothing more or less than counsel's belief of what scientific analysis might show. *Id.*

In his apparent anger and frustration, and his zeal to vindicate the Constitution, as a sanction, Judge Cory entered summary judgment against defendants for the entire expanded time period at issue in the complaint, in an amount in excess of $1 Million, even though no motion seeking such a judgment was before the court. AA 7438-42. The judgment was not against Nady. *Id.* Plaintiffs argued that because the trial of the claims against Nady had been bifurcated from the other defendant, the order would qualify as a final judgment, but when defense counsel argued that bifurcation would not create finality, the district court instead severed the claims against Nady to create finality. AA 7448-51. The district court appointed a third Special Master to review defendants' financial records to confirm whether A Cab was truly unable to pay, but did not wait for that report before entering a finding of contempt against Nady personally. AA 7404-7406; 9799; 9824.

On August 22, 2018, the district court entered summary judgment in favor of plaintiffs on all claims in an amount reflected on the spreadsheets prepared by counsel, which added up to $1,033,027.81. AA 8676. The district court also severed plaintiffs' claims against Nady, declaring the judgment to be final. *Id.*

Five hours after entry of the district court's summary judgment, on August 22, 2018, plaintiffs filed a motion to amend the judgment to add a new defendant to the case, A Cab Series, LLC. AA 8742. Although the relationship between A Cab, LLC, and A Cab Series, LLC, had been explained to plaintiffs' counsel

multiple times since the onset of the case, plaintiffs claimed that A Cab Series, LLC, was the new name of A Cab, LLC., that they were one and the same entity, and a substitution should be made. *Id.*

On September 10, 2018, defendant opposed the motion to amend, pointing out that A Cab, LLC, and A Cab Series, LLC are two separate and distinct entities, and that one cannot add a defendant and make it subject to a judgment after judgment has already been entered. AA 8810.

On September 10, 2018, defendants filed a motion for reconsideration, a new trial and to dismiss for lack of subject matter jurisdiction. AA 8751. Immediately, and during the pendency of this tolling motion, plaintiffs began to aggressively execute on their judgment, taking money from the bank accounts of five separate entities plaintiffs claim are the alter egos of A Cab, LLC. This has resulted in separate lawsuits that will result in separate future appeals.

Refusing to recognize the difference between A Cab, LLC, and its separate series LLCs, and considering the series LLC statute to be unwise and an avenue for fraud, the district court ignored the statute, granted plaintiffs' motion, and added A Cab Series, LLC, as a separate defendant subject to its summary judgment, on October 22, 2018. AA 9302. The order does not merely make a name change or substitute A Cab Series, LLC, for A Cab, LLC; it adds A Cab Series, LLC, as a new defendant: "[T]he Clerk of this Court shall indicate on the records that the judgment originally entered by the Court on August 21, 2018 in this case is also entered against A Cab Series LLC; the current name of the originally summoned defendant and judgment debtor A Cab LLC." *Id.* A Cab

Series LLC is not "the current name of the originally summoned defendant." It is a separate entity.

On September 21, 2018, defendants filed their first notice of appeal. AA 8917.

On October 12, 2018, plaintiffs filed a motion for attorney's fees. AA 9143. On November 1, 2018, defendants opposed. AA 9414.

On October 17, 2018, shortly after this Court decided *Castillo v. United Fed. Credit Union*, 134 Nev. 13, 16, 409 P.3d 54, 57 (2018), defendants moved to dismiss, again raising the issue of the district court's lack of subject matter jurisdiction based on the insufficiency of the amount of plaintiffs' damages, specifically noting that aggregation of claims was not allowed in Nevada to meet the jurisdictional limit. AA 9278. As with all of the prior motions, defendants' arguments fell on deaf ears. AA 9916 (order denying, December 20, 2018.)

On January 15, 2019, after the district court entered several post-judgment orders, defendants filed their second notice of appeal. AA 9929.

On February 6, 2019, the district court entered its order granting plaintiffs' attorney's fees in the amount of $614,599.07, and costs of $46,528.07. AA 10220.

On March 5, 2019, the district court denied defendants' tolling motion. AA 10281.

On March 6, 2019, defendants filed their third notice of appeal. AA 10285.

SUMMARY OF ARGUMENT

Judge Cory, in his zeal to vindicate the Constitution whether or not a violation was proved, and in racing to enter a final judgment before Judge Delaney

could finalize a settlement pending before her, exceeded his jurisdiction.

The district court never had subject matter jurisdiction over plaintiffs' claims.

Plaintiffs alleged only fraud claims, *i.e.*, that drivers were forced to write in fake break times resulting in unpaid hours. This case should not have been certified.

The district court adopted a construction of the MWA notice requirement that tolled the statute of limitation out of existence.

The district court repeatedly found plaintiffs' methodology for its calculation of damages to be unreliable. Yet instead of dismissing, the district court ordered defendants to pay for work not completed by plaintiffs during discovery. When defendants were financially unable to pay a third party to conduct discovery, the district court reversed itself and used the unreliable evidence to support summary judgment, shifting the burden to defendants to prove the absence of a violation.

The district court added a party and made that party subject to a judgment that had already been entered, refusing to recognize the separate legal existence of that party.

The district court's award of attorney's fees and costs is an abuse of discretion.

DISCUSSION

I. Standard of Appellate Review.

This Court reviews whether a district court has subject matter jurisdiction *de*

novo. *Aspen Fin. Services, Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 878, 882, 313 P.3d 875, 878 (2013); *Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 374, 328 P.3d 1152, 1156 (2014) (whether personal jurisdiction has been established is a question of law that this court reviews *de novo*); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (subject-matter jurisdiction is a question of law that is reviewed *de novo*).

> This court reviews a district court's grant of summary judgment *de novo*, without deference to the findings of the lower court. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate that no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." This court has noted that when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.

Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

The addition of a party after final judgment is an error of law, which must be reviewed *de novo*. *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 611, 173 P.3d 715, 717 (2007) (district court's jurisdiction ends when final judgment is entered).

The district court's construction of the MWA is reviewed *de novo*. *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 98, 392 P.3d 614, 616 (2017).

The district court's award of attorney's fees is reviewed for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014).

II. The District Court Abused Its Discretion in Severing Claims.

On July 12, 2019, this Court dismissed Nady's appeal because "the district court's summary judgment order severed respondents' claims against [Nady] [and

the] severance created two separate actions." The order noted that "appellant contests whether the district court's severance was proper," and did not preclude that issue on appeal.

In *Valdez v. Cox Commc'ns Las Vegas*, 130 Nev. 905, 908, 336 P.3d 969, 971 (2014), this Court concluded that "a judgment resolving claims properly severed under NRCP 21 [] is appealable." By negative inference, a judgment on a claim that has not been properly severed is not appealable.

NRCP 21 provides that "the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." The Rule does not set forth a standard, other than "on just terms," but the severance of interrelated claims for the sole purpose of artificially creating finality cannot be considered just.

Although a district court has discretion to sever claims for legitimate purposes, it cannot sever claims in bad faith merely to create finality. In *Spencer, White & Prentis Inc. of Connecticut v. Pfizer Inc.*, 498 F.2d 358 (2d Cir. 1974), the Second Circuit dismissed an appeal *sua sponte* for lack of appellate jurisdiction, finding that the trial court had transparently abused its discretion when it simultaneously severed a main claim from a counterclaim and granted summary judgment on the main claim in order to make the summary judgment final for purposes of appeal, which was "in derogation of the finality requirements of 28 U.S.C. § 1291." *Id*. at 364. The Second Circuit stated:

> Facially the court's order of severance in reliance upon Rule 21 is suspect when it is read with its grant also of summary judgment on plaintiff's claims, especially in light of the assigned reasons. While application of Rule 42(b)11 involves primarily the consideration of convenience and fairness, that of Rule 21 also presupposes basic

> conditions of separability in law and logic. The terms of the court's memorandum and order negate the latter conditions and indicate that what it said in attempted justification for severance was self-defeating or at best would relate only to the matter of separate trials. We therefore conclude that the 'severance' was so transparently a confusion of Rule 21 with 42(b), or an attempt to separate an essentially unitary problem, that it should be disregarded out of hand as devoid on its face of any foundation for appellate jurisdiction or, at least, an abuse of discretion with the same result.

Id. at 362.

The same is true in this case. The district court's reasons for severing the claims have nothing to do with fairness or judicial administration; the district court transparently attempted to create finality by severing what is a unitary problem. It should be disregarded out of hand.

In considering whether to sever a claim under Rule 21, a court considers the following factors:

(1) whether the claims arise out of the same transaction or occurrence;

(2) whether the claims present some common questions of law or fact;

(3) whether settlement of the claims or judicial economy would be facilitated;

(4) whether prejudice would be avoided if severance were granted; and

(5) whether different witnesses and documentary proof are required for the separate claims.

SEC v. Leslie, No. 07–3444, 2010 U.S. Dist. LEXIS 76826, at *10,2010 WL 2991038(N.D.Cal. July 29, 2010) (quoting *Morris v. Northrop Grumman Corp.*, 37 F.Supp.2d 556, 580 (E.D.N.Y.1999)) (quoted in *Anticancer, Inc. v. Pfizer Inc.*, No. 11CV107 JLS RBB, 2012 WL 1019796, at *1 (S.D. Cal. Mar. 26, 2012).

Judge Cory did not consider whether the claims against Nady were separate

and divisible, or judicial economy, or the prejudice to the parties, or the proof required. He wanted to enter a judgment to vindicate the MWA. He wanted to create finality to beat Judge Delaney to judgment. The claims against Nady are not only intertwined and inter-dependant, they are derivative. The severance of the claims to defeat Nady's right of a timely trial (the five year deadline was approaching) and to create finality was such a palpable abuse that it must not be allowed to stand.

III. The District Court Had No Subject Matter Jurisdiction Over Plaintiffs' Complaint Based on the Amount in Controversy.

In order to meet the jurisdictional amount required for district court jurisdiction, plaintiffs had to aggregate the loss of the entire class. Not one of the class representatives had damages sufficient to independently qualify for district court jurisdiction; indeed, no member of the class had damages that would have met the jurisdictional minimum. Thus, the case should have been filed in justice court.

At the time the original complaint was filed and served, and at the time each amended complaint was filed and served, and at the time the judgment was rendered, the law in Nevada was that class representatives could not aggregate their claims, and could not aggregate the claims of the putative members of the class, to satisfy the jurisdictional minimum; at least one class representative had to have suffered damages sufficient to satisfy the district court minimum; otherwise, jurisdiction over the case was in justice court. In dozens of motion papers and at every hearing over a period of years, defendants argued consistently that the damages claims were minimal and insufficient to support the district court's

jurisdiction, but the district court denied every motion. Because the district court never had subject matter jurisdiction over plaintiffs' complaint, everything it did is void.

A. Nevada's District Courts Are Courts of Limited Jurisdiction.

Prior to 1978, the Nevada Constitution allowed district courts and justice courts to exercise concurrent jurisdiction in some areas. In 1978, Article 6, section 6 of the Nevada Constitution was amended to provide: "The District Courts . . . shall have original jurisdiction in all cases excluded by law from the original jurisdiction of the justices' courts." In *K.J.B. Inc. v. Second Judicial Dist. Court*, 103 Nev. 473, 475, 745 P.2d 700, 701 (1987), this Court declared that district courts have no original jurisdiction in matters in which justice courts have original jurisdiction. In short, concurrent jurisdiction between district and justice courts cannot exist.

This remains the constitutional law in Nevada today. Recently this Court declared:

> Justice courts only have original jurisdiction as specified by statute, whereas district courts "have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const. art. 6, § 6(1); see also NRS 4.370(1) (2017).

Castillo v. United Fed. Credit Union, 134 Nev. 13, 16, 409 P.3d 54, 57 (2018).

As recognized in *Castillo*, unlike in many states, in Nevada both district and justice courts have subject matter jurisdiction to entertain class action suits. *See* NRCP 23 & JCRCP 23. Thus, a class action claim that falls under the jurisdiction of justice court cannot ever fall under the jurisdiction of district court, and vice versa. Concurrent jurisdiction is constitutionally prohibited. A party cannot

choose which court has jurisdiction; jurisdiction must be determined as a matter of law.

In this case, jurisdiction is determined by the amount in controversy. NRS 4.370 declares that in almost all civil actions where the amount in controversy is $15,000 or less, jurisdiction lies in justice court. By process of elimination, where the amount in controversy is greater than $15,000, jurisdiction lies in district court.[21] The parties do not choose the court that suits them; the correct court must be chosen based on the amount in controversy.

In this case, no class representative and no putative member of the class arguably had a claim even approaching the minimum amount required for district court jurisdiction. Thus, jurisdiction was exclusively in justice court. This result is inescapable based on the constitutional and statutory analysis above. The only way plaintiffs can reach the statutory minimum is by aggregating claims. But aggregation of claims cannot be allowed without violating the Nevada Constitution.

Faced with this issue and in light of the undeniable fact that a class action can be brought in justice court in Nevada, this Court correctly determined in *Castillo* that the claims of the class members must not be aggregated to meet the statutory minimum, because to do so would violate the Nevada Constitution. But following this Court's declaration in *Castillo*, this Court attempted to change that result by amendment of NRCP 23 (without a corresponding amendment of JCRCP

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[21]The amount specified at the time this action was filed was $10,000, but either way, the result is the same.

23). The new rule on aggregation cannot be applied in this case for two reasons: (1) this Court exceeded its jurisdiction in amending the Rule; and (2) this Court cannot apply an amended Rule retroactively.

B. The Amendment of NRCP 23 Did Not Retroactively Confer Jurisdiction on the District Court.

In *Castillo*, this Court held that "in Nevada, aggregation of putative class member claims is not permitted to determine jurisdiction." *Id.* at 14, 409 P.3d at 56. There can be no doubt that at the time plaintiffs filed each of their complaints, based on Nevada law, the district court had no subject matter jurisdiction to entertain the action. Whenever it appears by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction, the court must dismiss the action. NRCP 12(h)(3); *see Morrison v. Beach City LLC,* 116 Nev. 34, 38, 991 P.2d 982, 984 (2000) (when a court concludes to a legal certainty that a plaintiff cannot recover the amount of damages necessary to establish jurisdiction, dismissal for want of jurisdiction is appropriate).

Shortly following *Castillo*, as part of this Court's overhaul of the rules of civil procedure, this Court amended NRCP 23 by adding NRCP 23(b), which allows the aggregation of damages of putative class members to meet the district court's jurisdictional minimum. The amendment became effective on March 1, 2019, rendering JCRCP 23 nugatory and ignoring the Constitutional and statutory analysis set forth above.

This Court may make rules not inconsistent with the Nevada Constitution and the laws of Nevada for its own governance. NRS 2.120. But this Court cannot create its own subject matter jurisdiction, nor can it create, modify, extend

or restrict the subject matter jurisdiction of the district or justice courts. That jurisdiction can only be created by the legislature. *K.J.B. Inc. v. Second Judicial Dist. Court of State of Nev., In & For Washoe Cty.*, 103 Nev. 473, 475, 745 P.2d 700, 701 (1987).

The questions becomes (1) whether the decision in *Castillo* was constitutionally and statutorily mandated, or was merely based on a construction of the rules of this Court; (2) whether the subject matter jurisdiction of the district court can be created or altered by court rule; and (3) whether the change to NRCP 23 is substantive or procedural, *i.e.*, is it a rule for the governance of the courts (authorized) or a substantive rule of jurisdiction (not authorized).

The amendment to NRCP 23 has undoubtedly created concurrent jurisdiction between the justice and district courts over class actions, a result prohibited by the constitution. The amendment creates confusion over whether and when each court should exercise jurisdiction over such suits.

Assuming this Court's jurisdiction to alter by rule amendment the subject matter jurisdiction of the lower courts established by statute and existing for decades, NRS 2.120 prohibits the retroactive application of court rules. See *Nevada Pay TV v. Eighth Judicial Dist. Court*, 102 Nev. 203, 205, 719 P.2d 797, 798 (1986) ("this Court is precluded from giving amendments to court rules retroactive application").

Nothing in the amendment to NRCP 23 states that it was intended to create jurisdiction in district courts over actions previously filed over which the district court had no jurisdiction when the action was filed (and in this case when the

judgment was rendered). *See Castillo*. This is not a procedural change; it makes a fundamental, substantive change in the subject matter jurisdictions of both the district and the justice courts, as declared by this Court in *Castillo*.

Although the existence of jurisdiction in justice court based on JCRCP 23 informed this Court's constitutional analysis, it seems unlikely this Court may undertake to change subject matter jurisdiction by court rule. The justice courts have not lost their jurisdiction over class-action suits, and the declaration of Article 6, § 6 of the Nevada Constitution that justice courts and district courts are precluded from ever exercising concurrent jurisdiction has not been altered. Even assuming the validity of the amendment to NRCP 23, that amendment could not breath life into a complaint that was filed in the wrong court at the time it was filed. This Court should therefore declare that plaintiffs' action was filed in the wrong court, and that the district court did not, as a result of the lapse of time and/or the unforseen amendment to NRCP 23, obtain subject matter jurisdiction over the action it had no jurisdiction to consider. NRCP 23 cannot be applied retroactively.

C. The Judgment of the District Court is Void.

Plaintiffs' complaint was filed at a time when according to *Castillo*, the justice courts had exclusive subject matter jurisdiction over class action suits where the class representatives' claims were not sufficient to invoke district court subject matter jurisdiction. At that time, any decision rendered by the district court would have been void as a matter of law. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) (decision rendered where there is no subject matter

jurisdiction is void).

If a district court lacks subject matter jurisdiction, the judgment rendered is void. In *Univ. of Nevada v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979), the issue was whether the district court obtained subject matter jurisdiction when it failed to join a necessary party. In holding that the district court had no subject matter jurisdiction, this Court stated: "Thus the question of waiver is not appropriate to the determination of this issue, and the trial court or the appellate court may raise the issue *sua sponte*. *Johnson v. Johnson*, 93 Nev. 655, 572 P.2d 925 (1977)." *See also, Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("As an initial matter, whether a court lacks subject matter jurisdiction 'can be raised by the parties at any time, or *sua sponte* by a court of review, and cannot be conferred by the parties.' *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). However, if the district court lacks subject matter jurisdiction, the judgment is rendered void. *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984)."

D. Subject Matter Jurisdiction Cannot be Waived and May be Raised at Any Time.

"[S]ubject matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court of review." *Vaile v. Dist. Court*, 118 Nev. 262, 276 44 P.3d 506 (2002). NRCP 12(b)(1) allows defendants to file a motion to dismiss claims for a lack of subject matter jurisdiction. Although the defendant is the moving party, the plaintiff is the party invoking the court's jurisdiction. The plaintiff therefore bears the burden of proving the court has subject matter jurisdiction over the pending case. *Morrison v. Beach City LLC*, 116 Nev. 34,

36-37, 991 P.2d 982, 983 (2000).

E. Only the Nevada Legislature Can Change the Jurisdictional Limits of Nevada's Justice and District Courts.

"The separation of powers; the independence of one branch from the others; the requirement that one department cannot exercise the powers of the other two is fundamental in our system of government." *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967). Judicial power arises from the judicial powers and functions granted to Nevada's courts in the Nevada Constitution. *Id.*, 83 Nev. at 20, 422 P.2d at 242-43. "The judicial department may not invade the legislative and executive province." *Dunphy v. Sheehan*, 92 Nev. 259, 265, 549 P.2d 332, 336 (1976) (citing *State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969)). Thus, this Court cannot by court rule extend, limit or modify the subject matter jurisdiction of justice or district courts. *See* NRCP 82 (recognizing that court rules do not change jurisdiction).

By amending NRCP 23 but not amending JCRCP 23, this Court has dramatically altered the subject matter jurisdiction of both courts. It is doubtful this Court could make such a dramatic change without direct legislative authority.

F. The District Court Did Not Have Subject Matter Jurisdiction Based on Plaintiffs' Summary Request for an Injunction.

In *Castillo*, the district court did not have jurisdiction based on the aggregation of claims, but this Court still found that the district court had jurisdiction because the plaintiff had pleaded a claim for an injunction. Specifically, this Court stated: "[W]e conclude that because appellant sought appropriate injunctive relief, the district court possessed original jurisdiction." *Castillo*, 134 Nev. at 19, 409 P.3d at 59 (2018). Nevertheless, before so

concluding, this Court examined the claim for an injunction, and determined it was genuine because "appellant alleged actual and threatened injury." *Id.*

In this case, plaintiffs' claims for injunctive relief are a non-issue, because their claims ceased as of December 31, 2015. AA 1184. Despite plaintiffs adding the word "injunctive relief" to their complaint, AA 6, there is no indication that plaintiffs were at any time actually seeking an injunction, particularly in light of the fact that the class representatives were no longer employed by A-Cab, and there was no indication of any continuing violation. Plaintiffs never moved for an injunction and never attempted to demonstrate an "actual and threatened injury."

An injunction is appropriate when monetary damages are inadequate. *See Czipott v. Fleigh*, 87 Nev. 496, 499, 489 P.2d 681, 683 (1971). However, "injunctive relief is not available in the absence of actual or threatened injury, loss or damage." *Berryman v. Int'l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388 (1966). "There should exist the reasonable probability that real injury will occur if the injunction does not issue." *Id.* at 280, 416 P.2d at 389; *Castillo*, 409 P.3d at 59. Plaintiffs did not plead a claim for an injunction, and the district court did not obtain jurisdiction over plaintiffs complaint on this basis.

IV. The District Court Erred in Extending the Two Year Statute of Limitations for Minimum Wage Claims.

A. The Minimum Wage Amendment Rate Adjustment Provision.

This Court decided in *Perry v. Terrible Herbst*, 132 Nev. 767, 383 P.3d 257 (2016), that a two year statute of limitations applies in claims for underpayment of minimum wage. The district court ignored *Perry*.

In relevant part, the minimum wage amendment provision provides:

> An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin.

Nev. Const. Art. 15. Sec. 16A. Plaintiffs argued that this requires that each employee be given a separate, written notification of minimum wage rate adjustments. The district court ruled that specific, individual notices are required, and that a general posting of notice is not sufficient.

It was undisputed that A Cab followed all instructions from the State Labor Commissioner to post all posters and signs in a common area addressing the State minimum wage, FLSA, OSHA, workers compensation, and all other required notices. There is no requirement from the State Labor Commissioner to hand a notice to each employee; yet, the district court concluded the MWA required such notice, and retroactively stretched the statute of limitations five years, outside of the record keeping statutes for employers–a consideration for this Court's ruling in *Perry*. Nothing in the language of the MWA requires or justifies such a requirement.

Thousands of employers in Nevada have given notice by posting as did A Cab. The implications of a wholesale abrogation of the statute of limitation are staggering. A Cab posted in a prominent location known to all cab drivers notice of the current rate of the minimum wage, and notice of every adjustment to the rate of the minimum wage, in the form provided by the DOL. This notice was prominently posted and current at all times relevant to this litigation, as conceded by plaintiffs' counsel at the hearing of this issue. AA 3903-04. No other facts are necessary to this Court's resolution of the proper construction of the MWA.

Assuming the MWA requires that individual notices, and assuming drivers

were not given individual notice, the question of remedy is raised. The answer is not to equitably toll the statute of limitation. that result that has little or nothing to do with the notice requirement.

The cab drivers were aware of their rights under the MWA. The cab drivers were aware of the actual rate of the minimum wage. No information was withheld from plaintiffs. The district court applied its "reluctant" construction of the Nevada Constitution in a most absurd manner.

B. The District Court's "Nonpragmatic" Interpretation Does Not Justify Tolling the Statute of Limitations.

This issue boils down to construction of the word "each." The MWA requires that employers give written notice "to each of its employees." The district court determined that "each" requires separate notices; a collective notice posted where all employees can see is not sufficient.

Posting notice in a conspicuous place known to all employees as the place where they receive important notices satisfies the MWA. This is the manner in which notices are routinely given to employees with respect to almost all notices required by state and federal law. The MWA suggests no other requirement.

"Each" is not synonymous with individual. In this context, "each" is applied to the employees, not the notification (which is singular in the text). The MWA does not say "separate notifications shall be given to each employee;" it says "notification shall be given to each employee." (Paraphrased.) A single notification can be given to multiple recipients. The MWA is silent as to the required method for giving notice to each employee.

The posted notice is written. It has been given to every employee by

posting it where every employee may read it. The non-pragmatic, overly technical reading the district court gave to the MWA is not required by the language of the Constitution. It is not a wise construction as a matter of public policy. There is no indication in the history of the MWA that such a restrictive reading is warranted.

Counsel's insistence that the MWA requires that each individual receive a separate piece of paper finds no support in the language of the MWA. Notice to all is necessarily notice to each.

At the hearing, the district court postulated correctly that the sole source of resolving this issue would be a construction of the language of the MWA itself. AA 3903. The district court then asked:

> THE COURT: Why would we -- assuming that I agree with you that -- and I must tell you both that the lay of the land is I have frankly tried to talk myself out of a very literal application of this because it seems to me generally speaking the law, you know, is more concerned with effective notices where you're talking about notices, as opposed to some precise, exact way to do it.[22] However, I am leaning towards finding that the interpretation that Mr. Greenberg is arguing for probably is correct, that to satisfy the Constitution it is necessary to give the written notification to each of the employees.
> . . . .
> THE COURT: So, Mr. Greenberg, why -- assuming that I agreed with your interpretation, even, why do you jump from that to the notion that there must be some equitable tolling?

AA 3907-08.

Counsel argued that tolling should follow any violation of any notice provision. Counsel was unable to articulate any reason for tolling the statute here.

Against its own better judgment, the district court granted plaintiffs' motion

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[22]Despite recognition that the law is concerned with notice, rather than the method of notice, the district court myopically adopted "a very literal application" of the MWA, construing it to require individual pieces of paper to every employee.

for equitable tolling, explaining its decision as follows:

> THE COURT: Okay. It is definitely, as everyone has conceded, not a 4-year statute, it's a 2-year statute [of limitation]. I feel compelled to interpret the Constitution in the way that the plaintiff has argued for here and I do so reluctantly because it requires so much more than posting of such a thing. It wouldn't matter how big a print, how -- it wouldn't matter if they broadcast it over a P.A. system, if it didn't do what this language in the Constitution says then it would not comply. And that's essentially what I feel compelled to hold. I generally speaking am much more in favor of more practical approaches to say that, you know, something adequate, sufficient notice, something of that sort. But I think that Mr. Greenberg's argument that the literal language of the Constitution and I guess the fact that it is in the Constitution I feel it's entitled to more respect, if you will, judicial respect and careful and assiduous application, even a broader application than perhaps statutory language. I have a great regard for constitutions, both the Constitution of the United States and the Constitution of the State of Nevada. It's not a question of how I think it should be done, it's a question of does this language mean that literally written notice must be given to each driver, and my holding is that that is what the language says.
>
> The next question is whether that then provides an equitable tolling, and I must -- again, I feel compelled to hold that it does; once again because of the broad statement in another part of the Constitution which says an employee claiming the 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, injunctive relief. The best I can do is to say I think that principles of constitutional application and interpretation require this result.

AA 3913-14.. Later the district court explained:

> THE COURT: . . . I tend to where possible think what's pragmatic is what works, is what passes muster under the law. I'm afraid I don't think so in this case. To do so I would be modifying, I would be -- I don't know, just not doing what the Constitution appears to me to specifically require.

AA 3918-19. The error in the district court's reasoning is patent in these excerpts.

This Court should be guided by common sense, sound judgment, and considerations of public policy and effective administration. The district court's decision punishes A Cab in a manner unrelated to fault. A Cab had every reason

to believe that by posting the notice supplied by the Department of Labor, it was in compliance with the law. The district court's ruling would require employers across the state to send separate notices each time the minimum wage is increased, at the peril that the failure so to do may strip them of defenses in cases unrelated to the rate of the minimum wage. Future notices will not remedy past failures, assuming there have been any. The lives of many businesses hang in the balance.

C. Even if Individual Notices Are Required, the Failure to Provide Such Notices is Not a Legal Basis for Tolling the Statute of Limitation.

Tolling of limitation periods is allowed as a matter of equity to ameliorate the harsh result of applying a bar to a claim the claimant had no way of knowing he or she had. It has never been used to penalize a defendant for an unintentional violation of a statute, when that violation is unrelated to the claim being brought.

In *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011), this Court allowed equitable tolling of a filing deadline, which this Court determined was a statute of limitation, stating:

> As recognized by the Ninth Circuit Court of Appeals, equitable tolling "focuses on 'whether there was excusable delay by the plaintiff: If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.' " *Lukovsky v. City and County of San Francisco,* 535 F.3d 1044, 1051 (9th Cir.2008) (quoting *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir.2002)); *see also* Black's Law Dictionary 618 (9th ed. 2009) (equitable tolling is defined as "[t]he doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired").

The focus is on the knowledge of the plaintiff, not the actions of the defendant (except to the extent that the defendant interferes with the plaintiff's

ability to learn of a claim). In this case, there is no indication that any plaintiff did not bring his or her action for underpayment of a minimum wage because he or she was unaware or could not have discovered the existence of that claim. With diligent effort, plaintiffs could have, and should have, discovered the readily available facts necessary to their present claim, a claim that is not dependent on any adjustment to the rate of the minimum wage.

This Court has set forth the factors to consider in determining whether to apply equitable tolling in a particular case as follows:

> Without limiting or restricting the application of the doctrine of equitable tolling, we note that there are several factors which have been mentioned by the above authorities in determining whether the doctrine should apply in a given case. Those factors include: the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the limitations period is tolled; and any other equitable considerations appropriate in the particular case.

Copeland v. Desert Inn Hotel, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (holding limited on other grounds in *Siragusa v. Brown*, 114 Nev. 1384, 1394, 971 P.2d 801, 808 (1998)).

Applying these factors to this case (something the district court did not do), the claimant is a class. Those class members who did not claim they had been underpaid within the statutorily limited period were not diligent in pursuing their claims. The claimants had knowledge of the facts relevant to their claims, or should have had knowledge upon reasonable inquiry, and they were specifically aware of the rate of the minimum wage: It was posted at all times for them to see at a conspicuous and designated area for notices at their place of employment. There

is no administrative agency involved in this case, and to the extent this element could be applied as referring to A Cab, there is no element of reliance in this case on incorrect information supplied by A Cab. Indeed, it has been conceded that A Cab posted the correct information for all to see at all relevant times. There have been no allegations of deception or fraud against A Cab with respect to the only matter at issue in the notices, adjustments to the rate of the minimum wage. Finally, the prejudice to A Cab at having the statute of limitation ignored is great. All factors indicate that there should be no tolling in this case, because tolling is not necessary in equity to remedy a wrong that has not prejudiced plaintiffs' ability to timely pursue their claims.

V. The District Court Erred in Entering Summary Judgment.

On the eve of trial, with the *Dubric* matter proceeding to judgment, the district court entered summary judgment *sua sponte* at a hearing where no motion for that relief was pending, to vindicate the Constitution and out of frustration that plaintiffs had failed to present a case. To understand the absurdity and the utter shock to the parties of this action, one must simply look at the district court's own words and prior rulings, which contradict its unprecedented actions taken on the eve of trial. In granting summary judgment, the district court ignored all law on summary judgment.

Summary judgment may be granted only when there are no material issues of fact that should be tried by a jury, and when one party is entitled to judgment as a matter of law based on the undisputed facts or, assuming a dispute regarding the facts, based on the facts as represented by the party against whom summary

judgment is sought. NRCP 56; *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985); *see Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026 (2005). Summary judgment was not even sought by plaintiffs in this matter; the district court entered summary judgment on its own motion. Clearly, there were issues of fact in this case, and plaintiffs did not demonstrate that they were entitled to judgment as a matter of law.

A plaintiff has the burden of proving each and every legal element of his claims, including liability and damages. *Bulbman Inc. v. Nevada Bell*, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992); *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975). "Where an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper." *Bulbman*, 108 Nev. at 111, 825 P.2d at 592. *See Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 956 P.2d 1382, 1386 (1998). Rather than granting summary judgment in favor of plaintiffs, where they had no proof of liability or damages, the district court was obligated to grant *defendants'* many motions for summary judgment.

During discovery, everything plaintiffs needed to prove their case was provided, but they refused to analyze the documents. Multiple hearings were held before the Discovery Commissioner, with A Cab objecting to wasteful and unnecessary production of documents unrelated to a minimum wage claim. All payroll information was produced to demonstrate what each driver was paid, and the tripsheets were produced, evidencing all hours worked by each driver. If a driver sought clarification of his paystub, the backup documentation was readily

available and could be provided to the driver pursuant to NAC 608.155.

In plaintiffs' first three attempts to rely on spreadsheets "an unskilled clerk could produce" rather than on evidence, the district court rejected the speadsheets and their methodology. The district court extended discovery to allow plaintiffs to get experts, which the court said was necessary, but the two experts plaintiffs retained conceded they were rubber-stamping an opinion and a theory created by plaintiffs' counsel. Both admitted they had no opinion on actual damages.

Defendants' motion to strike the experts was set for hearing on January 25, 2018. Recognizing that plaintiffs' experts could not prove plaintiffs' case, the district court took heroic efforts to rescue plaintiffs and vindicate the MWA by appointing experts of its own, at defendants' expense, reversing its position that this was plaintiffs' obligation, but still recognizing that real evidence was required.

When defendants were incapable of financing plaintiffs' late and forced discovery, the district court simply decided to dispense with the obligation of evidence, and instead rely on what it had thrice determined was not evidence to support an award, because he was losing the race to judgment and had an obligation to honor the constitution by awarding plaintiffs something because he was convinced that A Cab owed something.

With no proof whatsoever of either liability or damages, the district court would vindicate the right of the poor cab drivers to minimum wage even if the award was based only on what the court acknowledged was a faulty foundation, justifying the award because it was defendants' fault their documents did not provide an easy method of arriving at real damages without the necessity of

analysis of the tripsheets, which analysis the court always acknowledged would yield an actual damages figure supported by real evidence.

In short, seeing his baby getting away from him, Judge Cory punted the obligation of evidence in favor of vindicating a wrong he perceived, but which neither he, his appointed experts, nor plaintiffs had proved.

Plaintiffs argued for an "estimate" approach based upon *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-687 (1946). *Anderson* involved a claim for wages not paid under the FLSA. The employees claimed to have been actually working at times when they were not allowed to be clocked in. The defendant did not keep records of the time the employees claimed to have worked outside of clocked in time. The Court stated that the employee had the burden of proving that he performed work for which he was not compensated, but the burden was not intended to be impossible. Where no records existed, the employee could "prove[] that he has in fact performed work for which he was improperly compensated [] if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 687–88. The Court stated: "When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records." *Id.*

The Court in *Anderson* did not relieve the employee of his or her burden to analyze records that exist, not did it allow the employee to simply guess at an amount of time worked. The employee was required to present evidence to show the amount of time worked "as a matter of just and reasonable inference," and the employer was entitled to an opportunity to rebut the evidence. In this case, the records have always existed from which actual time and pay can be calculated; plaintiffs simply chose not to analyze the documents.[23] And the method of estimation by plaintiffs is hardly just or reasonable, nor should conjecture be afforded any inference. Most importantly, defendants were deprived of a trial, and of all opportunity to rebut the estimates. The district court simply entered a judgment in an amount it knew was not defensible because it was frustrated that plaintiffs had presented no evidence and it blamed defendants for plaintiffs' failure.

From commencement of the action to the end, defendants continuously demonstrated that plaintiffs had no proof of liability or actual damages. The district court erred by not dismissing at multiple opportunities where it should have been obvious both by suggestion of the parties and otherwise that the district court lacked subject matter jurisdiction. But in his zeal to defend the Constitution

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[23]Plaintiffs' claims were of fraudulent breaks; breaks are handwritten by the driver in the tripsheets. Plaintiffs made no attempt to prove the existence of the breaks, let alone that they were fraudulent.

Further, A Cab kept complete and detailed records. The argument that A Cab was required to keep some other form of records not specified by statute and failed to do so was specious, and the district court's rulings on the records issue shows just how far Judge Cory was willing to go to advocate for plaintiffs.

and based on his prejudgment that A Cab was guilty of something, the district court instead entered summary judgment on the basis of conjecture alone. This cannot be condoned.

At the end of the day, there was no evidence to support plaintiffs' claim of fraudulent break times. There was no evidence that minimum wage was not paid to every employee. Plaintiffs never did a computation of actual damages because they never reviewed the tripsheets during discovery. Plaintiffs' two experts rendered no opinion or support for any of plaintiffs' claims. Both should have been excluded, but the district court avoided that reality and its consequences. Inexplicably, the district court found liability after hearing and rejecting the same motion on five separate occasions; and then determined it was just a matter of damages to be postulated by plaintiffs and refuted by defendants.

The burden to prove a lack of triable issues of fact was on plaintiffs, not defendants. The burden to present admissible evidence that would support an award of damages was on plaintiffs, not defendants. The burden to prove entitlement to a judgment as matter of law was on plaintiffs, not defendants. But the district court threw the law and the right of trial out the window, sacrificed on the sacred alter of vindicating the Constitution regardless of proof of a violation. More palpable error can hardly be imagined.

VI. The District Court Erred in Allowing Addition of a New Defendant post-judgment, and disregarding the Series LLC.

A. Additional Facts.

By adding a party after final judgment, plaintiffs sought to circumvent the basic rules of civil procedure. Plaintiffs did not amend their complaint pursuant to

NRCP 15. The last date to amend to add parties was July 2, 2015. In over five years of litigation, plaintiffs never sought to add A Cab Series, LLC. Instead, plaintiffs sought to add a new entity only *after* judgment was entered. The corporate documentation pertaining to A Cab Series, LLC was available to plaintiffs prior to the filing of their original complaint on October 12, 2012. *See* Restated Articles filed February 16, 2012; AA 8816.

A Cab Series, LLC, was incorporated as a Series limited liability corporation pursuant to NRS 86.296. *Id.* Subsequently, pursuant to NRS 86.296(2), A Cab Series, LLC, Maintenance Company; Cab Series, LLC, Administration Company; A Cab Series, LLC, Taxi Leasing Company; A Cab Series, LLC, Employee Leasing Company, A Cab Series, LLC, Medallion Company; and others (hereinafter "separate series entities") were created. These entities operate independently from A Cab LLC, and have their own books and records. They were created and at all times have operated in strict compliance with NRS 86.296(2).

On October 22, 2018, months after the judgment was entered, the district court added A Cab Series LLC as a judgment debtor. AA 9302. At that point and continuing to this day, plaintiffs have aggressively collected against A Cab Series LLC, and the other separate series entities, insisting that they are all one entity subject to the judgment, stealing the funds of entities that are complete strangers to this litigation.

On September 11, 2018, plaintiffs began execution of the judgment by serving a writ of execution upon Wells Fargo Bank, claiming "any bank account or

funds . . . belonging to judgment debtor A Cab LLC or A Cab Taxi Service LLC."[24] The writ was not directed to nor did it reference any other entity.

Upon receipt of the writ on September 17, 2018, Wells Fargo froze all funds from all entities which included the name "A Cab," including the individually denominated accounts of the separate A Cab entities. AA 8895.

The separate A Cab entities received no notice of the writ, but upon learning that their assets had been attached, filed timely claims for exemption. AA 9091-9132. Defendants also made a timely claim of exemption, which was addressed in an order entered on December 18, 2018. AA 9865. The order did not explicitly address the exemptions of the separate A Cab entities. *Id.*

On September 21, 2018, defendants filed a motion to quash the writ of execution. AA 8892. Defendants provided sworn declarations attesting to the corporate personhood, with the statutory requirements for existence, operations, and finances. *Id.*

At the hearings, defendants were not permitted to offer sworn testimony or to conduct an evidentiary hearing discussing the separate nature of the entities. AA 9378. The district court held it was "not the time to take evidence, frankly." *Id.* The district court's concern was to satisfy the judgment, regardless of whether the funds taken belonged to the judgment debtor. The district court concluded that the limitation of liability established in NRS 86.296 does not limit liability of all of the separate entities in the series, or provide protection from liability for violations of the MWA. The MWA trumped all statutory exemptions from liability, even as

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[24]As noted previously, there is and never has been any such entity.

to non-party separate entities whose relationship with the debtor had never been proved (or even raised). AA 9380-84. In other words, the series and all of its separate entities were one and the same entity for purposes of the MWA, the statute notwithstanding.

On December 18, 2018, the district court denied defendants' motion to quash, citing as primary basis the defendants' lack of standing. AA 9865. The court concluded the "allegedly separate, non-party 'series' LLC entities . . . have not appeared in this case." AA 9871. The court acknowledged NRS 86.296 hypothetically provided for separate entities, but concluded that defendants had not provided sufficient evidence to establish that the property at issue belonged to the separate entities, despite proffered testimony and documents. AA 9873-74. The court did not determine that defendants were the alter ego of separate A Cab entities.[25]

B. NRS 86.296 Permits Series of Limited Liability Corporations.

NRS 86.296 creates and protects the Series LLC as a separate business organization. The business organization that functions as a series LLC was created by the legislature in 2001. The rights and liabilities of such entities are found within the four corners of the statute.

The statute authorizes the creation of separate entities as a series of existing limited liability corporations without filing with the Nevada Secretary of State.

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[25]The issue of alter ego was never raised in any pleading, and the district court never required plaintiffs to prove that A Cab, LLC, and the series entities were not separate. The district court just viewed all A Cab series entities as part of A Cab, LLC, in its zeal to vindicate the MWA.

Such entities are formed by adoption of an operating agreements by the members of a limited liability company that has filed articles of organization pursuant to NRS 86.151. NRS 86.296(2).

The statute does not create a series of individual but related businesses. It creates a single business organization structured with independently functioning, separate members whose relationship to one another is governed by statute and the operating agreement or articles of incorporation *of the company*. *Id.*

A Series LLC and all of its series components are one business organization. The Series entity (the one that files with the Secretary of State) is sometimes referred to as the "container." It is a business organization that is structured with multiple series entities as separate parts. The multiple series entities may be set up in any number of different ways; *one way* is to make each series entity a separate LLC. NRS 86.296(2).[26]

Each series LLC is a separate entity for the purposes set forth in NRS 86.296. To be clear, each series member (*see* NRS 86.1255 for definition), regardless of how it is formally organized, is a separate and distinct entity, and each has separate protections under the statute. There is no parent company. There are no subsidiaries. There is just a company, structurally organized in a manner allowed by statute as a series of separate members, for the express purpose of

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[26]Prior to 2017, subsection 2 of the statute did not include: "A series may be created as a limited-liability company, without the filing of articles of organization with the Secretary of State, by the adoption of an operating agreement by the members of the series." This language was added to make clear that business owners have complete flexibility in their manner of organization.

managing exposure and risk. That is why only the container entity is required to file articles of organization with the Secretary of State. In the words of the architect, Richard G. Barrows, "The series LLC is created, not organized. The master LLC [the company] is organized, not created." Nevada Senate Committee Minutes, Committee on the Judiciary, Seventy-Ninth Session, 2017, May 1, 2017, pg. 4.

A series LLC has no corporate or company veil that can be pierced. It does not share the structure of corporations that have parents and subsidiaries, whose corporate veils can be pierced. The shield the separate entities have from the liabilities of the other series members is statutory. If the company has been properly organized is operating in compliance with the statute, that shield is absolute.

The legislature recognized the importance of this purpose to business entities in Nevada, and mandated it by statute. It is not a clever scheme to avoid liability or commit fraud, and no matter how much Judge Cory does not like the business form, he is bound by the statute. All business organizations are intended to allow entrepreneurs to engage in business while managing risk and exposure, to the advantage of society. A series LLC, while a relatively new business organization, serves that same purpose.

It is not relevant that the entities may have common owners. It is not relevant that they may have employee lease agreements. It is not relevant that they operate from the same premises. Unless the business organization has not been set up in conformance with the statute, the liability limitations within the statute are

absolute. A Cab Series LLC, and the separate LLC series entities, are not liable for the debts of A Cab, LLC, as a matter of law.

These series are separate and distinct, and the debts, liabilities, obligations and expenses of the series are enforceable only against that series. NRS 86.296(3). NRS 86.1255 is explicit in that series are intended to be separate entities. A Series of a LLC may "sue and be sued, complain and defend, in its own name" under NRS 86.296(2)(c).

There is no statute or case law which provides that this limitation on liability is eliminated because claims against one series entity arise out of violations of the MWA. Nothing in law or policy states that when minimum wage is the issue, the corporate structure of business entities may be ignored.

The separate A Cab entities were created by members of A Cab Series LLC which was formed in compliance with NRS 86.151. The separate A Cab entities maintained distinct records, business functions, purposes and finances. Documents were shown and testimony was proffered establishing complete compliance, but they were not reviewed or weighed by the district court under the appropriate standard. *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 635, 189 P.3d 656, 660 (2008). The district court instead incorrectly found that defendants bore the burden to establish that they were not a single entity, and that defendants had not done so. The burden was on plaintiffs to pierce the business structure.[27]

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[27]There is no corporate veil to pierce in this statutory construct; the Series is a single company divided into separate series entities, each of which enjoys protection against liability as set forth in the statute. That liability shield is absolute unless the requirements of NRS 86.296(2)&(3) are not satisfied. At all

C. Plaintiffs Improperly Sought Amendment of the Judgment.

1. Adding and Collecting from New Parties Requires an Independent Action.

Plaintiffs moved pursuant to NRCP 59(e) for an order amending the judgment to add a party. AA 8742. NRCP 59(e) does not provide for the addition of a party to a judgment.

The addition of a third party requires due process in the form of an independent action. *Callie v. Bowling*, 123 Nev. 181, 185, 160 P.3d 878, 880 (2007). With the addition of an alter ego claim, the impending defendant must receive, "in an independent action, formal notice, service of process, an opportunity to conduct discovery, fact-finding, and an opportunity to be heard, before the claim is resolved." *Id.* at 186, 160 P.3d at 881. Here, there was no independent action, no formal notice or service, no opportunity to conduct discovery, and a complete lack of due process.

Due process was also violated regarding the *de facto* addition of the separate A Cab entities, and the allowance of collection of the debt from them. The property of these separate entities was taken; thus, they were entitled to the same due process in *Callie*. Yet there was no independent action, formal service or opportunity to be heard. The Order found that standing did not exist, that the aggrieved parties had not appeared, and this was the sole basis of the denial of defendants' motion. But the district court allowed the theft of the assets of the

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times, A Cab, LLC and all of the series LLCs have complied with and met all requirement of NRS 86.296(2)&(3). While "piercing" of the shield may (or may not) involve similar considerations to piercing a corporate veil, ignoring the shield must be based on demonstration of non-compliance with the statute.

separate entities to stand. The separate A Cab entities are further aggrieved in that there has not been an order addressing their claims for exemption.

2. Collecting from a Third Party Requires An Alter Ego Theory Action Supported by Substantial Evidence Following a Trial or Hearing.

In addition to the lack of the requirements set out in *Callie,* there is a failure to meet the requirements for an alter ego claim.[28] To proceed on an alter ego doctrine: (1) the corporation must be influenced and governed by the person asserted to be its alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice. *Roland v. Lepire*, 99 Nev. 308, 316-18, 662 P.2d 1332, 1337-38 (1983). "Each of these requirements must be present before the alter ego doctrine can be applied." *N. Arlington Med. Bldg., Inc. v. Sanchez Constr. Co.*, 86 Nev. 515, 520-21, 471 P.2d 240, 243 (1970). The party attempting to pierce the corporate veil bears the burden of proving each of these elements. *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 846 (2000). This protection is strongly held, and is "not lightly thrown aside." *Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220, 452 P.2d 916, 916 (1969). Here, there was no

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[28]It is doubtful alter ego could even apply to the separate entities that form a series LLC. By definition they are related and share the same owners and interests. If they have organized and separated their business as allowed by the statute, and are not in violation of the statute, application of general principles of alter ego would defeat the purposes of the statute. But to the extent plaintiffs rely on alter ego as their basis for stealing the assets of separate entities, they must at least be required to proceed with such an action, and carry their burden.

claim, no hearing, no evidence, and no finding, and the burden was placed on defendants. The ruling is not supportable.

Plaintiffs cannot properly claim they were collecting property of the judgment debtor. A judgment creditor is not automatically entitled to an order requiring a third party to pay money, unless admitted by the party or established by indisputable evidence. *Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 726, 380 P.3d 836, 841 (2016). Without an admission, claiming property by turnover requires finding clear and undisputed title. *Hagerman v. Tong Lee*, 12 Nev. 331, 335 (1877). A judgment creditor does not have any right to require the disclosure of assets of persons other than the judgment debtor. *Rock Bay, LLC v. Eighth Jud. Dist. Court.*, 129 Nev. 205, 211, 298 P.3d 441, 445 (2013). If a garnishment is contested, "the matter must be tried and judgment rendered as in civil cases." *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1214, 197 P.3d 1051, 1056 (2008).

At the post judgment hearings on these issues, there was no evidentiary hearing or trial, no discovery, no evidence, no testimony. There was no discovery permitted to the separate A Cab entities, much less a time where they were permitted to appear or try the matter.

Adding a separate party after judgment with no process is obvious error. Allowing collection from non-parties with no process is also error.

VII. The Award of Excessive Attorney Fees and Costs Constituted An Abuse of Discretion.

A. Multiple Procedural Safeguards Were Disregarded by the Court.

The district courts have discretion in awarding attorney's fees. *Shuette v.*

Beazer Homes, 121 Nev. 837, 124 P.3d 530, 549 (2005); *see also University of Nevada v. Tarkanian*, 110 Nev. 581, 591, 879 P.2d 1180, 1188 (1989). Nevertheless, the award must be reasonable under all of the circumstances. *Id.* The burden is on the movant to demonstrate that the fees were actually incurred, and are reasonable in amount. *Id.*

With its blanket blessing of everything requested by plaintiffs, the district court disregarded procedural rules and statutes outlining nondiscretionary mandates. These included the district court's complete disregard of NRCP 54(d), NRS 18.110, NRCP 68, NRS 17.115, as well as a consideration of the legal requirements set forth in the *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969), *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120, 345 P.3d 1049, 1054 (2015). The court awarded plaintiffs the excessive fees of $614,599.07 and costs of $46,528.07, for a case that never proceeded to trial. The disproportionality of plaintiffs' request should have been apparent. By contrast and comparison, the *Dubric* settlement which had a completed discovery period involving depositions and written discovery, a court settlement conference, multiple court hearings, and motion practice resulted in fees of $57,500.00.

NRCP 54(d)(2)(B), at the time the motion was filed, required that a motion for fees "specify the judgment and the statute, rule, or other grounds entitling the movant to the award; state the amount sought or provide a fair estimate of it; and be supported by counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable, documentation concerning the amount

of fees claimed, and points and authorities addressing appropriate factors to be considered by the court in deciding the motion." Plaintiffs' motion did not provide documentation concerning the amount of fees claimed. There were no documents attached to their motion. Instead, the motion contained generalizations which defendants could not challenge without specifics.

The district court disregarded NRCP 68 and NRS 17.115. Defendants beat offers of judgment extended more than a year prior to class certification. As such, plaintiffs were not entitled to fees and costs. By this rule, defendants were the prevailing party entitled to fees and costs. On March 10, 2015, defendants offered judgment to Reno in the amount of $15,000. AA 805. On August 22, 2018, the district court entered judgment in favor of Reno in the amount of $4,966.19. AA 8734. The judgment of $4,966.19 is not more favorable than $15,000.

On March 10, 2015, defendants offered judgment to Murray in the amount of $7,500. AA 758. On August 22, 2018, this Court entered judgment in favor of Murray in the amount of $770.33. AA 8731. The judgment of $770.33 is not more favorable than $7,500.

There was no class certification for nearly one year after these Rule 68 offers were made. Therefore, there was nothing precluding plaintiffs from accepting the offers, other than their counsel not communicating to them the existence of the offers. Class certification was not entered until the next year on February 10, 2016. At that time, it was pointed out to the district court that it was in the plaintiffs' best interest to be told about the offers, but it was not in plaintiffs' counsel's best interest, as he could only profit by escalating the fees. As predicted,

Murray and Reno are now in a position with a substantially lower recovery, while their attorney was awarded an exorbitant amount of fees in which they will not share.

The district court overlooked that plaintiffs' request for costs was not supported by a Verified Memorandum of Costs pursuant to NRS 18.110, and could not be considered. No supporting documentation was attached as required. Plaintiffs sought in excess of $29,000 for experts who were never used, and who were subject to being stricken as having not met the required standards for admissibility.

B. The District Court Abused its Discretion in Awarding Excessive Fees, Rewarding Abusive Tactics.

Plaintiffs refused to provide, and the district court refused to order, a copy of the fee agreement, which would most likely demonstrate that counsel is receiving fifty percent of the million dollar judgment entered by the district court. The district court stressed its interest in having the drivers recover any underpayments they may have been owed, but the district court failed to recognize that it is plaintiffs' counsel who stands to profit at the expense of closing down a Nevada business and hundreds of employees losing their jobs.

Defendants informed the district court repeatedly that plaintiffs were deliberately and unnecessarily increasing the fees for profit. Early in the case, defendants informed the district court that plaintiffs' counsel was not acting on behalf of his clients' interests, but rather was seeking to profit from prolonged litigation and a fee-shifting mechanism. The depositions and discovery responses of Murray and Reno made it clear that both had no interest in the litigation, had no

understanding of the litigation, and had merely signed up when solicited by counsel. When defendants made a good faith attempt to resolve the claim, at a value exceeding ten times the value of the claim, the clients were not made aware of the offers. This evidenced that counsel had no interest in what was best for the plaintiffs, but rather stood to obtain further financial gain by prolonging the litigation and escalating attorney fees in a fee-shifting type case.

At that time, plaintiffs' counsel confirmed that he would not engage in any mediation or alternative type of resolution, nor would he disclose a settlement demand. Also, plaintiffs' counsel had a pattern of dragging out the litigation, asking for extension after extension, indicating he needed more time to prepare, and compelling discovery that plaintiffs did not analyze. In reality, plaintiffs' counsel was prolonging the litigation to continue advertising in an attempte to recruit more clients by stating, "there is no set deadline for this case to be finished." AA 3058 (Greenberg's website).

At the end of the case, defendants' assertions that plaintiffs were merely running up the tab proved correct. Not one scintilla of the hundreds of thousands of documents plaintiffs argued were so important to their case was ever used by plaintiffs. The only relevant documents were the tripsheets, which were produced and available at the beginning of the case, but plaintiffs did not want to be bothered with analysis of those documents. Instead, plaintiffs filed repeated motions to compel for items that their experts and their attorneys admittedly never looked at. The purpose of plaintiffs' motion practice was not to engage in discovery, but to escalate the fees.

In their request for fees, plaintiffs attached no detail as to the hours they claim. Plaintiffs merely spoke in generalities as to the hundreds of hours spent, even including 122 hours of paralegal time without any authority. At the minimum, this district court should have ordered plaintiffs to provide the detail as to the hours claimed, which would most likely demonstrate that the hours are quadruple-billed by multiple attorneys attending the same hearings. Further, the detail would evidence that the hours billed were for items which were frivolous, and cannot be supported as reasonably incurred. Defendants were deprived of an opportunity to oppose the specifics of the hours claimed, as none were provided, other than "travel time."

Because plaintiffs' motion was did not meet the minimum requirements for an award, it should have been denied. Plaintiffs failed to obtain a judgment in excess of the NRCP 68 offers, so their motion should have been denied. Defendants request, at a minimum, that this Court remand this issue to the district court for proper analysis, not a blanket acceptance.

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CONCLUSION

The judgment of the district court should be reversed.

DATED this 5 day of August, 2020.

HUTCHISON & STEFFEN, PLLC.

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Esther Rodriguez (6473)
RODRIGUEZ LAW OFFICE, P.C
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

James J. Jimmerson (264)
JIMMERSON LAW FIRM
415 S 6th Street, Suite 100
Las Vegas, NV 89101

Attorney for Appellants

ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

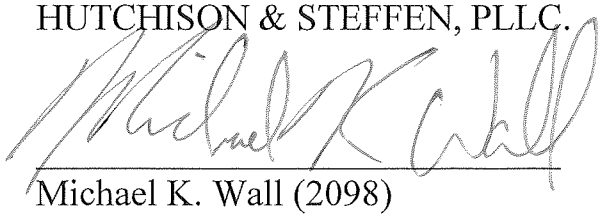
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 19,880 words.

3. Finally, I certify that I have read this appellate 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)(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 is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules

of Appellate Procedure.

DATED this 5 day of August, 2020.

HUTCHISON & STEFFEN, PLLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Esther Rodriguez (6473)
RODRIGUEZ LAW OFFICE, P.C
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

James J. Jimmerson (264)
JIMMERSON LAW FIRM
415 S 6th Street, Suite 100
Las Vegas, NV 89101

Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **APPELLANTS OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 S. Jones Blvd., Ste. E3
Las Vegas, NV 89146
Telephone: (702) 383-6085
Facsimile: (702) 385-1827
leongreenberg@overtimelaw.com
Dana@overtimelaw.com

Attorneys for Respondents

DATED this 5th day of August, 2020.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC