IN THE SUPREME COURT OF THE STATE OF NEVADA

HILLSBORO ENTERPRISES INC., A NEVADA CORPORATION; AND, MOBILE BILLBOARDS, LLC, A NEVADA LIMITED LIABILITY COMPANY; EBVB HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY; VINCE BARTELLO, AN INDIVIDUAL; ERICA BARTELLO, AN INDIVIDUAL; Appellants, vs. SEAN FITZGERALD, Respondent.	Supreme Court No. 79698

Appeal from the Eighth Judicial District Court
Department IX, Clark County, Nevada
The Honorable Christina Silva, District Court Judge,
District Court Case No. A-15-716570-C

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S NRAP 26.1 DISCLOSURE [1]

The undersigned counsel of record certifies that Respondent, Sean Fitzgerald, is an individual. Kemp & Kemp is the only law firm who has appeared for Respondent in this action.

This representation is made so the judges of this court may evaluate possible disqualification or recusal.

DATED this 8th day of September 2020.

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[1] Appellants neglected to disclose their previous representation by Allen Lichtenstein, Esq.; Michael C. Van, Esq., and Samuel A. Marshall, Esq., Shumway Van.

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ISSUES PRESENTED

I. Whether the Jury's finding by a preponderance of the evidence that Erica Bartello and Vince Bartello were *personally* liable for tortious conduct committed personally by them of Retaliatory Discharge and Conversion (Vince Bartello) was supported by substantial evidence. [2]

II. Whether the Jury's finding by a preponderance of the evidence that EBVB was liable for the tort of Retaliatory Discharge was supported by substantial evidence.

III. Whether the Jury's finding by a preponderance of the evidence that Hillsboro Enterprises, Inc., was liable for the tort of Retaliatory Discharge was supported by substantial evidence.

IV. Did the district court err is giving Jury Instruction 26 instructing the jury on personal liability for tortious conduct committed by Erica Bartello and Vince Bartello when they *personally* committed the tortious acts?

V. Whether the Jury's finding by a preponderance of the evidence that Sean's damages for Retaliatory Discharge was supported by substantial evidence.

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[2] Appellants do not argue that the jury finding Mobile Billboards liable for both Retaliatory Discharge and Conversion was not supported by substantial evidence.

VI. Appellants have waived any and all argument as to breaking out the assignment of liability to individual Appellants on the claim of Retaliatory Discharge by failing to object to the Special Verdict Form.

STATEMENT OF FACTS

Appellants Erica Bartello (herein "Erica") and Vince Bartello (herein "Bartello") are husband and wife who owned, controlled, and operated Hillsboro Enterprises, Inc., (herein "Hillsboro"), Mobile Billboards, LLC, (herein "Mobile Billboards"), and EBVB, LLC (herein "EBVB") during all relevant periods of time. [3] (III AA 449:23-25, 478:10-11, 382:2-5; 555:20-556:11; IV AA 643:16-645:20, 627:20- 628:6; 655:12-18; I RA 0015, 0036-39.) [4] Erica and Bartello personally committed the torts against Sean while acting within the scope of their positions as Sean's employer and employment managers. (*Id.*) They were additionally acting on behalf of their Hillsboro, Mobile Billboards, and EBVB business entities. (*Id.*)

Bartello hired the twenty-year old Respondent Sean Fitzgerald (herein "Sean") as a fleet mechanic on April 9, 2014. (II AA 193:16-18; IV AA 669:7-9.) Sean worked Monday-Friday 9:00 a.m.-5:00 p.m. but was on-call in the event vehicles broke down. (II AA 194:5-22.) Bartello worked seven days a week. between 4:30 p.m.-3:30 a.m. (III AA 460:21-461:3.)

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[3] Respondent objects to uncited facts in Appellants' Statement of Fact (AOB 2-3) and the mischaracterizations throughout.

[4] Appellants submitted their Appendix but erroneously represent it as being a Joint Appendix. Respondent refers to as Appellants' Appendix (herein "AA.")

When Bartello hired Sean, he told him he was working for Hillsboro. (II AA 290:13-291:7.) All pre-employment tax documentation was completed under Hillsboro and Sean's first check was issued by Hillsboro five (5) days *before* his April 30, 2014 serious work-related injury. (*Id.* 199:5-12, 290:13-291:7; V AA 897, 901.) Sean's second check was issued by Mobile Billboards, three days *after* his serious work-related injury. (II AA 201:5-11)

On the date of his injury, Sean believed he worked for Hillsboro and had the workers' compensation form C-4 filled out reflecting the same. (II AA 218:11-220:1; I RA 0042.) The C-4 form was later changed by an unknown person to incorrectly represent that Sean worked for Sky Mobile Billboards. (II AA 218:15-25, 219:15-22.) Sean was present in the room when Bartello was on speaker phone with his office manager telling her to change his employer to Mobile Billboards because there was a problem with Hillsboro's insurance. (II AA 208:5-209:13.)

Sean's job duties included washing and repairing trucks/cars, maintenance and cleaning in the shop and the building, auto electrical, and welding/fabricating. (III AA 470:8-14; RA 0033.) [5] This included the billboard trucks used by Mobile Billboards, as well as vehicles and mopeds owned by Hillsboro. (II AA 189:16-190:1, 193:19-194:12; III AA 415:12-18, 509:19-510:8, IV AA 634:13-635:6.) In

[5] Respondent submits a *readable* copy of these text messages also submitted by Appellants at APP 855-APP 895 which are difficult to read.

addition, Sean was in charge of repairing Appellants' personal cars. (I RA 0027). Sean had a key to Appellants' property because he was on call every day in the event a Mobile Billboard truck needed repairs or towing after hours or on the weekends. (II AA 194:5-22.) Bartello informed Sean that the shop was his responsibility and he could choose who he wanted in the shop. (I RA 0017.) Sean also worked at Appellants' house performing maintenance duties. (II AA 247:1-15.)

To perform his job duties, Sean took his personal mechanic hand tools which were housed in a locking Mateo Single Bay Flip-Top toolbox, two red motorized karts, and a computer that he used to pull up wiring diagrams. (II AA 195:3-17, 198:13-199:4, 265:9-13, 285:25-286:8.) Sean kept his toolbox locked. (II AA 231:13-232:6; III AA 395:2-6.)

On April 30, 2014, while working on the Hillsboro Monster Truck, Sean sustained a serious work-related injury that partially amputated his thumb. (II AA 212-217, 329; III AA 509-510.) Sean was constantly working on the Hillsboro Monster Truck and his interview for the mechanics position was done on that truck. (II AA 212:12-15; I RA 0006-0014.)

The day of his injury, Sean was told he could continue to work on light/modified duty. (I RA 0042.) Sean provided Appellants with this information.

(I RA 0028.) Sean was never offered light-duty work. (II AA 359:15-24; III AA 524:14-526:25.)

Sean returned to work on May 1, 2014, the day following his industrial injury. (I RA 0016.) On May 5, 2014, Sean inquired as to the status of the workers' compensation claim because he needed to get the dressing changed on his open wound. (I RA 0018.) Appellants did not provide Sean with any workers' compensation information until May 7, 2014, when he was finally provided a claim number. (I RA 0020.) On the same day, May 7, 2014, Appellants began a concerted effort to find a reason to terminate Sean. (I RA 0019-0041.) On May 8, 2014, Sean was instructed to continue working on the Hillsboro Monster Truck. (I RA 0025)

Appellants first accused Sean of making fraudulent credit card purchases. (I RA 0021; III AA 497:7-500:16.) On May 9, 2014, at 7:08 p.m. Bartello reprimanded Sean for scheduling time to work on a Toyota Supra that Bartello's friend Ryan was going to purchase. (I RA 0025, 27; II AA 209:16-210:3; IV AA 626:15-627:16.) There had been a prior agreement between Bartello and Sean that he could perform that work. (*Id.*) Further, Bartello had given Ryan Sean's phone number. (*Id.*) Bartello also reprimanded Sean for leaving work at 4:30 p.m. because he was not feeling well. (I RA 0023-0024; IV AA 623:3-626:14.) Bartello had previously given Sean permission to leave early. (*Id.*)

In the same text message, Bartello criticized Sean for not cleaning the billboard trucks. (I RA 0025). Sean explained that detailing the trucks was not a one-man job, that he was not supposed to get his hand wet, and that he was supposed to be on workers' compensation light duty work. (I RA 0025-0026) Sean additionally asked for the workers' compensation telephone number because he needed to get his open wound cleaned and checked. (*Id.*) He also informed Bartello that he had an appointment for a cat scan the following Monday. (*Id.*)

On Saturday, May 10, 2014, at 2:18 a.m., Bartello texted Sean telling him he cannot return to work until he has a doctor's note saying that he "can perform [his] job duties including washing the truck and doing maintenance on the trucks." (I RA 0027.) Sean responded at 6:44 a.m. that he had turned in his doctor's paperwork to the office manager, Kimmie, regarding light duty, and that after surgery you are not supposed to have any bandages wet, and that he would get additional documentation. (*Id.*) Since he was told not to return to work, Sean asked if he was being laid off or going on disability. (I RA 0029.) At 7:54 p.m., in a two and one-half page text message, Bartello concludes by telling Sean that there are discrepancies in his story and that he cannot return to work until he can perform all his job duties. (*Id.*)

On Monday, May 12, 2014, Sean contacted Appellants requesting the list of workers' compensation doctors because he needed to seek additional medical

attention to stave off a bone infection that could cause additional loss of his thumb. (I RA 0034.) On May 13, 2014, Sean informed Bartello that he had an appointment to see a hand surgeon on May 14, 2014. (*Id.*)

Beginning at 7:54 p.m. on May 14, 2014, Bartello engaged Sean in a text argument that lasted until 3:00 a.m. May 15, 2014, and then was resumed by Bartello at 8:45 a.m. (I RA 0035-0041.) The argument began with Bartello questioning Sean about the location of his timecard. (I RA 0035) Sean told Bartello it was locked up and that tomorrow, May 15, 2014, he would come to the shop and give Ken his timecard and drop off another doctor's note. (I RA 0035-0041; II AA 228:13-238:25.)

At 11:20 p.m., Bartello texted Sean that he had a shift manager go through his toolbox to find his timecard. (*Id.*) Sean verified Bartallo's admission about going through his locked toolbox to which Bartello texted, "Yes that's what the text message says!" (*Id*; II AA 240:22-242:20) Sean pointed out that no one had obtained his permission to enter his locked toolbox and that he said he would be in tomorrow. (*Id.*)

At 12:20 a.m., Baretllo texts that he does not need to ask Sean to go through his toolbox because he is the "owner of the building" and Sean's "employer." (I RA II 0037; II AA 235:19-236:3; IV AA 627:17-23.) Bartello additionally told Sean to come at 12:30 p.m., and to bring his key because he can no longer be in the

shop without a manager being present. (I RA 0038.) Bartello defined managers that Sean could speak with as either himself or his wife, Erica. (*Id.*) After Sean clearly informed Bartello that his toolbox was his private property, that he needs to be there if people are going to be going through his personal property, and addressed Bartello's questions about the time card, doctor's note, and his borrowing a piece of equipment, Bartello texted, at 2:29 a.m., (May 15, 2014),

> I have him (sic) informed Metro of the situation. I'm giving you notice now that you are not allowed on my property, at 4558 W. Hacienda without Erica or myself present! If you do go there that will be trespassing. If you take something from my property, that is robbery and I will have you arrested!

(I RA 0039.)

At 8:45 a.m., Bartello texts Sean,

> If you do not bring your key to the shop today as scheduled, I will be forced to change the locks immediately! That said, I will have to sell any personal property you may have there to cover the cost.

(I RA 0040.) Sean arrived at Appellants' property for the 12:30 p.m. to meet with Appellants. (I RA 0036.) Sean's father and a friend accompanied him to help load and transport his tools. (II AA 153:22-154:17; 251:25-252:1; III AA 384:22-285:13.) Sean expressed multiple times that he wanted to get his tools: Appellants refused. (II AA 251:9-24; 252:21-213; 253:12-19.) Erica came out of the building

and Sean gave her the key and doctor's note. (III AA 433:21-23; 436:5-15.) [6] After Sean gave Erica the key and the doctor's note, Appellants called Metro. (II AA 157:1-5; 253:2-5; III AA 414:22:415:3; 433:21-23; 436:5-15; 489:3-12.) Sean also called Metro but was informed officers had already been dispatched. (II AA 253:19-253:5.) When Metro arrived, they went directly into the building and upon returning informed Sean he was being trespassed from the property. (II AA 254:8-20.) Sean left immediately after being trespassed from the property and without his personal property. (II AA 257:7-10.)

Appellants told Sean he could not get his property until they did an inventory and that he had to come back on May 19, 2014. (II AA 252:7-18; 258:16-259:6.) Sean returned on May 19, 2014, to retrieve his property and brought his father to help. (II AA 259:7-260:10; *see also* fn 6) Appellants would not allow Sean's father in the shop while he was checking the inventory list against the tools in his box. (*Id.*) It took approximately 1.5 hours for Sean to check the inventory list against what was in his toolbox. (II AA 261:10-14.)

In Sean's toolbox he had a prescription for 30 Lortabs for injuries he received from a motorcycle accident he had before working for Appellants. (II AA 271:19-272:5; 388:16-390:4.) He had picked the prescription up on his way to

[6] The jury was given an adverse inference jury instruction after Appellants "failed to produce recordings of interactions with the Plaintiff in May of 2014." (V AA 812.)

work when he first started working for Appellants. (*Id.*) Sean did not ingest the Lortabs because they made him sick. (*Id.*) The Lortabs were not inventoried by Appellants' and appear nowhere on their list. (I RA 0067-0072.) When Sean was assessed by the workers' compensation medical professionals at the time of his industrial injury, it was noted that he was not under the influence. (IV AA 676:21-679:9.)

On May 21, 2014 Appellants contacted Michelle Goodes (herein "Goodes") their third-party workers' compensation administrator, telling her they found the prescription in his toolbox and that he is not allowed to take it while at work. (IV AA 611:19-615:28; I RA 0061.) Goodes responded that they could deny his claim because of this, and that they should start a paper trail including offering him light duty work, so they do not get "stuck having to pay" Sean. (IV AA 611:19-615:28; I RA 0064-66.) Goodes also informed Appellants that injury claims raise their premiums. (*Id.*) Sean was never offered light-duty work. (II AA 359:15-24; III AA 524:14-526:25.)

While checking his toolbox against Appellants' inventory list, Sean discovered that items were placed in his toolbox that were not his; this, in addition to discovering items missing from his toolbox. (II AA 262:21-266:4; I RA 0062-0063, 0067-0072.) Sean had asked to be present any time someone went through his toolbox: Appellants refused. (III AA 535:18-540:14.) On June 17, 2014, Sean

faxed a list of missing property including the missing Lortabs, to Appellants' attorneys' office which included missing tools and his missing computer. (II AA 266:24-267:4, 267:23-268:12, 270:8-271:2; I RA 0062-0063.) Appellants took Sean's computer to have it scanned to find a reason to terminate his employment. (IV 641:12-643:9.) Sean's missing property was not returned to him nor was his computer retrieved. (III AA 401:18-404:18.)

SUMMARY OF THE ARGUMENTS

I. The district court did not err in giving Jury Instruction 26 which followed well established Nevada law that finds Nevada Revised Statutes 78.747 and 86.376 do not protect principals of corporations and LLCs from personal liability for torts they personally commit. Further, in the interest of justice and to prevent fraud, the Supreme Court of Nevada holds that corporations and LLCs are subject to tort liability where there is no distinguishable difference between the tortfeasors and business entities. Jury Instruction 26 embodies well established Nevada law.

II. The jury's finding by a preponderance of the evidence that Erica and Bartello are personally liable for the tort of Retaliatory Discharge was supported by substantial evidence underscored by well settled Nevada law on personal liability for those personally committing the torts, even if those persons are principals of business entities as defined under Nevada Revised Statute Chapters 78 and 86.

III. The jury's finding by a preponderance of the evidence that EBVB was liable for the tort of Retaliatory Discharge was supported by substantial evidence underscored by well settled Nevada law and a case directly on point wherein the Supreme Court of Nevada found business entities are liable for torts where there is no distinguishable difference between the tortfeasor and the corporation.

IV. The jury's finding by a preponderance of the evidence that Hillsboro was liable for the tort of Retaliatory Discharge was supported by substantial evidence underscored by well settled Nevada law and a case directly on point wherein the Supreme Court of Nevada found business entities are liable for torts where there is no distinguishable difference between the tortfeasor and the corporation. In addition, the evidence revealed that Hillsboro was Sean's employer *before* his industrial accident and was changed only because of the accident and issues with workers' compensation insurance.

V. Relevant, admissible, and corroborated evidence supported the jury's finding by a preponderance of the evidence presented that Sean's damages for the Retaliatory Discharge he suffered at the hands of Appellants totaled $56,000.00.

VI. Appellants waived any argument as to breaking out the assignment of liability to Erica, Bartello, Hillsboro and EBVB on the claim of Retaliatory Discharge because they failed to object to the Special Verdict Form.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR GIVING JURY INSTRUCTION 26 ADDRESSING PERSONAL LIABILITY BY INDIVIDUAL TORTFEASORS WHO PERSONALLY COMMIT THE TORT. [7]

A. Appellants Have Failed In Their Responsibility On Appeal Of This Issue.

Appellants have neglected their responsibility to cogently argue, and present relevant authority, legal analysis and supporting allegations in support of their appellate concerns on this issue. Thus, this Court need not consider conclusory arguments or novel legal propositions that are unsupported by legal authority. *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984); *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978) (declining "to consider appellant's constitutional challenge ... because he [had] failed to cite any relevant authority in support of that argument."). Appellants' thin appeal of this issue leaves Sean to respond in a vacuum, trying to anticipate what Appellants' argument(s) actually are, which is prejudicial to Sean who is deprived a fair opportunity to fully address the issue, as well as depriving the appellate court of the same. This includes Appellants' Standard of Review which is intentionally incomplete so that in Reply they can argue what should have been addressed by their appeal.

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[7] Appellants' Issue IV.

B. Standard Of Review.

The appellate court will uphold a district court's decision regarding a jury instruction absent an abuse of discretion. *Brooks v. State,* 124 Nev. 203, 206, 180 P.3d 657, 659 (2008). The district court has broad discretion to settle jury instructions, and its decision to give or decline a particular instruction will not be overturned absent an abuse of discretion or judicial error. *Skender v. Brunsonbuilt Constr. & Dev. Co.,* 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."); *Jeffries v. State*, 133 Nev. Adv. Op. 47, 397 P.3d 21, 27-28 (2017) (same).

Jury instruction errors are subject to a harmless-error analysis. In the civil context, the appellate court applies the standard articulated in NRCP 61, which provides that a judgment or verdict should be disturbed only when "refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." NRCP 61; *see In re A.B.*, 128 Nev. Adv. Op. 70, 291 P.3d 122, 128 n.3 (2012).

C. Jury Instruction 26.

Appellants fail to fully set forth Jury Instruction 26, although arguing it was error by the district court to give the instruction. The Instruction reads as follows:

> An officer, agent, or employee of a corporation or business entity who commits a legally wrongful act causing damages in the course of acting on behalf of the corporation or business entity is individually liable for his or her conduct regardless of whether the business entity may also be found liable for the conduct. The corporation or business entity and the individual officer, agent, or employee may be sued jointly for the legally wrongful act.

(V AA 814.) When read in totality, not cherry-picking language as Appellants would encourage, the Instruction plainly states that it is applicable when corporate or business entities' officers, agents and employees are acting in their individual capacity and that they can also be jointly liable with the business entity. This is a correct statement of Nevada law as demonstrated *infra* at §§ D, E, F, and G.

D. Tortfeasors Cannot Be Shielded By A Corporation or LLC From His/Her Personal Tortious Conduct.

It is well settled that an employee, officer, director, or agent of a corporation is personally liable for the torts he or she commits personally, **regardless** of whether the corporation or master may be held directly or vicariously liable. An employer who commits an intentional tort upon an employee cannot claim that the

intentional act resulted in an accidental injury, nor can they use the corporate entity as a shield whether defined as a corporation or limited liability company. *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 689 (Nev. 1995) ("An officer of a corporation may be individually liable for any tort which he commits, and, if the tort is committed within the scope of employment, the corporation may be vicariously or secondarily liable under the doctrine of respondeat superior."); *Gardner v. Eighth Judicial Dist. Ct.* 133 Nev. 730, 730-31, 405 P.3d 651, 652 (2017) ("We conclude that NRS 86.371 is not intended to shield members or managers from liability for personal negligence."); *Prell Hotel Corp. v. Antonacci,* 86 Nev. 390, 391, 469 P.2d 399, 400 (1970) ("Where, however, the willful tort is committed in the course of the very task assigned to the employee, liability may be extended to the employer."); *See also Barjesteh v. Faye's Pub Inc.,* 106 Nev. 120, 122, 787 P.2d 405, 406 (1990) ; 13 *Am. Jur., Corporations,* Sec. 1122 at page 1049; 13 *Am. Jur., Corporations,* Sec. 1086 at page 1086; *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 317 P.2d 847, 849- 850 (1957); *Sanford* v. *Kobey Brothers Construction Corp.,* 689 P.2d 724 (Colo.App 1984); Nevada Revised Statute 41.745; Nevada Revised Statute 42.007; *Wood v. Safeway, Inc.,* 121 P.3d 1026, 1034-35, 121 Nev. 724 (2005) .

In both *Gardner* and *Semenza* the Supreme Court of Nevada could not have been clearer in finding that officers of a corporation and members of LLCs are

individually liable for any tort they personally commit without running afoul of corporate or LLC protections, and could be held jointly liable with the business entities as well. Any other result would be absurd and give corporate officers and members of LLCs carte blanche to personally commit any tort at any time and be shielded for their personal actions by the business entity.

After review of the legal authority provided and hearing argument from both parties, the district court correctly reasoned that Jury Instruction 26 was a correct statement of Nevada law, and was, in fact, a "companion" instruction to Jury Instruction 25 on alter ego liability. (IV AA 582:8-11, 588:1-591:10; V AA 813.) Jury Instruction 26 is not a misstatement of Nevada law and the district court's well-reasoned decision to include it did not exceed the bounds of the law.

E. Appellants' "Argument" That Retaliatory Discharge In Violation Of Public Policy Is Not A Tort Wherein Personal Liability Can Attach Is Meritless, Lacks Any Legal Support, And Is Void Of Any Analysis.

Employees in Nevada are presumed to be employed "at-will" unless the employee can prove facts legally sufficient to show a contrary agreement was in effect. *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 375, 989 P.2d 882,884 (1999). The at-will rule gives the employer the right to discharge an employee for any reason, so long as the reason does not violate public policy or the law. *Id.* at 376; 989 P.2d at 885 (citing *Vancheri v. GNLV Corp.*, 105 Nev.417,421, 777 P.2d

366,369(1989); *K Mart Corp. v. Ponsock*, 103 Nev. 39,47,732 P.2d 1364,1369(1987)). "The at-will employment is subject to limited exceptions founded upon strong public policy..." *Hansen v. Harrah's*, 100 Nev. 60, 63,675 P.2d 394, 396(1984) .

An employer commits a tortious discharge by terminating an employee for reasons that violate public policy. *Allum v. Valley Bank*, 114 Nev. 1313, 1319-20 (1998). Nevada recognizes the cause of action of retaliatory discharge for filing a workers' compensation claim. *Hansen*, *supra*, 100 Nev. at 63-65,675 P.2d at 396-397; *State Indus. Ins. System v. Campbell*, 109 Nev. 997, 1001, 862 P.2d 1184, 1186 (1993) (noting *Hansen* adopted a remedy for an employee discharged in retaliation for filing workers' compensation claims); *Finn v. City of Boulder City*, 2:14-cv-01835-JAD-GWF,2018 WL 473001, at *8 (D.Nev. Jan. 17,2018) (noting that *Harrah's* adopted the narrow exception to the at-will employment rule and recognized that "retaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort".

The Supreme Court of Nevada has recognized that "**retaliatory discharge** by an employer stemming from the filing of a workers' compensation claim by an injured employee is actionable in tort" as **"both the cause of action and the remedy are governed by the law of torts**." (Emphasis added). *Hansen*, *supra*, 100 Nev. at 64-65,675 P.2d at 397 ; *Ponsock*, *supra*, 103 Nev. at 46,732 P.2d at

1369 (referring to the application of general tort law to employee discharge cases and citing *Hansen* as the prototypical tortious discharge or public policy tort); *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 212 (1991) (the tort of wrongful discharge is not dependent upon or related to an employment contract); *Dillard*, *supra*, 115 Nev. at 376-77, 989 P.2d at 885 ("retaliatory discharge for filing workmen's compensation claims [is] tortious behavior").

In *D'Angelo v. Gardner*, the Supreme Court of Nevada states that "[t]he essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means of which are deemed contrary to the public policy of this state." *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 212 (1991). The Court further noted that "although a public policy tort cannot ordinarily be committed absent the employer-employee relationship, the tort, the wrong itself, is not dependent upon or directly related to a contract of continued employment..." *Id.* (quoting *Ponsock*, *supra*, 103 Nev. at 46, 732 P.2d at 1369)); see *Shoen v. Amerco, Inc.*, 111 Nev. 735, 744,896 P.2d 469,475(1995) (quoting *D'Angelo*).

Appellants' "argue," without citation to any legal authority or analysis, that *may be* because the tort of Retaliatory Discharge is based on public policy, it is not the type of tort to which liability should be extended. (AOB 19-20.) Nevada law plainly states otherwise and Appellants' "argument" flies in the face of over 30 years of law as they attempt to create a new body of tort law drawing a distinction

between common law torts and torts based on statutory violations. Nevada has repeatedly found that an employer commits a tortious discharge by terminating an employee for reasons that violate public policy, and specifically where the discharge stems from the employee's filing of a workers' compensation claim.

F. Appellants' Objection To Language Cherry-Picked And Taken Out Of Context Is A Red-Herring

Without citation to any legal authority or analysis whatsoever, Appellants argue that the language "legally wrongful act causing damages," was error because it could hypothetically "include negligence, statutory violations, breach of contract etc." that "would create personal liability in direct contradiction" to statutes that serve to protect corporations. (AOB 19-20.)

An appellate court may only reverse a district court's judgment where the party challenging the judgment can establish prejudice to its rights. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) ; *Wyeth v. Rowatt,* 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To be reversible, an error must be prejudicial and not harmless.) Prejudice means that, but for the district court's error, a different result might have been reached. (*Id.*) No such prejudice befell Appellants with Jury Instruction 26 as the only claims considered by the jury were the **tort** claims of Retaliatory Discharge and Conversion for which Appellants could be, and were, found personally liable. The jury would not

have reached a different result in this case because, again, the jury was only applying the Instruction to the torts of Retaliatory Discharge and Conversion.

To demonstrate that an alleged error caused harm, the party must show that the error affects the party's substantive rights so that, but for the alleged error, a different result might reasonably have been reached. (*Id.*) The jury would not have reached a different result in this case because, again, the jury was only applying the Instruction to the torts of Retaliatory Discharge and Conversion.

There is no conflict with the corporate protections under Nevada Revised Statutes as it relates to Jury Instruction 26, as the law is well settled that employees, officers, directors, or agents of Corporations and LLC's are personally liable for torts he or she commits personally.

G. Corporations Are Subject To Common Law Tort Liability Where Owners/Operators Personally Committing The Tort Are Indistinguishable From The Business Entity.

Appellants are correct that Nevada Revised Statutes 78.747 and 86.376 codified corporate protections which the Supreme Court of Nevada set forth in the matter of *McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957) . (AOB 8, 13, 20.) But there is an important distinction between a corporation where there may be other (even passive) owners who had nothing personally to do with the tortious conduct and those corporations which are wholly owned, controlled, and operated by the tortfeasors. The threat that a person could

create a corporate shell observing corporate formalities and capitalizing it sufficiently for its expected ordinary business expenses, and then use it for all manner of tortious activities with no personal liability for what he has done is repugnant. The Supreme Court of Nevada has recognized this abhorrent practice and condemned the creation of shell corporations to shield individual tortfeasors from liability holding that, "adherence to the fiction of a separate entity must not sanction a fraud or promote injustice." *McCleary*, 73 Nev. at 282, 317 P.2d 957 (1957); *see also* Nevada Revised Statute 78.747(2)(c) and Nevada Revised Statute 86.376(2)(c).

The case of *Barjesteh v. Faye's Pub,* 106 Nev. 120, 122, 787 P.2d 405, 406 (1990) is directly on point. In *Barjesteh*, a case addressing tort liability in the context of workers' compensation, the Supreme Court of Nevada held that corporations are subject to common law tort liability where there is no distinguishable difference between the tortfeasor and the corporation. (*Id.*) ("corporation subject to common law tort liability where president and operator of the corporation's bar and grill committed an intentional tort upon an employee.")

Jury Instruction 26 was a complete and accurate statement of well settled Nevada law and the district court did not err in giving the instruction.

II. THE JURY'S FINDING BY A PREPONDERANCE OF THE EVIDENCE THAT ERICA AND BARTELLO WERE LIABLE FOR THE TORT OF RETALIATORY DISCHARGE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED. [8] [9]

A. Standard of Review.

"[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993); accord *Bally's Emps.' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). In considering such a claim, the appellant court must look at the facts from the viewpoint of the prevailing party, assuming that the jury believed all the evidence favorable to that party and drew all reasonable inferences in his favor. *See e.g. El Dorado Hotel v. Brown,* 100 Nev. 622, 626, 691 P.2d 436, 439-40 (1984). The Supreme Court of Nevada has repeatedly stated that on appeal it will not weigh the credibility of witnesses because that duty rests with the trier of fact. *See e.g. Thomas v.*

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[8] The jury was given an adverse inference jury instruction after Appellants "failed to produce recordings of interactions with the Plaintiff in May of 2014." (V AA 812.)

[9] Appellants' Issue I.

State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) (citing *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981)).

B. Nevada Recognizes A Claim Of Retaliatory Discharge For Filing A Worker's Compensation Claim As A Tort.

Employees in Nevada are presumed to be employed "at-will" unless the employee can prove facts legally sufficient to show a contrary agreement was in effect. *Dillard Dept. Stores, Inc. v. Beckwith*, 115 Nev. 372, 375, 989 P.2d 882,884(1999). The at-will rule gives the employer the right to discharge an employee for any reason, so long as the reason does not violate public policy or the law. Id. at 376; 989 P.2d at 885 (citing *Vancheri v. GNLV Corp.*, 105 Nev.417,421, 777 P.2d 366,369(1989); *K Mart Corp. v. Ponsock*, 103 Nev. 39,47,732 P.2d 1364,1369(1987)). "The at-will employment is subject to limited exceptions founded upon strong public policy...". *Hansen v. Harrah's*, 100 Nev. 60, 63,675 P.2d 394, 396(1984).

An employer commits a tortious discharge by terminating an employee for reasons that violate public policy. *Allum v. Valley Bank*, 114 Nev. 1313, 1319-20 (1998). Nevada recognizes the cause of action of retaliatory discharge for filing a workers' compensation claim. *Hansen*, *supra*, 100 Nev. at 63-65,675 P.2d at 396-397; *State Indus. Ins. System v. Campbell*, 109 Nev. 997, 1001, 862 P.2d 1184, 1186 (1993) (noting *Hansen* adopted a remedy for an employee discharged in

retaliation for filing workers' compensation claims); *Finn v. City of Boulder City*, 2:14-cv-01835-JAD-GWF,2018 WL 473001, at *8 (D.Nev. Jan. 17,2018)(noting that *Harrah's* adopted the narrow exception to the at-will employment rule and recognized that "retaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort".

The Supreme Court of Nevada has recognized that "retaliatory discharge by an employer stemming from the filing of a workers' compensation claim by an injured employee is actionable in tort" as **"both the cause of action and the remedy are governed by the law of torts**." (Emphasis added). *Hansen*, *supra*, 100 Nev. at 64-65,675 P.2d at 397; *Ponsock*, *supra*, 103 Nev. at 46,732 P.2d at 1369 (referring to the application of general tort law to employee discharge cases and citing *Hansen* as the prototypical tortious discharge or public policy tort); *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 212 (1991)(the tort of wrongful discharge is not dependent upon or related to an employment contract); *Dillard*, *supra*, 115 Nev. at 376-77, 989 P.2d at 885 ("retaliatory discharge for filing workmen's compensation claims [is] tortious behavior").

In *D'Angelo v. Gardner*, the Supreme Court of Nevada stated that "[t]he essence of a tortious discharge is the wrongful, usually retaliatory, interruption of employment by means of which are deemed contrary to the public policy of this state." *D'Angelo v. Gardner*, 107 Nev. 704, 718, 819 P.2d 206, 212(1991). The

Court further noted that "although a public policy tort cannot ordinarily be committed absent the employer-employee relationship, the tort, the wrong itself, is not dependent upon or directly related to a contract of continued employment..." *Id.* (quoting *Ponsock, supra*, 103 Nev. at 46, 732 P.2d at 1369)); *see Shoen v. Amerco, Inc.*, 111 Nev. 735, 744,896 P.2d 469,475(1995) (quoting *D'Angelo*).

C. Nevada Recognizes Conversion Of Property As A Tort.

It is well settled Nevada law that wrongful dominion over property, conversion, is a claim founded in tort. *M.C. Multi-Family Development, L.L.C.* v. *Crestdale Assoc., Ltd.*, 193 P.3d 536, 543 (Nev., 2008); *Evans* v. *Dean Witter Reynolds*, 5 P.3d 1043 (Nev. 2000). Furthermore, the element of "wrongful dominion" is distinct from the elements of 'wrongfulness' with respect to other torts, and it is for a jury to determine whether the specific elements" exist as to each. *Evans, supra,* at 116 Nev. at 606, 5 P.3d at 1048 (2000). The jury found Bartello liable for *personally* committing the tort of Conversion against Sean, as well as the business entities of Hillsboro and Mobile Billboards. (V AA 840-842.)

D. Tortfeasors Cannot Be Shielded By A Corporation or LLC From His/Her Personal Tortious Conduct.

It is well settled that an employee, officer, director, or agent of a corporation is personally liable for the torts he or she commits personally, **regardless** of

whether the corporation or master may be held directly or vicariously liable. An employer who commits an intentional tort upon an employee cannot claim that the intentional act resulted in an accidental injury, nor can they use the corporate entity as a shield whether defined as a corporation or limited liability company. *Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 689 (Nev. 1995) ("An officer of a corporation may be individually liable for any tort which he commits, and, if the tort is committed within the scope of employment, the corporation may be vicariously or secondarily liable under the doctrine of respondeat superior."); *Gardner v. Eighth Judicial Dist. Ct.* 133 Nev. 730, 730-31, 405 P.3d 651, 652 (2017) ("We conclude that NRS 86.371 is not intended to shield members or managers from liability for personal negligence."); *Prell Hotel Corp. v. Antonacci,* 86 Nev. 390, 391, 469 P.2d 399, 400 (1970) ("Where, however, the willful tort is committed in the course of the very task assigned to the employee, liability may be extended to the employer."); *see also Barjesteh v. Faye's Pub Inc.,* 106 Nev. 120, 122, 787 P.2d 405, 406 (1990); 13 *Am. Jur., Corporations,* Sec. 1122 at page 1049; 13 *Am. Jur., Corporations,* Sec. 1086 at page 1086; *Russell v. American Rock Crusher Co.*, 181 Kan. 891, 317 P.2d 847, 849- 850 (1957); *Sanford* v. *Kobey Brothers Construction Corp.,* 689 P.2d 724 (Colo.App 1984); Nevada Revised Statute 41.745; Nevada Revised Statute 42.007; *Wood v. Safeway, Inc.,* 121 P.3d 1026, 1034-35, 121 Nev. 724 (2005) .

In both *Gardner* and *Semenza* the Supreme Court of Nevada could not have been clearer in finding that officers of a corporation and members of LLCs are individually liable for any tort they personally commit without running afoul of corporate or LLC protections. Any other result would be absurd and give corporate officers and member of LLCs carte blanche to commit any tort at any time and be shielded for their personal actions by the business entity.

Erica and Bartello personally committed the tort of Retaliatory Discharge against Sean while acting within the scope of their positions as Sean's employer and employment managers. Bartello explicitly stated he was Sean's employer. (I RA 0037) ("I'm the owner of the building and your employer!") This also includes repeatedly failing to provide Sean with information about workers' compensation so the process could be started. (I RA 0016, 0018, 0020, 0034.) Engaging in a concerted effort to find a reason to terminate Sean including accusing him of fraudulent credit card purchases, accusing him of performing work previously approved but suddenly was unapproved, and accusing him for taking time off for medical attention that had previously been approved. (I RA 0019-0041; III AA 497:7-500:16; II AA 209:16-210:3; IV AA AA 623:3-627:16.) Appellants' also accused Sean of taking illicit drugs at work and then contacted workers' compensation to start a paper trail in an attempt to defeat his claim. (IV AA 611:19-615:28; I RA 0061, 0064-0066; II AA 359:15-24; III AA 524:14-526:25.)

This also included Erica and Bartello fully participating in the events of May 15, 2014 when Sean repeatedly asked to retrieve his property and was denied, eventually ending with Appellants calling Metro and having him trespassed from the property so he (1) could no longer work; and, (2) could not have his personal property. (II AA 157:1-5; 251:9-24; 252:21-253:19; 253:20-253:5, 254:8-20, 257:7-10; III AA 414:22:415:3, 433:21-23; 436:5-15, 449:23-25, 489:3-12, 555:20-556:11; IV AA 643:16-645:20, 627:20- 628:6; I RA 0015, 0036-39; *see also* fn 6.) Also included are the events of May 19, 2014 when Sean came to retrieve his property and both Erica and Bartello were there and participating in the events. (*Id.*)

There was substantial evidence to support the jury's finding that Erica and Bartello are personally liable for the tort of Retaliatory Discharge they committed against Sean and this Court should affirm the jury's verdict.

III. THE JURY'S FINDING BY A PREPONDERANCE OF THE EVIDENCE THAT EBVB WAS LIABLE FOR THE TORT OF RETALIATORY DISCHARGE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. [10]

A. Standard of Review.

"[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence

[10] Appellants' Issue II.

presented." *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993); accord *Bally's Emps.' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). In considering such a claim, the appellant court must look at the facts from the viewpoint of the prevailing party, assuming that the jury believed all the evidence favorable to that party and drew all reasonable inferences in his favor. *See e.g. El Dorado Hotel v. Brown,* 100 Nev. 622, 626, 691 P.2d 436, 439-40 (1984). The Supreme Court of Nevada has repeatedly stated that on appeal it will not weigh the credibility of witnesses because that duty rests with the trier of fact. *See e.g. Thomas v. State,* 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) (citing *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981)).

B. Substantial Evidence Supported The Jury's Verdict Of Liability Against EBVB For The Retaliatory Discharge Of Sean.

Appellants are correct that Nevada Revised Statute 78.747 and 86.376 codified corporate protections which the Supreme Court of Nevada set forth in the matter of *McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957). (AOB 8, 13, 20.) But there is an important distinction between a

corporation where there may be other (even passive) owners who had nothing personally to do with the tortious conduct and those corporations which are wholly owned and operated by the tortfeasor. The threat that a person could create a corporate shell observing corporate formalities and capitalizing it sufficiently for its expected ordinary business expenses, and then use it for all manner of tortious activities with no personal liability for what he has done is repugnant. The Supreme Court of Nevada has recognized this repugnant practice and condemned the creation of shell corporations to shield individual tortfeasors from liability holding that, "adherence to the fiction of a separate entity must not sanction a fraud or promote injustice." *McCleary*, 73 Nev. at 282, 317 P.2d 957 (1957); *see also* Nevada Revised Statute 78.747(2)(c) and Nevada Revised Statute 86.376(2)(c).

The case of *Barjesteh v. Faye's Pub,* 106 Nev. 120, 122, 787 P.2d 405, 406 (1990) is directly on point. In *Barjesteh*, a case addressing tort liability in the context of workers' compensation, the Supreme Court of Nevada held that corporations are subject to common law tort liability where there is no distinguishable difference between the tortfeasor and the corporation. (*Id.*) ("corporation subject to common law tort liability where president and operator of the corporation's bar and grill committed an intentional tort upon an employee.")

There was substantial evidence before the jury that Erica and Bartello owned and controlled 100% of EBVB, Hillsboro, and Mobile Billboards. (IV AA 643:16-

645:20; III AA 555:20-556:25.) This, in addition to, Erica and Bartello also operating the businesses seven days a week and identifying themselves as employment managers of those businesses. (III AA 460:22-461:3, 555:20-556:11; IV AA 643:16-645:20, 627:20- 628:6; I RA 0015, 0036-39.)

There is no distinguishable difference between EBVB, Erica and Bartello. EBVB owns 100% of Hillsboro and Mobile Billboards. (IV AA 644:16-645:20.) The building where Sean worked, and that housed Hillsboro and Mobile Billboards, was part of EBVB. (IV AA 627:17-628:16; I RA 37.) The Monster Truck was owned by Hillsboro or Mobile Billboards but nevertheless considered by Bartello as his personal property. (III AA 509:19-510:1; IV AA 634:13-635:6.) The Viper Bartello had built for himself was titled to Mobile Billboards, kept at his residence and worked on at the shop. (III 508:5; IV 506:24-507:11.) The tools in the Mobile Billboards shop area were purchased by one of the companies, but Bartello considered them his personal property. (III 506:24-207:11.)

Sean's job duties included washing and repairing trucks/cars, maintenance and cleaning in the shop and the building, auto electrical, and welding/fabricating. (III AA 470:8-14; RA 0033.) This included the billboard trucks used by Mobile Billboards, as well as vehicles and mopeds owned by Hillsboro. (II AA 189:16-190:1, 193:19-194:12; III AA 415:12-18, 509:19-510:8, IV AA 634:13-635:6.) In addition, Sean was in charge of repairing and oil changes on Appellants' personal

cars including a Viper and oil changes on other personal vehicles. (III AA 454:23-455:18; IV AA 634:16-635:6; I RA 0027). Sean was injured while working on the Hillsboro Monster Truck which he had been working on since he was hired and continued to work on after his injury. (II AA 212-217, 329; III AA 509-510; I RA 0006-0014, 24-25.)

There is no distinguishable difference between Appellants and the jury's finding by a preponderance of the evidence that EBVB is liable for Sean's claim of Retaliatory Discharge should be affirmed.

IV. THE JURY'S FINDING BY A PREPONDERANCE OF THE EVIDENCE THAT HILLSBORO WAS LIABLE FOR THE TORT OF RETALIATORY DISCHARGE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Standard of Review.

"[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993); accord *Bally's Emps.' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). In considering such a claim, the appellant court must look at the facts from the viewpoint of the prevailing

party, assuming that the jury believed all the evidence favorable to that party and drew all reasonable inferences in his favor. *See e.g. El Dorado Hotel v. Brown,* 100 Nev. 622, 626, 691 P.2d 436, 439-40 (1984).

B. Substantial Evidence Supported The Jury's Verdict Of Liability Against Hillsboro For The Retaliatory Discharge Of Sean.

Appellants are correct that Nevada Revised Statute 78.747 and 86.376 codified corporate protections which the Supreme Court of Nevada set forth in the matter of *McCleary Cattle Co. v. Sewell*, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957). (AOB 8, 13, 20.) But there is an important distinction between a corporation where there may be other (even passive) owners who had nothing personally to do with the tortious conduct and those corporations which are wholly owned and operated by the tortfeasor. The threat that a person could create a corporate shell observing corporate formalities and capitalizing it sufficiently for its expected ordinary business expenses, and then use it for all manner of tortious activities with no personal liability for what he has done is repugnant. The Supreme Court of Nevada has recognized this repugnant practice and condemned the creation of shell corporations to shield individual tortfeasors from liability holding that, "adherence to the fiction of a separate entity must not sanction a fraud

or promote injustice." *McCleary*, 73 Nev. at 282, 317 P.2d 957 (1957); *see also* Nevada Revised Statute 78.747(2)(c) and Nevada Revised Statute 86.376(2)(c).

The case of *Barjesteh v. Faye's Pub,* 106 Nev. 120, 122, 787 P.2d 405, 406 (1990) is directly on point. In *Barjesteh*, a case addressing tort liability in the context of workers' compensation, the Supreme Court of Nevada held that corporations are subject to common law tort liability where there is no distinguishable difference between the tortfeasor and the corporation. (*Id.*) ("corporation subject to common law tort liability where president and operator of the corporation's bar and grill committed an intentional tort upon an employee.")

There was substantial evidence before the jury that Erica and Bartello owned and controlled 100% of EBVB, Hillsboro, and Mobile Billboards. (IV AA 643:16-645:20; III AA 555:20-556:25.) This, in addition to, Erica and Bartello also operating the businesses seven days a week and identifying themselves as employment managers of those businesses. (III AA 460:22-461:3, 555:20-556:11; IV AA 643:16-645:20, 627:20- 628:6; I RA 0015, 0036-39.)

Hillsboro was also Sean's employer *until after* his industrial accident, and the jury was provided substantial evidence of this fact. Before the jury was evidence that Sean was hired by Hillsboro and that only after he sustained his injury was he switched to Mobile Billboards because of an issue with the insurance. (II AA 218:4-219:11-220:1; V AA 897, 901; I RA 0042.) The evidence

included worker's compensation form C-4 that identified Hillsboro as his employer. (I RA 0042.) The form was later changed by an unknown person to represent that Sean worked for Sky Mobile Billboards. (II AA 218:15-25, 219:15-22; I RA 0042.) There was also a speaker phone conversation for which Sean was present on May 1, 2014 between Bartello and his office manager, where Bartello instructed her to switch him to Mobile Billboards. (II AA 201:12-202:1; 208:9-209:13.) Sean did not work on May 2, 2014. (I RA 0048.) Sean's evidence refutes Bartello's testimony that Sean was switched to Mobile Billboards before his industrial accident because he was paid by Mobile Billboards on May 2, 2014. (III AA 454:17-20.) The worker's compensation Employer's Wage Verification Form, filled out and signed by Erica, corresponds with Sean's first paycheck issued by Hillsboro for hours worked between 4/6/14 and 4/19/14. (IV AA 897; I RA 0048.) Sean's second paycheck was issued by Mobile Billboards for hours worked between 4/20/14 and 4/26/14, with a ***pay date*** of May 2, 2014, two days *after* Sean's industrial accident. (IV AA 898; I RA 0042.) Bearing in mind that Bartello worked at night, the evidence clearly shows that Bartello would run payroll the day before or the day of its distribution. For the jury's consideration was the evidence that Bartello told Sean to bring in his timecard on May 15, 2014 so the payroll with a pay date of May 16, 2014, could be done. (I RA 0034, 0037; IV AA 898.) The evidence shows that Bartello switched Sean to Mobile Billboards after his 4/30/14

industrial accident and *before* payroll was distributed on 05/02/14 which is corroborated by Sean's testimony about the speakerphone conversation between Bartello and the office manager on May 1, 2014. (II AA 208:5-209:13.)

The jury also obviously noted the discrepancy with the Employers Wage Verification Form failing to mention that Sean had allegedly been assigned to the incorrect employer, instead claiming that the "previous manager was processing his payroll weekly," which was obviously incorrect.

Before the Jury was evidence that the building where Sean worked housed Hillsboro and Mobile Billboards and was owned by Erica and Bartello. (IV AA 627:17- 628:16.) Sean's job duties included washing and repairing trucks/cars, maintenance and cleaning in the shop and the building, auto electrical, and welding/fabricating. (III AA 470:8-14; RA 0033.) This included the billboard trucks used by Mobile Billboards, as well as vehicles and mopeds owned by Hillsboro. (II AA 189:16-190:1, 193:19-194:12; III AA 415:12-18, 509:19-510:8, IV AA 634:13-635:6.) In addition, Sean was in charge of repairing and oil changes on Appellants' personal cars including a Viper, Supra and oil changes on other personal vehicles. (III AA 454:23-455:18; IV AA 634:16-635:6; I RA 0027). Sean was injured while working on the Hillsboro Monster Truck which he had been working on since he was hired and continued to work on after his injury. (II AA 212-217, 329; III AA 509-510; I RA 0006-0014, 24-25.)

There was substantial evidence for the jury to determine by a preponderance of that evidence that Hillsboro was Sean's employer *before* his accident and that he was changed *after* his industrial accident to Mobile Billboards.[11]

There also is no distinguishable difference between Hillsboro, Erica and Bartello. EBVB owns 100% of Hillsboro and Mobile Billboards. (IV AA 644:16-645:20.) The building where Sean worked, and that housed Hillsboro and Mobile Billboards, were part of EBVB. (IV AA 627:17-628:16; I RA 37.) The Monster Truck was owned by Hillsboro or Mobile Billboards but considered by Bartello as his personal property. (III AA 509:19-510:1; IV AA 634:13-635:6.) The Viper Bartello had built for himself is titled to Mobile Billboards, kept at his residence and worked on at the shop. (III 508:5; IV 506:24-507:11.) The tools in the Mobile Billboards shop area were purchased by one of the companies, but Bartello considered them his personal property. (III 506:24-207:11.)

There is no distinguishable difference between Appellants and the jury's finding by a preponderance of the evidence that Hillsboro is liable for Sean's claim of Retaliatory Discharge should be affirmed.

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[11] Appellants do not dispute that Mobile Billboards was Sean's employer *after* his industrial accident.

V. THE JURY'S FINDING BY A PREPONDERANCE OF THE EVIDENCE AS TO DAMAGES FOR THE TORT OF RETALIATORY DISCHARGE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. [12]

A. Appellants Have Failed To Carry Their Burden On Appeal Of This Issue.

Appellants have neglected their responsibility to cogently argue, and present relevant authority, legal analysis and supporting allegations in support of their appellate concerns on this issue. Thus, this Court need not consider conclusory arguments or novel legal propositions that are unsupported by legal authority. *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984).

B. Standard Of Review.

"[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pac. Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993); accord *Bally's Emps.' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). In considering such a claim, the appellant court must look at the facts from the viewpoint of the prevailing

[12] Appellants' Issue V.

party, assuming that the jury believed all the evidence favorable to that party and drew all reasonable inferences in his favor. *See e.g. El Dorado Hotel v. Brown,* 100 Nev. 622, 626, 691 P.2d 436, 439-40 (1984). The Supreme Court of Nevada has repeatedly stated that on appeal it will not weigh the credibility of witnesses because that duty rests with the trier of fact. *See e.g. Thomas v. State,* 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) (citing *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981)).

C. There Was Substantial Evidence From Which The Jury Could Reasonably Award Damages.

Citing no legal authority, Appellants now object to Sean's testimony as being "self-serving." Sean's testimony was relevant and admissible. *See* Nevada Revised Statute 48.015 ("...evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); Nevada Revised Statute 48.025 (admissibility.)

At the core of Appellants' argument is that Sean's testimony was not credible because it was "self-serving." The fact Sean's testimony "might be self-serving ... would not alone, bar it. It would instead be a matter of credibility for the fact-finder to determine." *Aranda v. Cardenas,* 215 Ariz. 210, 219, ¶ 34 (App. 2007) (citing *Allstate Indemnity Co. v. Ridgely,* 214 Ariz. 440, ¶ 19, 153 P.3d

1069, 1073 (App.2007) (citations omitted). The Supreme Court of Nevada also finds that matters of credibility rests with the trier of fact. *See e.g. Thomas v. State,* 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) (citing *Bolden v. State*, 97 Nev. 71, 624 P.2d 20 (1981)).

Sean presented substantial evidence of his lost wages including the basis of the damages calculation which was his monthly wage calculated from information submitted by Appellants, and through the workers' compensation process. (II AA 279:20-280:13; I RA 0048, 0059.) Documentation corroborated Sean's testimony about reaching maximum medical improvement so he could return to work. (II AA 224:25-225:6; I RA 0053-54, 0059.) Sean testified about his efforts in searching and securing a new job when he was released to work. (II AA 273:25-274:12.) He further testified when he started in his new position, the number of hours he worked, the raises he received, and the differential between what he was receiving from Appellants until he was fully mitigated. (*Id.* 274:25-284:13.) Sean's testimony was to his own personal finances and the basis of the calculations were corroborated by other evidence. When unable to recall specific dates and amounts, Sean used a document he had previously prepared to refresh his recollection. (*Id.* 281:16-22, 283:7-10.) Appellants did not object to the document used to refresh Sean's recollection. (*Id.* 278:24-278:24.)

Appellants objected twice during the presentation of evidence by Sean on his damages for Retaliatory Discharge. They first objected to a question they believed was leading. (II AA 281:24-282:7.) The district court sustained the objection. (*Id.*) The question was rephrased, and testimony continued. (*Id.*)

Appellants' second objection was that Sean was testifying. (*Id.* at 283:11-18.) The district court reminded Appellants that they would have the opportunity to cross-examine Sean. (*Id.* at 283:17-18.) Appellants had the opportunity to cross examine Sean on his testimony and other trial evidence, as well as presenting evidence to rebut the testimony and documentation: **Appellants did nothing**.

Appellants "argue" that Sean's testimony as to his damages for Retaliatory Discharge was "essentially attorney testimony." (AOB 22.) Appellants provide no legal authority or analysis to suggest this occurred and as stated above, objected only once to a question being leading which the district court sustained.

The jury was presented with sufficient evidence to determine by a preponderance of that evidence the amount of damages for the retaliatory discharge that Sean suffered at the hands of the Appellants. The jury's verdict should be affirmed.

VI. APPELLANTS WAIVED ANY ARGUMENT AS TO BREAKING OUT THE ASSIGNMENT OF LIABILITY TO INDIVIDUAL APPELLANTS BY FAILING TO OBJECT TO THE SPECIAL VERDICT FORM.

To preserve an issue for appeal, a party must object in the district court to the complained-of conduct. *Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008); *Fick v. Fick*, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993); *Peke Res., Inc. v. Fifth Jud. Dist. Ct.*, 113 Nev. 1062, 1068 n.5, 944 P.2d 843, 848 n.5 (1997). When a party fails to make a specific objection before the district court, the party fails to preserve the issues for appeal. *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 91 (2016). An argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (holding that "[a] party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below"). The appellate court generally will not consider an argument raised for the first time on appeal. *Montesano v. Donrey Media Group*, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 n.5 (1983); *Hooper v. State*, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979).

Appellants have waived any argument as to breaking out the assignment of liability against Erica, Bartello, Hillsboro and EBVB on the claim of Retaliatory Discharge because they failed to object to the Special Verdict Form. (IV AA

605:11-609:4; I RA 0073-0076.) In particular, the Special Verdict Form did not breakout the Appellants individually as was done for the claim of Conversion. (I RA 0073-0076.) The jury found all Appellants liable for Retaliatory Discharge including Mobile Billboards which Appellants have not argued on appeal lacks substantial evidentiary support.

Appellants have waived any argument as to breaking out the assignment of liability for the claim of Retaliatory Discharge as to each individual Appellant and the appellate court should affirm the jury's verdict. In the alternative, Respondent should be granted a new trial.

CONCLUSION

For the reasons stated herein, Respondent Sean Fitzgerald respectfully requests that the jury's verdict finding Erica and Bartello personally liable for the torts they personally committed against him be affirmed. The appellate court should also find that the district court did not err in giving Jury Instruction 26 as it was based on well settled Nevada law and did not usurp any corporate protections.

Sean respectfully requests the appellate court find that Appellants have waived any and all arguments as to breaking out the assignment of liability to individual Appellants for the claim of Retaliatory Discharge as they failed to raise the issue before the district court. In the alternative, a new trial should be ordered to resolve the issue.

Sean respectfully requests that the jury's verdict finding Hillsboro and EBVB liable for the tort of Retaliatory Discharge, and for Hillsboro on the claim of Conversion, be affirmed as substantial evidence supported the jury's finding by a preponderance of the evidence that they are liable.

Finally, Sean respectfully requests the appellate court find that substantial evidence supported the jury's findings as to damages for the claim of Retaliatory Discharge.

Dated this 8th day of September 2020.

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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 8th day of September 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 10,291 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion 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 that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of September 2020.

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STATEMENT OF RELATED CASES

Respondent hereby certifies that, to Respondent's knowledge, there are no cases or appeals pending before this Court related to the present appeal.

Dated this 8th day of September 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing with the Supreme Court of Nevada by using the Court's electronic filing system. I certify that all participants in the case are registered and that service will be accomplished by the Supreme Court of Nevada's electronic filing system.

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