**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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



# APPELLANTS REPLY 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 Appellants*

## 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

///

///

///

///

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

DATED this 22 day of December, 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*

## TABLE OF CONTENTS

## AUTHORITIES CITED
## RULES AND STATUTES

## CASE LAW

## INTRODUCTION

Respondents'/plaintiffs' answering brief sets forth and relies on a version of the facts that is interesting, to say the least. This false version of the facts was pursued at every level in district court below, and to some extent finds support in the orders and documents prepared by plaintiffs' counsel and signed by Judge Cory. But that does not change the actual facts, nor can it be argued that there were not material factual disputes that could not be resolved by judicial fiat.

The obvious disputes regarding the salient facts demonstrates why this case should not have been taken from the jury. Genuine factual issues should have precluded summary judgment, and the district court's judgment is wrong as a matter of law.

The district court originally found on multiple occasions over a period of years that factual issues precluded summary judgment, and that the methodology proposed by plaintiffs for proving their damages was not sound. Then, in a desperate attempt to win the road race with Judge Delaney, and a misguided belief that he was vindicating the Nevada Constitution, Judge Cory granted summary judgment as a sanction, because he could see no other path to judgment without a trial, and a trial would come too late to win the road race.

The district court sanctioned Nady because Nady did not pay the Special

Master to create plaintiffs' case by doing the analysis of the tripsheets plaintiffs should have done. The record could not be more clear on this point. It was evident to all that without an analysis of the tripsheets, no reliable damages figure could be proved. Nady did not pay because he could not. Based on speculation alone, and pointing to money not held by A Cab or Nady and not available to pay the Master, plaintiffs insist that Nady could pay, but refused. Even were this fabrication the gospel truth, the fact remains that it was plaintiffs' duty to prove damages. The order for A Cab to pay for plaintiffs' failure is wrong as a matter of law. The district court shifted the burden of proof in desperation to vindicate the MWA rights of the cab drivers when it became apparent plaintiffs could not shoulder their burden of proof.

Judge Cory did not determine that there were no issues of fact that should be tried; he determined that A Cab was at fault for plaintiffs' inability to prove its damages because A Cab should have kept records in a manner not required by statute, and not used by any other cab company in Nevada, but that would have made it easier for plaintiffs to prepare their case. Judge Cory was convinced A Cab owed some amount of money under the MWA. In the absence of proof, he was willing to accept an estimate based on a methodology he himself had declared unsound. Having declared that plaintiffs would have to present proof of their

actual damages at trial, Judge Cory did an about face and picked a damages number from a hat, rather than lose the road race to Judge Delaney. All of this is apparent on the record, and is set forth in detail with citations to the record in the opening brief.

The lynchpin of the district court's decision to shift the burden of proof was that A Cab had a statutory duty under NRS 608.115 to maintain records in a form that even Judge Cory could not articulate. Judge Cory ruled incorrectly that the tripsheets did not qualify as such records. For reasons unfathomable to A Cab, plaintiffs made no effort to analyze the tripsheets, even though it was apparent from the outset that analysis of the tripsheets was the only method to prove actual damages. It was plaintiffs' obligation to prove its case, but plaintiffs instead relied on estimates based on speculation,[1] because that was the easier path. The district court rejected those speculations as not reliable nor based on any supportable theory, but later adopted those speculations as a judgment solely to get to judgment quickly, to beat Judge Delaney. As justification, Judge Cory argued that A Cab should have proved plaintiffs' damages by keeping different records than it

---

[1]Cases that allow a judgment to be based on reasonable estimates based on supportable methodology do not justify the judgment in this case, which is based on speculation alone, and supported by "experts" who simply opined that the arithmetic was correct, not that the methodology was sound.

kept. Unless Judge Cory is correct in his conclusion that the tripsheets do not satisfy the statutory mandate to keep records, this Court must reverse.

More importantly, the district court never had jurisdiction over the case. Its judgment is void *ab initio*.

## DISCUSSION

### I. FACTUAL MISSTATEMENTS.

Plaintiffs accuse A Cab of providing a statement of facts that does not properly cite to the appendix, but a review of the opening brief belies that claim. A Cab has faithfully set forth the facts with proper citation and support. In response, plaintiffs have provided two fact sections, each of which is argument only, supported by citations to plaintiffs' own arguments below.

The parties view the facts of this case very differently. A Cab will rely on its supported version of facts in the opening brief, as well as its legal arguments. Plaintiffs cannot overcome A Cab's legal arguments regarding the sufficiency (or lack of sufficiency) of the judgment. This Court is capable of its own analysis of the record, which does not support plaintiffs' assertions, but does demonstrate genuine issues for trial.

In addition, plaintiffs redrafted the issues to make them more palatable to plaintiffs. It is easy to set up a strawman. A Cab relies on the issues it has raised;

they mandate reversal.

## II. LEGAL ARGUMENTS.

### A. The Discovery Non-Issue.

Misrepresenting a single discovery sanction issued in November of 2015, plaintiffs repeatedly assert that A Cab refused to disclose documents and to properly participate in discovery. This is untrue. There were a great many discovery disputes below; if discovery were an issue, the appendix would be doubled.

No discovery issue is raised in this appeal, but to put the record straight, Jay Nady was admonished by the discovery commissioner over five years ago for swearing at his deposition,[2] and A Cab was sanctioned because the Discovery

---

[2]At his deposition, at approximately 5:30 p.m., Nady became frustrated:

> A. Mr. Greenberg, you've asked me that five times. Five times. Why?
>
> Ms. Sniegocki: We are in the same room. We don't need to scream.
>
> The Witness: He is infuriating me with his continually asking the same question. And I don't like it. I think you're trying to mess with my mind, and I don't like it, Mr. Greenberg. So please discontinue asking the same question.

By Mr. Greenberg:

> Q. Mr. Morgan, is the sole source of –

Commissioner concluded the deposition of computer consultant Morgan could have been avoided had A Cab consulted with Morgan regarding how to generate documents responsive to a request. AA 6847-50. This, and all other discovery matters, was hotly disputed. The representation of wholesale evasion of discovery by A Cab is unfounded. On the contrary, plaintiffs engaged in significant discovery abuse.

A Cab produced all of the tripsheets early in the case. Plaintiffs never complained during the years of discovery it was too much to analyze these documents; instead, they sought a different methodology using template spreadsheets. There were a number of options never explored nor sought by plaintiffs–digital reading or sending to India/Philippines for inexpensive services. But plaintiffs did not want to make the effort to look at the source documents kept in the normal course of business. They were looking for an easier route.

By order of the Discovery Commissioner, A Cab produced tens of thousands of pages of irrelevant documents plaintiffs insisted they needed to calculate damages, although it should have been as apparent at the beginning as it

---

> A. No, he's not, Mr. Greenberg. That's not what I said you lying little shit. That's not what he said. That's not what I said. It's not what I said. You are misstating it. I said the taxi cab authority was the one that said it. So he's not the only one, Mr. Greenberg.

AA 173.

was at the end that the only method to calculate accurate damages was by analysis of the tripsheets.[3] Not only did plaintiffs never analyze the tripsheets, by their own admission, plaintiffs never even looked at the tens of thousands of pages of other documents they compelled A Cab to produce. AA 4936. By the end of the discovery war, A Cab had produced far more than it should have been required to produce. The Discovery Commissioner did not require more.

The suggestion that summary judgment was required because A Cab withheld documents or did not participate properly in discovery is a classic misdirection. The district court appointed a Master to review the tripsheets, which had been available to plaintiffs almost from the inception of the case. When A Cab could not pay for this review, the district court blamed A Cab for the lack of reliable proof of damages, placed the burden on A Cab to prove the case against itself, and relied for a judgment on information it had previously ruled too

---

[3]Plaintiffs misrepresented repeatedly below and again on appeal that A Cab conceded that the damages for a period covered by the complaint are based on records A Cab testified were correct. Nady testified that the information in the Quickbooks is correct, but the damages for any period of time cannot be calculated from the Quickbooks, because they do not contain necessary information. This position was consistently maintained by A Cab below, and accepted by Judge Cory, until he did an about face when he was losing the road race. To be clear, neither Nady nor A Cab has ever conceded that any of plaintiffs' estimations of damages through its speculative methodology has any validity; they are just numbers picked from a hat.

speculative to support a judgment. This was a road race and Judge Cory won.

### B. The District Court Lacked Subject Matter Jurisdiction.

Plaintiffs concede that absent aggregation of claims, the amount in controversy is insufficient to support district court jurisdiction.

Plaintiffs assert, as an alternative basis for jurisdiction, they sought injunctive relief in their complaints, but the complaints plead no separate injunction claim. AA 4 Complaint (general request for "all relief available to them" "including appropriate injunctive . . . relief to make the defendants cease their violations;" AA 79 Amended Complaint (same); AA 589 Second Amended Complaint (same). Plaintiffs simply requested injunctive relief in their rambling narrative, but did not specifically plead injunction, the elements of injunction, or ongoing violation of the MWA. The complaint and all proceedings below focused on damages for past violation of the MWA. A general request for an injunction against future violation of the law without a showing of a threatened violation is improper. *Berryman v. Int'l Bhd. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 388 (1966).

At the time the complaint was filed, there was no issue of ongoing violation, and plaintiffs did not at any time seek an injunction. Plaintiffs were former employees of A Cab. Plaintiffs argue they obtained an injunction because form

injunctive language against the class members settling their claims outside of this case was included in the order of class certification, and plaintiffs obtained an injunction against Judge Delaney from proceeding in a separate action. This Court reversed the injunction against Judge Delaney. Neither of these "injunctions" was in any way related to the general request for an injunction against future MWA violation by A Cab included in the boilerplate language of the three complaints.

That a court's interlocutory orders may include injunctive elements does not make a complaint that does not plead a claim for an injunction sufficient to invoke the jurisdiction of the district court. Similarly, that plaintiffs improperly sought by motion and obtained an injunction against Judge Delaney cannot retroactively confer subject matter jurisdiction on Judge Cory. If that jurisdiction did not exist when the complaint was filed, it does not exist. No claim for injunctive relief was pleaded in the complaint. The district court did not obtain subject matter jurisdiction on that basis. *Castillo v. United Fed. Credit Union*, 134 Nev. 13, 19, 409 P.3d 54, 59 (2018) (only a genuine claim for an injunction invokes district court jurisdiction).

Plaintiffs argue the justice courts have no jurisdiction over claims brought under the Nevada Constitution. This is nonsense. Justice courts have jurisdiction granted by the Nevada Constitution over civil claims as defined by the legislature

in NRS 4.370. Many of these civil cases are brought regarding claims under the Nevada Constitution. Nothing in the Nevada Constitution would preclude a class action suit in justice court; such actions are authorized by JCRCP 23. Plaintiffs cite no authority for the proposition that justice courts have no jurisdiction over civil cases raising claims under the Nevada Constitution.[4]

Plaintiffs argue that the language of *Castillo* disallowing aggregation of claims was dicta. The no-aggregation language in *Castillo* was its primary holding. Although this Court–in refusing to depublish *Castillo*–stated that the language addressing aggregation was arguably dicta, it did not recede from that language. AA 9296.

That district court jurisdiction was found to exist because an injunction was sought does not make the dispositive discussion in *Castillo* about aggregation superfluous or dicta. Had aggregation been available, it would not have been necessary for this Court to address jurisdiction based on the claim for an injunction. Had there not been a claim for an injunction, this Court's decision would have been to affirm the district court's finding that there was no jurisdiction

---

[4]In district court, plaintiffs convinced Judge Cory multiple times to ignore procedure and law because their MWA claims were based on the Nevada Constitution. Judge Cory's zeal to vindicate the constitution led him to commit multiple errors.

based on the amount in controversy, and that would have been the dispositive ruling of the case. It was the dispositive ruling on that issue, and that issue was not unnecessary to the opinion. Indeed, a review of the structure of the opinion demonstrates that the discussion of jurisdiction by injunction was secondary.

Because reversal was based on a single ground does not render discussion of all other issues in the opinion dicta. Such a broad application of the dicta rule would call into question much of the decided law in Nevada. Often multiple issues are addressed, discussed, and decided, although reversal (or affirmance) technically results only from a single issue. The doctrine of dicta is designed to disavow unfortunate language that was not directed to an issue fully considered and decided by the Court. When two issues are addressed head on and decided, and one leads to reversal but the other would not have, the discussion of neither issue is properly reduced to dicta.

In any event, whether characterized as dicta or holding, *Castillo* establishes that at the time this case was filed, and at the time judgment was rendered, based on the law that then existed, it was this Court's opinion that aggregation of claims would not invoke the jurisdiction of the district court as a matter of constitutional law. A later change in the Rule could not have retroactively created subject matter jurisdiction where it did not otherwise exist.

### C. The District Court's Severance Order Was An Abuse of Discretion.

Plaintiffs argue that A Cab "does not explain how the district court abused its discretion in severing the claims against Nady." RAB 19. This assertion is confusing, at best. To be clear, the district court severed the claims to artificially create finality after it was explained to the district court that merely bifurcating the trial on the claims would not create finality. That ulterior motive in aid of winning the road race with Judge Delaney reeks of abuse of discretion.

Further, the claims are too closely related and intertwined to simply sever. Plaintiffs' argument that A Cab never argued below "there were unitary issues" that should not be severed is nonsense. Plaintiffs' counsel suggested that because the trial had been bifurcated, the judgment would be final. Undersigned counsel informed the district court that it would take severance of claims to create finality. Plaintiffs' counsel recognized the finality issue, and was not willing to dismiss the closely related claims against Nady in order to get finality. I argued that severance was not proper, as follows:

> Mr. Wall: There's a difference between severing cases and making two cases out of them when you've have cases that are consolidated and then you sever them.
>
> . . . .
>
> Then once they're consolidated they're one case and when they're severed they're separate cases. Here we've bifurcated. That's

> a completely different thing. You can't make [take] one case and sever it into two cases. So we have bifurcated here the issues that have been resolved, and although the mistake that Mr. Greenberg made in [a prior] case is unfortunate, it doesn't justify the argument he's made in this case as to finality.

AA 7450. The argument that the claims should not be severed because there was only one, indivisible action was made and understood by the district court. Finality was created artificially by severing claims in a case with unitary issues. Although the words "unitary issues" were not uttered, that does not mean the argument was not made. Finally, plaintiffs' arguments on page 21 of the answering brief that the claims are separate could not more forcefully demonstrate why severance of the claims was improper. Bifurcation may have been justified by those arguments, but severance was not.

### D. The Statute of Limitations Was Improperly Tolled on Stale Claims Unrelated to the Notice Issue.

Plaintiffs argue there is a factual issue as to the notice that was given to the employees regarding their minimum wage rights. This is sophistry. At no time below did plaintiffs argue that notice was not properly posted in compliance with the instructions from the State Labor Commissioner. The issue below was solely whether individual notices handed to each employee are required by the MWA.

Plaintiffs argue that it "is impossible to interpret the use of the words "each

of its employees" to require anything but notification in hand to each employee individually. RAB 28. That is quite the overstatement. Each employee could be given notice by a single notice that went to all. Each applies to the employees, who are plural, not to the notice, which in the MWA is singular. At the very least, the notice provision of the MWA is subject to differing interpretations. The State Labor Commissioner did not find A Cab's (and every other cab company's) understanding of the requirement to be "impossible;" it ordered posting of notice to all in a conspicuous place. For the reasons expressed at page 46 of the opening brief, we suggest this is a more reasonable construction of the language of the MWA.

Reading words and phrases from a statute or constitution with blinders on and insisting there is no ambiguity is fraught with danger. Most words standing alone are ambiguous. The plain language rule is supposed to be an aid for ascertaining intent, which is supreme, not a substitute for it, or a trap for the drafter.

Although plain language is useful in determining intent, plain language must never be a substitute for intent. "The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute." *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). This

paramount rule is sometimes lost in expressions of the standard of review. *Compare Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018) (reh'g denied (2018)) ("To determine legislative intent, we first consider and give effect to the statute's plain meaning because that is the best indicator of the Legislature's intent.") (citations omitted) with *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 641–42, 81 P.3d 532, 534 (2003) ("When the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended. However, if a statute is ambiguous, the plain meaning rule of statutory construction is inapplicable, and the drafter's intent becomes the controlling factor in statutory construction.") (citations and internal punctuation omitted).

Although these formulations of the standard are similar, we suggest the articulation of the rule in *Dezzani* is superior to the statement in *Harris*. The "unless" clause in *Harris* is often ignored in application of that standard. Courts use the plain language to ascertain intent, intent does not become important only when the language is ambiguous. This is a slippery slope that could give meaning to an interpretation of the statute based on one reading of the language that seems plain to one reader, even when a different intent is manifest. A court should never conclude, "A is what the legislature intended, but the plain language says B, so we

are stuck with B." Intent should always be the controlling factor.

Judge Cory found the language of the MWA to be plain, but the Labor Commissioner and every cab company in the state are of the opinion that it plainly says that posted notice to all is sufficient, based both on its plain language and decades of history. There can be no doubt the MWA could have been understood by the voters to require the same type of notice as had always been required. The MWA does not require individual notice in clear, unambiguous terms. It uses the word each rather than all, but when the entire provision is read in context, "each" does not preclude notice to all (which is notice to each) by the method of posting; indeed, the MWA says nothing about the method of providing notice. The focus on a single word to adopt a construction of the MWA the district court found to be unreasonable (although it felt bound by it) was error.[5]

Plaintiffs follow with a string of non sequiturs regarding service of process, opining that employers who post notices conspicuously do so with intent to hide information. They argue that service of process is required, even if parties know about a case and potential claims against them. They recite cases where no notice was given which resulted in tolling of the statute of limitation. This is an exercise

---

[5]It resulted in an absurd application of the statute of limitation, as set forth in the opening brief. Plaintiffs have not addressed the absurdity of the district court's statute of limitation application.

in legerdemain. This case has nothing to do with service of process, or the concerns of process. A Cab posted the notices prominently; there is no evidence of an intent to hide information, nor is there evidence that any claimant failed to file in a timely fashion because he or she was not informed of his or her rights. These arguments are unrelated to what happened in this case, and are based on speculation. A Cab believes its arguments in the opening brief to be better reasoned. Even if individual notice was required, a doubtful premise at best, the remedy is not to toll the statute of limitation on stale claims unrelated to the notice issue.

### E. A Cab's Tripsheets Satisfy NRS 608.115.

Plaintiffs assert that the district court properly shifted their burden of proof to A Cab because A Cab did not keep adequate records as required by NRS 608.115, which states:

> 1. Every employer shall establish and maintain records of wages for the benefit of his or her employees, showing for each pay period the following information for each employee:
>
> (a) Gross wage or salary other than compensation in the form of:
>
> (1) Services; or
>
> (2) Food, housing or clothing.
>
> (b) Deductions.

(c) Net cash wage or salary.

(d) Except as otherwise provided in NRS 608.215, total hours employed in the pay period by noting the number of hours per day.

(e) Date of payment.

NRS 706.8844 more particularly describes how such records are to be kept on the tripsheets. This method of record keeping is used by every cab company and common carrier in Nevada, and is approved by every regulating body, both federal and state.

The information in the tripsheets is comprehensive, including every trip, every break, and every minute of every work period.[6] From this information, individual cab drivers who requested information as to any particular pay period were easily provided with such information as required by the statute. From this information, plaintiffs admittedly could have calculated all hours worked, all amounts paid, and any deficiency. As conceded by plaintiffs in the answering

---

[6]In the second amended complaint, the only complaint containing any specific allegations regarding the non-payment of minimum wage, plaintiffs alleged the information in the tripsheets was fraudulent, but provided no proof of even a single fraudulent entry. AA 587-88. Now plaintiffs disavow the fraud claims in the complaints, claiming this was just a failure to pay case, but this Court's review of the second amended complaint will verify that the primary claim asserted was that A Cab compelled the cab drivers to make fraudulent entries in the tripsheets, which resulted in underpayment of wages.

brief multiple times,[7] all the information required by the statute is contained in the tripsheets. The wages can be calculated from the tripsheets with respect to each pay period. Indeed, plaintiffs' "experts" did partial calculations of particular pay periods from the few tripsheets they reviewed.

NRS 608.115 does not specify the form of the records that must be kept, only the information that must be kept. Because all of the information is kept on the tripsheets, A Cab–and every other cab company in Nevada–did not violate NRS 608.115 by not keeping records in a form plaintiffs' counsel would have preferred.

### F. Summary Judgment Was Improper.

Plaintiffs admit that the district court granted summary judgment as a sanction because Nady did not pay the Special Master to review the tripsheets. Plaintiffs insist that they calculated damages for the period of 2013-2015 based on documents A Cab admitted were accurate and complete, but they made this false assertion in their motion filed on November 2, 2017, and in every motion paper filed thereafter. It was denied in every responsive motion paper filed by A Cab. But plaintiffs continue to insist that the number of hours they calculated must be

---

[7]"A Cab's tripsheets . . . contained information from which such hours could be calculated." RAB 6.

fair, because it was calculated from A Cab's books which A Cab admitted were correct. A Cab admitted nothing, and it would have been just as improper for A Cab to speculate a number of hours worked from documents that did not show a number of hours worked as it was for plaintiffs to make such speculations. That A Cab presented no counter-speculation is hardly a reason to validate plaintiffs' speculations.

Plaintiffs made their calculations from QuickBooks that did not contain the necessary data for such calculations. So they speculated from the QuickBooks an average number of hours worked per week, applied it to every cab driver, applied it to the period of time of the QuickBooks they analyzed, and then Judge Cory applied the same estimate to other periods of time, based on no evidence of any kind. Plaintiffs did not analyze the tripsheets, the only documents from which their damages could be calculated. A Cab authenticated the QuickBooks, but argued consistently that those books serve a different purpose and do not contain information from which total hours or total pay could be calculated. Plaintiffs "experts," prepared speculations as to damages for the period of 2013-2015 based on the QuickBooks.[8]

---

[8]Actually, the spread sheets were created by Bass, a former cab driver, using information and a methodology provided by Greenberg. Greenberg insisted no expert analysis was required, because it was just simple arithmetic. Greenberg did

Judge Cory rejected the methodology as unsound, concluded that a reliable calculation would require analysis of the tripsheets, and appointed a Master at A Cab's expense to do the calculation. Although A Cab authenticated the QuickBooks, that is not an admission that plaintiffs' calculations are anything but speculations. There was an even further "guestimate" for the remaining time periods of applying 9.21 hours across the board. RAB 41.

Plaintiffs state throughout the answering brief that A Cab's expert said the spreadsheets were "impressive" but plaintiffs cut-off his statement. In reality, Scott Leslie, CPA, stated the spreadsheet, "though impressive is meaningless." Leslie was impressed with the sorting and different functions, but he quickly explained that the calculations were based on wrong assumptions. "One is that it relies on bad assumptions and two, it doesn't perform the testing it needs to be done to come to the conclusions that you're trying to come to." AA 5949-5951.

---

not timely disclose any expert, and insisted that Bass and Clauretie, when they were challenged, were not experts, did not have to be disclosed, and did not have to do reports, but hedged his bets when Judge Cory said expert analysis was necessary and allowed disclosure of experts long after close of discovery. AA 4301. Plaintiffs' alleged experts merely confirmed the addition and multiplication was correct; they never opined the methodology was sound. Judge Cory never ruled on the pending motions to disqualify Bass and Clauretie, recognized they were not disclosed and were not experts, but then relied on their spread sheets in entering judgment in order to win the road race with Judge Delaney, all because A Cab allegedly had not provided plaintiffs with an easier way to prove damages.

Throughout Leslie's testimony, he was clear that the correct arithmetic in the speadsheets did not result in accurate calculations of damages, because the methodology and assumptions were not correct. AA 5949-961.

Plaintiffs fail to note that the district court did not grant their November 2, 2017 motion with respect to any period of time until August of 2018. The district court took a several day recess to review the numbers presented by plaintiffs' "experts," and then rejected them because he could not follow them, and the methodology was not sound. AA 4301. But then Judge Cory granted summary judgment as a sanction against A Cab for not having paid to prove plaintiffs' damages.

Plaintiffs argue that A Cab was not denied a trial because it had no evidence to present at trial anyway, and suggest that A Cab could have speculated a different damages figure but did not do so. A Cab argued consistently that an actual damages number (which it believes is zero or close to zero) could be calculated from the tripsheets, and it was plaintiffs' burden to present evidence to support its claims. The district court originally agreed, denying summary judgment to both sides, but telling plaintiffs it would be their burden to prove damages at trial, and they could not do so based on the methodology employed by their "experts."

But Judge Cory did an about face when he saw he would lose the road race if he insisted on proof of damages, and concluded that a guess at damages was all that was available, for which he blamed A Cab. This is hardly an application of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-687 (1946), which allowed estimated damages only after the plaintiff shouldered his burden of proving the existence of actual damages, based on a formula that approximated the amount owed, when no records from which actual damages could be calculated existed. This was not reliance on an estimate because that is all that is available, as was *Anderson*. This was rely on speculation already declared unsound when all the documents necessary to prove actual damages were available but could not be analyzed in time for trial or in time to win the road race, although plaintiffs were in possession of the documents for years, and had made a conscious choice not to analyze them. In *Anderson*, the burden shifted only after plaintiff carried his burden; in this case, plaintiffs did nothing except ask for a handout based on speculation they may not have been paid a minimum wage.

### G. The District Court Erred by Adding A Party to the Judgment After the Judgment Was Entered.

Plaintiffs cannot add an entity to a judgment after the judgment is entered, and argue that the entity has a burden to demonstrate it is an entity. No theory of

due process or civil procedure would allow a party claiming to be a separate entity to be added to a judgment subject to its after-the-fact burden to demonstrate its own existence. Notice and an opportunity to be heard come before, not after judgment.

Plaintiffs insist repeatedly that there is only one appellant because A Cab, LLC, and A Cab Series, LLC, is one and the same entity. Plaintiffs rely on a single piece of paper filed by Nady with the Secretary of State indicating that the name of A Cab, LLC, is now A Cab Series, LLC. AA 8748. Nady does not suggest that this is a name change, or when the change occurred. This change occurred in 2012. Hence, no additional documents were filed in 2017.

Although the organization of A Cab Series, LLC, and its separation from A Cab, LLC, as an entity happened in 2012, Jay Nady filed this notice in 2017 as a clarification of the current name of the series (not a suggestion that A Cab, LLC, had become A Cab Series, LLC.), because of litigation in other cases not involving A Cab, to clarify the name of the company that was operating as a series of separate entities as allowed by NRS 86.151 and NRS 86.296. This was not a change in the structure, business organization, name or operation of the series, which was established in 2012.

The so-called "name-change" document has no impact on the structure of

A Cab Series, LLC, nor does it change the fact that A Cab, LLC, and A Cab Series, LLC, are not one and the same. Plaintiffs assert that when A Cab, LLC, reorganized as a series in 2012, the change did not create a new entity, just a new form of operation. RAB 49. This is incorrect.

A Cab Series, LLC, is a company operating as a series of separate entities as allowed by NRS 86.151 and NRS 86.296. A Cab Series, LLC, was created in 2012 as a new series company. The separate components within the company, which are themselves separate entities, were never created pursuant to NRS 86.141; they were organized through the authority granted in organizing documents to the members and managers to create separate series. They operate as separate entities as a matter of law. NRS 86.296(2). The 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). Sworn testimony was submitted below attesting to the separation of finances. These records were submitted to a Special Master who did not find that the entities were not separate. NRS 86.1255 states that series are intended to be separate entities. A Series of an LLC may "sue and be sued, complain and defend, in its own name" under NRS 86.296(2)(c). Although plaintiffs insist that A Cab, LLC, and A Cab Series, LLC, are the same entity for purposes of suing, being sued, and liability, they are wrong

as a matter of law.

Plaintiffs insist they did not add a new party to the judgment after the judgment was entered, but that is precisely what they did. Plaintiffs ignore the many filings with the Secretary of State, and other documents in this case, supposing to have found their silver bullet in the "name change" document which was filed by Nady. They insist that the shield of NRS 86.296(3) was not invoked, and argue that A Cab had the obligation to prove otherwise. They ignore that the district court refused to allow A Cab Series, LLC, to prove its structure, AA 9865, and that A Cab Series, LLC, is a single company created and organized under the series LLC statute before this lawsuit was filed. It is properly organized and functioning as multiple separate entities that enjoy the liability shield of the statute applicable to such series entities. There is and can be no evidence to the contrary, because plaintiffs never sued A Cab Series, LLC, so it had no opportunity to defend.

Plaintiffs also ignore that these facts were explained to them early on in the litigation during the deposition of Nady, but they neglected to attempt to bring A Cab Series, LLC, or any of its constituent parts, into the litigation until after

judgment was entered.[9] They made no attempt in the years that followed to ascertain the identity of the proper party liable for the payment of wages to the cab drivers. They ignored the separate nature of each series entity in their collection efforts on the slender reed that each entity uses the same federal EIN. If they understood the nature of a series LLC, or LLCs in general, they would know that series LLCs are not required to have a separate employer identification number unless it separately maintains employees. It is not required for a business to maintain employees, and LLCs, including series, and must file a single federal tax return for the company, thus using a single EIN. This does not vitiate the liability protections afforded by the statute.

Burying their heads deep in the sand, plaintiffs attempt no refutation of the statute or its implications, repeating instead only the mantras that the separate entities are one, and that if they are not, there was no proof the entities were properly created. Both mantras are unavailing. It was plaintiffs' duty to sue and prove a case against a proper party. If they believed A Cab Series, LLC, was not properly organized, they should have sued A Cab Series, LLC, engaged in discovery, and brought appropriate motions directed at their claim that A Cab

---

[9]Even if they are correct that A Cab Series, LLC, could have been substituted during the lawsuit for A Cab, LLC, they did not do so. Substitution after judgment is too late.

Series, LLC, was not properly created or organized. Plaintiffs' lack of understanding of civil procedure is confusing. Their lack of understanding of the series LLC statute is displayed by both the district court order and plaintiffs' arguments. There is nothing "vapid" about A Cab's argument that plaintiffs had the burden of proof, nor is the lack of evidence fatal to A Cab's argument; it is fatal to plaintiffs'.[10] It was for this purpose that the legislature enacted the series LLC statute; to expressly support the separation of liabilities as between series.[11]

Plaintiffs make no attempt to address the plain language of NRS 86.296, preferring instead their assumptions as to what the statute requires. And if the separate entities are not properly created and organized–separate concepts neither understood nor addressed by plaintiffs–a plaintiff must sue the separate entities

---

[10]Plaintiffs argue that NRS 86.296(2) requires the existence of an operating agreement, and complains that "no operating agreements were produced." RAB 51. Produced when? During discovery? There was no discovery. A Cab Series, LLC, was not added to the case until after judgment, and then the district court denied A Cab's requests for an evidentiary hearing. This Court may rest assured that all required operating agreements exist.

[11] *See* Assembly Committee On Judiciary testimony, March 16, 2017, Erven T Nelson: "The whole reason LLCs were invented or established decades ago was to have the benefits of a corporation–which protects the shareholders assets–but also the flow-through taxation of a partnership" and that "each series, or each slice of the pie, can own its own property, buy and sell property, sue or be sued, but does not have to separately file an articles of organization with the Secretary of State."

and assert claims regarding their creation and organization prior to obtaining a judgment against them. This is the same as it would for any other corporate entity. NRS 86.296 does not abrogate any protections for the entity or provide plaintiffs a shortcut.

The district court entered an ambiguous order that purports to both substitute A Cab Series, LLC, in the place of A Cab, LLC, and to add A Cab Series, LLC, as a separate party. AA 9302. The district court then found that A Cab Series, LLC, had no standing to attempt to prove A Cab Series, LLC, is a properly created and organized entity, and that other separate entities whose assets were stolen had no standing to seek protection from collection.

The assertion that this is only a name change and that the separate entities are not entitled to the shield of the statute is one that must be made after the parties are sued and before a judgment is entered, not after the judgment is entered. The assertion that the shield goes only one way is belied by the express language of the statute, which plaintiffs neglect to address.[12] Even if the shield goes only one way,

---

[12]"The debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series are enforceable against the assets of that series only, and not against the assets of the company generally or any other series." NRS 86.296(3). The argument that the statute provides no protection to the company would render the statutory scheme nugatory. One would simply sue the company for any debt of any series, and then enforce the company obligation against all of the separate series entities. Indeed, that is what

the parties had a right to litigate their defense before a judgment was entered against them.

### H. The Attorney's Fees Award is Excessive.

Plaintiffs' arguments regarding the attorneys' fees are generic. A Cab will rely in its arguments from the opening brief on this subject.

## CONCLUSION

The judgment of the district court should be reversed.

DATED this 22 day of December, 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*

---

plaintiffs have attempted to do here.

## 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.

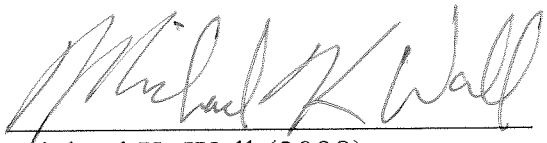
2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 6,981 words.

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 22 day of December, 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 Appellant*s

## CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date **APPELLANTS REPLY 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 22nd day of December, 2020.

An employee of Hutchison & Steffen, PLLC