IN THE SUPREME COURT OF THE STATE OF NEVADA

A CAB, LLC, and A CAB SERIES, LLC,

Appellants,

vs.

MICHAEL MURRAY; and MICHAEL RENO, Individually and on behalf of others similarly situated,

Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No: 77050

District Case No: A-12-669926-C

APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR AN AWARD OF ATTORNEY'S FEES AND INTEREST

Appellants oppose Respondents' requests in full. There are a number of items interspersed in Respondents' request; and therefore Appellants wish to be clear in their opposition to all. Appellants assert that said requests are without basis and not supported by the record nor this Court's decision in this appeal.

1. Respondents' Request for Costs is Not Supported.

Respondents request an award of "costs upon remand" in their "conclusion" submitted to this Court. Other than the request itself, the request is not detailed nor supported by a verified memorandum of costs as required by NRAP 39 and NRS Chapter 18. Therefore, this request should be denied in its entirety.

2. Respondents' Request for Attorneys' Fees is Not Warranted.

Respondents indicate in their motion: "This motion concerns an award of attorney's fees solely for the respondents' counsel's work performed in this Court and in connection with this appeal." *Motion*, p.4.

Such an award for attorneys' fees is governed under NRAP 38, which indicates:

> When an appeal has frivolously been taken or been processed in a frivolous manner, when circumstances indicate that an appeal has been taken or processed solely for purposes of delay, when an appeal has been occasioned through respondent's imposition on the court below, or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future.
> **NRAP 38(b).**

In this Court's Order filed December 30, 2021 (137 Nev. Adv. Op. 84), the Court clearly indicated there were grounds for reversal and remand to the District Court. Specifically, the Court "conclude[d] the district court erred by tolling the statute of limitations far beyond two years based on an erroneous interpretation of the MWA's notice requirements." *Id.*, p. 32. Secondly, the Court also concluded the district court must reconsider the award of attorney fees. *Id.* Thirdly, the Court concluded the district court erred in its award of costs. *Id.* Further, this Court remanded to the district court to take evidence on what corporate entity is actually liable for any damages. *Id.*

Thus, with this Court determining the existence of a series of serious errors that affected the progress and the ultimate outcome of the case, this appeal cannot be deemed to be frivolous. If anything, it is Appellants who were greatly harmed by the District Court's errors.

Just solely looking at the issue of the district court haphazardly extending the statute of limitations, one can see the harm that was caused and the domino effect upon the litigation. Appellants repeatedly brought the statute of limitations issue to the attention of the District Court following this Court's clear guidance in

Thomas v. Nev. Yellow Cab Corp., 130 Nev. 484, 327 P.3d 518 (2014).

Following the entry of that Order on June 26, 2014, Appellants moved the District Court specifically on the two-year issue in August 2015, and again in November 2016, but were repeatedly and erroneously denied. See *Defendant's Motion for Declaratory Order Regarding Statute of Limitations*, filed August 10, 2015 (AA000470-AA000570); and *Defendant's Motion for Judgment On the Pleadings Pursuant to NRCP 12(c) With Respect to All Claims for Damages Outside the Two Year Statute of Limitations*, filed November 17, 2016 (AA001587-AA001591).

As a result of the District Court's erroneous path, Defendants were forced to defend a claim for alleged under-payments as far back as July 1, 2007. These District Court rulings completely changed the disposition of the litigation with neither party wanting to or having the financial wherewithal to fund an analysis of thousands of tripsheets dating back to 2007. In fairness, the back-dated timeframe was far outside of any record keeping requirements; and there was no way for A Cab to anticipate in 2007 that a lawsuit would be filed 5 years later in 2012 to enforce a clause that was interpreted by this Court in 2014.

Quite frankly, even if they could afford it at the time, it never made sense to Defendants to pay for a retro-analysis of the tripsheets due to a number of reasons:

1. They did not bear the burden of proof.

2. The tripsheets were standard in the industry and had already been accepted by the Department of Labor as well as the Office of the Labor Commissioner as sufficient, offering no reason to think the documents were not compliant with the statutes; and

3. Defendants believed it was an unsupportable error to extend the statute of limitations so many years in the past.

However, this determination by the district court to extend a statute of limitations for years and with an inexplicable formula for individual drivers based upon hire dates, was deemed so detrimental to the defense of this case that Appellants felt compelled to file a Petition for Writ of Mandamus to this Court on June 26, 2017 on this issue. (*A Cab, LLC v. Eighth Judicial District Court*, No. 73326) . Unfortunately, the writ was denied with the indication that petitioner had an adequate legal remedy available in the form of an appeal from the final judgment. *Order Denying Petition for Writ of Mandamus*, September 19, 2017. (*A Cab, LLC v. Eighth Judicial District Court*, No. 73326)

As such, the litigation continued and "approximations" were utilized in an attempt to reinvent years of past hours, yielding an absurd amount of damages clearly out of line with normal pay and other settlements achieved in the industry. The Employer always anticipated that at the trial of this matter it would clearly demonstrate how unreasonable it was for the Plaintiffs to assert a 9+ hour work shift as being typical or the average.

With this Court's decision now reversing that course and limiting the timeframe, a specific calculation of any alleged underpaid hours is manageable (for both parties) and can be based upon a reality of hours worked, rather than a random guess. Unfortunately, in order to arrive at to this point in time has cost Appellants hundreds of thousands of dollars in litigation fees and costs, the majority of which are not recoverable.

In light of this Court's decision reversing and remanding on all of these issues, Respondent's request for attorney's fees in the amount of $63,760 is unreasonable, not supported, and should be denied in its entirety. There is no supporting argument in favor of Respondent's request other than this Court has never ruled on how fees under the MWA should be determined.

3. This Court has indicated in its decision that the judgment is to be modified and reversed; interest will accrue accordingly when it is entered by the district court.

Respondents are seeking to amend this Court's decision and instruction to the district court, with their request to have interest run from dates of entry of district court orders which are now to be modified as specified in the decision. This request should be denied.

Specifically, Respondents want interest on an award of attorney's fees and costs to run from February 6, 2019, the entry date of the unsupported award of attorney fees. *Motion*, p. 6. That district court order awarding fees is vacated. This Court has remanded for a proper determination based upon what the final judgment ultimately will be; and also Respondents' ability to demonstrate they are in fact entitled to an award of attorney fees and costs. Thus far, they have not properly demonstrated an entitlement to fees, and this Court found the award of costs was also in error. Interest cannot run from orders which have been found to be unsupported and in error.

Similarly, Respondents are requesting an Order that interest run from August 18, 2018 on a judgment which has not been finalized, and which this Court has found was clouded with errors. The remand on this issue will greatly affect any entry of a calculation of damages and the final judgment in this matter. First and foremost, the first three (3) years of the claimed damages of July 1, 2007 through October 8, 2010 have been completely eliminated. This is over 1195 days of the claimed 9.2 hour workdays which should not have been included.

The only items which remain for Plaintiffs' claimed damages are from October 8, 2010 through December 31, 2015. The presentation to the district court upon remand of this time period will demonstrate that any award of damages is now greatly reduced and/or has already been paid and satisfied:

1. There is no liability after June 26, 2014 when *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014) was published, as the company changed its procedures for full compliance by excluding tips in its calculations of minimum wage (testified by the company's Person Most Knowledgeable and believed to be undisputed by Plaintiffs). Any liability that exists after this time frame would be de minimus and arising from a clerical error.
2. Defendants have already paid out any alleged underpayment for the time period of October 1, 2010 to October 1, 2012 through a settlement with the Department of Labor who agreed that $139,988.80 was the underpayment for a two year time period. These monies have already been paid in full and satisfied. *Perez v. A Cab*, USDC Case No. 2:14-cv-1615, AA003138-003157.
3. Defendants have made additional payments towards the $224,529.00 class action resolution reached with the drivers who did not opt out in the matter of *Jasminka Dubric v. A Cab, LLC,* District Court Case No. A-15-721063-C.

Accordingly, the imposition of interest from a date more than three (3) years ago when a judgment which no longer is in place would not be reasonable. As this Court wrote in its decision, "when a judgment has been entered resolving claims properly severed, it is final and appealable." *Order*, p. 20 citing *Valdez*, 130 Nev. at 907, 336 P.3d at 971. The claims are not resolved per the remand and interest should not commence to accumulate retroactively.

Further, this Court has remanded to the district court for a determination as to "what corporate entities existed and were actually liable for the judgment." *Order*, p. 32.

Finally, it is important to note that Respondents seek to profit from the delay caused by their own actions. It was Respondents who petitioned to place Appellants into involuntary bankruptcy on April 12, 2019, following summary judgment. Their actions caused a stay on this appeal and other pending litigation surrounding this action. This delay which they created is that, upon which they want to collect interest asserting they will be "deprived" of the interest accumulated during this time. Respondents' attempts to place Appellants into bankruptcy were dismissed by order of the Federal Bankruptcy Court. Respondents' acts in pursuing this vindictive petition of involuntary bankruptcy constituted a waste of time and resources; and greatly escalated fees and costs in causing Appellants to hire commercial bankruptcy counsel to have the matter dismissed. Similarly, many of the delays have been directly caused by Respondents as is reflected in the record on appeal. This Court should not allow Respondents to further profit from engaging in such tactics.

The district court is qualified to follow this Court's remand and instructions and to enter judgment as deemed appropriate with an accompanying award of interest upon entry of its order.

CONCLUSION

Respectfully, Respondents' motion should be denied in its entirety.

DATED this 13th day of January, 2022.

RODRIGUEZ LAW OFFICES, P.C.

/s/ Esther C. Rodriguez, Esq.

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CERTIFICATE OF SERVICE

I certify that I am an employee of RODRIGUEZ LAW OFFICES, P.C. and that on this date **APPELLANTS' RESPONSE TO RESPONDENTS' MOTION FOR AN AWARD OF ATTORNEY'S FEES AND INTEREST** 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:

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DATED this 13th day of January, 2022.

/s/ Susan Dillow

An employee of Rodriguez Law Offices, P.C.