EXHIBIT 12

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

OPPOSITION TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT and COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES

Plaintiff Aaron M. Morgan, by and through his attorneys of record, Micah S. Echols, Esq., and Kathleen A. Wilde, Esq., of the law firm of Marquis Aurbach Coffing, and Benjamin P. Cloward Esq., and Bryan A. Boyack, Esq. of the Richard Harris Law Firm, hereby files his Opposition to Defendant Harvest Management Sub LLC's Motion for Entry of Judgment and

Counter-Motion to Return Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues.

This Opposition and Counter-Motion are made and based upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument permitted by the Court at a hearing on the matter.

Dated this 15th day of January, 2019.

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By: Kathleen Wilde

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For over four years, Plaintiff Aaron Morgan ("Morgan") litigated three negligence-based claims against the Defendants, David Lujan ("Lujan") **and** Harvest Management Sub LLC ("Harvest Management"). During this time period, all parties understood that Morgan's claims centered on Lujan's failure to act with reasonable care while driving bus in the course of his employment and Harvest Management's liability as Lujan's employer. Consistent with this understanding, a single law firm jointly represented both Defendants up to and throughout two separate jury trials. But, because Judge Bell made a single, easily explainable error by recycling a special verdict form, new counsel for Harvest Management now argues that the jury trial established liability only as to Lujan and that, as such, this Court should enter judgment in favor of Harvest Management as to Morgan's third cause of action for vicarious liability / respondeat superior.

In so arguing, Harvest Management expects this Court to ignore two serious procedural problems, namely, the fact that Morgan's December 18, 2018, Notice of Appeal divested this

Court of jurisdiction to enter orders which may affect the decisions which are subject to appellate review. Relatedly, because the Court already entered a final judgment in this case, Harvest Management's motion is also improper under *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007), because Harvest Management did not file a proper "motion sanctioned by the Nevada Rules of Civil Procedure."

These two reasons, of themselves, are grounds upon which to deny outright Harvest Management's Motion for Entry of Judgment. Yet, even if this Court considers the motion on the merits, Harvest Management's attempts to backdoor its way into a judgment that is inconsistent with the jury's verdict also must fail because Judge Bell is in a better position to address what happened during trial, this Court already rejected Harvest Management's arguments regarding NRCP 49, and there is no basis upon which to enter judgment in Harvest Management's favor. Thus, while this Court can resolve the Motion for Entry of Judgment in several different ways, the end result is the same: Harvest Management's motion must fail.

II. FACTS AND PROCEDURAL HISTORY

A. BRIEF STATEMENT OF FACTS.

On April 1, 2014, Morgan was driving northbound on McLeod Drive in the far right lane as he approached the intersection at Tompkins Avenue. At the same time, Lujan, who was driving a Montara Meadows shuttle bus during the course and scope of his employment, crossed McLeod Drive while attempting to continue eastbound onto E. Tompkins Avenue. The vehicles collided in the intersection, with the front of Morgan's car striking the side of the Montara Meadows bus. As a result of the collision, Morgan's vehicle was totaled. Worse, Morgan also sustained serious injuries which required emergency medical treatment and admission to Sunrise Hospital.

In the two years after the accident, Morgan underwent a series of treatments and procedures for his injuries, including bilateral medial branch block injections to his thoracic spine, injections to ease the pain from his bilateral triangular fibrocartilage tears, left wrist arthroscope and triangular fibrocartilage tendon repair with debridement. All told, these medical expenses exceeded $264,281.

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B. RELEVANT PROCEDURAL HISTORY.

On May 5, 2015, Morgan filed a complaint against Lujan and Harvest Management in which he asserted three causes of action: (1) negligence against David E. Lujan; (2) negligence per se against Lujan premised on his failure to obey traffic laws; and (3) vicarious liability / respondeat superior against Harvest Management Sub LLC. The Defendants jointly answered the complaint on June 16, 2015 with the assistance of Douglas J. Gardner, Esq. of Rands, South & Gardner. Mr. Gardner and his firm also represented both Defendants throughout the lengthy discovery period.[1]

The case then proceeded to trial in early November, 2017, where Mr. Gardner and his partner, Douglas Rands, continued to represent both Defendants jointly. Notably, during this first trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management, at the time of the accident:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[2]

---

[1] *See, e.g.*, Stipulation and Order to Extend Discovery ant [sic] Continue Trial Date First Request, filed August 30, 2016; Defendants David E. Lujan and Havest Management Sub LLC's Individual Pre-Trial Memorandum, filed September 25, 2017.

[2] *See* Transcript of Jury Trial, November 8, 2017, at page 109 (direct examination of Lujan).

The trial was not completed, however, because the Court declared a mistrial on Day 3 on the basis of Defendants' counsel's misconduct.[3]

Following the mistrial, the case proceeded to a second trial in April 2018. Vicarious liability was not contested during trial.[4] Instead, Harvest Management's NRCP 30(b)(6) representative focused on primary liability by claiming that either Morgan or an unknown third party was primarily responsible for the accident.[5]

On the final day of trial, April 9, 2018, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption.[6] The Court informed the parties of this omission, and the Defendants explicitly agreed they had no objection:

> THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.
>
> [Defendants' counsel]: Yeah. That looks fine.
>
> THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar sort of.[7]

At the end of the six-day jury trial, written instructions were provided to the jury with the proper caption.[8] The jury used those instructions to deliberate and fill out the improperly-captioned special verdict form. Ultimately, the jury found Defendants to negligent and 100% at

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[3] *See* Transcript from November 8, 2017, at pages 152-167, *especially* page 166; Court Minutes, November 8, 2017, on file herein.

[4] *See* Transcript of Jury Trial, April 5, 2018, at pages 165-78 (testimony of Erica Janssen, NRCP 30(b)(6) witness for Harvest Management); Transcript of Jury Trial, April 6, 2018, at pages 4-15 (same).

[5] *Id.*

[6] A copy of the special verdict form is attached hereto as **Exhibit 1**.

[7] *See* Transcript of Jury Trial, April 9, 2018, at pages 5-6, attached hereto as **Exhibit 2**.

[8] *See* Jury Instructions cover page, attached as **Exhibit 3**.

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fault for the accident.[9] In addition, the jury awarded Morgan $2,980,000 for past and future medical expenses as well as past and future pain and suffering.[10]

On April 26, 2018, the law firm of Bailey Kennedy substituted in as counsel of record for Harvest Management.[11] In May and early June of 2018, the parties and the Court dealt with residual issues and confusion relating to the Motion for Attorney Fees and Cost of Mistrial that Morgan withdrew on April 11, 2018, so that the motion may be addressed at once with his post-trial motion for attorney fees and costs.

On June 29, 2018, the Court filed a Civil Order to Statistically Close Case in which the box labeled "Jury – Verdict Reached" was checked. The following Monday, when Judge Bell assumed the role of Chief Judge, the case was reassigned to Department XI as part of the mass reassignment of cases that came with the new fiscal year.

On July 30, 2018, Morgan filed a Motion for Entry of Judgment in which it urged this Court to enter a written judgment against both Lujan and Harvest Management or, in the alternative, make an explicit finding in accordance with NRCP 49(a) that the jury's special verdict was rendered against both Defendants.

After the motion was thoroughly briefed,[12] the Court held a hearing during which it allowed oral arguments from the parties' counsel.[13] At the conclusion of the hearing, the Court verbally ruled that the inconsistency in the caption of the jury instructions and special verdict form was not enough to support judgment against both Defendants.[14]

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[9] *See* Exhibit 1.

[10] *Id.*

[11] As noted in the errata to the substitution, Bailey Kennedy is *not* counsel of record for Defendant Lujan. Instead, Rands, South & Gardner remains Lujan's legal counsel.

[12] *See generally* Harvest Management's Opposition filed on August 16, 2018, and four appendices thereto, as well as Morgan's Reply filed on September 7, 2018.

[13] *See* Minutes dated November 6, 2018, on file herein.

[14] *Id.*

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A written Order Denying Morgan's Motion for Entry of Judgment followed on November 28, 2018. Then, on December 17, 2018, the Court entered a Judgment on the Jury Verdict against Lujan which totaled $3,046,382.72

On December 18, 2018, Morgan filed a Notice of Appeal in which he requested appellate review of the Order Denying Plaintiff's Motion for Entry of Judgment and Judgment Upon the Jury Verdict.[15] On December 27, 2018, Morgan's appeal was docketed in the Supreme Court as case number 77753.[16] As of December 31, 2018, the appellate matter has been assigned to the NRAP 16 Settlement Program. Consistent with NRAP 16(a)(1), transmission of necessary transcripts and briefing are stayed pending completion of the program.

III. LEGAL ARGUMENT

Harvest Management's new counsel has done a fine job Tuesday morning quarterbacking. Indeed, while Bailey Kennedy did not appear in this case until weeks *after* the jury reached its verdict, Harvest Management now seeks to unravel years of litigation with an after-the-fact assessment of what did and did not happen during the trial. Indeed, in moving this Court to enter judgment in its favor, Harvest Management hopes to use confusion and distorted portions of the record once again[17] to draw a conclusion that is wholly incorrect.

This Court should reject Harvest Management's efforts because, most importantly, (A) Morgan's timely notice of appeal divested this Court of jurisdiction and (B) the Motion for Entry of Judgment is improper under *SFPP, L.P. v. Second Judicial District Court.* Alternatively, even if this Court believes it is proper to rule upon Harvest Management's motion, this Court should (C) transfer the case back to Department VII because Judge Bell presided over the trial in question; (D) deny the motion as a rehash of Harvest Management's previous request for NRCP 49(a) relief, (E) deny the motion as unsupported by the record; and/or (F) reject the

[15] The Notice of Appeal is attached hereto as **Exhibit 4**.

[16] *See* Supreme Court Register, attached hereto as **Exhibit 5**.

[17] Morgan does not dispute the fact that this Court sided with Harvest Management in denying his Motion for Entry of Judgment. But, with all due respect for this Court, Morgan continues to believe that the decision was misguided.

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motion as a matter of law because the vicarious liability / respondeat superior claim against Harvest Management is derivative of the other claims which were already tried by consent.

A. MORGAN'S NOTICE OF APPEAL DIVESTED THIS COURT OF JURISDICTION.

"The point at which jurisdiction is transferred must [ ] be sharply delineated." *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987). The reason for this rule is obvious, as scarce judicial resources are wasted and confusion ensues when multiple courts address the same issues at the same time. To this end, the Supreme Court of Nevada has repeatedly held that "a timely notice of appeal divests the district court of jurisdiction" to "revisit issues that are pending before [the Supreme Court]." *Mack-Manley v. Manley*, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006); *see also Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455, 2010 WL 1407139[18] (2010). Stated inversely, once a notice of appeal has been filed, district courts are limited to entering orders "on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530.

Here, it is undeniable that Harvest Management filed the instant motion after Morgan filed his Notice of Appeal. As such, this Court lacks jurisdiction to revisit the Order Denying Morgan's Motion for Entry of Judgment, the Judgment Upon Jury Verdict, or related substantive issues unless jurisdiction is returned to the Court pursuant to the *Huneycutt*[19] procedure.

Under *Huneycutt*, district courts may consider NRCP 60(b) motions for relief from judgment or order which involve the same issues that are pending before the Supreme Court of Nevada. *Foster*, 126 Nev. at 52, 228 P.3d at 455 ("[T]he district court nevertheless retains a limited jurisdiction to review motions made in accordance with this procedure"). However, the Court's decision-making authority is limited to denying the motion for a relief from judgment or

[18] Because the Supreme Court of Nevada issued two opinions in *Foster v. Dingwall*, the Westlaw citation is provided for the sake of clarity and should not be misinterpreted as a citation to an unpublished decision.

[19] *See Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).

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certifying to the Supreme Court of Nevada its inclination to revisit the issues. *See Foster*, 126 Nev. at 52-53, 228 P.3d at 455; *Huneycutt*, 94 Nev. at 80-81, 575 P.2d at 585. Under the latter scenario, it is then up to the Supreme Court to decide, in its discretion, whether a remand is necessary or whether the appeal should proceed as is. *See Mack-Manley*, 122 Nev. at 856, 138 P.3d at 530; *see also Post v. Bradshaw*, 422 F.3d 419, 422 (6th Cir. 2005) (noting that appellate courts do not "rubber-stamp" or grant such motions for remand as a matter of course)

In this case, Harvest Management has not filed an NRCP 60(b) motion or otherwise indicated that it is seeking to use the *Huneycutt* procedure to revisit the issues that are already before the Supreme Court of Nevada. As such, this Court should decline to entertain the Motion for Entry of Judgment because Morgan's timely notice of appeal divested this Court of jurisdiction to make non-collateral decisions. And, on a similar note, because the Order Denying Plaintiff's Motion for Entry of Judgment involved the exact same issue as the motion currently before the Court – whether the jury's verdict supported a judgment against both Defendants – there is no way this Court can rule upon Harvest Management's motion without infringing upon the Appellate Court's jurisdiction. Thus, the Motion for Entry of Judgment must be denied.

B. THE MOTION FOR ENTRY OF JUDGMENT IS IMPROPER UNDER *SFPP, L.P. V. SECOND JUDICIAL DIST. COURT.*

"[O]nce a district court enters a final judgment, that judgment cannot be reopened except under a timely motion sanctioned by the Nevada Rules of Civil Procedure." *SFPP, L.P. v. Second Judicial Dist. Court*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007); *see also Greene v. Eighth Judicial Dist. Court*, 115 Nev. 391, 396, 990 P.2d 184, 187 (1999) ("Once a judgment is final, it should not be reopened except in conformity with the Nevada Rules of Civil Procedure"). The rationale for this rule centers on the word "final." After all, multiple "final judgments" within a single action would be wholly inconsistent with the norm that a final judgment "puts an end to an action at law." *Greene*, 115 Nev. at 395, 990 P.2d at 186 (citing BLACK'S LAW DICTIONARY 843 (6th ed.1990)); *see also Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (a final judgment is one that disposes of all the issues presented in the case). More importantly, attempts to undermine the finality of judgments without a proper judgment

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would also cause serious procedural, jurisdictional, and practical difficulties. *Greene*, 115 Nev. at 395, 990 P.2d at 186 ("Our rules of appellate procedure rely on the existence of a final judgment as an unequivocal substantive basis for our jurisdiction. . . . Permitting such amendments would create procedural and jurisdictional difficulties.").

Here, this Court's Judgment on the Jury Verdict was a "final judgment" which Morgan properly appealed under NRAP 3A(b)(1). So, under *SFPP, L.P.*, this Court lacks jurisdiction to reopen, revisit, or supplement the judgment "absent a proper and timely motion" which sets aside or vacates the judgment. 123 Nev. at 612, 173 P.3d at 717. As such, this Court must reject Harvest Management's Motion for Entry of Judgment because doing so would impermissibly alter the final judgment that is already on appeal.

C. JUDGE BELL IS BETTER EQUIPPED TO ADDRESS THE MOTION BECAUSE SHE PRESIDED OVER THE TRIAL.

Harvest Management's Motion for Entry of Judgment would not even be before this Court if it were not for Judge Bell *accidentally*[20] failing to update the caption on the special verdict form that she recycled. After all, if the special verdict form had been updated to include a correct caption and the word "Defendants," Morgan's request for entry of judgment would have been a simple administrative matter that required no review of the record.[21] Yet, because of Judge Bell's minor error, the parties have essentially re-litigated the entire case in an attempt to demonstrate what actually happened.

Given the circumstances, this Court has done an admirable job getting up to speed. Nevertheless, and with all due respect, the issues raised in Harvest Management's Motion for Entry of Judgment would be better addressed by Judge Bell because of her experience presiding over this case from the very beginning through the completion of trial. In this regard, the Motion for Entry of Judgment implicates the *Hornwood v. Smith's Food King No. 1* decision in which

[20] The record confirms the mistake was unintentional since Judge Bell explicitly noted "I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay." Transcript of Jury Trial, April 9, 2018, at page 5-6

[21] Granted, Harvest Management theoretically would have then had an opportunity to file post-trial motions. But, the entire burden of proof is much different under the relevant Rules.

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the Supreme Court of Nevada recognized that the District Court that presided over a trial was in the best position to re-assess the evidence and award consequential damages. *See* 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989). Similarly, because the motion requires significant consideration of this case's history and the evidence at trial, other Supreme Court decisions which note the special knowledge of presiding judges are also pertinent. *See, e.g., Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("This court's rationale for not substituting its own judgment for that of the district court, absent an abuse of discretion, is that the district court has a better opportunity to observe parties and evaluate the situation"); *Winn v. Winn*, 86 Nev. 18, 20, 467 P.2d 601, 602 (1970) ("The trial judge's perspective is much better than ours for we are confined to a cold, printed record."); *Wittenberg v. Wittenberg*, 56 Nev. 442, 55 P.2d 619, 623 (1936) ("[M]uch must be left to the wisdom and experience of the presiding judge, who sees and hears the parties and their witnesses, scrutinizes their testimony and studies their demeanor.").

Thus, while Morgan appreciates the reasons why Judge Bell's cases were reassigned upon her becoming Chief Judge, it is more sensible to re-assign this case back to Judge Bell for a determination from the Presiding Judge regarding the issues that were litigated, the full extent of the jury's decision, and the meaning (or lack thereof) behind the mistaken special verdict form.

D. HARVEST MANAGEMENT'S MOTION CREATES A POTENTIAL JURISDICTIONAL GAP SINCE THIS COURT ALREADY RULED ON NRCP 49.

In his July 30, 2018, Motion for Entry of Judgment, Morgan argued that this Court should make an explicit finding pursuant to NRCP 49(a) that the special verdict was rendered against both Defendants.

NRCP 49(a) provides that courts may require a jury to return a special verdict upon issues of fact that are susceptible to categorical or brief answers. In doing so, "[t]he court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* But, if the court omits any issue of fact raised by the pleadings or by the evidence and none of the parties submission of the omitted issue(s) to the jury," then the Court may make its own finding.

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In its Opposition, Harvest Management argued that Morgan's reliance upon NRCP 49(a) was erroneous because Morgan "request[ed] that the Court engage in reversible error by determining the ultimate liability of party – rather than an issue of fact, as contemplated by [the Rule."[22] In denying Morgan's Motion for Entry of Judgment in its entirety, this Court apparently agreed with Harvest Management's argument regarding NRCP 49(a). Indeed, while the Court's written order is short and to the point, the Court necessarily had to find NRCP 49(a) inapplicable to the instant case.

Having prevailed on this issue, Harvest Management now argues that this Court should enter "judgment in favor of Harvest on any and all claims for relief alleged by Plaintiff Aaron Morgan."[23] Aside from the fact that its request is a complete 180 from a previously asserted position, Harvest Management's motion is problematic because it effectively asks this Court to revisit a previously decided issue. If this Court already decided that it cannot – or should not – make its own determination of facts, especially as to ultimate liability, there is no reason to revisit the issue simply because another party made the request. And, to make matters worse, if the Court were to revisit a previously decided issue which is also on appeal, a jurisdictional and procedural nightmare would ensure. Thus, this Court should reject Harvest Management's motion because it effectively undermines the Court's own previous decision. Indeed, because Harvest Management prevailed against Morgan on his motion for entry of judgment, Harvest cannot now offer a different set of rules of its own convenience as a matter of judicial estoppel. *See Marcuse v. Del Webb, Communities*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007).

E. THE MOTION FAILS ON THE MERITS BECAUSE IT IS UNSUPPORTED BY THE RECORD.

Harvest Management would have this Court believe that Morgan "made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial."[24] In reality, the

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[22] *See* page 3.

[23] Motion for Entry of Judgment at page 1.

[24] *Id.* at page 14.

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record confirms that Harvest Management and its corporate representative were identified as Defendants during trial. Harvest Management and Lujan were represented by the same counsel at both trials. Lujan attended the first trial, while Harvest Management's NRCP 30(b)(6) representative, Erica Janssen, sat at counsel's table throughout the second trial. At the beginning of the second trial, Harvest Management's counsel introduced her to the jury venire as his client before jury selection started:

> [Harvest Management's counsel]: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica is right back here. . . .[25]

This point was again confirmed during a bench conference that occurred during jury selection, outside the presence of the jury venire:

> THE COURT: Is that your client right there, folks?
>
> [Harvest Management's counsel]: Yeah.
>
> THE COURT: All right. What does your client prefer to be called?
>
> [Harvest Management's counsel]: Erica.
>
> THE COURT: Okay. Thank you. So the case is captioned, do it the way in which I'm assuming is her legal name.
>
> [Harvest Management's counsel]: No, she's the representative of the --
>
> THE COURT: She's the representative. Oh, okay.
>
> [Harvest Management's counsel]: -- of the corporation.
>
> THE COURT: I thought --
>
> [Harvest Management's counsel]: Mr. Lujan is the --
>
> THE COURT: Got it. Okay. It's a different -- different person.[26]

In addition to introducing the corporate representative as a party, both sides discussed theories regarding corporate defendants during voir dire, with the members of the jury venire answering

[25] Transcript of Jury Trial, April 2, 2018, at page 17.

[26] *Id.* at pages 94-95.

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three separate questions about liability for corporate defendants, including one posed by Harvest Management.[27]

During opening statements, both parties also addressed the fact that Lujan was acting in the course and scope of his employment at the time of the accident.[28] Thereafter, Harvest Management's NRCP 30(b)(6) representative also stated that she was testifying on behalf of Harvest Management, was authorized to do so, and was aware of the fact that Lujan, the driver, was a Harvest Management employee.[29] Similarly, Morgan also established the employee-employer relationship between the Defendants by reading Lujan's testimony from the first trial into the record.[30] And, even as the parties wrapped up with closing arguments, both parties' referenced responsibility and agreed that Lujan, Harvest Management's employee, should not have pulled in front of Morgan when Morgan had the right of way.[31]

Thus, by the conclusion of the trial, the jury was aware of the fact that Morgan pursued claims again *both* Defendants. Moreover, the jurors received significant evidence regarding the relationship between the Defendants which established the facts necessary to prove vicarious liability. It thus would be a mistake to enter judgment in favor of Harvest Management when the record supports Morgan's claim for vicarious liability.

F. VICARIOUS LIABILITY / RESPONDEAT SUPERIOR IS A DERIVATIVE CLAIM THAT WAS ALREADY TRIED BY CONSENT.

The doctrine of respondeat superior subjects an employer to vicarious liability for torts that its employee committed within the scope of his or her employment. *See, e.g., McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. Adv. Op. 115, 408 P.3d 149, 152 (2017) (Vicarious

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[27] *Id.* at pages 47, 213, 232.

[28] Transcript of Jury Trial, April 3, 2018, at page 126; *see also id.* at page 147 (statement from Harvest Management's counsel: "[W]e're going to show you the actions of our driver were not reckless.").

[29] Transcript of Jury Trial, April 5, 2018, at pages 165, 171; see also Transcript of Jury Trial, April 6, 2018, at pages 6-14.

[30] Transcript of Jury Trial, April 6, 2018, at pages 191-96.

[31] Transcript of Jury Trial, April 6, 2018, at pages 122-23, 143.

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liability simply describes the burden "a supervisory party . . . bears for the actionable conduct of a subordinate"). Although the employer's liability is separate from the employee's *direct liability*, vicarious liability claims are nevertheless derivated in that the employee's negligence is imputed to his or her employer. *Id.*; *see also* BLACK'S LAW DICTIONARY 934 (8th ed. 2004) (defining "vicarious liability" as "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." And, because of that imputation of negligence, vicarious liability subjects an employer to liability "for employee torts committed within the scope of employment, distinct from whether the employer is subject to direct liability." RESTATEMENT (THIRD) OF AGENCY, § 7.07, cmt. b, ¶ 4 (2006); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 51, cmt. a (1982) (noting that "the [employer] may be held liable even though an action cannot be maintained against the [employee]."); NRS 41.130 ("[W]here the person causing the injury is employed by another person or corporation responsible for the conduct of the person causing the injury, that other person or corporation so responsible is liable to the person injured for damages.").

In this case, the issue of vicarious liability / respondeat superior was tried by consent. Indeed, while Harvest Management tries to argue that Morgan's claim was actually for negligent entrustment or that his claim failed for lack of a specific allegation that Lujan was driving in the course and scope of his employment, any such failings are beside the point under NRCP 15(b). NRCP 15(b) provides, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." So, because Harvest Management did not object – and, in fact, contributed to – the evidence and discussions regarding the employee-employer relationship and its role as a corporate defendant, Harvest Management cannot now argue that it is entitled to judgment in its favor. *See, e.g., Schmidt v. Sadri*, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) ("[I]t is rudimentary that when an issue not raised by the pleadings is tried by express or implied consent of the parties, those issues shall be treated as if they were raised in the pleadings."); *Whiteman v. Brandis*, 78 Nev. 320, 322, 372 P.2d 468, 469 (1962) ("[T]he result of the trial must be upheld

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because evidence supporting a [specific claim] recovery was received without objection and the issues thereby raised were tried with the implied consent of the parties.").

Likewise, the distinction between primary liability and an employer's separate, vicarious liability also defeats Harvest Management's argument. After all, Lujan was acting in the course and scope of his employment as a bus driver when he collided with Morgan.[32] Given the jury's verdict, it is also established that Lujan was negligent and 100% at fault for the accident. So, regardless of what role Harvest Management played (or did not play) in the trial, Lujan's negligence is imputed to Harvest Management because of the employee-employer relationship. It would thus be erroneous to enter judgment in favor of Harvest Management because such a judgment would be inconsistent with the jury's verdict.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Harvest Management's Motion for Entry of Judgment outright, without even considering the merits of the motion. Alternatively, even if this Court believes it is proper to rule upon the motion despite the pending appeal, this Court should transfer the case back to Judge Bell for a ruling because Judge Bell lived through the entirety of this case, including the trial. Yet, even if this Court is inclined to review the motion itself and make a ruling on the merits, it should nevertheless deny the Motion for Entry of Judgment because Harvest Management cannot flip its position regarding NRCP 49, the record

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[32] *See, e.g.*, Transcript of Jury Trial, April 3, 2018, at page 147 ([W]e're going to show you the actions of our driver were not reckless. They weren't wild."); Transcript of Jury Trial, April 6, 2018, at page 14 (stating "our driver" completed the "Accident Information Card, Other Vehicle."); Transcript of Jury Trial, April 6, 2018, at pages 191-94 (testimony of Lujan that he was the bus driver for Montera Meadows, a local entity under the control of Harvest Management's corporate office).

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does not support a judgment in favor of Harvest Management, and vicarious liability / respondeat superior was tried by consent.

Dated this 15th day of January, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **OPPOSITION TO DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT AND COUNTER-MOTION TO TRANSFER CASE BACK TO CHIEF JUDGE BELL FOR RESOLUTION OF POST-VERDICT ISSUES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 15th day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[33]

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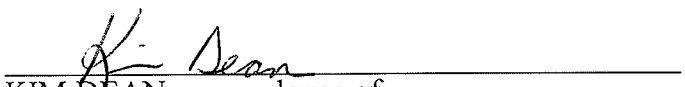

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[33] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

EXHIBIT 11

EXHIBIT 11

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI Hearing Date: September 14, 2018 Hearing Time: In Chambers

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT

Plaintiff, Aaron M. Morgan, in this matter, by and through his attorneys of record, Benjamin P. Cloward, Esq. and Bryan A. Boyack, Esq., of the Richard Harris Law Firm, and Micah S. Echols, Esq. and Tom W. Stewart, Esq., of Marquis Aurbach Coffing, hereby files Plaintiff's Reply in Support of Motion for Entry of Judgment. This Reply is made and based on

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the papers and pleadings on file herein, the attached memorandum of points and authorities, and the oral argument before the Court.

Dated this 6th day of September, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is undisputed that Defendant David Lujan, while working for and driving a bus owned by Defendant Harvest Management Sub LLC, struck Plaintiff Aaron Morgan's vehicle and caused Morgan severe injury. Because of the accident, Morgan incurred significant medical bills and requires future medical care. As a result, after a six-day jury trial, Morgan prevailed on his claims of negligence and vicarious liability and was awarded roughly $3 million against both Harvest and Lujan.[1] Morgan moved this Court, pursuant to NRCP 49, to correct an inadvertent error in the special verdict form, which was acknowledged by Lujan and Harvest during trial, to reflect the evidence and testimony adduced at trial. *See generally* Plaintiff's Motion for Entry of Judgment (the "Motion").

Now, Harvest's new counsel spends twenty-six pages, and four volumes of appendices, attempting to reinvent their case after losing that six-day jury trial, in which their client was held 100% liable for the injuries to Morgan, using comically slanted facts, new legal theories, flurries of bold and italicized text, and random citations to legal opinions from other jurisdictions. *See* Defendant Harvest Management Sub LLC's Opposition to Plaintiff's Motion for Entry of Judgment (the "Opposition"). In doing so, however, Harvest presents an opposition that is internally inconsistent, factually disingenuous, and legally misguided. Harvest overlooks basic, established facts and conclusions of the underlying trial: that, because it was undisputed that Lujan was in the course and scope of his employment with Harvest at the time of the accident, and because that was acknowledged by Lujan and Harvest, Harvest and Lujan consented to vicarious liability for any negligence found against Lujan. Harvest's new counsel's arguments to the contrary are not supported by the record and, thus, can be properly disregarded by this Court. As a result, this Court should discard the Opposition and, instead, grant the Motion.

[1] This six-day trial followed a prior three-day trial that was declared a mistrial because of Harvest's prior counsel improperly questioned Morgan.

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II. FACTS

Throughout the Opposition, Harvest's new counsel cherry-picks portions of the record to provide purportedly factual points of reference to support arguments that are both irrelevant and untimely.[2] Irrespective of the portions of the record Harvest chooses to include, however, Harvest's twenty-six page Opposition, and four appendices, do not supplant the evidence and testimony adduced over six days of trial clearly demonstrating Harvest's vicarious liability for Lujan's negligence. Indeed, the record plainly supports such a finding. As demonstrated below, Harvest's consented to vicarious liability for Lujan's negligence throughout the trial and, thus, consented to judgment being rendered against them in the event Lujan was found to be negligent. Accordingly, the Motion should be granted, pursuant to NRCP 49(a).

A. FROM THE BEGINNING, HARVEST'S CORPORATE REPRESENTATIVE WAS PRESENTED TO THE JURY AND THE COURT AS THE "CLIENT" BEING REPRESENTED.

Harvest and Lujan were represented by the same counsel at both trials. Lujan attended the first trial, while Harvest's NRCP 30(b)(6) representative, Erica Janssen, sat at counsel's table throughout the second trial. At the beginning of the second trial, Harvest's counsel introduced her to the jury venire as his client before jury selection started:

> [Harvest's counsel]: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and *then my client, Erica is right back here. . . .*

Transcript of Jury Trial, April 2, 2018, attached as **Exhibit 1**, at 17 (emphasis added).

This point was again confirmed during a bench conference that occurred during jury selection, outside the presence of the jury venire:

> THE COURT: Is that your client right there, folks?
>
> [Harvest's counsel]: Yeah.
>
> THE COURT: All right. What does your client prefer to be called?

[2] Specifically, Harvest's new counsel advances new arguments regarding Nevada's "going and coming rule" and its impact on vicarious liability that Harvest did not advance during trial. Opposition at 17–18. Accordingly, just as "[p]arties may not raise a new theory for the first time on appeal," this Court should also decline "to allow [Harvest] to reinvent [their] case on new grounds" after losing at trial on the merits. *See Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 437, 245 P.3d 542, 544 (2010).

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[Harvest's counsel]: Erica.

THE COURT: Okay. Thank you. So the case is captioned, do it the way in which I'm assuming is her legal name.

[Harvest's counsel]: *No, she's the representative of the* --

THE COURT: She's the representative. Oh, okay.

[Harvest's counsel]: -- *of the corporation.*

THE COURT: I thought --

[Harvest's counsel]: Mr. Lujan is the --

THE COURT: Got it. Okay. It's a different -- different person.

Exhibit 1 at 94–95 (emphasis added).

In addition to introducing the corporate representative as a party, both sides discussed theories regarding corporate defendants during voir dire, with the members of the jury venire answering three separate questions about liability for corporate defendants, including one posed by Harvest. *See* **Exhibit 1** at 47, 213, 232.

B. DURING OPENING STATEMENTS, BOTH PARTIES ARGUE LUJAN WAS ON THE JOB AT THE TIME OF THE ACCIDENT.

Next, Morgan, during his opening statement, clearly stated that Lujan was a bus driver, driving a bus—thus in the course and scope of his employment—when the accident occurred:

> [Morgan's counsel]: Let me tell you about what happened in this case. And this case starts off with the actions of Mr. Lujan, who's not here. He's driving a shuttlebus. He worked for a retirement [indiscernible], shuttling elderly people. He's having lunch at Paradise Park, a park here in town. . . . Mr. Lujan gets in his shuttlebus and it's time for him to get back to work. So he starts off. Bang. Collision takes place.

Transcript of Jury Trial, April 3, 2018, attached as **Exhibit 2**, at 126.

During their opening statement, Harvest admitted Lujan was "[their] driver" at the time of the accident:

> [Harvest's counsel]: Now, what was this accident all about? What happened in this accident? . . . [W]e're going to show you the actions of *our driver* were not reckless. They weren't wild. The impact did occur. We agree with that . . .

Exhibit 2 at 147 (emphasis added).

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C. HARVEST'S NRCP 30(B)(6) REPRESENTATIVE TESTIFIES ON BEHALF OF HARVEST THAT LUJAN WAS A HARVEST EMPLOYEE AT THE TIME OF THE ACCIDENT

Then, Morgan called Erican Janssen, Harvest's 30(b)(6) corporate representative, on the fourth and fifth days of trial. She testified that she was employed by Harvest, that she was testifying on behalf of Harvest, and that she was listed in the interrogatories as the person authorized to respond on behalf of Harvest. She further testified that Lujan was the driver at the time of the accident:

> [Morgan's counsel]: . . . All right, Ms. Janssen, did you have an opportunity to review the sworn testimony of Mr. Lujan in this matter?
>
> [Janssen]: No.
>
> [Morgan's counsel]: Okay. Are you aware that Mr. Lujan was the driver?
>
> [Janssen]: Yes.

Transcript of Jury Trial, April 5, 2018, attached as **Exhibit 3**, at 165.

Janssen testified that "[their] shuttlebus," driven by Lujan, was the vehicle involved in the accident:

> [Janssen]: Our shuttle bus is quite large and very visible, and it managed to cross three lanes of traffic and enter the fourth lane when the collision took place. Essentially, I'm saying that your client needs to look out.
>
> [Morgan's counsel]: So it was his fault for assuming that Mr. Lujan would obey the rules of the road and would stop at the stop sign? It's Aaron's fault?
>
> [Janssen]: He had the last opportunity to avoid the accident.
>
> [Morgan's counsel]: Are you aware of what actions he took to avoid the accident?
>
> [Janssen]: I believe he braked and swerved.
>
> [Morgan's counsel]: Okay. What could Mr. Lujan have done differently?
>
> [Harvest's counsel]: Object. Speculation and irrelevant, frankly.
>
> [Morgan's counsel]: It's their employee.

Exhibit 3 at 171 (emphasis added).

Additionally, Harvest's counsel confirmed that Janssen represented Harvest by eliciting the following information on cross-examination:

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[Harvest's counsel]: You are here today as a representative of the Defendant, correct?

[Janssen]: Correct.

[Harvest's counsel]: And you're employed by the Defendant?

[Janssen]: Correct.

Transcript of Jury Trial, April 6, 2018, attached as **Exhibit 4**, at 6.

Then, Janssen further established that she acted on behalf of a "company defendant," during the lawsuit:

[Harvest's counsel]: Did you have any -- anything to do with preparing that answer?

[Janssen]: I provided, I believe, the names of the correct Defendant.

[Harvest's counsel]: Okay.

[Janssen]: Company Defendant, I should say.

Exhibit 4 at 7.

On re-direct, Janssen confirmed that she signed the verification on behalf of Harvest for Harvest's answers to Morgan's interrogatories:

[Morgan's counsel]: And are those the answers that were provided in response to our interrogatories?

[Janssen]: Yes.

[Morgan's counsel]: And, in fact, you were the one that prepared those?

[Janssen]: Actually, our attorney did.

[Morgan's counsel]: Okay.

[Janssen]: I signed the verification.

[Morgan's counsel]: So where it says, on interrogatory number 14, and you can follow along with me:

> "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your are authorized to respond on behalf of said Defendant.
>
> "Erica Janssen, Holiday Retirement, Risk Management."

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Exhibit 4 at 11.

Finally, Janssen indicated that, following the accident, Lujan, as Harvest's driver, would have filled out an "accident information card," one of Harvest's "internal documents":

> [Morgan's counsel]: Okay. Can you tell the jurors what that document is?
>
> [Janssen]: It's titled "Accident Information Card, Other Vehicle."
>
> [Morgan's counsel]: Okay. And that's a document that Mr. Lujan would have filled out, true?
>
> [Janssen]: There is no name or signature on it.
>
> [Morgan's counsel]: Is that one of your internal documents?
>
> [Janssen]: It is.
>
> [Morgan's counsel]: Okay. So, obviously, if it's one of your company's internal documents, Mr. Morgan would not have filled that out, true?
>
> [Janssen]: In terms of who completed that document?
>
> [Morgan's counsel]: Yes.
>
> [Janssen]: I believe it was our driver.

Exhibit 4 at 14.

D. HARVEST READS INTO THE RECORD LUJAN'S TESTIMONY THAT HE WAS EMPLOYED BY HARVEST AT THE TIME OF THE ACCIDENT.

On the fifth day of trial, Harvest's counsel requested Lujan's testimony from the first trial be read into the record in the jury's presence. **Exhibit 4** at 191–92. That testimony, originally elicited by Morgan's counsel, explicitly indicated that Lujan was employed by Harvest as a bus driver at the time of the accident:

> [Harvest's counsel]: All right, Mr. Lujan, at the time of the accident of April 2014, were you employed with Montera Meadows?
>
> [Lujan]: Yes.
>
> [Harvest's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Harvest's counsel]: Okay. And what is your understanding of the relationship of Montera Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.

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[Harvest's counsel]: Okay.

[Lujan]: Montera Meadows is just the local.

[Harvest's counsel]: Okay, all right. And this accident happened on April 1st, 2014, correct?

[Lujan]: Yes, sir.

Exhibit 4 at 195–96.

E. BOTH PARTIES REFERENCE HARVEST'S RESPONSIBILITY FOR LUJAN'S ACTIONS.

One final time during his closing, Morgan indicated that Erica Janssen, Harvest's corporate representative, had taken the stand during the trial to testify about the actions of Lujan, Harvest's driver, who did not contest liability:

> [Morgan's counsel] . . . They're going to point the finger at Aaron despite the fact that when Erica Janssen, the corporate representative, took the stand, she didn't even know whether the driver had a stop sign. . . . [y]ou know, when we talked to Ms. Janssen and said, . . . "Did you know that your driver said that Aaron did nothing wrong?" "No, I didn't know that."

Transcript of Jury Trial, April 6, 2018, attached as **Exhibit 5**, at 122–23.

Likewise, Harvest indicated that Janssen testified and that Lujan did not contest liability:

> [Harvest's counsel]: . . . [S]o this is why Ms. Janssen testified that he may have had some responsibility for the accident. I'm not saying that he caused the accident. There's no question Mr. Lujan should not have pulled out in front of him. He had the right of way . . .

Exhibit 5 at 143.

F. HARVEST WAIVES OBJECTION TO MAKING CHANGES TO THE SPECIAL VERDICT FORM.

As noted in the Motion, on the final day of trial, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption. The Court informed the parties of this omission, and the Defendants explicitly agreed they had no objection:

> THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.
>
> [Harvest's counsel]: Yeah. That looks fine.

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THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar sort of.

Exhibit 5 at 5–6.

The jury ultimately found Defendants to be negligent and 100% at fault for the accident. Special Verdict Form, attached as **Exhibit 6**.

III. LEGAL ARGUMENT

A. PRINCIPLES OF VICARIOUS LIABILITY

Harvest's Opposition is seemingly premised upon a misunderstanding of vicarious liability and, thus, some clarification may be helpful. *See, e.g.*, Opposition at 23–24. To begin, "vicarious liability" describes the burden "a supervisory party . . . bears for the actionable conduct of a subordinate . . . based on the relationship between the two parties." *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev., Adv. Op. 115, 408 P.3d 149, 152 (2017) (citing BLACK'S LAW DICTIONARY 1055 (10th ed. 2014)). As a result, "[t]he supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor." *Id.*

The distinction between primary liability and the employer's separate, vicarious liability is codified in NRS 41.130, which distinguishes between a primary tortfeasor's liability for damages, and "where the person causing [a personal injury] is employed by another . . . or corporation responsible for the conduct of the person causing the injury, that other . . . corporation so responsible is liable to the person injured for damages." Thus, "a person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other."[3] Restatement (Third) of Torts: Apportionment Liability § 13 (2000).

Here, it is undisputed that Lujan was an employee of Harvest within the course and scope of his duties with Harvest when the accident occurred. Harvest never objected to such a theory

[3] On this point, Harvest again makes raises a new argument regarding joint and several liability and comparative negligence requirements under NRS 41.141. Opposition at 23–24. The point is irrelevant—vicarious liability applies irrespective of which liability regime is the governing rule. *McCrosky*, 133 Nev., Adv. Op. 115, 408 P.3d at 152.

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and, throughout trial, it was understood by the parties, the jury, and the Court, that Lujan was employed by Harvest and on the job for Harvest when he drove the Harvest-owned bus into Morgan's vehicle. As a result, Lujan's negligence, and the resulting liability, is imputed to Harvest, who is vicariously liable for the negligence of their subordinate. Given this undisputed vicarious liability, Morgan moves this Court to enter a judgment, or to make a finding and then enter a judgment, consistent with this legal imputation of liability. Accordingly, this Court should grant the Motion and enter such a judgment.

B. HARVEST CANNOT OBJECT TO THE FINDINGS BECAUSE HARVEST IMPLIEDLY CONSENTED TO VICARIOUS LIABILITY FOR LUJAN'S NEGLIGENCE

Further, throughout the life of this lawsuit, Harvest has consented to vicarious liability by raising the issue themselves during trial and failing to object to the theory when raised by Morgan during trial. Indeed, an issue had been tried by implied consent where a party's counsel "had raised the issue in his opening argument, [opposing counsel] specifically referred to the matter as an issue in the case, that the factual issue had been explored in discovery, that no objection had been raised at trial to the admission of evidence relevant to the issue." *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979). When issues not raised by the pleadings are treated by express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings and that, though the pleadings may be amended to conform to the evidence, failure to amend does not affect the result of the trial of such issues." *Essex v. Guarantee Ins. Co.*, 89 Nev. 583, 585, 517 P.2d 790, 791 (1973).

Here, both Harvest began jury selection by introducing Harvest's corporate representative as his client to the jury venire and the judge. **Exhibit 1** at 17, 94–95. Harvest and Morgan both referred to corporate defendants during voir dire. **Exhibit 1** at 47, 213, 232. During opening statements, Morgan described Lujan as being on the job when the accident occurred, and Harvest failed to object; likewise, during Harvest's opening, they referred to Lujan as "our driver" at the time of the accident. **Exhibit 2** at 126, 147. Lujan admitted he was employed by Harvest at the time of the accident. **Exhibit 4** at 195–96. Harvest's corporate representative, speaking on behalf of Harvest, took ownership of Lujan's employment ("our driver," **Exhibit 4** at 14) and of

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the shuttle bus Lujan drove into Morgan ("our shuttle bus," **Exhibit 3** at 171). During closing, both parties again referenced Harvest's corporate representative testifying, on behalf of Harvest, about Lujan's involvement in the accident. **Exhibit 5** at 122–23, 143.

Here, just as in *Schwartz*, where the parties impliedly consented to claims during trial by discussing them, failing to object to them, throughout trial, Harvest impliedly consented to vicarious liability for Lujan's actions. Harvest never objected to Lujan being outside the course or scope of his employment with Harvest at the time of the accident; Lujan himself did not contest liability for that accident. To the contrary, Harvest expressly took ownership for Lujan's actions and for the bus Lujan drove while on the job. That Lujan was within the course and scope of his employment was plainly evident by the testimony of Harvest and Lujan themselves. Thus, Harvest cannot now argue that such claims are improper; rather, because Harvest implied consented to the claims throughout the six-day jury trial, this Court should recognize Harvest's vicarious liability for Lujan's negligence.

To combat this, Harvest, in an interesting decision, attempts to reinterpret Morgan's own claims upon which he has already prevailed at trial. Opposition at 14–19. While Morgan pursued and prevailed on his claim for vicarious liability against Harvest, Harvest's new counsel asserts that Mr. Morgan actually intended to pursue a claim of negligent entrustment. Opposition at 14–19. Harvest's new counsel concludes, with string cites to out-of-state jurisdictions and a block quotation of a twenty-five year old case from a Texas appellate court, that Morgan failed to prove this non-existent theory at trial. *See* Opposition at 15–19. However, the argument is irrelevant—the claim was tried by the implied consent of the parties, and, thus, "the claim shall be treated in all respects as if they had been raised in the pleadings." NRCP 15(b). Indeed, neither Lujan nor Harvest objected to the nature of the claim against them as argued by Harvest's new counsel. Thus, to the extent Morgan "failed to amend" his pleadings to conform to a negligent entrustment theory, it "does not affect the result of the trial of these issues." NRCP 15(b); *see also I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1204 (2013) ("NRCP 15(b) allows a court to hear an issue not raised in the

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pleadings when the issue is tried with the express or implied consent of the parties). Thus, Harvest's argument is unavailing, and can properly be disregarded by this Court.

C. NRCP 49(A) ALLOWS A COURT TO MAKE A FINDING ABOUT HARVEST'S CONSENTED-TO VICARIOUS LIABILITY.

NRCP 49(a) provides, in certain circumstances, that this Court may make a finding "in accord with the judgment on the special verdict" as to "any issue of fact raised by the pleadings or by the evidence" not expressly submitted to the jury.[4] Here, this Court should enter a finding that conforms with the evidence and testimony adduced throughout discovery and trial—that unanimous special verdict rendered judgment against both Lujan and Harvest. Such a finding is in accordance with the principles of vicarious liability and Harvest's implied consent to that vicarious liability throughout the life of this lawsuit. Accordingly, this Court should grant the Motion.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Aaron Morgan respectfully requests this Court grant his Motion for Entry of Judgment.

Dated this 6th day of September, 2018.

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[4] In opposition, Harvest cites a thirty-year old case from the Third Circuit and describes it as the "clearly established law" that evidently demonstrates Morgan's request "is beyond the power of this Court." Opposition at 20–23 (citing *Kinnel v. Mid-Atl. Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988)). However, it appears the issue is actually in dispute in the Third Circuit, which has also held that "[a] special verdict, finding, or answer must be construed in light of surrounding circumstances and, in connection with pleadings, instructions, the issue or question submitted." *Halprin v. Mora*, 231 F.2d 197, 201 (3d Cir. 1956). Decades-old Third Circuit opinions aside, Morgan's request is permissible under the plain language of NRCP 49(a), and thus this Court need look no further to grant the Motion.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of August, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[5]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

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an employee of Marquis Aurbach Coffing

[5] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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EXHIBIT 10

EXHIBIT 10

IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL,
Respondents,
and
AARON M. MORGAN; AND DAVID E. LUJAN,
Real Parties in Interest.

No. 78596

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying a motion for entry of judgment.

Having considered the petition and supporting documentation, we are not persuaded that our extraordinary and discretionary intervention is warranted at this time. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing such relief is warranted); *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991) (recognizing that writ relief is an extraordinary remedy and that this court has sole discretion in determining whether to entertain a writ petition). Accordingly, we deny petitioner's request for writ relief. We clarify that this denial is without prejudice to petitioner's ability to seek writ relief again if subsequent steps are taken to reconvene the jury. *Cf. Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991) ("[T]he general rule

19-21314

in many jurisdictions is that a trial court is without authority or jurisdiction to reconvene a jury once it has been dismissed . . . .").

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: Hon. Linda Marie Bell, Chief Judge
Bailey Kennedy
Richard Harris Law Firm
Rands & South & Gardner/Reno
Rands, South & Gardner/Henderson
Marquis Aurbach Coffing
Eighth District Court Clerk

EXHIBIT 9

EXHIBIT 9

Case No. _____

IN THE SUPREME COURT OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE LINDA MARIE BELL, DISTRICT COURT CHIEF JUDGE,
Respondent,

- and -

AARON M. MORGAN and DAVID E. LUJAN,
Real Parties in Interest.

District Court Case No. A-15-718679-C, Department VII

PETITION FOR EXTRAORDINARY WRIT RELIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

HARVEST MANAGEMENT SUB LLC, Petitioner, vs. EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE LINDA MARIE BELL, DISTRICT COURT CHIEF JUDGE, Respondent, and AARON M. MORGAN and DAVID E. LUJAN, Real Parties in Interest.	Supreme Court No. _____ District Court No. A-15-718679-C **NRAP 26.1 DISCLOSURE**

NRAP 26.1 DISCLOSURE

Pursuant to Nevada Rule of Appellate Procedure 26.1, Petitioner Harvest Management Sub LLC ("Harvest") submits this Disclosure:

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Harvest is a limited liability company with no parent corporations. No publicly held companies own ten (10) percent or more of its stock.

2. Harvest was originally represented by the law firm of Rands, South & Gardner in the underlying action, and the law firm of Bailey❖Kennedy then substituted as Harvest's counsel. The law firm of Bailey❖Kennedy also represents Harvest for the purposes of this Petition and in a related appeal.

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3. Harvest is not using a pseudonym for the purposes of this appeal.

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 18th day of April, 2019, service of the foregoing **NRAP 26.1 DISCLOSURE** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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VIA HAND DELIVERY:

Respondent

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PETITION FOR EXTRAORDINARY WRIT RELIEF

Pursuant to NRS 34.160 *et seq.* and Nevada Rule of Appellate Procedure 21, Petitioner Harvest Management Sub LLC ("Harvest") petitions this Court to issue an extraordinary writ of mandamus directing the Eighth Judicial District Court for the State of Nevada, in and for Clark County, the Honorable Linda Marie Bell, to enter judgment in its favor. This is why the relief is sought:

- The plaintiff in the underlying action, Aaron M. Morgan ("Mr. Morgan"), sued two defendants — an employer (Harvest) and an employee (David E. Lujan ("Mr. Lujan")) — for injuries suffered in an automobile accident.
- At the trial in April 2018, the plaintiff did not pursue his claims against the employer; did not submit those claims to the jury; and the jury returned a verdict against the employee only.
- The employer moved the District Court to enter judgment in its favor on the plaintiff's claims, but the District Court has declined to do so; instead, the District Court intends to recall the jurors — who were discharged more than one year ago — to have them decide the claims against the employer.

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The District Court's refusal to enter judgment in favor of the employer and its decision to reconstitute the jury more than one year after its discharge are manifestly incorrect, and as fully explained herein, justify this Court's issuance of a writ of mandamus.

DATED this 18th day of April, 2019.

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By: /s/ Dennis L. Kennedy
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I. NRAP 21(a)(3)(A) ROUTING STATEMENT

This Petition does not fall squarely within any category set forth in Nevada Rule of Appellate Procedure 17; however, Harvest believes that it is most closely analogous to cases presumptively assigned to the Court of Appeals. While this Petition concerns a *post-trial* writ proceeding, *pre-trial* writ proceedings are presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(13). Similarly, while this is a Petition concerning a post-trial order, *appeals* from post-judgment orders in civil cases are presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7).

However, this Petition is substantially related to a pending appeal before the Nevada Supreme Court (*Morgan v. Lujan*, Case No. 77753). Mr. Morgan appealed from the District Court's denial of his motion for entry of judgment against Harvest and from the judgment entered against Mr. Lujan. If this Court issues the requested writ of mandamus, it is expected that Mr. Morgan would appeal from the subsequent judgment in favor of Harvest and consolidate the new appeal with this pending case.

II. INTRODUCTION

In 2014, Mr. Morgan and Mr. Lujan were involved in a motor vehicle accident in Las Vegas, Nevada. Mr. Lujan was employed as a shuttle bus driver

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for Harvest and was driving one of Harvest's shuttle buses at the time of the accident. Mr. Morgan filed a complaint against Mr. Lujan and Harvest, alleging a claim of negligent entrustment against Harvest. The case proceeded to a jury trial in April 2018. During the trial, Mr. Morgan did not pursue his claim against Harvest. Specifically:

- He failed to inform the jury of his claim against Harvest in his opening statement;
- He failed to offer any evidence to prove his claim against Harvest;
- He failed to propose any jury instructions relating to his claim against Harvest;
- He failed to articulate a claim against Harvest in his closing argument; and
- He failed to include Harvest in the Special Verdict form submitted to the jury.

As a result, the jury rendered a verdict solely against Mr. Lujan.

After the trial, the Honorable Linda Marie Bell, the trial judge, was promoted to Chief Judge of the Eighth Judicial District Court, and this action was transferred to the Honorable Elizabeth Gonzalez for all post-trial matters.

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Several months later, Mr. Morgan filed a Motion for Entry of Judgment against Harvest on a claim for vicarious liability (not the claim for negligent entrustment pled in his Complaint). Mr. Morgan asserted that the jury's failure to include Harvest and the unpled claim in the Special Verdict was merely a "clerical error." The District Court (Judge Gonzalez) determined that there was no evidence that any claim against Harvest had been presented to the jury for determination. Therefore, the jury's verdict did not apply to Harvest, and no judgement could be entered against Harvest. At that time, Harvest made an oral motion for entry of judgment in its favor, but the District Court instructed Harvest to submit a motion seeking that relief.

The District Court (Judge Gonzalez) entered judgment in favor of Mr. Morgan on his claims against Mr. Lujan, and Mr. Morgan promptly appealed from the interlocutory order denying his Motion for Entry of Judgment (against Harvest) and from the non-final judgment entered solely against Mr. Lujan. Harvest then filed its own Motion for Entry of Judgment as to Mr. Morgan's remaining and unresolved claim, and Mr. Morgan subsequently moved to have the motion (and the remainder of the entire case) transferred back to Chief Judge Bell for determination. Judge Gonzalez granted the motion to transfer

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the *Motion for Entry of Judgment* to Judge Bell, but she kept jurisdiction over the remainder of the action.

While the Motion for Entry of Judgment was pending, Harvest also moved to dismiss Mr. Morgan's appeal as premature. This Court lacks jurisdiction because Mr. Morgan never moved for certification of a final judgment pursuant to Nevada Rule of Civil Procedure 54(b), and the claim against Harvest clearly remains unresolved in the District Court. However, this Court denied the Motion to Dismiss without prejudice because the appeal had been assigned to the settlement conference program. The settlement conference for the appeal is not scheduled to occur until August 13, 2019.

On March 14, 2019, Chief Judge Bell *sua sponte* reversed Judge Gonzalez' prior decision and ordered that the entire underlying action — not just the Motion for Entry of Judgment — be transferred back to her department.[1] Then, on April 5, 2019, Chief Judge Bell issued a Decision and Order relating to Harvest's Motion for Entry of Judgment. The District Court determined that as a result of Mr. Morgan's appeal, it lacked jurisdiction to

[1] Harvest believes that Judge Gonzalez's order to transfer the Motion for Entry of Judgment and Chief Judge Bell's order to transfer the entire action were erroneous; however, neither error is the subject of this Petition for Extraordinary Writ Relief. Harvest reserves its right to raise these issues on appeal, if and when appropriate.

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decide Harvest's Motion for Entry of Judgment. Chief Judge Bell also issued a *Huneycutt* order and certified that if the appeal were remanded to the District Court, she would recall the members of the jury from the April 2018 trial and instruct them to consider whether their verdict applied to Harvest.

Because jurisdiction of this case is confused as a result of Mr. Morgan's premature appeal — and because Chief Judge Bell has certified that she intends to recall the members of the discharged jury if this case is remanded to her — Harvest respectfully requests that this Court issue a writ of mandamus in order to prevent a manifest error of law from occurring and to ensure the most efficient and economical resolution of this case. If the District Court is ordered to vacate the April 5, 2019 Decision and Order and to enter judgment in favor of Harvest, a final judgment will have finally been entered in the underlying action, and Mr. Morgan's pending appeal could properly proceed in this Court. Mr. Morgan would also be free to appeal from the judgment entered in favor of Harvest and consolidate the new appeal with the pending appeal.

The issuance of such a writ of mandamus is the only outcome consistent with due process and Nevada law. It is well recognized that once a jury has been discharged and released from the District Court's jurisdiction and control, it is tainted and cannot be recalled for further deliberations. The District

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Court's only proper course of action to resolve Mr. Morgan's claim against Harvest is to enter judgment in favor of Harvest. The claim was the subject of a jury trial, and Mr. Morgan failed to pursue or prove his claim. Mr. Morgan also failed to present the claim to the jury for determination. The District Court has already correctly determined that the jury's verdict against Mr. Lujan does not apply to Harvest. Therefore, the only proper outcome is to enter judgment in favor of Harvest.

III. SUMMARY OF REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER

A. Standard of Decision for Seeking Writ Relief.

This Court has original jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 4; *see also* NRS 34.160 ("The writ [of mandamus] may be issued by the Supreme Court . . . ."). A writ of mandamus is proper to compel a public officer to perform an act that the law requires "as a duty resulting from an office, trust, or station," where no plain, speedy, and adequate remedy of law is available. NRS 34.160; NRS 34.170; *Leibowitz v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003). Harvest has no other plain, speedy, and adequate remedy for obtaining a decision on a motion

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properly within the District Court's jurisdiction or obtaining entry of a judgment that Harvest is entitled to as a matter of law.

This Court has broad discretion to decide whether to consider a petition for a writ of mandamus. *Leibowitz*, 119 Nev. at 529, 78 P.3d at 519. This Court has held that it "may entertain mandamus petitions when judicial economy and sound judicial administration militate in favor of writ review." *Scarbo v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009); *see also We the People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 880, 192 P.3d 1166, 1170 (2008) (explaining that this Court may entertain a writ petition that raises an issue "that presents an 'urgency and necessity of sufficient magnitude' to warrant [its] consideration") (quoting *Jeep Corp. v. Second Jud. Dist. Ct. ex rel. Washoe Cnty.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982)).

The petitioner has the burden of demonstrating why extraordinary writ relief is warranted. *Pan v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). Further, the petitioner must have a "beneficial interest" in obtaining writ relief, which means the petitioner must have a "direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted. *Mesagate Homeowners' Ass'n v. City of*

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Fernley, 124 Nev. 1092, 1097, 194 P.3d 1248, 1251-52 (2008) (internal quotations omitted).

B. Writ Relief Is Appropriate Here.

This Court should exercise its discretion to consider this Petition and grant the relief sought for the following reasons:

First, Harvest does not have a plain, speedy, and adequate remedy at law to address the clear errors of law committed by the District Court with regard to Harvest's Motion for Entry of Judgment. The April 5, 2019 Decision and Order is not immediately appealable. *See* NRAP 3A(b) (identifying instances in which "[a]n appeal may be taken"). Mr. Morgan's claim against Harvest remains unresolved; thus, there is no final judgment from which to appeal. This leaves Harvest (and the entire case) in limbo. Under the current procedural posture of this case, Harvest's Motion will remain undecided until: (1) the settlement conference in Mr. Morgan's appeal is held in August 2019, after which, assuming the conference is unsuccessful, Harvest will be permitted to re-file its motion to dismiss Mr. Morgan's premature appeal; (2) this Court decides Mr. Morgan's appeal; or (3) remand of this action to the District Court *sua sponte* by this Court or upon future motion by Mr. Morgan. Further, upon remand of the action to District Court, by any of the means set forth above, the

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District Court intends to recall the members of the discharged jury to resolve the pending claim against Harvest. Therefore, the only way to obtain relief from the District Court's April 5, 2019 Decision and Order is through this Petition. *Marquis & Aurbach v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 122 Nev. 1147, 1155, 146 P.3d 1130, 1136 (2006) ("As an appeal is not authorized . . ., the proper way to challenge such dispositions is through an original writ petition . . . .").

Second, Harvest has a direct and substantial interest in filing this Petition and seeking extraordinary writ relief from this Court. Based upon the District Court's (Judge Gonzalez's) prior ruling that Mr. Morgan failed to present his claim against Harvest to the jury for determination, judgment should have been entered in Harvest's favor on Mr. Morgan's remaining claim in this case. Instead: (i) the claim against Harvest remains unresolved because the District Court is unwilling to hold Mr. Morgan accountable for the choices made at trial; (ii) this Court lacks jurisdiction to decide Mr. Morgan's premature appeal; and (iii) the District Court's proposed remedy for this procedural conundrum is to recall the members of a jury it discharged over one year ago to render a decision regarding Harvest's liability.

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Finally, judicial efficiency, judicial economy, and sound judicial administration militate in favor of writ review in this action. *Scarbo*, 125 Nev. at 121, 206 P.3d at 977. Mr. Morgan has already received a jury trial of his claims for relief in this action. Whether by choice or otherwise, he failed to present his claim against Harvest to the jury for determination. He is not entitled to another bite at the apple — either with a jury or the District Court. He did not pursue his claim and the only proper course of action is to enter judgment in favor of Harvest on the claims Mr. Morgan raised, or could have raised, in the action. If this Court denies consideration of this Petition, Harvest will be left without any remedy until this Court dismisses Mr. Morgan's Motion as premature, issues a substantive decision on Mr. Morgan's pending appeal, or otherwise remands this case to District Court for further proceedings. However, when the District Court resumes jurisdiction, Chief Judge Bell has stated that she intends to recall the discharged jurors to determine if Harvest is vicariously liable for Mr. Morgan's damages. To prevent this manifest error and avoid a further delay of months, if not years, this Court should issue the requested writ of mandamus. Once judgment is entered in Harvest's favor, this Court will obtain jurisdiction over Mr. Morgan's pending appeal, and Mr. Morgan can appeal from the entry of judgment in favor of Harvest and consolidate this new

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appeal with his pending appeal. Thus, issuance of the writ of mandamus will not prejudice Mr. Morgan and will unwind the procedural tangle currently plaguing this action.

Therefore, for the reasons addressed in more detail below, this Court should exercise its jurisdiction to hear and decide this Petition and grant a writ of mandamus as requested.

IV. RELIEF REQUESTED

Harvest seeks a writ of mandamus directing the District Court to:

(i) Vacate the April 5, 2019 Decision and Order concerning Harvest's Motion for Entry of Judgment; and

(ii) Grant Harvest's Motion for Entry of Judgment in its entirety.

V. TIMING OF THIS PETITION

Extraordinary writ relief must be timely sought by a petitioner. *Widdis v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998). The District Court's Decision and Order on Harvest's Motion for Entry of Judgment was entered on April 5, 2019. (14 P.A. 39, at

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2447-2454.)[2] Harvest filed this petition thirteen (13) days later. Thus, this Petition is timely.

VI. ISSUES PRESENTED FOR REVIEW

This Petition presents the following issues:

1. Does the District Court lack jurisdiction to decide Harvest's Motion for Entry of Judgment due to Mr. Morgan's premature appeal from an interlocutory order and a non-final judgment?
2. Can the District Court recall a jury, whose members were discharged and released from the District Court's jurisdiction and control over one year ago, to determine whether Harvest is vicariously liable for Mr. Morgan's injuries?
3. Was the District Court required to enter judgment in favor of Harvest given: (i) the District Court's prior ruling that no claim against Harvest was presented to the jury for determination; and (ii) the complete lack of evidence offered by Mr. Morgan to prove a claim against Harvest for either vicarious liability or negligent entrustment.

[2] For citations to Petitioner's Appendix, the number preceding "P.A." refers to the applicable Volume of the Appendix, while the number succeeding "P.A." refers to the applicable Tab.

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VII. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Accident.

On April 1, 2014, Mr. Morgan was driving north on McLeod Drive, heading towards Tompkins Avenue in Las Vegas. (11 P.A. 18, at 1855:8-9.) Mr. Lujan exited Paradise Park onto Tompkins Avenue and was attempting to cross McLeod Drive when the shuttle bus he was driving was struck by Mr. Morgan. (*Id.* at 1855:9-13.) Mr. Morgan alleged that he injured his head, spine, wrists, neck, and back as a result of the accident. (*Id.* at 1855:14-17.)

B. Harvest Was Sued for Negligent Entrustment — Not Vicarious Liability.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* 1 P.A. 1, at 1-6.) He alleged claims for negligence and negligence *per se* against Mr. Lujan. (*Id.* at 4:1-18.) The sole claim alleged against Harvest was captioned "Vicarious Liability/Respondeat Superior"; however, the allegations in the Complaint clearly recite the elements of a claim for negligent entrustment — not vicarious liability. (*Id.* at 4:19-5:12.) Specifically, the Complaint alleges that:

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- Harvest ***entrusted*** the vehicle to Mr. Lujan's control, (*id*. at 4, at ¶ 18);
- Mr. Lujan was "***incompetent, inexperienced, or reckless*** in the operation of the Vehicle [*sic*]," (*id.* at 5, at ¶ 19 (emphasis added));
- Harvest ***knew or reasonably should have known*** that Mr. Lujan was "incompetent, inexperienced, or reckless in the operation of motor vehicles," (*id.* at 5, at ¶ 20);
- Mr. Morgan was injured as a "proximate consequence" of Mr. Lujan's negligence and incompetence, "concurring with the ***negligent entrustment***" of the vehicle by Harvest, (*id.* at 5, at ¶ 21 (emphasis added)); and
- "[A]s a direct and proximate cause of the ***negligent entrustment***," Mr. Morgan has been damaged, (*id.* at 5, at ¶ 22 (emphasis added)).

No allegation in the Third Cause of Action — the only cause of action alleged against Harvest — asserts that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the car accident. (*Id.* at 4:19-5:12.) In fact, the only reference to "course and scope of employment"

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in the entire Complaint is in a general, nonsensical paragraph which also references negligent entrustment:

> On or about April 1, 2014, Defendants, [*sic*] were the owners, employers, family members[,] and/or operators of a motor vehicle, while in the *course and scope of employment* and/or family purpose and/or other purpose, which was ***entrusted and/or driven in such a negligent and careless manner*** so as to cause a collision with the vehicle occupied by Plaintiff.

(*Id.* at 3, at ¶ 9 (emphasis added).) Despite his failure to allege a claim for vicarious liability, Mr. Morgan contended, after trial, that this was the claim he tried to the jury. (11 P.A. 18, at 1855:24-25.)

C. Harvest Denied the Claim for Negligent Entrustment (and Any Implied Claim for Vicarious Liability).

In its Answer, Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (1 P.A. 2, at 9, at ¶ 7.) However, Harvest denied that:

- Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle;
- It knew or should have known that Mr. Lujan was incompetent, inexperienced, or reckless in the operation of motor vehicles;

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- Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and
- Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (*Id.* at 9, at ¶ 8.)

To the extent that the general and nonsensical paragraph in the Complaint, with its brief and generic reference to course and scope of employment, could, in and of itself, be considered notice of a claim for vicarious liability, Harvest also denied this allegation of the Complaint. (*Id.* at 8, at ¶ 3.)

D. <u>Discovery Demonstrated That the Claim Against Harvest Was Groundless.</u>

Mr. Morgan conducted no discovery relating to vicarious liability or the essential element of the claim relating to the course and scope of employment; rather, Mr. Morgan's discovery focused on his claim for negligent entrustment. Specifically, on April 14, 2016, Mr. Morgan propounded interrogatories to Harvest. (*See generally* 1 P.A. 3, at 14-22.) The interrogatories sought information about the background checks that Harvest performed prior to hiring

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Mr. Lujan, (*id.*, at 19:25-20:2), and a request regarding any disciplinary actions (relating to the operation of a motor vehicle) that Harvest had taken against Mr. Lujan in the five years preceding the accident with Mr. Morgan, (*id.* at 20:15-19). There were no interrogatories propounded upon Harvest which related to the issue of whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id.* at 14-22.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* 1 P.A. 4, at 23-30.) In response to the interrogatory relating to background checks on Mr. Lujan, Harvest answered as follows:

> Mr. Lujan was hired in 2009. ***As part of the qualification process, a pre-employment DOT drug test was conducted as well as a criminal background screen and a motor vehicle record***. Also, since he held a CDL, an inquiry with past/current employers within three years of the date of application was conducted and ***w[as] satisfactory***. A DOT physical medical certification was obtained and monitored for renewal as required. ***MVR was ordered yearly to monitor activity of personal driving history and always came back clear***. Required Drug and Alcohol Training was also completed at the time of hire and included the effects of alcohol use and controlled substances use on an individual's health, safety, work environment and personal life, signs of a problem with these[,] and available methods of intervention.

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(*Id.* at 25:2-19 (emphasis added).) Further, in response to the interrogatory relating to disciplinary actions taken against Mr. Lujan, Harvest's response was: "***None***." (*Id.* at 26:17-24 (emphasis added).)

No other discovery regarding Harvest's alleged liability for negligent entrustment (or vicarious liability) was conducted by Mr. Morgan. In fact, Mr. Morgan never even deposed an officer, director, employee, or other representative of Harvest as a fact witness or a Nevada Rule of Civil Procedure 30(b)(6) witness.

E. Mr. Morgan Presented No Evidence to Prove His Claim Against Harvest at the First Trial of This Action.

This case was originally scheduled for trial in April 2017; however, Mr. Lujan was hospitalized just before the trial was scheduled to commence. (1 P.A. 5, at 31.) Therefore, the case was first tried to a jury from November 6, 2017 to November 8, 2017. (*See generally* 2 P.A. 6A, at 32-271; 3 P.A. 6B, at 272-365; 3 P.A. 7, at 366-491; 4 P.A. 8, at 492-660.) At the start of the first trial, when the District Court asked the prospective jurors if they knew any of the parties or their counsel, the District Court inquired about Mr. Morgan, his counsel, Mr. Lujan, and defense counsel — no mention was made of Harvest, and no objection was raised by Mr. Morgan to this omission. (2 P.A. 6A, at

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67:24-68:25.) Similarly, when the District Court asked counsel to identify their witnesses (in order to determine if the prospective jurors had any potential conflicts), no officer, director, employee, or other representative of Harvest was named as a potential witness by either party. (*Id.* at 72:1-21.)

Mr. Morgan never referenced Harvest, his claim for negligent entrustment, or even vicarious liability during voir dire or in his opening statement. (*Id.* at 76:25-152:20, 155:13-271:25; 3 P.A. 6B, at 272:1-347:24; 3 P.A. 7, at 371:4-394:2.) In fact, Harvest wasn't even mentioned until the third day of trial, while Mr. Lujan was on the witness stand. Mr. Lujan testified as follows:

> BY MR. BOYACK [COUNSEL FOR MR. MORGAN]:
> Q: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
> [BY MR. LUJAN] A: Yes.
> Q: And what was your employment?
> A: I was the bus driver.
> Q: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
> A: Harvest Management was our corporate office.
> Q: Okay.
> A: Montara Meadows was just the local —

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(4 P.A. 8, at 599:23-600:8.) Nothing about this testimony indicates to the jury that Harvest is a defendant in the action or what claim — if any — Mr. Morgan has alleged against Harvest. Mr. Morgan merely established the undisputed fact that Mr. Lujan was an employee of Harvest.

Mr. Lujan's testimony at this first trial is also significant because it provides the only evidence offered at the trial which was relevant to the claims of negligent entrustment and vicarious liability:

> Q: Okay. And isn't it true that you said to [Mr. Morgan's] mother you were sorry for this accident?
> A: Yes.
> Q: And that you were actually pretty worked up and crying after the accident?
> A: I don't know that I was crying. I was more concerned than I was crying —
> Q: Okay.
> A: — ***because I never been in an accident like that***.

(*Id.* at 602:16-24 (emphasis added).)

> Q: Okay. So this was a big accident?
> A: Well, it was for me[,] because ***I've never been in one in a bus***, so it was for me.

(*Id.* at 603:8-10 (emphasis added).) Based on these facts, Mr. Morgan could not possibly prove that Harvest negligently entrusted its shuttle bus to Mr. Lujan.

After the Parties completed their examination of Mr. Lujan, the District Court permitted the jury to submit its own questions. A juror asked Mr. Lujan:

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> THE COURT: ***Where were you going at the time of the accident?***
> THE WITNESS: ***I was coming back from lunch. I had just ended my lunch break.***
> THE COURT: Any follow up? Okay. Sorry. Any follow up?
> MR. BOYACK: No, Your Honor.

(*Id.* at 623:18-624:2 (emphasis added).) Based on this testimony, which Mr. Morgan chose not to dispute, Mr. Morgan could not prove his purported claim for vicarious liability without offering evidence proving that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

Later, on the third day of this first trial, the trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 641:15-643:14, 657:12-18.) However, even if the mistrial had not occurred, Mr. Morgan could not have proven any claim against Harvest — Mr. Morgan's counsel represented that he only had one witness left to examine, Mr. Morgan, before he rested his case. (*Id.* at 653:18-22.) Mr. Morgan has no personal knowledge as to whether Harvest negligently entrusted its shuttle bus to Mr. Lujan, or as to whether Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. Therefore, Mr. Morgan could not have offered any evidence to support his claim against Harvest.

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F. The Second Trial: Where Mr. Morgan Failed to Prove His Claim Against Harvest and Also Failed to Present the Claim to the Jury for Determination.

1. Mr. Morgan Never Mentioned Harvest in His Introductory Remarks to the Jury.

The second trial of this action commenced on April 2, 2018, and it concluded on April 9, 2018. (*See generally* 4 P.A. 9A, at 661-729; 5 P.A. 9B, at 730-936; 6 P.A. 10, at 937-1092; 7 P.A. 11, at 1093-1246; 8 P.A. 12, at 1247-1426; 9 P.A. 13, at 1427-1635; 10 P.A. 14, at 1636-1803.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered against Harvest.

First, Harvest was never identified as a Party when the District Court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[3] is right back here. Let's see, I think that's it for me.

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[3] Mr. Lujan chose not to attend the second trial. Mr. Gardner's introduction of his "client, Erica," refers to Erica Janssen, the corporate representative for Harvest.

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(4 P.A. 9A, at 677:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even Mr. Lujan's "employer." (*Id.* at 677:19-21.)

When the District Court asked the prospective jurors whether they knew any of the Parties or their counsel, there was no mention of Harvest — only Mr. Lujan was named as a defendant:

> THE COURT: All right. Thank you.
>
> Did you raise your hand sir? No. Anyone else? Does anyone know the plaintiff in this case, Aaron Morgan? And there's no response to that question. Does anyone know the plaintiff's attorney in this case, Mr. Cloward? Any of the people he introduced? Any people on [*sic*] his firm? No response to that question.
>
> Do any of you know the defendant in this case, David Lujan? There's no response to that question. Do any of you know Mr. Gardner or any of the people he introduced, Mr. Rands? No response to that question.

(*Id.* at 685:6-14.) Again, consistent with his approach in the first trial and throughout the remainder of the second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 685:15-19.)

Finally, when the District Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer,

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director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 685:15-686:3.)

2. Mr. Morgan Never Mentioned Harvest or His Claim for Negligent Entrustment/Vicarious Liability in Voir Dire or His Opening Statement.

Just as in the first trial, Mr. Morgan failed to reference Harvest, corporate defendants, corporate liability, negligent entrustment, or vicarious liability during voir dire. (*Id.* at 693:2-729:25; 5 P.A. 9B, at 730:1-753:22, 757:6-848:21, 851:7-928:12; 6 P.A. 10, at 939:24-997:24, 1003:16-1046:22.) Moreover, during Mr. Morgan's opening statement, he never made a single reference to Harvest, a corporate defendant, vicarious liability, negligent entrustment, or even the fact that there were two defendants in the action. (6 P.A. 10, at 1062:7-1081:17.) Mr. Morgan's counsel merely stated:

> [MR. CLOWARD:] Let me tell you about what happened in this case. And this case starts off with the actions of Mr. Lujan, who's not here. He's driving a shuttlebus. He worked for a retirement [indiscernible], shuttling elderly people. ***He's having lunch at Paradise Park, a park here in town***. . . .
>
> Mr. Lujan gets in his shuttlebus and it's time for him to get back to work. So he starts off. Bang. Collision takes place. He doesn't stop at the stop sign. He doesn't look left. He doesn't look right.

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(*Id.* at 1062:15-25 (emphasis added).) Mr. Morgan's opening statement made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan.

3. The Evidence Offered and Testimony Elicited Demonstrated That Harvest Was Not Liable for Mr. Morgan's Injuries.

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative for Harvest, as a witness during his case in chief. (8 P.A. 12, at 1410:13-23.) Ms. Janssen confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

> [MR. CLOWARD:]
> Q: And have you had an opportunity to speak with Mr. Lujan about what he claims happened?
> [MS. JANSSEN:]
> A: Yes.
> Q: ***So you are aware that he was parked in a park in his shuttle bus having lunch, correct?***
> ***A: That's my understanding, yes.***

(*Id.* at 1414:15-20 (emphasis added).)

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Mr. Morgan never asked Ms. Janssen where she was employed; her title; whether Harvest employed Mr. Lujan; what Mr. Lujan's duties were; whether Mr. Lujan had ever been in an accident in the shuttle bus before; whether Harvest had checked his driving history prior to hiring him as a driver; where Mr. Lujan was going as he exited Paradise Park; whether he was transporting any passengers at the time of the accident[4]; whether he was authorized to drive the shuttle bus while on a lunch break; whether Mr. Lujan had to clock-in and clock-out during the work day; whether Harvest knew that Mr. Lujan had used a shuttle bus for his personal use during a lunch break; or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (8 P.A. 12, at 1410:21-1423:17; 9 P.A. 13, at 1430:2-1432:1.)

In fact, it was not until re-direct examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:

/ / /

[4] It should be noted that despite the lack of evidence on this issue, Mr. Morgan's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (10 P.A. 14, at 1759:17 ("Aren't we lucky that there weren't other people on the bus? Aren't we lucky?").)

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> "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, [*sic*] LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.["]
>
> "A: Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(9 P.A. 13, at 1437:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on re-direct examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 1435:23-1438:6, 1439:16-1441:5.)

On the fifth day of trial, Mr. Morgan rested his case. (*Id*. at 1481:6-7.) Mr. Morgan's case had focused almost exclusively on his injuries and the amount of his damages.

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 1621:7-1629:12.) As referenced above, this testimony included the following facts:

- Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident;

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- Harvest was the "corporate office" for Montara Meadows;
- The accident occurred when Mr. Lujan was leaving Paradise Park; and
- Mr. Lujan had never been in an "accident like that" or an accident in a bus before.

(*Id.* at 1621:8-17, 1621:25-1622:10, 1622:19-24, 1623:8-10.) This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that is even tangentially related to Harvest.

4. There Were No Jury Instructions Pertaining to a Claim Against Harvest.

There were no jury instructions pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability. (*See generally* 10 P.A. 15, at 1804-1843.) In fact, Mr. Morgan never even proposed that such instructions be given to the jury. (9 P.A. 13, at 1527:1-1532:25.) Again, this is entirely consistent with Mr. Morgan's trial strategy — he all but ignored Harvest during the trial.

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5. Mr. Morgan Failed to Include Harvest or His Claim Against Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for the day, the District Court provided the parties with a sample verdict form that the District Court had used in its last car accident trial:

> THE COURT: Take a look and see if — will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.
> MR. RANDS: Yeah. That looks fine.
> THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar sort of.

(10 P.A. 14, at 1640:20-1641:1.)

Later that same day, after the defense rested its case, Mr. Morgan's counsel informed the District Court that he only wanted to make one change to the Special Verdict form provided by the District Court:

> MR. BOYACK: On the verdict form[,] we just would like the past and future medical expenses and pain and suffering to be differentiated.
> THE COURT: Yeah. Let me see.
> MR. BOYACK: Just instead of the general.
> THE COURT: That's fine. That's fine.
> MR. BOYACK: ***Yeah. That's the only change.***
> THE COURT: That was just what we had laying around, so.

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> MR. BOYACK: Yeah.
> THE COURT: So you want — got it. Yeah. That looks great. I actually prefer that as well.
> MR. BOYACK: Yeah. ***That was the only modification.***
> THE COURT: That's better if we have some sort of issue.
> MR. BOYACK: Right.

(*Id.* at 1751:11-23 (emphasis added).) The Special Verdict form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy):

- The Special Verdict form asked the jury to determine only whether the "***Defendant***" was "***negligent***," (10 P.A. 16, at 1844:17);
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.* at 1844-1845); and
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 1845:1-4).

Thus, Mr. Morgan failed to present any claim against Harvest to the jury for determination.

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6. Mr. Morgan Never Mentioned Harvest or His Claim Against Harvest in His Closing Arguments.

Finally, in closing arguments, Mr. Morgan never mentioned Harvest or his claim for negligent entrustment (or vicarious liability). (10 P.A. 14, at 1756:5-1771:19.) Further — and perhaps the clearest example of Mr. Morgan's decision to abandon his claim against Harvest — Mr. Morgan's counsel explained to the jury, in closing arguments, how to fill out the Special Verdict form. His remarks on liability were limited exclusively to ***Mr. Lujan***:

> So when you are asked to fill out the special verdict form there are a couple of things that you are going to fill out. This is what the form will look like. Basically, the first thing that you will fill out is ***was the Defendant negligent***. Clear answer is yes. ***Mr. Lujan***, in his testimony that was read from the stand, said that [Mr. Morgan] had the right of way, said that [Mr. Morgan] didn't do anything wrong. That's what the testimony is. Dr. Baker didn't say that it was [Mr. Morgan's] fault. You didn't hear from any police officer that came in to say that it was [Mr. Morgan's] fault. The only people in this case, the only people in this case that are blaming [Mr. Morgan] are the corporate folks. They're the ones that are blaming [Mr. Morgan]. So was Plaintiff negligent? That's [Mr. Morgan]. No. And then from there you fill out this other section. What percentage of fault do you assign each party? ***Defendant***, 100 percent, Plaintiff, 0 percent.

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(*Id.* at 1759:20-1760:6.) At no point did Mr. Morgan's counsel inform the District Court that the Special Verdict form contained errors, that it only referred to one defendant, that Harvest had been mistakenly omitted, or that Mr. Morgan's claim against Harvest had been omitted.

Mr. Morgan also failed to mention Harvest or his claim against Harvest in his rebuttal closing argument. (*Id.* at 1792:13-1796:10.)

7. The Verdict.

On April 9, 2018, the jury rendered a verdict against the ***Defendant*** on a claim for ***negligence***, and awarded Morgan $2,980,980.00 in past and future medical expenses and past and future pain and suffering. (10 P.A. 16, at 1845:6-14.)

G. The Action Was Reassigned to Department XI.

On July 1, 2018, approximately three months after the jury trial concluded, the trial judge, the Honorable Linda Marie Bell, began her tenure as the Chief Judge of the Eighth Judicial District Court. (13 P.A. 28, at 2292:10.) Thus, on July 2, 2018, Chief Judge Bell chose to reassign this action to the Honorable Elizabeth Gonzalez, in Department XI, for resolution of any and all post-trial matters. (10 P.A. 17, at 1849.)

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H. The District Court Determined That No Judgment Could Be Entered Against Harvest.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to apply the jury's verdict against Mr. Lujan to Harvest. (*See generally* 11 P.A. 18, at 1853-1910.) Because the jury's verdict lacked an apportionment of liability between Mr. Lujan's negligence and Harvest's alleged negligent entrustment, Mr. Morgan asserted, for the first time, that his claim against Harvest was actually for vicarious liability. (*Id.* at 1855:24-25.) Mr. Morgan argued that the verdict form contained a simple clerical error in its caption; that Chief Judge Bell caused this error when she provided the sample form to the parties during the trial; and that it was clear from the evidence that the jury intended to enter a verdict against both defendants. (*Id.* at 1854:24-1855:6, 1858:7-11.)

On August 16, 2018, Harvest filed its Opposition to Mr. Morgan's Motion for Entry of Judgment[5] and demonstrated, based on the facts set forth above, that Harvest's omission from the Special Verdict form was not a simple

[5] The Appendix of Exhibits to Harvest's Opposition to Mr. Morgan's Motion for Entry of Judgment has been omitted from the Petitioner's Appendix in the interest of judicial efficiency and economy, as all of the documents included in the Appendix of Exhibits to the Opposition are included in the Petitioner's Appendix.

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clerical error — Harvest was, in fact, omitted from the entire trial. (11 P.A. 19, at 1912:13-1930:11.) Moreover, Harvest demonstrated that Nevada Rule of Civil Procedure 49(b) (now Rule 49(a)(3)) was not an available remedy for the allegedly-deficient Special Verdict. (*Id.* at 1930:12-1933:2.) While the District Court can determine an inadvertently omitted issue of fact (i.e., as to one element of the claim for relief), it cannot determine the ***ultimate issue*** of Harvest's liability. (*Id.*) Finally, Harvest established that: (1) it had denied the allegations of Mr. Morgan's claim for relief in its Answer; (2) Mr. Morgan, not Harvest, bore the burden of proof on his claim for relief; and (3) the "going and coming rule" precluded vicarious liability in this case based on the undisputed evidence establishing that Mr. Lujan was on his lunch break at the time of the accident. (*Id.* at 1915:9-21, 1925:6-1928:14.)

On September 7, 2018, Mr. Morgan filed his Reply in support of his Motion for Entry of Judgment, and he asserted that his claim for vicarious liability had been tried by implied consent and that the issue of Harvest's vicarious liability was undisputed at trial. (11 P.A. 20, at 1941:11-1950:2.) Mr. Morgan's argument was based on the fact that Harvest did not dispute that Mr. Lujan was its employee or that Mr. Lujan was driving its shuttle bus at the time of the accident. (*Id.* at 1947:24-1948:4.)

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On November 28, 2018, the District Court (Judge Gonzalez) entered an Order denying Mr. Morgan's Motion for Entry of Judgment. (11 P.A. 22, at 2005-2011.) The District Court held:

> While there is a[n] inconsistency in the caption of the jury instructions and the special verdict form, ***there does not appear to be any additional instructions that would lend credence to the fact that the claims against defendant Harvest Management Sub LLC were submitted to the jury***. So if you would submit the judgment which ***only includes the one defendant***, I will be happy to sign it, and then you all can litigate the next step, if any, related to the ***other defendant***.

(11 P.A. 21, at 2001:13-21 (emphasis added).)

Harvest sought clarification of the District Court's last statement about further litigation as to the "other defendant" and specifically inquired as to whether the judgment against Mr. Lujan would also reference the fact that the claims against Harvest were dismissed. (*Id*. at 2001:24-2002:1.) The District Court confirmed that the judgment pertained solely to Mr. Lujan and that Harvest should file a separate motion seeking relief. (*Id.* at 2002:2-6.) Judge Gonzalez stated that she wanted to "go[] one step at a time." (*Id.* at 2002:8.)

I. Mr. Morgan's Appeal.

The Notice of Entry of Order denying Mr. Morgan's Motion for Entry of Judgment was filed on November 28, 2018. (11 P.A. 22, at 2005-2011.) Mr.

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Morgan filed his Judgment Upon the Jury Verdict against Mr. Lujan on December 17, 2018. (12 P.A. 25, at 2120-2129.) The next day, on December 18, 2018, Mr. Morgan filed a Notice of Appeal from the interlocutory Order denying his Motion for Entry of Judgment and from the non-final Judgment against Mr. Lujan. (12 P.A. 23, at 2012-2090.)

Mr. Morgan has identified three issues on appeal:

> (1) Whether Judge Elizabeth Gonzalez should have transferred the case back to Judge Linda Bell for purposes of determining what happened at trial.
>
> (2) Whether the evidence presented at trial demonstrates that the jury's verdict is against both Lujan and Harvest Management.
>
> (3) Whether the District Court should have, alternatively, made a finding that the jury's verdict is against both Lujan and Harvest Management.

(13 P.A. 30, at 2316, at § 9.) However, on February 11, 2019, Harvest filed a Response to the Docketing Statement clarifying that Mr. Morgan never requested that Judge Gonzalez transfer the case back to Chief Judge Bell for determination of his Motion for Entry of Judgment; therefore, this is not a proper issue on appeal. (13 P.A. 33, at 2378, at § B.)

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On January 23, 2019, Harvest filed a Motion to Dismiss Mr. Morgan's appeal as premature. (*See generally* 13 P.A. 27, at 2172-2284.) Based on Judge Gonzalez's unambiguous statements at the hearing on Mr. Morgan's Motion for Entry of Judgment, it was clear that Mr. Morgan's claim against Harvest had not yet been fully resolved. Therefore, Harvest argued that Mr. Morgan had not appealed from a final judgment, and this Court lacked jurisdiction over the appeal. (*Id.* at 2177:1-2178:15.) However, on March 7, 2019, this Court entered an Order Denying Motion to Dismiss, without prejudice, because the appeal had been diverted to the settlement program. (14 P.A. 36, at 2438-2440.)

Originally, the appeal was scheduled for a settlement conference on February 26, 2019, with Settlement Judge Ara H. Shirinian. (13 P.A. 29, at 2309.) At the time that the Order denying the Motion to Dismiss was entered, the parties had agreed to continue the settlement conference to March 19, 2019; however, due to additional scheduling conflicts, the settlement conference has now been continued to August 13, 2019. (14 P.A. 38, at 2444.)

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J. Harvest's Motion for Entry of Judgment.

On December 21, 2018, Harvest filed a Motion for Entry of Judgment[6] in its favor on the sole remaining, unresolved claim in this case. (*See generally* 12 P.A. 24, at 2091-2119.) Based on the facts set forth above, Harvest asserted that Mr. Morgan voluntarily abandoned his claim against Harvest and, as Judge Elizabeth Gonzalez had already determined, chose not present his claim to the jury for determination. (12 P.A. 24, at 2104:20-2105:25.) Harvest contended that Mr. Morgan should not be given another bite at the apple and that judgment should be entered in Harvest's favor. (*Id.* at 2105:17-25.) Alternatively, Harvest asserted that if Mr. Morgan had not intentionally abandoned his claim, he still failed to prove either his pleaded claim of negligent entrustment or his unpled claim for vicarious liability. (*Id.* at 2106:1-2110:6.)

In response, Mr. Morgan asserted that the District Court had no jurisdiction to decide the Motion for Entry of Judgment because he had filed an appeal to this Court. (12 P.A. 26, at 2137:3-2139:10.) Mr. Morgan also contended that the claim for vicarious liability was tried by consent and that there was substantial evidence to support a judgment against Harvest because

[6] The Appendix of Exhibits to Harvest's Motion for Entry of Judgment has been omitted from the Petitioner's Appendix in the interest of judicial efficiency and economy, as all of the documents included in the Appendix of Exhibits to the Motion are included in the Petitioner's Appendix.

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he had proven that Mr. Lujan was responsible for the accident and that Mr. Lujan was Harvest's employee. (*Id.* at 2141:21-2145:10.) Finally, Mr. Morgan filed a counter-motion to transfer the case back to Chief Judge Bell for determination of these post-trial issues, because, as the trial judge, she was in a better position to determine the "meaning (or lack thereof) behind the mistaken special verdict form." (*Id.* at 2139:11-2140:17.)

On January 23, 2019, Harvest filed a Reply in support of its Motion for Entry of Judgment and an Opposition to Mr. Morgan's Counter-Motion to Transfer the Case Back to Chief Judge Bell. (*See generally* 13 P.A. 28, at 2285-2308.) Harvest demonstrated that the District Court did not lack jurisdiction to decide the Motion for Entry of Judgment, as no final judgment had been entered in the action. (*Id*. at 2288:20-2290:10.) Harvest also argued that since Mr. Morgan had chosen not to oppose the Motion for Entry of Judgment as to a claim of negligent entrustment — the only claim pled in his Complaint — Harvest's unopposed Motion should automatically be granted. (*Id.* at 2293:5-13.) Harvest further demonstrated that a claim for vicarious liability was not tried by consent — either express or implied. (*Id.* at 2293:14-2294:18.) Moreover, Harvest established, in pain-staking detail, the complete lack of evidence identified by Mr. Morgan to support his contention that

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"substantial evidence" justified entry of judgment against Harvest on a claim for vicarious liability. (*Id.* at 2294:19-2299:26.) Finally, Harvest opposed the transfer of the case to Chief Judge Bell, arguing that the trial judge possessed no special knowledge needed to decide Harvest's Motion — this was not an instance where the credibility of witnesses or conflicting evidence needed to be weighed by the judge. (*Id.* at 2290:11-2292:17.) Because Harvest's Motion was based on a complete lack of evidence and an abandonment of the claim, Judge Gonzalez was fully capable and qualified to decide Harvest's Motion. (*Id.* at 2292:3-9.)

On February 7, 2019, Judge Gonzalez granted, in part, Mr. Morgan's Counter-Motion to Transfer the Case Back to Chief Judge Bell. (13 P.A. 31, at 2359-2368.) Specifically, Judge Gonzalez transferred Harvest's Motion for Entry of Judgment to Chief Judge Bell for determination but retained jurisdiction over the remainder of the case. (*Id.* at 2365:26-2366:5.) That same day, Harvest filed a Notice of Objection and Reservation of Rights to the Order granting the Counter-Motion to Transfer the Case Back to Chief Judge Bell because "[n]o legal basis or need was demonstrated for the transfer of one pending motion in this action to another judge for determination." (13 P.A. 32, at 2370:1-2.)

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At the first hearing on Harvest's Motion for Entry of Judgment, on March 5, 2019, Chief Judge Bell inquired whether the parties wanted her to take back the entire action, despite Judge Gonzalez's Order that only the Motion for Entry of Judgment was being transferred. (14 P.A. 35, at 2421:14-17.) Mr. Morgan agreed that the whole case should be transferred, and Harvest stated that it could not consent given that it had objected to even the transfer of the one motion. (*Id.* at 2421:18-2422:3.) Judge Bell stated that she would take this issue under advisement. (*Id.* at 2422:4-5.)

During oral argument, Chief Judge Bell demonstrated a misunderstanding of the claims and defenses pled in the action and the burden of proof as to these claims and defenses:

> [THE COURT:] I mean, I understand what you're saying and I understand that there's an issue with the verdict, but the way this case was presented by both sides, *there was really never any dispute that this was an employee in the course and scope of employment.* ***It was never an issue in the case***.
> MR. KENNEDY [counsel for Harvest]: Actually, there was no evidence substantively presented by the Plaintiff. What the employee — what the evidence on the employee was was he was returning from his lunch break. He had just eaten lunch and was returning. And, of course, Nevada has the coming and going rule. Okay. He had no passengers in the bus. He'd gone to eat lunch on his lunch break. That's why we will — so he's not in course and scope

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> of his employment at that point. That is why —
> THE COURT: I mean, *that wasn't an affirmative defense raised in the answer* that — I mean, ***I don't recall that issue***.
> MR. KENNEDY: And ***there is no claim in the complaint for vicarious liability***. It's negligent entrustment.

(*Id.* at 2431:21-2432:11 (emphasis added).)

Finally, during the hearing, Chief Judge Bell requested transcripts of the settling of the jury instructions from the April 2018 trial of this action. (*Id.* at 2422:20-2423:20, 2435:5-17.) Immediately after the hearing, Harvest submitted the trial transcripts regarding the settling of the jury instructions and the creation of and revisions to the Special Verdict form. (14 P.A. 34, at 2381:23-2383:19.) These transcripts demonstrated that there were "no proposed instructions as to either negligent entrustment or vicarious liability." (*Id.* at 2382:19-21, 2382:25-2383:1.) The transcripts also demonstrated that the only revision that Mr. Morgan requested be made to the Special Verdict form was a separation of past and future medical expenses and past and future pain and suffering. (*Id.* at 2383:13-17.)

On March 14, 2019, Chief Judge Bell issued an order transferring the entire action back to her department. (14 P.A. 37, at 2441.) Then, on April 5, 2019, Chief Judge Bell issued a Decision and Order on Harvest's Motion for

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Entry of Judgment. (*See generally* 14 P.A. 39, at 2447-2454.) Chief Judge Bell found as follows:

- The District Court lacked jurisdiction to decide Harvest's Motion for Entry of Judgment and would stay proceedings pending resolution of Mr. Morgan's appeal to the Nevada Supreme Court, (*id.* at 2447:16-19, 2451:2-3);
- The Court lacked jurisdiction because "[t]he Supreme Court could find that Mr. Morgan's appeal has merit and may reverse the Order granting [*sic*] the Motion for Entry of Judgment. This would grant Mr. Morgan a judgment against Harvest and render Harvest's current Motion moot. Thus, this Motion is not collateral and independent. This Motion directly stems from Judge Gonzalez denying Mr. Morgan's Motion for Entry of Judgment," (*id.* at 2450:1-5);
- Mr. Morgan *alleged* a claim for *vicarious liability/respondeat superior* against Harvest, (*id.*at 2447:26-2448:2);
- Harvest's Answer "***denied the allegation that Mr. Lujan was acting in the course and scope of his employment at the time of the accident***," (*id.* at 2448:3-5 (emphasis added));

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- Chief Judge Bell "*d[id] not recall Harvest contesting vicarious liability during any of the three trials or during the two years proceeding* [*sic*]," (*id.* at 2448:21-22 (emphasis added));
- Chief Judge Bell "***agree[d] with Harvest that the flawed verdict form used at trial does not support a verdict against Harvest***," (*id.* at 2450:6-7 (emphasis added)); and
- Pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), Chief Judge Bell certified that if the Supreme Court remanded the case to District Court, she would "***recall the jury and instruct them to consider whether their verdict applied to Harvest***," (*id.* at 2447:19-21, 2450:7-9, 2451:3-5 (emphasis added)).

VIII. REASONS WHY A WRIT SHOULD ISSUE

A. The District Court Has Jurisdiction to Decide Harvest's Motion for Entry of Judgment.

The District Court erred as a matter of law when it determined that it lacked jurisdiction to render a decision on Harvest's Motion for Entry of Judgment. (*Id.* at 2447:16-19.) After a notice of appeal has been filed, a district court generally retains jurisdiction to decide "matters that are collateral

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to and independent from" the appealed order or judgment. *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006). However, this restriction on jurisdiction is only applicable where the appeal to the Supreme Court is proper. NRAP 3A(b) provides that an appeal may only be taken from a final judgment or nine other specified interlocutory orders or judgments. Neither the Order denying Mr. Morgan's Motion for Entry of Judgment nor the Judgment entered against Mr. Lujan are appealable pursuant to NRAP 3A.

It is well-settled that "when multiple parties are involved in an action, a judgment is not final unless the rights and liabilities of all parties are adjudicated." *Rae v. All Am. Life & Cas. Co.*, 95 Nev. 920, 922, 605 P.2d 196, 197 (1979). "[A] final judgment is one that disposes of all issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

Here, Judge Gonzalez expressly and unambiguously informed the parties that Mr. Morgan's claim against Harvest was not resolved by either the jury's verdict or the judgment entered against Mr. Lujan — the District Court ordered that a subsequent motion was necessary to resolve the claim against Harvest. (11 P.A. 21, at 2001:13-2002:8.) Thus, by definition, the judgment against Mr.

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Lujan is not a final judgment ripe for appeal. Mr. Morgan never sought NRCP 54(b) certification for the judgment against Mr. Lujan. Therefore, Mr. Morgan's appeal is premature and did not divest the District Court of jurisdiction to resolve Harvest's Motion for Entry of Judgment.

While this Court denied Harvest's Motion to Dismiss Appeal as Premature, the denial of the motion was without prejudice and was based on administrative grounds (the upcoming settlement conference) as opposed to substantive legal grounds. (14 P.A. 36, at 2438.) Judicial economy and efficiency necessitate that the District Court be permitted to enter judgment in favor of Harvest, rendering a final judgment in the underlying action, so that Mr. Morgan's appeal can properly proceed before this Court. Therefore, Harvest respectfully requests that this Court issue a writ of mandamus directing the District Court to vacate the April 5, 2019 Decision and Order and to enter judgment in favor of Harvest.

B. Mr. Morgan's Appeal Should Not Be Remanded Pursuant to *Huneycutt.*

Based on its determination that it lacked jurisdiction to resolve Harvest's Motion for Entry of Judgment, the District Court certified the decision it would render on Harvest's motion if this case were remanded. (14 P.A. 39, at

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2447:19-21, 245107-9, 2451:3-5.) However, this case is not appropriate for a *Huneycutt* certification. Harvest's Motion for Entry of Judgment never sought reconsideration of the issues raised in Mr. Morgan's appeal — rather, the motion requested entry of judgment consistent with the Order Denying Mr. Morgan's Motion for Entry of Judgment (i.e., a judgment in favor of Harvest as a natural consequence of the District Court's prior ruling that the jury's Special Verdict did not apply to Harvest).

In *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), an appeal was taken from a property distribution in a divorce proceeding. *Id.* at 79, 575 P.2d at 585. While the appeal was pending, the appellant filed a motion to remand to District Court so that she could file motions pursuant to NRCP 60(b) and NRCP 59(a) based on newly discovered evidence. *Id.* at 79-80, 575 P.2d at 585. This Court held that when a party seeks to file a motion in the district court that concerns the issues raised in a pending appeal, like a motion for reconsideration or a motion for new trial, the proper procedure is to file the motion in the district court (rather than filing a motion to remand in the Nevada Supreme Court), and if the district court "is inclined to grant relief, then it should so certify to the [Nevada Supreme Court] and, at that juncture, a request

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for remand would be appropriate." *Id.* at 80-81, 575 P.2d at 585-86. This process was confirmed in *Foster v. Dingwall*, where this Court stated:

> [I]f a party to an appeal believes a basis exists to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from that order or judgment has been perfected in this court, the party can seek to have the district court certify its intent to ***grant the requested relief***, and ***thereafter*** [t]he party may ***move this court to remand*** the matter to the district court for the entry of an order granting the requested relief.

126 Nev. 49, 52, 228 P.3d 453, 455 (2010) (emphasis added). In *Foster*, this Court also clarified that despite a pending appeal, the district court also has jurisdiction to ***deny*** requests for such relief. *Id.* at 52-53, 228 P.3d at 455.

Here, Harvest has not filed any motion seeking to alter, vacate, or otherwise modify the Order denying Mr. Morgan's Motion for Entry of Judgment or the Judgment entered against Mr. Lujan. Rather, Harvest seeks entry of judgment against Mr. Morgan, which is consistent with the District Court's prior ruling that the jury's Special Verdict does not apply to Harvest (due to Mr. Morgan's failure to present his claim against Harvest to the jury for determination). Therefore, the District Court could have granted Harvest's motion without vacating or altering the appealed from Order and Judgment in any way. Instead, Chief Judge Bell has *sua sponte* decided to reconsider Mr.

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Morgan's Motion for Entry of Judgment — based on unknown grounds — and determined — on her own — that the jury from the April 2018 trial should be recalled to assess Harvest's liability.

Not only would Chief Judge Bell's planned course of action constitute a manifest error of law (as addressed in Section VIII(C) below), but there is no basis for Chief Judge Bell to "vacate" or "reconsider" the Order and Judgment on appeal. No such relief has been sought by any party in the action. The only relevant motion pending before the District Court was a Motion for Entry of Judgment in favor of Harvest. The relief sought in Harvest's Motion was consistent with the District Court's prior ruling concerning the jury's verdict. Thus, a *Huneycutt* decision was not warranted.

Therefore, Harvest respectfully requests that this Court issue a writ of mandamus directing the District Court to vacate the April 5, 2019 Decision and Order and to enter judgment in favor of Harvest. Without this relief, it is expected that Mr. Morgan will file a motion to remand in the pending appeal consistent with Chief Judge Bell's certification. However, remand will likely result in further confusion and render this action more judicially inefficient and uneconomical.

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C. The District Court Cannot Recall Jurors Discharged and Released Over One Year Ago.

If this Court issues a writ of mandamus directing the District Court to vacate the April 5, 2019 Decision and Order and to decide Harvest's Motion for Entry of Judgment, this Court should also direct the District Court to grant Harvest's Motion. Without such a direction, it is clear what the District Court intends to do: deny Harvest's Motion and recall the discharged jurors from the 2018 trial. This — respectfully — would constitute plain error.

It is an accepted axiom of law, not only in Nevada, but also the majority of other jurisdictions, that once jurors have been discharged and released from the courthouse, they cannot be reconvened to decide any issues in an action. *See e.g., Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991); *Mohan v. Exxon Corp.*, 704 A.2d 1348, 1351 (N.J. Super. Ct. App. Div. 1998); *People v. Soto*, 212 Cal. Rptr. 425, 428-29 (Cal. Ct. App. 1985); *People v. Lee Yune Chong*, 29 P. 776, 777 (Cal. 1892); *State v. Rattler*, 2016 WL 6111645, at *9 (Tenn. Crim. App. Oct. 19, 2016).

In *Sierra Foods*, this Court adopted the majority rule and held as follows:

> Although the general rule in many jurisdictions is that a trial court is without authority or jurisdiction to reconvene a jury once it has been dismissed, we elect

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> to adopt a well-reasoned exception to the general rule. The exception in [*Newport Fisherman's Supply Co. v. Derecktor*, 569 A.2d 1051 (R.I. 1990)] applies when the jury has ***not yet dispersed*** and where there is ***no evidence that the jury has been subjected to outside influences from the time of initial discharge to the time of re-empanelment***. The *Masters* court [*Masters v. State*, 344 So.2d 616 (Fla. Dist. Ct. App. 1977)] found that the general rule that a jury cannot be reconvened after discharge is inapplicable where the jury has not been influenced or lost its separate identity.

107 Nev. at 576, 816 P.2d at 467 (emphasis added).

Here, the jurors were discharged and released from the District Court's control ***over one year ago***, on April 9, 2018. (10 P.A. 14, at 1800:13-1801:2.) Over the course of the ensuing year, each juror has certainly been subject to outside influences, potential conflicts, and new experiences — even assuming that each one still resides in Clark County and can be located.

> The operative element in determining when and whether a jury's functions are at an end is not when the jury is told it is discharged but when the ***jury is dispersed, that is, has left the jury box, the court room[,] or the court house and is no longer under the guidance, control and jurisdiction of the court***. This clearly is the rule in criminal cases; there is no reason why the same rule should not apply in civil cases as well. Our focus is not limited to the issues to be decided by the jury. Our objective is to insure the integrity of the jury system. Whether the issues

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> before the jury are civil or criminal in nature, the admonitions of the trial judge restrict jurors' conduct while they are within the jurisdiction and control of the court even when the jurors are dispersed during deliberations. This is markedly different from jurors who have been discharged from their responsibilities as jurors and now ***return to society to resume their normal lives unfettered by restriction or limitation imposed by the court***.

Mohan, 704 A.2d at 1351-52 (emphasis added) (involving a case in which the jury had only been discharged for a period of four days).

Thus, the *Sierra Foods* exception to the general rule regarding the reconvening of a discharged jury does not apply in this case. *See Soto*, 212 Cal. Rptr. at 428-29 (holding that it was an error for the trial court to re-empanel a jury to clarify an ambiguous verdict when the jury had been discharged the ***previous day***, because once the jurors left the courtroom, they were no longer subject to the court's jurisdiction); *Lee Yune Chong*, 29 P. at 777-78 (holding that it was an error for the trial court to re-empanel the jury ***ten minutes*** after they had been discharged, even though the jurors were still located inside the courthouse, because they had "mingled with their fellow citizens free from any official obligation" and had "thrown off their characters as jurors"); *Rattler*, 2016 WL 6111645 at *9 (affirming denial of a motion to reconvene the jury where jury had been discharged ***one month*** before the motion was filed "during

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which time the opportunity for outside contact and influence was great as jurors returned to their daily lives").

In order to ensure that the District Court does not proceed with recalling the jury if and when this case is remanded to the District Court (whether by dismissal of the appeal, granting of this Petition for a writ of mandamus, reversal of the Order denying Mr. Morgan's Motion for Entry of Judgment, granting of a motion for remand, or any other means), Harvest respectfully requests that this Court issue a writ of mandamus directing the District Court to enter judgment in favor of Harvest.

D. Judgment Should Be Entered in Favor of Harvest.

A writ of mandamus directing the District Court to enter judgment in favor of Harvest is warranted by both the District Court's prior ruling and the evidence presented at trial. Given the District Court's prior ruling that the jury's verdict did not apply to Harvest because Mr. Morgan failed to present his claim against Harvest to the jury for determination, the only proper resolution is to enter judgment in favor of Harvest. This will allow for entry of a final judgment, which, in turn, will allow Mr. Morgan to proceed with his appeal of the issue of whether he failed to present his claim to the jury or there was merely a clerical error in the verdict form. Even disregarding the District

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Court's determination that the verdict did not apply to Harvest, judgment in favor of Harvest is further warranted by the complete lack of evidence offered by Mr. Morgan at trial to prove his claim.

1. Mr. Morgan Abandoned His Claim Against Harvest and Failed to Present a Claim to the Jury for Determination.

The District Court (Judge Gonzalez) has already ruled that Mr. Morgan failed to present any claim against Harvest to the jury for determination; therefore, the jury's Special Verdict does not apply to Harvest. (11 P.A. 21, at 2001:13-21; 11 P.A. 22, at 2005-2011; 12 P.A. 25, at 2120-2129.) This ruling was based upon the following facts (which are not subject to dispute):

- ***Mr. Morgan did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses***, (4 P.A. 9A, at 677:2-13, 685:7-23);
- ***Mr. Morgan did not mention Harvest or any claim he alleged against Harvest during jury voir dire***, (*id.* at 693:2-729:25; 5 P.A. 9B, at 730:1-753:22, 757:6-848:21, 851:7-928:12; 6 P.A. 10, at 939:24-997:24, 1003:16-1046:22);

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- ***Mr. Morgan did not reference Harvest or any claim he alleged against Harvest in his opening statement***, (6 P.A. 10, at 1062:7-1081:17);
- ***Mr. Morgan failed to offer any evidence regarding Harvest's liability for his damages***, (*see* Section VIII(D)(2) below);
- ***Mr. Morgan did not elicit any testimony from any witness that could have supported his claim against Harvest***, (*see id.*);
- ***Mr. Morgan did not reference Harvest or any claim against Harvest in his closing argument or rebuttal closing argument***, (10 P.A. 14, at 1756:5-1771:19, 1792:13-1796:10);
- ***Mr. Morgan did not offer any jury instructions relating to any claim against Harvest***, (10 P.A. 15, at 1804-1843); and
- ***Mr. Morgan did not include Harvest in the Special Verdict form submitted to the jury*** (despite making substantive revisions to the sample form proposed by the Court), and ***never asked the jury to assess liability against Harvest*** (despite explaining to the jury, in closing argument, how they should complete the Special Verdict form), (10 P.A. 16, at 1844-1845; 10 P.A. 14, at 1751:11-23, 1759:20-1760:6).

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Mr. Morgan had the opportunity to have a jury determine if Harvest was liable for his damages, and he abandoned his claim. He does not get another bite at the apple and the District Court cannot remedy this error for him. His only remedy is an appeal — but the appeal cannot proceed until a final judgment is entered in this action. Because Judge Gonzalez required a separate motion to be filed before she would enter judgment for Harvest, the only course of action that follows as a natural and probable consequence of the District Court's prior ruling regarding the non-applicability of the jury's Special Verdict is to enter judgment in favor of Harvest.

2. Mr. Morgan Failed to Prove Any Claim Against Harvest at Trial.

Separate and apart from the District Court's prior ruling that Mr. Morgan failed to present his claim against Harvest for the jury's determination, Harvest is also entitled to entry of judgment in its favor because Mr. Morgan utterly failed to prove his claim at trial. Before examining the failure of proof, it must first be determined what claim Mr. Morgan alleged against Harvest.

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(i). Mr. Morgan only pled a claim for negligent entrustment.

The elements of a claim for vicarious liability are that: "(1) the actor at issue was an employee[;] and (2) the action complained of occurred ***within the [course and] scope of the actor's employment***." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 1225, 925 P.2d 1175, 1179, 1180 (1996) (emphasis added) (holding that an employer is not liable if any employee's tort is an "'independent venture of his own'" and was "'not committed in the course of the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)). Negligent entrustment, on the other hand, occurs when "a person knowingly entrusts a vehicle to an inexperienced or incompetent person" and damages arise therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527-28, 688 P.2d 310, 312 (1984).

In Mr. Morgan's Complaint, he alleged a single claim against Harvest for ***negligent entrustment***. (1 P.A. 1, at 4:19-5:12.) Despite the fact that Mr. Morgan titled his claim for relief "Vicarious Liability/Respondeat Superior," the allegations made in his claim for relief relate exclusively to a claim for negligent entrustment (i.e., alleging that Harvest entrusted a vehicle to Mr. Lujan, that Mr. Lujan was an incompetent or inexperienced driver, and that

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Harvest knew or reasonably should have known that Mr. Lujan was an incompetent or inexperienced driver). (*Id*.)

Mr. Morgan ***has never contended*** that he presented a claim of negligent entrustment for the jury's determination, that he proved a claim for negligent entrustment at trial, or that Harvest is not entitled to judgment in its favor on a claim for negligent entrustment. (13 P.A. 28, at 2293:5-13.) Therefore, Harvest is entitled to judgment as a matter of law on this claim.

(ii). Vicarious liability was <u>not</u> tried by consent.

In apparent acknowledgement that Harvest is entitled to judgment on the only claim Mr. Morgan actually pled in this case, Mr. Morgan contended, five months after the trial concluded, that vicarious liability was "tried by implied consent." (11 P.A. 20, at 1948:10-20; 12 P.A. 26, at 2144:16-2145:2.) However, in order for Harvest to expressly or impliedly consent to trial of an unpled claim for vicarious liability, it must have been clear that Mr. Morgan was attempting to prove this claim at trial. *Sprouse v. Wentz*, 105 Nev. 597, 602-03, 781 P.2d 1136, 1139 (1989) (holding that an unpled issue or claim cannot be tried by consent unless a party has taken some action to inform the other parties that he was seeking such relief and the district court has notified the parties that it intends to consider the unpled issue or claim). No such notice

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was ever provided — by either Mr. Morgan or the District Court — during the course of the underlying action or at trial.

Mr. Morgan conducted no discovery relevant to a claim for vicarious liability. He never deposed Mr. Lujan or a single employee, officer, or other representative of Harvest. He never conducted any written discovery relating to the course and scope of his employment at the time of the accident. Rather, Mr. Morgan's written discovery focused on background checks performed by Harvest prior to hiring Mr. Lujan and disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident — information relevant to a claim for negligent entrustment, not vicarious liability. (1 P.A. 3, at 19:25-20:2, 20:15-19.)

Moreover, Mr. Morgan failed to take any action at trial that would constitute notice of his intent to pursue a claim for vicarious liability. Specifically, his opening statement did not include any references to his intent to prove that Harvest was vicariously liable for Mr. Morgan's damages or that, at the time of the accident, Mr. Lujan was acting within the course and scope of his employment with Harvest. (6 P.A. 10, at 1062:7-1081:17.) He never offered any evidence at trial regarding the issue of course and scope of his employment; rather, he only proved that Mr. Lujan was an employee of Harvest

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and that Mr. Lujan was driving Harvest's shuttle bus at the time of the accident — two facts which Harvest never disputed. (1 P.A. 1, at 4:23-28; 1 P.A. 2, at 9:7-8.) Like Mr. Morgan's opening statement, his closing argument failed to include any reference to vicarious liability or the course and scope of Mr. Lujan's employment. (10 P.A. 14, at 1756:5-1771:19, 1792:13-1796:10.) There were no jury instructions regarding the elements of a claim for vicarious liability or relating to the course and scope of employment. (10 P.A. 15, at 1804-1843.) Even in the Special Verdict form, the jury was not asked to find Harvest vicariously liable for Mr. Morgan's injuries. (10 P.A. 16, at 1844-1845.) In sum, Mr. Morgan never provided Harvest, the Court, or the jury with notice that he intended to try a claim for vicarious liability as opposed to, or in addition to, a claim for negligent entrustment. As such, Harvest could not — and did not — expressly or impliedly consent to trial of a claim that Mr. Morgan failed to raise in his pleadings.

(iii). Vicarious liability was not "undisputed" at trial.

Mr. Morgan also contended that Harvest never disputed that it was vicariously liable for Mr. Morgan's injuries and never raised a defense that Mr. Lujan was acting outside the course and scope of his employment at the time of the accident. (12 P.A. 26, at 2134:3-6.) It appears that this argument is the

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basis for the District Court's decision to recall the jury to determine Harvest's liability. (14 P.A. 35, at 2431:21-2432:11 (stating that it was the District Court's recollection that "there was really never any dispute that this was an employee in the course and scope of employment" and that Harvest did not raise course and scope of employment as an affirmative defense).) This argument fails on many grounds.

First, Mr. Morgan never alleged a claim for vicarious liability — Harvest need not and cannot dispute an unpled, unnoticed claim for relief. Second, to the extent that Mr. Morgan's Complaint could be construed as alleging a claim for vicarious liability, Mr. Morgan denied the allegations in the Complaint. (1 P.A. 2, at 8:8-9, 9:9-10.) Third, denials of essential elements of a claim — like Mr. Lujan was acting outside the course and scope of his employment at the time of the accident — are not affirmative defenses and do not have to be raised in an Answer. *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395-96, 168 P.3d 87, 96 (2007). Finally, it is Mr. Morgan — not Harvest, that bears the burden of proof on a claim of vicarious liability. *Porter v. SW Christian Coll.*, 428 S.W. 3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment"); *Montague v. AMN*

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Healthcare, Inc., 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment.").

Therefore, the District Court erred in denying Harvest's Motion for Entry of Judgment based on its failure to raise course and scope of employment as a defense. Mr. Morgan bore the burden of proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident, and he utterly failed to satisfy this burden.

(iv). The unrefuted evidence offered by the defense at trial proves that Harvest cannot be liable for vicarious liability.

The sole evidence offered at trial regarding whether or not Mr. Lujan was acting within the course and scope of his employment at the time of the accident was the unrefuted evidence offered by the defense that Mr. Lujan was on his lunch break when the accident occurred. (8 P.A. 12, at 1414:15-20.) Mr. Morgan failed to offer any evidence proving that Mr. Lujan was "on the clock" during his lunch break; that Mr. Lujan had returned to work when the accident occurred; that Mr. Lujan was transporting passengers or was on his way to pick up passengers when the accident occurred; that Mr. Lujan had "clocked in" after his lunch break or had no requirement to "clock in" and "clock out" as part

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of his employment with Harvest; that Harvest knew that Mr. Lujan was using the company shuttle bus during his lunch breaks; and/or that Harvest authorized such use of the shuttlebus.

In light of the evidence that Mr. Lujan was on his lunch break at the time of the accident, merely proving that Mr. Lujan was employed by Harvest and driving Harvest's bus at the time of the accident is not sufficient to prove that Mr. Lujan was also acting within the course and scope of his employment when the accident occurred. In Nevada, it is well settled that "[t]he tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability . . . ." *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). This is known as the "going and coming rule." The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While this Court has not yet specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the

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language and policy of the "going and coming rule" suggests that an employee is not within the course and scope of his or her employment when commuting to and from lunch. Moreover, other jurisdictions have routinely determined that employers are not liable for an employee's negligence during a lunch break. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding than an employer was not liable under respondeat superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly engage in work***" but rather whether the employee has "***returned to the zone of his employment***" and engaged in the employer's business) (emphasis added); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is ***outside the course of his employment from the time he leaves the work premises until he returns***.") (emphasis added).

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Because Mr. Morgan failed to allege a claim for vicarious liability, never provided notice that he intended to try a claim for vicarious liability to the jury during trial, and failed to prove that Mr. Lujan was acting within the course and scope of his employment at the time of the accident, judgment should be entered in favor of Harvest as a matter of law (separate and apart from the District Court's prior ruling that no claim against Harvest was ever presented to the jury for determination). Therefore, Harvest respectfully requests that this Court issue a writ of mandamus directing that judgment be entered in favor of Harvest.

IX. CONCLUSION

The record in this case unequivocally demonstrates that Mr. Morgan is not entitled to a judgment against Harvest. He did not pursue his claim at trial and failed to present the claim to the jury for determination. He failed to obtain a verdict against Harvest and does not get a second bite at the apple against Harvest. Therefore, judgment on his claim should be entered in favor of Harvest.

Even if this Court finds that Mr. Morgan did not abandon his claim, the record clearly establishes that he failed to prove his claim against Harvest. Mr. Morgan pled a claim for negligent entrustment, and he does not even contest the

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fact that he failed to prove this claim at trial and failed to present the claim to the jury for determination. Mr. Morgan never amended his Complaint to include a claim for vicarious liability, conducted no discovery regarding the claim, and provided no notice to Harvest, the District Court, or the jury that he intended to pursue the claim during trial. Whichever claim Mr. Morgan has alleged in this action, Harvest's Answer clearly denied and disputed the claim. Mr. Morgan bore the burden of proof on the claim at trial. He failed to offer any evidence to prove his claim, and the undisputed evidence offered by the defense established that Harvest could not be liable as a matter of law.

Whether by abandonment or a failure of proof, Harvest is entitled to entry of judgment in its favor. The District Court had jurisdiction to enter this judgment but declined to do so. Instead, the District Court certified that if and when the case is remanded, it would recall the discharged jurors to determine Harvest's liability. This would constitute plain error and cannot be allowed. Rather than leave this case in procedural limbo until Mr. Morgan's current, premature appeal is resolved, this Court should issue a writ of mandamus vacating the District Court's April 5, 2019 Decision and Order and directing the District Court to enter judgment in favor of Harvest. This will cure the jurisdictional defect in Mr. Morgan's pending appeal and allow for

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judicial efficiency and economy when — presumably — Mr. Morgan appeals from Harvest's judgment and consolidates the appeal with the pending appeal.

DATED this 18th day of April, 2019.

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By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
SARAH E. HARMON
ANDREA M. CHAMPION

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

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VERIFICATION

STATE OF OREGON)

COUNTY OF Multnomah

I, Michele Stone, as General Counsel for Harvest Management Sub LLC, hereby declare under penalty of perjury under the laws of the State of Oregon and the State of Nevada that I am an authorized representative of the Petitioner named in the foregoing Petition for Extraordinary Writ Relief and know the contents thereof; that the Petition is true of my own knowledge, except as to those matters stated on information and belief, and that, as to such matters, I believe them to be true; and that I make this verification pursuant to NRS 34.170, NRS 53.045, and NRAP 17(a)(5),

EXECUTED on this 17th day of April, 2019.

Michele Stone

MICHELE STONE

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition complies with the formatting requirements of NRAP 21(d), NRAP 32(a)(4), and NRAP 32(c)(2), as well as the reproduction requirements of NRAP 32(a)(1), the binding requirements of NRAP 32(a)(3), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because:

[x] This Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font 14.

2. I further certify that I have read this Petition, 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 Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of April, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 18th day of April, 2019, service of the foregoing **PETITION FOR EXTRAORDINARY WRIT RELIEF** and **APPENDIX TO PETITION FOR EXTRAORDINARY WRIT RELIEF (Volumes 1-14)** were made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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VIA HAND DELIVERY: *Respondent*

HONORABLE LINDA MARIE BELL
EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK
Department VII
200 Lewis Avenue
Las Vegas, Nevada 89155

ARA H. SHIRINIAN
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Settlement Program Mediator

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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EXHIBIT 8

EXHIBIT 8

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** Hearing Date: Hearing Time:

Defendant Harvest Management Sub LLC ("Harvest"), hereby requests that the Court enter judgment in favor of Harvest on any and all claims for relief alleged by Plaintiff Aaron Morgan ("Mr. Morgan") in this action. (A proposed Judgment is attached hereto as Exhibit A.) Mr. Morgan failed to present any evidence in support of his claims, failed to refute the defendants' evidence offered in defense of these claims, failed to submit these claims to the jury for determination, and has ostensibly chosen to abandon his claims against Harvest.

/ / /

This Motion is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.

DATED this 21st day of December, 2018.

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By: */s/ Dennis L. Kennedy*
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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant Harvest Management Sub LLC's Motion for Entry of Judgment will come on for hearing before the Court in Department XI, on the 25 day of January, 2019, at the hour of In Chambers, or as soon thereafter as counsel can be heard.

DATED this 21st day of December, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Although there is some confusion as to what cause of action Mr. Morgan asserted against Harvest in this action — negligent entrustment or vicarious liability — there is no dispute that at the recent trial of this matter, Mr. Morgan wholly failed to pursue — and in fact appears to have abandoned — his claim for relief against Harvest. Specifically:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[1] at 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[2] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding Harvest's liability for his damages;
- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[3] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[4]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Ex. 14[5]).

[1] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H384-H619.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H620-H748.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H749-H774.

[4] A true and correct copy of the Jury Instructions (Apr. 9, 2018) is attached as Exhibit 13, at Vol. IV of App. at H775-H814.

[5] A true and correct copy of the Special Verdict (Apr. 9, 2018) is attached as Exhibit 14, at Vol. IV of App. at H815-816.

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In addition to abandoning his claims against Harvest, Mr. Morgan also failed to refute the evidence offered by the defendants at trial which established that Harvest could not, as a matter of law, be liable for either negligent entrustment or vicarious liability — specifically, (1) David Lujan's ("Mr. Lujan") testimony that he was on a lunch break when the accident occurred; and (2) Mr. Lujan's testimony that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, Mr. Morgan's claims against Harvest should be dismissed with prejudice and judgment should be entered in favor of Harvest as to Mr. Morgan's express claim for negligent entrustment and his implied claim for vicarious liability.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1[6].) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).) Further, the cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id.*) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

> On or about April 1, 2014, Defendants, [*sic*] were the owners, employers, family members[,] and/or operators of a motor vehicle, while in the *course and scope of employment* and/or family purpose and/or other purpose, which was ***entrusted*** and/or driven in such a negligent and careless manner so as to cause a collision with the vehicle occupied by Plaintiff.

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint. (*See generally* Ex. 2.[7]) The Defendants denied Paragraph 9 of the Complaint, including the

[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H001-H006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H007-H013.

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purported allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.)[8]

B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest. (*See generally* Ex. 4.[9]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[10]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

> Mr. Lujan was hired in 2009. As part of the qualification process, *a pre-employment DOT drug test was conducted as well as a criminal background screen and a motor vehicle record*. Also, since he held a

[8] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H014-H029, at 169:25-170:17.)

[9] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H030-H038.

[10] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H039-H046.

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> CDL, an *inquiry with past/current employers within three years of the date of application was conducted and was* ***satisfactory***. A *DOT physical medical certification was obtained and monitored for renewal* as required. *MVR was ordered yearly to monitor activity of personal driving history* and ***always came back clear***. Required Drug and Alcohol Training was also completed at the time of hire and included the effects of alcohol use and controlled substances use on an individual's health, safety, work environment and personal life, signs of a problem with these and available methods of intervention.

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[11]

No other discovery regarding Harvest's alleged liability for negligent entrustment and/or respondeat superior was conducted by Mr. Morgan. In fact, Mr. Morgan never even deposed an officer, director, employee, or other representative of Harvest as a fact witness or a Nevada Rule of Civil Procedure 30(b)(6) witness.

C. <u>The First Trial.</u>

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[12]; Ex. 8.[13]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-

[11] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H047-H068, at 10:22-13:12).

[12] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H069-H344.

[13] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H345-H357.

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121:20, 124:13-316:24; Ex. 9,[14] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

> BY MR. BOYACK:
> Q: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
> A: Yes.
> Q. And what was your employment?
> A: I was the bus driver.
> Q: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
> A: Harvest Management was our corporate office.
> Q: Okay.
> A: Montara Meadows is just the local--

(Ex. 8, at 108:23-109:8.)

Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

> Q: Okay. And isn't it true that you said to [Mr. Morgan's] mother you were sorry for this accident?
> A: Yes.
> Q: And that you were actually pretty worked up and crying after the accident?
> A: I don't know that I was crying. I was more concerned than I was crying --
> Q: Okay.
> A: -- ***because I never been in an accident like that***.

(*Id.* at 111:16-24 (emphasis added).)

> Q: Okay. So this was a big accident?
> A: Well, it was for me ***because I've never been in one in a bus***, so it was for me.

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

> THE COURT: *Where were you going at the time of the accident?*
> THE WITNESS: ***I was coming back from lunch. I had just ended my lunch break***.
> THE COURT: *Any follow up?* Okay. Sorry. *Any follow up?*
> MR. BOYACK: ***No, Your Honor.***

[14] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H358-H383.

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(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. <u>The Second Trial.</u>

1. Mr. Morgan Never Mentioned Harvest in His Introductory Remarks to the Jury.

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[15] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

When the Court asked the prospective jurors whether they knew any of the Parties or their counsel, there was no mention of Harvest — only Mr. Lujan was named as a defendant:

> THE COURT: All right. Thank you.
> Did you raise your hand, sir? No. Anyone else? Does anyone know the plaintiff in this case, Aaron Morgan? And there's no response to that question. Does anyone know the plaintiff's attorney in this case, Mr. Cloward? Any of the people he introduced? Any people on [*sic*] his firm? No response to that question.
> ***Do any of you know the defendant in this case, David Lujan?*** There's no response to that question. Do any of you know Mr. Gardner or any of the people he introduced, Mr. Rands? No response to that question.

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[15] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

2. Mr. Morgan Never Mentioned Harvest or His Claim for Negligent Entrustment/Vicarious Liability in Voir Dire or His Opening Statement.

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability, negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

> [MR. CLOWARD:] Let me tell you about what happened in this case. And this case starts off with the actions of Mr. Lujan, who's not here. He's driving a shuttlebus. He worked for a retirement [indiscernible], shuttling elderly people. ***He's having lunch at Paradise Park***, a park here in town. . . .
>
> Mr. Lujan gets in his shuttlebus and it's time for him to get back to work. So he starts off. Bang. Collision takes place. He doesn't stop at the stop sign. He doesn't look left. He doesn't look right.

(*Id.* at 126:15-25 (emphasis added).) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan — rather, he acknowledged that Mr. Lujan was at lunch at the time of the accident. (*Id.* at 126:7-145:17.)

3. The Only Evidence Offered and Testimony Elicited Demonstrated That Harvest Was Not Liable for Mr. Morgan's Injuries.

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen

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confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

> [MR. CLOWARD:]
> Q: And have you had an opportunity to speak with Mr. Lujan about what he claims happened?
> [MS. JANSSEN:]
> A: Yes.
> Q: ***So you are aware that he was parked in a park in his shuttle bus having lunch, correct?***
> A: ***That's my understanding, yes.***
> Q: You're understanding that he proceeded to exit the park and head east on Tompkins?
> A: Yes.

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17; Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history;

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disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[16]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included the following facts: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

Mr. Morgan never submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability***. (*See generally* Ex. 13.) Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

> THE COURT: Take a look and see if – will you guys look at that verdict form? *I know it doesn't have the right caption. I know it's just the one we used the last trial*. See if that looks sort of okay.

[16] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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> MR. RANDS: Yeah. That looks fine.
> THE COURT: I don't know if it's right with what you're asking for for damages, but *it's just what we used in the last trial which was **similar sort of.***

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

> MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.
> THE COURT: Yeah. Let me see.
> MR. BOYACK: Just instead of the general.
> THE COURT: That's fine. That's fine.
> MR. BOYACK: Yeah. ***That's the only change***.
> THE COURT: ***That was just what we had laying around, so***.
> MR. BOYACK: Yeah.
> THE COURT: So you want – got it. Yeah. That looks great. I actually prefer that as well.
> MR. BOYACK: Yeah. ***That was the only modification***.
> THE COURT: That's better if we have some sort of issue.
> MR. BOYACK: Right.

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy):

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (Ex. 14, at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*); and
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added)).

Thus, Mr. Morgan chose not to present any claim against Harvest to the jury for determination.

6. Mr. Morgan Never Mentioned Harvest or His Claim Against Harvest in His Closing Arguments.

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Further, and perhaps the clearest example of Mr. Morgan's decision to abandon his claims against Harvest,

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Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form***. His remarks on liability were ***limited exclusively to Mr. Lujan***:

> So when you are asked to fill out the special verdict form there are a couple of things that you are going to fill out. This is what the form will look like. Basically, the first thing that you will fill out is *was the* ***Defendant*** *negligent.* Clear answer is yes. ***Mr. Lujan****, in his testimony that was read from the stand,* said that [Mr. Morgan] had the right of way, said that [Mr. Morgan] didn't do anything wrong. That's what the testimony is. Dr. Baker didn't say that it was [Mr. Morgan's] fault. You didn't hear from any police officer that came in to say that it was [Mr. Morgan's] fault. The only people in this case, the only people in this case that are blaming [Mr. Morgan] are the corporate folks. They're the ones that are blaming [Mr. Morgan]. So was Plaintiff negligent? That's [Mr. Morgan]. No. ***And then from there you fill out this other section. What percentage of fault do you assign each party? Defendant, 100 percent, Plaintiff, 0 percent.***

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

E. Plaintiff's Motion for Entry of Judgment Against Harvest Was Denied By This Court.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to apply the jury's verdict against Mr. Lujan against Harvest. On November 28, 2018, this Court entered an Order denying Mr. Morgan's Motion, finding that no claims against Harvest were ever presented to the jury for determination.

III. LEGAL ARGUMENT

A. Mr. Morgan Voluntarily Abandoned His Claim Against Harvest and Chose Note to Present Any Claim Against Harvest to the Jury for Determination.

The record in this case conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent

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entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to the damages question in the sample Special Verdict form proposed by the Court. (Ex. 12, at 116:11-23; *see also* Ex. 14.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

Typically, when a party chooses to abandon his or her claims at trial, the claims are dismissed with prejudice by stipulation either before or after the trial. It is rare that a party fails to litigate his or her alleged claims against a party yet refuses to dismiss the claims and insists that the abandoned claims should be resolved in his or her favor. Because Mr. Morgan has not sought the voluntary dismissal of his claims, Harvest respectfully requests that this Court enter judgment in favor of Harvest and against Mr. Morgan on both the express claim for negligent entrustment and the implicitly alleged claim for vicarious liability. Mr. Morgan had the opportunity for the jury to render a decision on these claims and voluntarily and intentionally chose not to present them to the jury for determination; therefore, Mr. Morgan should not be given another bite at the apple.

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B. Based on the Evidence Presented at Trial, Harvest Is Entitled to Judgment in Its Favor as to Mr. Morgan's Claim for Either Negligent Entrustment or Vicarious Liability.

As the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.") However, Mr. Morgan failed to offer any evidence in support of these claims — primarily, evidence that Mr. Lujan was acting in the course and scope of his employment at the time of the accident, or evidence that Harvest knew or reasonably should of known that Mr. Lujan was an inexperienced, incompetent, and/or reckless driver.

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not, as a matter of law, be liable for either vicarious liability or negligent entrustment. Specifically, the ***undisputed evidence*** offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Based on such unrefuted evidence, judgment should be entered in favor of Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was

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> on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

1. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Relating to This Claim, Judgment Should Be Entered in Favor of Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only when: "(1) the actor at issue was an employee[;] and (2) the action complained of occurred within the course and scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 1225-26, 925 P.2d 1175, 1179, 1180-81 (1996) (holding that an employer is not liable if an employee's tort is an "'independent venture of his own'" and was "'not committed in the course of the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

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Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[t]he tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835,

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838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, Mr. Morgan's implicit claim for vicarious liability should be dismissed with prejudice and judgment should be entered in favor of Harvest.

2. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id*. at 528, 688 P.2d at 313.

Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in the record relating to Mr. Lujan's driving history demonstrates that ***he has never been in an accident before***. (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the

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case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Based on the failure of evidence offered by Mr. Morgan, and Mr. Lujan's undisputed testimony regarding his lack of prior car accidents, as a matter of law, Mr. Morgan's express claim for negligent entrustment should be dismissed with prejudice and judgment should be entered in favor of Harvest.

IV. CONCLUSION

For the foregoing reasons, Harvest requests that the Court enter judgment in its favor as to Mr. Morgan's claim for negligent entrustment (or vicarious liability). A proposed Judgment is attached hereto as Exhibit A.

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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SARAH E. HARMON
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 21st day of December, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system to the following:

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EXHIBIT A

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HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI

PROPOSED JUDGMENT

On _____ ____, 2019, this matter came on for a duly-noticed hearing before the Honorable Elizabeth Gonzalez concerning Defendant Harvest Management Sub LLC's ("Harvest") Motion for Entry of Judgment. Having duly considered the pleadings and papers on file and the argument of counsel, and good cause appearing therefore; the Court makes the following Findings of Fact and Conclusions of Law and Judgment:

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FINDINGS OF FACT

1. On April 1, 2014, Defendant David E. Lujan ("Mr. Lujan"), an employee of Harvest, was involved in a car accident with Plaintiff Aaron M. Morgan ("Mr. Morgan").

2. Mr. Lujan was driving a passenger bus owned by Harvest at the time of the accident.

3. On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Mr. Lujan for injuries and damages arising from the car accident.

4. In the Complaint, Mr. Morgan alleged a claim for negligent entrustment and/or vicarious liability against Harvest.

5. Mr. Morgan's claims against Mr. Lujan and Harvest were tried before a jury from April 2, 2018 to April 9, 2018.

6. During the jury trial, Mr. Morgan failed to offer any evidence to demonstrate that Mr. Lujan was granted permission to drive the passenger bus and was acting within the course and scope of his employment at the time of the accident

7. During the jury trial, Mr. Morgan failed to offer any evidence to demonstrate that Harvest knew, or reasonably should have known, that Mr. Lujan was an incompetent, inexperienced, negligent, and/or reckless driver.

8. During the jury trial, Mr. Lujan and Harvest offered evidence to demonstrate that Mr. Lujan was on his lunch break at the time of the accident. Mr. Morgan did not dispute this evidence.

9. During the jury trial, Mr. Lujan and Harvest offered evidence to demonstrate that Mr. Lujan had never been in a car accident prior to the accident with Mr. Morgan. Mr. Morgan did not dispute this evidence.

10. The jury did not enter a verdict against Harvest on any of Morgan's claims for relief.

CONCLUSIONS OF LAW

1. The elements of a claim for negligent entrustment are: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Zugel by Zugel v. Miller*, 100 Nev. 525, 528, 688 P.2d 310, 313 (1984).

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2. "A person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting from negligent entrustment. *Id.* at 527, 688 P.2d at 312.

3. As the Plaintiff, Mr. Morgan bore the burden of proof regarding his claim for negligent entrustment. *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003); *Dukes v. McGimsey*, 500 S.W. 2d 448, 451 (Tenn. Ct. App. 1973).

4. Mr. Morgan offered no evidence to demonstrate that Mr. Lujan was an inexperienced or incompetent driver; therefore, he failed to satisfy his burden of proof regarding the essential elements of a claim for negligent entrustment.

5. Based on the undisputed evidence offered at trial, that Mr. Lujan had never been in a car accident prior to the accident with Mr. Morgan, Harvest did not and could not have known that Mr. Lujan was an incompetent or inexperienced driver.

6. Therefore, Harvest is not liable for negligent entrustment of its vehicle to Mr. Lujan, and Mr. Morgan's claim for negligent entrustment is dismissed with prejudice.

7. To the extent that Mr. Morgan alleged a claim for vicarious liability against Harvest, the elements of a claim for vicarious liability are: (1) that the actor at issue was an employee of the defendant; and (2) that the action complained of occurred within the course and scope of the actor's employment. *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). An employer is not liable for an employee's independent ventures. *Id.* at 1225-26, 925 P.2d at 1180-81.

8. As the Plaintiff, Mr. Morgan bore the burden of proof regarding his claim for vicarious liability. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014).

9. Mr. Morgan offered no evidence to demonstrate that Mr. Lujan had been granted permission to driver the passenger bus and was acting within the course and scope of his employment with Harvest at the time of the accident; therefore, he failed to satisfy his burden of proof regarding the essential elements of a claim for vicarious liability.

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10. Based on the undisputed evidence offered at trial that Mr. Lujan was on his lunch break at the time of the accident, Mr. Lujan could not have been acting within the course and scope of his employment when the accident occurred.

11. Nevada has adopted the "going and coming rule," which holds that "[t]he tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving." *Molino v. Asher,* 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978).

12. While Nevada has not yet specifically addressed an employer's vicarious liability for an employee's actions during his lunch break, based on the rationale and purpose of the "going and coming rule, it is clear that an employee is not acting within the course and scope of his or her employment while the employee is on a lunch break. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996); *Richardson v. Glass,* 835 P.2d 835, 838 (N.M. 1992); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982).

13. Therefore, based on the undisputed evidence offered at trial, Harvest is not vicariously liable for Mr. Morgan's injuries, and Mr. Morgan's claim for vicarious liability is dismissed with prejudice.

14. As a matter of law, Mr. Morgan failed to prove that Harvest was liable in any manner for Mr. Morgan's injuries and/or damages.

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JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, after a trial on the merits, any and all claims which were alleged or could have been alleged by Mr. Morgan in this action are dismissed with prejudice and judgment is entered in favor of Harvest and against Mr. Morgan on these claims. Mr. Morgan shall recover nothing hereby.

IT IS SO ORDERED this ___ day of _____, 2019.

_____
HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE

Respectfully submitted by:
BAILEY❖KENNEDY

By: _____
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EXHIBIT 7

EXHIBIT 7

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

NOTICE OF APPEAL

Plaintiff, Aaron M. Morgan, by and through his attorneys of record, Marquis Aurbach Coffing and the Richard Harris Law Firm, hereby appeals to the Supreme Court of Nevada from: (1) the Order Denying Plaintiff's Motion for Entry of Judgment, which was filed on

MAC:15167-001 3604743_1

November 28, 2018 and is attached as **Exhibit 1**; and (2) the Judgment Upon the Jury Verdict, which was filed on December 17, 2018 and is attached as **Exhibit 2**.

Dated this 18th day of December, 2018.

MARQUIS AURBACH COFFING

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF APPEAL** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 18th day of December, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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EXHIBIT 6

EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

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Plaintiff,

vs.

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Defendants.

Case No.: A-15-718679-C
Dept. No.: XI

NOTICE OF ENTRY OF JUDGMENT

MAC:15167-001 3612459_1

Please take notice that the Judgment Upon Jury Verdict was filed in the above-captioned matter on December 17, 2018. A copy of the Judgment Upon Jury Verdict is attached hereto as **Exhibit 1**.

Dated this 2nd day of January, 2019.

MARQUIS AURBACH COFFING

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 2nd day of January, 2019. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

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[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Exhibit 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	CASE NO.: A-15-718679-C Dept. No.: XI **JUDGMENT UPON THE JURY VERDICT**

JUDGMENT UPON THE JURY VERDICT

This action came on for trial before the Court and the jury, the Honorable Linda Marie Bell, District Court Judge, presiding,[1] and the issues having been duly tried and the jury having duly rendered its verdict.[2]

IT IS ORDERED AND ADJUDGED that PLAINTIFF, AARON M. MORGAN, have a recovery against DEFENDANT, DAVID E. LUJAN, for the following sums:

Past Medical Expenses	$208,480.00
Future Medical Expenses	+$1,156,500.00
Past Pain and Suffering	+$116,000.00
Future Pain and Suffering	+$1,500,000.00
Total Damages	**$2,980,980.00**

IT IS FURTHER ORDERED AND ADJUDGED that AARON M. MORGAN's past damages of $324,480 shall bear Pre-Judgment interest in accordance with *Lee v. Ball*, 121 Nev. 391, 116 P.3d 64 (2005) and NRS 17.130 at the rate of 5.00% per annum plus 2% from the date of service of the Summons and Complaint on May 28, 2015, through the entry of the Special Verdict on April 9, 2018:

PRE-JUDGMENT INTEREST ON PAST DAMAGES:

05/28/15 through 04/09/18 = **$65,402.72**

[(1,051 days) at (prime rate (5.00%) plus 2 percent = 7.00%) on $324,480 past damages]

[Pre-Judgment Interest is approximately $62.23 per day]

PLAINTIFF'S TOTAL JUDGMENT

Plaintiff's total judgment is as follows:

Total Damages:	**$2,980,980.00**
Prejudgment Interest:	**$65,402.72**
TOTAL JUDGMENT	**$3,046,382.72**

[1] This case was reassigned to the Honorable Elizabeth Gonzalez, District Court Judge, in July 2018.

[2] *See* Special Verdict filed on April 9, 2018, attached as **Exhibit 1**.

Now, THEREFORE, Judgment Upon the Jury Verdict in favor of the Plaintiff is as follows:

PLAINTIFF, AARON M. MORGAN, is hereby awarded **$3,046,382.72** against DEFENDANT, DAVID E. LUJAN, which shall bear post-judgment interest at the adjustable legal rate from the date of the entry of judgment until fully satisfied. Post-judgment interest at the current 7.00% rate accrues interest at the rate of $584.24 per day.

Dated this 13 day of Dec., 2018.

HONORABLE ELIZABETH GONZALEZ
DISTRICT COURT JUDGE
DEPARTMENT 11

Respectfully Submitted by:

Dated this 12th day of December, 2018.

MARQUIS AURBACH COFFING

By _____
Micah S. Echols, Esq.
Nevada Bar No. 8437
Tom W. Stewart, Esq.
Nevada Bar No. 14280
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff, Aaron M. Morgan

[CASE NO. A-15-718679-C—JUDGMENT UPON THE JURY VERDICT]

RICHARD HARRIS LAW FIRM

Exhibit 1

DISTRICT COURT

CLARK COUNTY, NEVADA

CASE NO: A-15-718679-C

DEPT. NO: VII

AARON MORGAN,

Plaintiff,

vs.

DAVID LUJAN,

Defendant.

SPECIAL VERDICT

We, the jury in the above-entitled action, find the following special verdict on the questions submitted to us:

QUESTION NO. 1: Was Defendant negligent?

ANSWER: Yes ✓ No _____

If you answered no, stop here. Please sign and return this verdict.

If you answered yes, please answer question no. 2.

QUESTION NO.2: Was Plaintiff negligent?

ANSWER: Yes _____ No ✓

If you answered yes, please answer question no. 3.

If you answered no, please skip to question no. 4.

///

QUESTION NO. 3: What percentage of fault do you assign to each party?

Defendant: 100

Plaintiff: 0

Total: 100%

Please answer question 4 without regard to you answer to question 3.

QUESTION NO. 4: What amount do you assess as the total amount of Plaintiff's damages? (Please do not reduce damages based on your answer to question 3, if you answered question 3. The Court will perform this task.)

Past Medical Expenses	$ 208,480.00
Future Medical Expenses	$ 1,156,500.00
Past Pain and Suffering	$ 116,000.00
Future Pain and Suffering	$ 1,500,000.00
TOTAL	$ 2,980,980.00

DATED this 9th day of April, 2018.

Arthur J. St. Laurent

FOREPERSON

ARTHUR J. ST. LAURENT

EXHIBIT 5

EXHIBIT 5

Electronically Filed
1/18/2019 12:28 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

AARON MORGAN	.	
	.	
Plaintiff	.	CASE NO. A-15-718679-C
	.	
vs.	.	
	.	DEPT. NO. XI
DAVID LUJAN, et al.	.	
	.	**Transcript of**
Defendants	.	**Proceedings**
. . . . .	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

TUESDAY, NOVEMBER 6, 2018

APPEARANCES:

FOR THE PLAINTIFF:	BRYAN A. BOYACK, ESQ. THOMAS W. STEWART, ESQ.
FOR THE DEFENDANTS:	DENNIS L. KENNEDY, ESQ. SARAH E. HARMON, ESQ. ANDREA M. CHAMPION, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

employee, discusses the facts of the accident. Never does she bring up on cross or direct examination he was on a break, we aren't on the hook here, or any assertion of that. So this is kind of after the fact them trying to escape the clear liability that was presented, although it wasn't stated on the special verdict form, defendant Lujan, defendant Harvest Management. It was the defendant.

THE COURT: Is there any instruction on either negligent entrustment or vicarious liability in the pack of jury instructions?

MR. BOYACK: I don't believe so, Your Honor.

THE COURT: Yeah. Okay. Thanks.

The motion's denied. While there is a inconsistency in the caption of the jury instructions and the special verdict form, there does not appear to be any additional instructions that would lend credence to the fact that the claims against defendant Harvest Management Sub LLC were submitted to the jury. So if you would submit the judgment which only includes the one defendant, I will be happy to sign it, and then you all can litigate the next step, if any, related to the other defendant.

MR. STEWART: Thank you, Your Honor.

MR. BOYACK: Thank you, Your Honor.

MR. KENNEDY: And just for purposes of clarification, that judgment will say that the claims against

Harvest Management are dismissed?

THE COURT: It will not, Mr. Kennedy.

MR. KENNEDY: Okay. Well, I'll just have to file a motion.

THE COURT: That's why I say we have to do something next.

MR. KENNEDY: Okay. I'm happy to do that.

THE COURT: I'm going one step at a time.

THE PROCEEDINGS CONCLUDED AT 9:13 A.M.

* * * * *

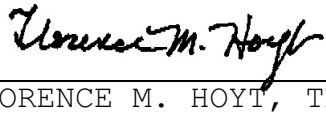
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

1/17/19

DATE

EXHIBIT 4

EXHIBIT 4

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No. A-15-718679-C Dept. No. XI

NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that an Order on Plaintiff's Motion for Entry of Judgment was entered on November 28, 2018.

/ / /

/ / /

/ / /

A true and correct copy is attached hereto.

DATED this 28th day of November, 2018.

BAILEY❖KENNEDY

By: */s/ Sarah E. Harmon*
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

Attorneys for Defendants
HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 28th day of November, 2018, service of the foregoing **NOTICE OF ENTRY OF ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

BENJAMIN P. CLOWARD — Email: Benjamin@richardharrislaw.com
BRYAN A. BOYACK — Bryan@richardharrislaw.com
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101

and

MICAH S. ECHOLS — Email: Mechols@maclaw.com
TOM W. STEWART — Tstewart@maclaw.com
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Attorney for Defendant
DAVID E. LUJAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PLEASE NOTE DEPT. CHANGE

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. [redacted] XI

ORDER ON PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT

Date of Hearing: November 6, 2018
Time of Hearing: 9:00 A.M.

On November 6, 2018, at 9:00 a.m., the Motion for Entry of Judgment came before the Court. Tom W. Stewart of Marquis Aurbach Coffing P.C. and Bryan A. Boyack of Richard Harris Law Firm appeared on behalf of Plaintiff Aaron Morgan and Dennis L. Kennedy, Sarah E. Harmon, and Andrea M. Champion of Bailey❖Kennedy appeared on behalf of Defendant Harvest Management Sub LLC.

///

The Court, having examined the briefs of the parties, the records and documents on file, and having heard argument of counsel, and for good cause appearing,

HEREBY ORDERS that the Motion for Entry of Judgment shall be, and hereby is, **DENIED**.

DATED this 26 day of November, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

BAILEY❖KENNEDY, LLP

By: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148
Attorneys for Defendant Harvest Management Sub LLC

Approved as to form and content by:

MARQUIS AURBACH COFFING P.C.

By: _____
MICAH S. ECHOLS
TOM W. STEWART
1001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiff Aaron Morgan

EXHIBIT 3

EXHIBIT 3

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Nevada Bar No. 8106
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Attorneys for Defendant
HARVEST MANAGEMENT SUB LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually,

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign-Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

Case No. A-15-718679-C
Dept. No. XI

DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Hearing Date: September 14, 2018
Hearing Time: In Chambers

Defendant Harvest Management Sub LLC ("Harvest"), hereby opposes the Motion for Entry of Judgment (the "Motion") filed by Plaintiff Aaron M. Morgan ("Mr. Morgan") on July 30, 2018.

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This Opposition is made and based on the following memorandum of points and authorities, the papers and pleadings on file, and any oral argument the Court may allow.[1]

DATED this 16th day of August, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

Attorneys for Defendants
HARVEST MANAGEMENT SUB LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the recent trial of this matter, Plaintiff Mr. Morgan wholly failed to pursue — and in fact appeared to have abandoned — the single claim (for negligent entrustment) that he asserted against Harvest, the former employer of the individual defendant, David E. Lujan ("Mr. Lujan"). In particular, Mr. Morgan failed to do any of the following at trial:

- He did not reference Harvest in his introductory remarks to the jury regarding the identity of the Parties and expected witnesses, (Ex. 10,[2] 17:2-24, 25:7-26:3);
- He did not mention Harvest or his claim against Harvest during jury voir dire, (*id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11,[3] at 3:24-65:7, 67:4-110:22);
- He did not reference Harvest or his claim against Harvest in his opening statement, (Ex. 11, at 126:7-145:17);
- He offered no evidence regarding any liability of Harvest for his damages;

[1] The Motion is currently scheduled to be heard in chambers by the Court on September 14, 2018. Harvest respectfully requests that, if the Court finds it appropriate, the Motion be set for hearing so that the parties can be heard on this important issue.

[2] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 2, 2018) are attached as Exhibit 10, at Vol. III of App. at H000384-H000619.

[3] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 3, 2018) are attached as Exhibit 11, at Vol. IV of App. at H000620-H000748.

- He did not elicit any testimony from any witness that could have supported his claim against Harvest;
- He did not reference Harvest or his claim against Harvest in his closing argument or rebuttal closing argument, (Ex. 12,[4] at 121:4-136:19, 157:13-161:10);
- He did not include his claim against Harvest in the jury instructions, (Ex. 13[5]); and
- He did not include Harvest in the Special Verdict Form, never asked the jury to assess liability against Harvest, and, in fact, gave the jury no option to find Harvest liable for anything, (Mot. at Ex. 1).

Now, having obtained a verdict in excess of $3 million (when interest is considered) against Mr. Lujan, and perhaps regretting his trial strategy, Mr. Morgan asks the Court to "fix" the jury's verdict and enter judgment against Harvest. Mr. Morgan attempts to classify the verdict form as merely an inadvertent clerical error that easily can be corrected by this Court. To the contrary, assessing liability against Harvest would require that this Court ignore the record and impose liability where none has been proven to exist, supplanting the jury's verdict with its own determination. Essentially, Mr. Morgan requests that the Court engage in reversible error by determining the ultimate liability of a party — rather than an issue of fact, as contemplated by Nevada Rule of Civil Procedure 49(a). Thus, Mr. Morgan's Motion must be denied.

Alarmingly, Mr. Morgan's Motion is based on multiple half-truths and blatant misrepresentations. For example, Mr. Morgan asserts — without a single citation to supporting evidence in the record (***because there is none***) — that (1) the issue of whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident was "undisputed," (Mot. at 2:21-23); (2) the issue of vicarious liability was uncontested by Harvest, (*id.* at 4:21-22); and (3) "the record plainly supports" a judgment against both Mr. Lujan and Harvest, (*id.* at 6:7). The record, however, demonstrates the complete opposite.

/ / /

[4] Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 9, 2018) are attached hereto as Exhibit 12, at Vol. IV of App. at H000749-H000774.

[5] A true and correct copy of the Jury Instructions (Apr. 9, 2018) are attached as Exhibit 13, at Vol. IV of App. at H000775-H000814.

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First, in his Complaint, Mr. Morgan pled a claim for negligent entrustment, not vicarious liability, and Harvest denied these allegations in its Answer. (Ex. 1,[6] at ¶¶ 15-22; Ex. 2,[7] at 2:8-9, 3:9-10.) Far from being undisputed or uncontested, ***Harvest squarely denied liability***. Thereafter, Mr. Morgan took no steps at trial to satisfy his burden of proof as to either negligent entrustment or vicarious liability. He developed no testimony and offered no evidence even suggesting that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. Nor did he develop any testimony or offer any evidence suggesting that Mr. Lujan was an inexperienced, incompetent, or reckless driver prior to the accident, or that Harvest knew or should have known of such (alleged) driving history. More importantly, Mr. Morgan failed to rebut the evidence offered by Mr. Lujan and Harvest which proved that Harvest could not be liable for either vicarious liability or negligent entrustment — specifically, Mr. Lujan's testimony that he was on a lunch break when the accident occurred and that he had never been in an accident before.

Given the lack of *any* evidence offered at trial against Harvest, there is no legal basis for entry of judgment against Harvest. Mr. Morgan's Motion — characterizing the verdict as a simple mistake — borders on dishonesty. Therefore, Harvest respectfully requests that Mr. Morgan's Motion be denied in its entirety and that a judgment be entered consistent with the jury's verdict — solely against Mr. Lujan.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (*See generally* Ex. 1.) The only claim alleged against Harvest in the Complaint is captioned "Vicarious Liability/Respondeat Superior," but the allegations of the claim are more akin to a claim for ***negligent entrustment***. (*Id.* at ¶¶ 15-22 (alleging that Harvest negligently entrusted the vehicle to Mr. Lujan despite the fact that it knew or should have known that Mr. Lujan was an incompetent, inexperienced, or reckless driver).)

[6] A true and correct copy of the Complaint (May 20, 2015) is attached as Exhibit 1, at Vol. I of App. at H000001-H000006.

[7] A true and correct copy of Defs.'Answer to Pl.'s Compl. (June 16, 2015) is attached as Exhibit 2, at Vol. I of App. at H000007-H000013.

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Despite the title of the claim, the third cause of action fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*Id.*) Rather, the only reference to "course and scope" in the entire Complaint is as follows:

> On or about April 1, 2014, Defendants, [*sic*] were the owners, employers, family members[,] and/or operators of a motor vehicle, while in the *course and scope of employment* and/or family purpose and/or other purpose, which was ***entrusted*** and/or driven in such a negligent and careless manner so as to cause a collision with the vehicle occupied by Plaintiff.

(*Id.* at ¶ 9 (emphasis added).)

On June 16, 2015, Mr. Lujan and Harvest filed Defendants' Answer to Plaintiff's Complaint.[8] (*See generally* Ex. 2.) The Defendants denied Paragraph 9 of the Complaint, including its implied allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (Ex. 1, at ¶ 9; Ex. 2, at 2:8-9.) Harvest admitted that it employed Mr. Lujan as a driver, that it owned the vehicle involved in the accident, and that it had entrusted control of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 16-18; Ex. 2, at 3:7-8.) However, Harvest denied that: (i) Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle; (ii) it knew or should have known that he was incompetent, inexperienced, or reckless in the operation of motor vehicles; (iii) Mr. Morgan was injured as a proximate consequence of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan; and (iv) Mr. Morgan suffered damages as a direct and proximate result of Harvest's alleged negligent entrustment of the vehicle to Mr. Lujan. (Ex. 1, at ¶¶ 19-22; Ex. 2, at 3:9-10.) Harvest's and Mr. Lujan's Answer also included an affirmative defense of comparative liability. (Ex. 2, at 3:16-21.)[9]

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[8] Mr. Morgan's Motion emphasizes that Mr. Lujan and Harvest were represented by the same counsel. (Mot. at 3:25-26.) This fact is irrelevant. Liability cannot be imputed to Harvest simply because it shared counsel with its employee. Mr. Morgan still bore the burden of proving his claims against both defendants.

[9] Harvest's and Mr. Lujan's Answer was admitted into evidence during the second trial, as Exhibit 26. (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 5, 2018), attached hereto as Exhibit 3, at Vol. I of App. at H000014-H000029, at 169:25-170:17.)

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B. Discovery.

On April 14, 2016, Mr. Morgan propounded interrogatories on Harvest.[10] (*See generally* Ex. 4.[11]) The interrogatories included a request regarding the background checks Harvest performed prior to hiring Mr. Lujan, (*id.* at 6:25-7:2), and a request regarding any disciplinary actions Harvest had taken against Mr. Lujan in the five years preceding the accident which related to Mr. Lujan's operation of a Harvest vehicle, (*id.* at 7:15-19). There were no interrogatories propounded upon Harvest which concerned whether Mr. Lujan was acting within the course and scope of his employment at the time of the accident. (*See generally* Ex. 4.)

On October 12, 2016, Harvest served its Responses to Mr. Morgan's Interrogatories. (*See generally* Ex. 5.[12]) Harvest answered Interrogatory No. 5, regarding the pre-hiring background checks relating to Mr. Lujan, as follows:

> Mr. Lujan was hired in 2009. As part of the qualification process, *a pre-employment DOT drug test was conducted as well as a criminal background screen and a motor vehicle record*. Also, since he held a CDL, an *inquiry with past/current employers within three years of the date of application was conducted and were* ***satisfactory***. A *DOT physical medical certification was obtained and monitored for renewal* as required. *MVR was ordered yearly to monitor activity of personal driving history* and ***always came back clear***. Required Drug and Alcohol Training was also completed at the time of hire and included the effects of alcohol use and controlled substances use on an individual's health, safety, work environment and personal life, signs of a problem with these and available methods of intervention.

(*Id.* at 3:2-19 (emphasis added).) Further, in response to Interrogatory No. 8, regarding past disciplinary actions taken against Mr. Lujan, Harvest's response was "***None***." (*Id.* at 4:17-23 (emphasis added).)[13]

/ / /

[10] Mr. Morgan also propounded interrogatories on Mr. Lujan, but Mr. Lujan failed to serve any responses. Mr. Morgan never moved to compel Mr. Lujan to answer the interrogatories and never deposed Mr. Lujan.

[11] A true and correct copy of Pl.'s First Set of Interrogs. to Def. Harvest Mgmt. Sub LLC (Apr. 14, 2016) is attached as Exhibit 4, at Vol. 1 of App. at H000030-H000038.

[12] A true and correct copy of Def. Harvest Mgmt. Sub, LLC's Resps. to Pl.'s First Set of Interrogs. (Oct. 12, 2016) is attached as Exhibit 5, at Vol. I of App. at H000039-H000046.

[13] Portions of Harvest's Responses to Mr. Morgan's Interrogatories were read to the jury during the second trial, (Excerpts of Recorder's Tr. of Hrg. Civil Jury Trial (Apr. 6, 2018), attached hereto as Exhibit 6, at Vol. I of App. at H000047-H000068, at 10:22-13:12).

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No other discovery regarding Harvest's alleged liability for negligent entrustment and/or respondeat superior was conducted by Mr. Morgan. In fact, Mr. Morgan never even deposed an officer, director, employee, or other representative of Harvest as a fact witness or a Nevada Rule of Civil Procedure 30(b)(6) witness.

C. The First Trial.

This case was first tried to a jury on November 6, 2017 through November 8, 2017. (*See generally* Ex. 7[14]; Ex. 8.[15]) At the start of the first trial, when the Court asked the prospective jurors if they knew any of the Parties or their counsel, the Court asked about Mr. Morgan, Plaintiff's counsel, Mr. Lujan, and defense counsel. (Ex. 7, at 36:24-37:25.) No mention was made of Harvest, and no objection was raised by Mr. Morgan. (*Id.*) Further, when the Court asked counsel to name their witnesses to determine if the prospective jurors were familiar with any witnesses, no officer, director, employee, or other representative of Harvest was named as a potential witness. (*Id.* at 41:1-21.)

Mr. Morgan also never referenced Harvest, his express claim for negligent entrustment, or his attempted claim for vicarious liability during voir dire or his opening statement. (*Id.* at 45:25-121:20, 124:13-316:24; Ex. 9,[16] at 6:4-29:1.) In fact, Harvest was not mentioned until the third day of the first trial, while Mr. Lujan was on the witness stand. Mr. Lujan's relevant testimony is as follows:

> BY MR. BOYACK:
> Q: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
> A: Yes.
> Q. And what was your employment?
> A: I was the bus driver.
> Q: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
> A: Harvest Management was our corporate office.
> Q: Okay.
> A: Montara Meadows is just the local--

(Ex. 8, at 108:23-109:8.)

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[14] Excerpts of Tr. of Jury Trial (Nov. 6, 2017) are attached as Exhibit 7, at Vol. II of App. at H000069-H000344.

[15] Excerpts of Tr. of Jury Trial (Nov. 8, 2017) are attached as Exhibit 8, at Vol. III of App. at H000345-H000357.

[16] Excerpts of Tr. of Jury Trial (Nov. 7, 2017) are attached as Exhibit 9, at Vol. III of App. at H000358-H000383.

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Mr. Lujan also provided the only evidence during trial which was relevant to claims of either negligent entrustment or vicarious liability:

> Q: Okay. And isn't it true that you said to [Mr. Morgan's] mother you were sorry for this accident?
> A: Yes.
> Q: And that you were actually pretty worked up and crying after the accident?
> A: I don't know that I was crying. I was more concerned than I was crying --
> Q: Okay.
> A: -- ***because I never been in an accident like that***.

(*Id.* at 111:16-24 (emphasis added).)

> Q: Okay. So this was a big accident?
> A: Well, it was for me ***because I've never been in one in a bus***, so it was for me.

(*Id.* at 112:8-10 (emphasis added).)

After counsel for Mr. Morgan completed his examination of Mr. Lujan, the court permitted the jury to submit its own questions. A juror — not Mr. Morgan — asked Mr. Lujan:

> THE COURT: *Where were you going at the time of the accident?*
> THE WITNESS: ***I was coming back from lunch. I had just ended my lunch break***.
> THE COURT: *Any follow up?* Okay. Sorry. *Any follow up?*
> MR. BOYACK: ***No, Your Honor.***

(*Id.* at 131:21-24, 132:18, 132:22-133:2 (emphasis added).)

Later that day, the first trial ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 150:15-152:14, 166:12-18.)

D. <u>The Second Trial.</u>

1. Mr. Morgan Never Mentioned Harvest in His Introductory Remarks to the Jury.

The second trial of this action commenced on April 2, 2018. (*See generally* Ex. 10.) The second trial was very similar to the first trial regarding the lack of reference to and the lack of evidence offered regarding Harvest. First, Harvest was not officially identified as a party when the court requested that counsel identify themselves and the Parties for the jury. In fact, counsel for the defense merely stated as follows:

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> MR. GARDNER: Hello everyone. What a way to start a Monday, right? In my firm we've got myself, Doug Gardner and then Brett South, who is not here, but this is Doug Rands, and then my client, Erica[17] is right back here. Let's see, I think that's it for me.

(*Id.* at 17:15-18.) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, or a corporate defendant, or even the employer of Mr. Lujan. (*Id.* at 17:19-24.)

When the Court asked the prospective jurors whether they knew any of the Parties or their counsel, there was no mention of Harvest — only Mr. Lujan was named as a defendant:

> THE COURT: All right. Thank you.
> Did you raise your hand, sir? No. Anyone else? Does anyone know the plaintiff in this case, Aaron Morgan? And there's no response to that question. Does anyone know the plaintiff's attorney in this case, Mr. Cloward? Any of the people he introduced? Any people on [*sic*] his firm? No response to that question.
> ***Do any of you know the defendant in this case, David Lujan?*** There's no response to that question. Do any of you know Mr. Gardner or any of the people he introduced, Mr. Rands? No response to that question.

(*Id.* at 25:6-14 (emphasis added).) Again, consistent with his approach in the first trial and throughout the remainder of this second trial, Mr. Morgan did not object or clarify that the case also involved a claim against Mr. Lujan's employer, Harvest. (*Id.* at 25:15-22.)

Finally, when the Court asked the Parties to identify the witnesses they planned to call during trial, no mention was made of any officer, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 25:15-26:3.)

2. Mr. Morgan Never Mentioned Harvest or His Claim for Negligent Entrustment/Vicarious Liability in Voir Dire or His Opening Statement.

Just as with the first trial, Mr. Morgan failed to reference Harvest or his claim for negligent entrustment/vicarious liability during voir dire. (*Id.* at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Moreover, during Mr. Morgan's opening statement, Plaintiff's counsel never made a single reference to Harvest, a corporate defendant, vicarious liability,

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[17] In the second trial, Mr. Lujan chose not to attend. Mr. Gardner's introduction referenced Erica Janssen, a representative of Harvest.

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negligent entrustment, or even the fact that there were two defendants in the action. (Ex. 11, at 126:7-145:17.) Plaintiff's counsel merely stated:

> [MR. CLOWARD:] Let me tell you about what happened in this case. And this case starts off with the actions of Mr. Lujan, who's not here. He's driving a shuttlebus. He worked for a retirement [indiscernible], shuttling elderly people. He's having lunch at Paradise Park, a park here in town. . . .
>
> Mr. Lujan gets in his shuttlebus and it's time for him to get back to work. So he starts off. Bang. Collision takes place. He doesn't stop at the stop sign. He doesn't look left. He doesn't look right.

(*Id.* at 126:15-25.) Plaintiff's counsel made no reference to any evidence to be presented during the trial which would demonstrate that Mr. Lujan was acting in the course and scope of his employment at the time of the accident or that Harvest negligently entrusted the vehicle to Mr. Lujan. (*Id.* at 126:7-145:17.)

3. The Only Evidence Offered and Testimony Elicited Demonstrated That Harvest Was Not Liable for Mr. Morgan's Injuries.

On the fourth day of the second trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative of Harvest, as a witness during his case in chief. (Ex. 3, at 164:13-23.) Ms. Janssen confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch and that the accident occurred as he exited the park:

> [MR. CLOWARD:]
> Q: And have you had an opportunity to speak with Mr. Lujan about what he claims happened?
> [MS. JANSSEN:]
> A: Yes.
> Q: ***So you are aware that he was parked in a park in his shuttle bus having lunch, correct?***
> A: ***That's my understanding, yes.***
> Q: You're understanding that he proceeded to exit the park and head east on Tompkins?
> A: Yes.

(*Id.* at 168:15-23 (emphasis added).)

Mr. Morgan never asked Ms. Janssen where she was employed, her title, whether Harvest employed Mr. Lujan, what Mr. Lujan's duties were, or any other questions that might have elicited evidence to support a claim for negligent entrustment or vicarious liability. (*Id.* at 164:21-177:17;

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Ex. 6, at 4:2-6:1.) In fact, it wasn't until redirect examination that Mr. Morgan even referenced the fact that Ms. Janssen was in risk management for Harvest:

> [MR. CLOWARD:]
> Q: So where it says, on interrogatory number 14, and you can follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.
> > "A. Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(Ex. 6, at 11:18-25.) Other than this acknowledgement that Ms. Janssen executed interrogatory responses on behalf of Harvest, Mr. Morgan, again, failed to elicit any evidence on redirect examination to support a claim for negligent entrustment or vicarious liability. (*Id.* at 9:23-12:6, 13:16-15:6.)

On the fifth day of the second trial, Mr. Morgan rested his case (*id.* at 55:6-7), again, with no evidence presented to support a claim for vicarious liability or negligent entrustment — i.e., evidence of Mr. Lujan's driving history; Harvest's knowledge of Mr. Lujan's driving history; disciplinary actions Harvest took against Mr. Lujan prior to the accident; background checks Harvest performed on Mr. Lujan; alcohol and drug testing Harvest performed on Mr. Lujan; Mr. Lujan's job duties; Harvest's policy regarding the use of company vehicles to drive to and from lunch; whether Mr. Lujan was required to clock-in and clock-out during his shifts; or whether any residents of the retirement home were passengers on the bus at the time of the accident, among other facts.[18]

During the defense's case in chief — not Mr. Morgan's — defense counsel read portions of Mr. Lujan's testimony from the first trial into the record. (*Id.* at 195:7-203:12.) As referenced above, this testimony included that: (1) Mr. Lujan worked as a bus driver for Montara Meadows at the time of the accident; (2) Harvest was the "corporate office" for Montara Meadows; (3) the

[18] It should be noted that despite the lack of evidence on these issues, Plaintiff's counsel stated, during his closing argument, that there were no passengers on the bus at the time of the accident. (Ex. 12, at 124:15-17) ("That this company transporting our elderly members of the community is going to follow the rules of the road. ***Aren't we lucky that there weren't other people on the bus?*** Aren't we lucky?") (emphasis added)).

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accident occurred when Mr. Lujan was leaving Paradise Park; and (4) Mr. Lujan had never been in an "accident like that" or an accident in a bus before. (*Id.* at 195:8-17, 195:25-196:10, 196:19-24, 197:8-10.)

This testimony, coupled with Ms. Janssen's testimony that Mr. Lujan was on his lunch break at the time of the accident, is the complete universe of evidence offered at the second trial that even tangentially concerns Harvest.

4. There Are No Jury Instructions Pertaining to the Claim Against Harvest.

As Mr. Morgan points out in his Motion, the jury instructions provided to the jury included the correct caption for this action and listed both Mr. Lujan and Harvest as defendants. (Ex. 13, at 1:6-12.) However, Mr. Morgan fails to disclose in his Motion that neither party submitted any jury instructions ***pertaining to vicarious liability, actions within the course and scope of employment, negligent entrustment, or corporate liability***. (*See generally* Ex. 13.)

Again, this is entirely consistent with Mr. Morgan's trial strategy. He all but ignored Harvest throughout the trial process.

5. Mr. Morgan Failed to Include Harvest in the Special Verdict Form.

On the last day of trial, before commencing testimony for that day, the Court provided the Parties with a sample jury form that the Court had used in its last car accident trial.

> THE COURT: Take a look and see if – will you guys look at that verdict form? *I know it doesn't have the right caption. I know it's just the one we used the last trial*. See if that looks sort of okay.
> MR. RANDS: Yeah. That looks fine.
> THE COURT: I don't know if it's right with what you're asking for for damages, but *it's just what we used in the last trial which was* ***similar sort of.***

(Ex. 12, at 5:20-6:1 (emphasis added).) Later that same day, after the defense rested its case, Plaintiff's counsel informed the Court that it only wanted to make one change to the special verdict form that the Court had proposed:

> MR. BOYACK: On the verdict form we just would like the past and future medical expenses and pain and suffering to be differentiated.
> THE COURT: Yeah. Let me see.
> MR. BOYACK: Just instead of the general.
> THE COURT: That's fine. That's fine.
> MR. BOYACK: Yeah. ***That's the only change***.
> THE COURT: ***That was just what we had laying around, so***.

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> MR. BOYACK: Yeah.
> THE COURT: So you want – got it. Yeah. That looks great. I actually prefer that as well.
> MR. BOYACK: Yeah. ***That was the only modification***.
> THE COURT: That's better if we have some sort of issue.
> MR. BOYACK: Right.

(*Id.* at 116:11-23 (emphasis added).) The Special Verdict Form approved by Mr. Morgan — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is entirely consistent with Mr. Morgan's trial strategy).

Mr. Morgan asserts that the Special Verdict form simply "inadvertently omitted Harvest Management from the caption." (Mot. at 2:24-25.) This is disingenuous. Not only does the caption list Mr. Lujan as the sole defendant, (*id.* at Ex. 1, at 1:6-12), but:

- The Special Verdict form only asked the jury to determine whether the "***Defendant***" was negligent, (*id.* at 1:17 (emphasis added));
- The Special Verdict form did not ask the jury to find Harvest liable for anything, (*id.*);
- The Special Verdict form directed the jury to apportion fault only between "***Defendant***" and Plaintiff, with the percentage of fault totaling 100 percent, (*id.* at 2:1-4 (emphasis added)); and
- Mr. Morgan never objected to the failure to apportion fault between Plaintiff and the ***two*** defendants, as is required by NRS 41.141, (*id.*).

6. Mr. Morgan Never Mentioned Harvest or His Claim Against Harvest in His Closing Arguments.

Finally, in closing arguments, Plaintiff's counsel never even mentioned Harvest or Mr. Morgan's claim for negligent entrustment or vicarious liability. (Ex. 12, at 121:5-136:19.) Plaintiff's counsel merely made references to the testimony of Erica Janssen and the fact that she: (1) contested liability; (2) blamed Mr. Morgan for the accident; (3) blamed an unknown third party for the accident; and (4) was unaware that Mr. Lujan had previously testified that Mr. Morgan had done nothing wrong and was not to blame for the accident. (*Id.* at 122:10-123:5.)

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Further, and perhaps the clearest example of the impropriety of Mr. Morgan's Motion, Plaintiff's counsel ***explained to the jury, in closing, how to fill out the Special Verdict form***. His remarks on liability were ***limited exclusively to Mr. Lujan***:

> So when you are asked to fill out the special verdict form there are a couple of things that you are going to fill out. This is what the form will look like. Basically, the first thing that you will fill out is *was the* ***Defendant*** *negligent.* Clear answer is yes. ***Mr. Lujan****, in his testimony that was read from the stand,* said that [Mr. Morgan] had the right of way, said that [Mr. Morgan] didn't do anything wrong. That's what the testimony is. Dr. Baker didn't say that it was [Mr. Morgan's] fault. You didn't hear from any police officer that came in to say that it was [Mr. Morgan's] fault. The only people in this case, the only people in this case that are blaming [Mr. Morgan] are the corporate folks. They're the ones that are blaming [Mr. Morgan]. So was Plaintiff negligent? That's [Mr. Morgan]. No. ***And then from there you fill out this other section. What percentage of fault do you assign each party? Defendant, 100 percent, Plaintiff, 0 percent.***

(Id. at 124:20-125:6 (emphasis added).) Plaintiff's counsel also failed to mention Harvest or the claim alleged against Harvest in his rebuttal closing argument. (*Id.* at 157:13-161:10.)

III. LEGAL ARGUMENT

A. A Judgment Cannot Be Entered Against Harvest Because It Would Be Contrary to the Pleadings, Evidence, and Jury Instructions in This Case.

Mr. Morgan's primary argument in bringing this Motion is that the Court should enter judgment against Harvest "because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict." (Mot. at 5:14-17; *see also Id.* at 2:23-24, 6:7.) However, Mr. Morgan fails to cite to a single piece of evidence or even a jury instruction that would demonstrate that the jury intended to find Harvest liable for the claim alleged in the Complaint. Rather, Mr. Morgan makes unsupported assertions that the claim of vicarious liability was not contested at trial, (*id.* at 4:21-22), and that it was undisputed that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident, (*id*. at 2:21-23).

The record establishes that Mr. Morgan failed to meet his burden of proof as to any claim he alleged (or attempted to allege) against Harvest. The record further establishes that Harvest cannot be liable for vicarious liability or negligent entrustment, as a matter of law, because Mr. Lujan was at

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lunch when the accident occurred and he has no prior history of reckless or negligent driving. Finally, the record establishes that Mr. Morgan — whether through carelessness, a strategic trial decision, or acceptance of the futility of his claim — completely ignored Harvest and Harvest's alleged liability at trial and chose to focus solely on Mr. Lujan's liability and the amount of his damages. Thus, there is no factual basis for entry of judgment against Harvest.

1. Mr. Morgan Failed to Prove That Harvest Was Vicariously Liable for Mr. Lujan Injuries or Liable for Negligent Entrustment.

Mr. Morgan asserts that the issue of vicarious liability was not contested. (Mot. at 4:21-22.) This is not true. Harvest contested liability for the only claim pled in the Complaint — negligent entrustment — and for the attempted claim of vicarious liability, by denying these allegations in its Answer. (Ex. 1, at ¶¶ 9, 19-22; Ex. 2, at 2:8-9, 3:9-10.) Thus, as the plaintiff, Mr. Morgan bore the burden of proving his claims against Harvest at trial. *Porter v. Sw. Christian Coll.*, 428 S.W.3d 377, 381 (Tex. App. 2014) ("A plaintiff pleading respondeat superior bears the burden of establishing that the employee acted within the course and scope of his employment."); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Reptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her employment."); *Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.")

Not only did Mr. Morgan fail to prove his claim, but the evidence adduced at trial actually demonstrated that Harvest could not be liable for either vicarious liability or negligent entrustment. Specifically, the undisputed evidence offered at trial proved that Mr. Lujan was at lunch at the time of the accident and had never been in an accident before. (Ex. 3, at 168:15-23; Ex. 6, at 196:19-24, 197:8-10.) Such evidence prevents the imposition of a judgment against Harvest.

J&C Drilling Co. v. Salaiz, 866 S.W.2d 632 (Tex. App. 1993), is instructive on this issue:

> We reject appellees' contention that the issue of course and scope was not contested. Appellants' answer contained a general denial, which put in issue all of the allegations of

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> appellees' petition, including the allegation that Gonzalez was acting in the course and scope of his employment with J&C. Because appellees had the burden of proof on this issue, it was not necessary for appellants to present evidence negating course and scope in order to contest the issue. In any event, as is discussed below, evidence was presented that Gonzalez was on a personal errand at the time of the accident, refuting the allegation that he was acting in the course and scope of his employment.

(*Id.* at 635).

a. Mr. Morgan Did Not Prove a Claim for Vicarious Liability, and Based on the Sole Evidence Offered at Trial Which Relates to This Claim, No Judgment Can Be Entered Against Harvest.

While Mr. Morgan's Complaint states one claim for relief against Harvest entitled "Vicarious Liability/Respondeat Superior," the allegations contained therein do not actually reflect a theory of respondeat superior — i.e., that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*See* Ex. 1 at ¶¶ 15-22.) Rather, his claim was akin to a claim for negligent entrustment, alleging that: (1) Mr. Lujan was employed as a driver for Harvest; (2) Harvest entrusted him with the vehicle; (3) Mr. Lujan was an incompetent, inexperienced, and/or reckless driver; and (4) Harvest actually knew, or should have known, of Mr. Lujan's inexperience or incompetence. (*See id.*)

It is anticipated that Mr. Morgan will argue that one general allegation in his Complaint which references the course and scope of employment was sufficient to state a claim for respondeat superior. (*Id.* at ¶ 9.) Even assuming *arguendo* that Mr. Morgan alleged a claim for vicarious liability, he failed to prove this claim at trial. Vicarious liability and/or respondeat superior applies to an employer only when: "(1) the actor at issue was an employee[;] and (2) the action complained of occurred within the course and scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 1225-26, 925 P.2d 1175, 1179, 1180-81 (1996) (holding that an employer is not liable if an employee's tort is an "'independent venture of his own'" and was "'not committed in the course of the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)).

Mr. Morgan failed to offer any evidence as to Mr. Lujan's status at the time of the accident. The *only* facts adduced at trial that are related to Mr. Lujan's employment were: (1) that Mr. Lujan

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was an employee of Montara Meadows (a bus driver); (2) that Mr. Lujan drove the bus to Paradise Park for a lunch break; (3) that the accident occurred as Mr. Lujan was exiting the park; and (3) that Harvest is the "corporate office" of Montara Meadows. (*See* Ex. 3, at 168:15-23; Ex. 6, at 195:8-17, 195:25-196:10.)

Mr. Morgan failed to establish whether Mr. Lujan was "on the clock" during his lunch break, whether Mr. Lujan had returned to work and was transporting passengers at the time of the accident, whether Mr. Lujan had to "clock in" after his lunch break, whether Mr. Lujan was permitted to use a company vehicle while on his lunch break, or whether Harvest Management even knew that Mr. Lujan was using a company vehicle during his lunch breaks. Without developing these facts, there is insufficient evidence, under Nevada law, to conclude that Mr. Lujan was acting in the course and scope of his employment at the time of the accident.

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Moreover, the evidence offered by Mr. Lujan and Harvest demonstrates that Harvest is not vicariously liable for Mr. Morgan's injuries. Nevada has adopted the "going and coming rule." Under this rule, "[t]he tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving." *Molino v. Asher*, 96 Nev. 814, 817-18, 618 P.2d 878, 879-80 (1980); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691 (1978). The rule is premised upon the idea that the "'employment relationship is "suspended" from the time the employee leaves until he returns, or that in commuting, he is not rendering service to his employer.'" *Tryer v. Ojai Valley Sch.*, 12 Cal. Rptr. 2d 114, 116 (Cal. Ct. App. 1992) (quoting *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990-91 (Cal. 1970)).

While the Nevada Supreme Court has not specifically addressed whether an employer is vicariously liable for an employee's actions during a lunch break, the express language of and policy behind the "going and coming rule" suggests that an employee is not acting within the course and scope of his employment when he commutes to and from lunch during a break from his employment. Moreover, other jurisdictions have routinely determined that employers ***are not liable for an employee's negligence during a lunch break***. *See e.g., Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W. 2d 202, 212 (Tex. App. 1996) (holding that an employer was not liable under respondeat

superior when its employee rear-ended the plaintiff while driving back from his lunch break in a company vehicle because the test is not whether the employee is returning from his personal undertaking to "***possibly*** engage in work" but rather whether the employee ***has*** "returned to the zone of his employment" and engaged in the employer's business); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident); *Gordon v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 411 So. 2d 1094, 1098 (La. Ct. App. 1982) ("Ordinarily, an employee who leaves his employer's premises and takes his noon hour meal at home or some other place of his own choosing is outside the course of his employment from the time he leaves the work premises until he returns.").

Because Mr. Morgan failed to offer any evidence proving that Mr. Lujan was acting within the course and scope of his employment at the time of the accident — and the only evidence regarding Mr. Lujan's actions at the time of the accident demonstrate that he was on a lunch break — as a matter of law, judgment cannot be entered against Harvest on a claim of vicarious liability.

b. Mr. Morgan Also Failed to Prove to the Jury That Harvest Is Liable for Negligent Entrustment.

While Mr. Morgan does not address the claim of negligent entrustment in his Motion, it bears noting that he likewise failed to prove that Harvest was liable for the ***sole claim actually alleged against it in the Complaint***. In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id*. at 528, 688 P.2d at 313.

It is true that Harvest conceded that Mr. Lujan was its employee and that it entrusted him with a vehicle — satisfying the first element of a negligent entrustment claim; however, the second element was contested and never proven to a jury. (Ex. 2, at 3:9-10.) Mr. Morgan offered no evidence of Harvest's negligence in entrusting Mr. Lujan with a company vehicle. He adduced no evidence that Mr. Lujan was an inexperienced or incompetent driver. In fact, the only evidence in

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the record relating to Mr. Lujan's driving history demonstrates that he has never been in an accident before. (*See* Ex. 6, at 196:19-24; 197:8-10).

Mr. Morgan also failed to offer any evidence regarding Harvest's knowledge of Mr. Lujan's driving history. This is likely because Harvest's interrogatory responses demonstrated early in the case that it thoroughly checked Mr. Lujan's background prior to hiring him, and Harvest's annual check of Mr. Lujan's motor vehicle record "always came back clear." (Ex. 5, at 3:2-19.)

Because Mr. Morgan failed to offer any evidence at trial that Mr. Morgan was an inexperienced or incompetent driver and that Harvest knew or should have known of his inexperience or incompetence, the record fails to support entry of a judgment against Harvest for negligent entrustment. In fact, the undisputed evidence offered by Mr. Lujan demonstrating that he has never been in an accident before precludes entry of judgment against Harvest for negligent entrustment.

2. The Record Belies Mr. Morgan's Contention That He Proceeded to Verdict Against Harvest.

Further undermining his current position, the record conclusively establishes that Mr. Morgan made a conscious choice and/or strategic decision to abandon his claim against Harvest at trial. Mr. Morgan never mentioned Harvest during the introductory remarks to the jury in which the Parties and expected witnesses were introduced to the jury. (Ex. 10, at 17:2-24, 25:7-26:3.) Mr. Morgan never mentioned Harvest to the jury during voir dire or examined prospective jurors about their feelings regarding corporate liability, negligent entrustment, or vicarious liability. (*Id*. at 33:2-93:22, 97:6-188:21, 191:7-268:12; Ex. 11, at 3:24-65:7, 67:4-110:22.) Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or even corporate liability in his opening statement. (Ex. 11, at 126:7-145:17.) Mr. Morgan never offered a single piece of evidence or elicited any testimony from any witness which would prove the elements of either vicarious liability or negligent entrustment. Mr. Morgan never mentioned Harvest, vicarious liability, negligent entrustment, or corporate liability in his closing argument or rebuttal closing argument. (Ex. 12, at 121:4-136:19, 157:13-161:10.) Mr. Morgan failed to include questions relating to Harvest's liability or the apportionment of fault to Harvest in the Special Verdict form, despite requesting revisions to

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the damages question in the sample Special Verdict form proposed by the Court.[19] (Ex. 12, at 116:11-23; *see also* Mot. at Ex. 1.) Finally, Mr. Morgan failed to include a single jury instruction relating to vicarious liability, negligent entrustment, or corporate liability. (Ex. 13.)

For Mr. Morgan to claim that the omission of Harvest from the Special Verdict form was a mere oversight or clerical error to be corrected by the Court is completely disingenuous. Mr. Morgan employed the same strategy for litigating his claims in the first trial — he chose to focus solely on Mr. Lujan's liability for negligence. Harvest was not mentioned in the introductory remarks to the jurors, in voir dire, in opening statements, or in the examination of any witness. (Ex. 7, at 29:4-17, 36:24-37:25, 41:1-21, 45:25-121:20, 124:13-316:24; Ex. 9, at 6:4-29:1.) Thus, the record clearly demonstrates that Mr. Morgan abandoned his claim against Harvest — likely due to a lack of evidence.

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B. Mr. Morgan's Alternative Request That Judgment Be Entered Against Harvest Pursuant to N.R.C.P. 49(a) Is Contrary to the Law and Must Be Denied.

In the alternative, Mr. Morgan asks this Court to make an explicit finding, under Nevada Rule of Civil Procedure 49(a), that Harvest is jointly and severally liable for the jury's verdict against Mr. Lujan. (*See* Mot. at 5:18-6:11.) N.R.C.P. 49(a) permits a court to submit a special verdict form, or special interrogatories, to the jury. If a special verdict form is submitted to the jury and a particular "issue of fact raised by the pleadings or by the evidence" is omitted from the special verdict form, "each party waives the right to a trial by jury of the issue omitted unless, before the jury retires[,] the party demands its written submission to the jury." N.R.C.P. 49(a). If there are any omitted issues for which a demand was not made by a party, "the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* Thus, the Court is permitted to make findings on omitted ***factual issues*** in order to avoid "the hazard of the verdict remaining incomplete and indecisive where the jury did not decide

[19] Mr. Morgan attempts to shift the blame to the Court for the Special Verdict form's omission of Harvest. (Mot. at 5:1-8.) While the Court did provide the Parties with a sample special verdict form that it had used in its most recent car accident case (completely unrelated to this action), the Court clearly expected counsel to apply the correct caption and make any other changes they wanted. (Ex. 12, at 5:20-6:1.) It is Mr. Morgan — not the Court — that is responsible for a special verdict form that pertains solely to Mr. Lujan.

every element of recovery or defense." 33 Fed. Proc., L. Ed. § 44:326, Omitted Issue—Substitute Finding By Court (June 2018).[20] However, N.R.C.P 49(a) does not permit the Court to decide the ultimate issue of liability or to enter judgment where there is a complete lack of evidence to support a judgment.

This Court need not look any further than *Kinnel v. Mid-Atlantic Mausoleums, Inc*., 850 F.2d 958 (3rd Cir. 1988), to determine that Mr. Morgan's request is beyond the power of this Court and completely contrary to clearly established case law. In *Kinnel*, the plaintiff brought claims against two defendants — a corporate entity (Mid-Atlantic Mausoleum, Inc.) and an individual (Kennan) — on the same claims for relief. *Id.* at 959. The court bifurcated the trial as to liability and damages. *Id*. During the trial on liability, the court submitted written interrogatories to the jury. *Id.* However, the written interrogatories failed to include any questions regarding Kennan's individual liability. *Id*. Thus, when the jury returned its verdict, it only found liability as to Mid-Atlantic Mausoleum. *Id*. Nonetheless, the district court entered judgment against both defendants in its order and the jury later determined damages against both defendants. *Id*. at 959-60.

On appeal, the Third Circuit reversed, finding that the district court erred in entering judgment against Kennan *even though the claims against the defendants were indistinguishable and the jury subsequently determined damages against both defendants*. *Id*. at 960. In reversing the trial court's entry of liability against Kennan, the Third Circuit drew a distinction between a court supplying an omitted subsidiary finding (as intended by the rule) and a court supplanting the jury to determine the ultimate liability of a party (which was never intended by the rule):

> Rule 49(a) as we understand it, was designed to have the court supply an omitted subsidiary finding which would complete the jury's determination or verdict. For example, although we recognize that in this case no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, nevertheless, the district court could 'fill in' those subsidiary elements when the jury returned a verdict finding that Mid-Atlantic had misrepresented commission rates to Kinnel. Subsumed within that ultimate jury findings were the five elements of misrepresentation, i.e., materiality,

[20] As the Nevada Rules of Civil Procedure are closely based on the Federal Rules of Civil Procedure, Nevada courts consider federal cases interpreting the rules as strong persuasive authority. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.2d 872, 876 (2002); *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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> deception, intent, reasonable reliance and damages, each of which could be deemed to have been supplied by the court in accordance with the jury's judgment once the jury's ultimate verdict was known.
>
> ***That procedure of supplying a finding subsidiary to the ultimate verdict is a far cry, however, from a procedure whereby the court in the absence of a jury verdict, determines the ultimate liability of a party, as it did here. We have been directed to no authority which would permit the district court to act as it did here in depriving Kennan of his right to a jury verdict***.

Id. at 965-66 (emphasis added). In refusing to make a finding as to the ultimate liability to the individual defendant, the Court declined to "'***enter the minds of the jurors to answer a question that was never posed to them . . .***'" *Id*. at 967 (emphasis added) (quoting *Stradley v. Cortez*, 518 F.2d 488, 490 (3rd Cir. 1975)).[21]

Despite the fact that Rule 49(a) only applies to factual findings, and ultimate liability cannot be entered by a court under Rule 49(a),[22] Mr. Morgan now invites reversible error by asking this

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[21] *Stradley* addressed a somewhat similar issue of an "omitted verdict." In *Stradley*, the complaint named two individual defendants, Frederick Cortez, Sr. and Frederick Cortez, Jr. 518 F.2d at 489. When the deputy clerk asked the jury foreman about the verdict, the clerk only inquired if the jury found the *defendant* liable, and the clerk announced that the jury had found *Cortez, Jr.* liable for the plaintiff's injuries. *Id*. at 489-90. The jury foreman confirmed this verdict. *Id*. at 490. Four years after the judgment was entered, the plaintiff moved to change the docket and enter judgment against both defendants, claiming that the deputy clerk's examination of the jury foreman was the only reason the judgment was not entered against both defendants. *Id*. The district court denied the plaintiff's motion, refusing to treat the judgment as a "clerical error." *Id.* The Third Circuit upheld that decision. *Id.* The Court held:

> We believe that the jury/clerk colloquy, the verdict, and the entry of judgment set out in Stradley's motion, if anything, supports the defendant's position rather than Stradley's. We cannot at this late stage overturn what appears to be ***a verdict consistent with the evidence presented*** on plaintiff's ***mere allegation that the jury intended to do other than it did*** when it returned a verdict solely against Cortez, Jr. Stradley's claim that the jury never exonerated Senior and never indicated that its findings of liability should relate only to Junior are not borne out by the verdict, the judgment, or the record at trial.
>
> We have ***reviewed the record*** of the 1970 trial and have found ***no evidence that, at the time of the accident, Cortez, Jr. was acting as the agent of or under the control of his father***. While the defendants were not present or represented at trial, ***their answer, specifically denying agency***, was still of record. ***It was incumbent upon plaintiff to offer some evidence to prove the alleged agency relationship***.

Id. at 495 (emphasis added).

[22] *See Williams v. Nat'l R.R. Passenger Corp.*, No. 90-5394, 1992 WL 230148 (E.D. Penn. Sept. 8, 1992) (refusing to determine individual recovery by each plaintiff, under Rule 49(a), because the three plaintiffs were treated jointly, and interchangeably, as the "plaintiff" throughout the case); *Jarvis v. Ford Motor Co*., 283 F.3d 33, 56 (2002) (holding that Rule 49(a) does not apply where "the jury is required to make determinations not only of issues of fact but of ultimate liability").

Court to do exactly what *Kinnel* held it cannot: to enter judgment against Harvest. The jury never rendered such a verdict and the record fails to support entry of such a verdict.

C. Mr. Morgan's Failure to Request Apportionment of Damages Between the Defendants Dooms His Current Request that Judgment Be Entered Against Harvest.

Finally, even assuming *arguendo* Mr. Morgan had proved a claim of negligent entrustment or vicarious liability against Harvest (which he did not), and the Court had the power to add Harvest to the jury's verdict under Rule 49(a) (which it does not), it still would be impossible to enter judgment against Harvest in this case because Mr. Morgan failed to have the jury determine how to apportion liability between the defendants. Specifically, Mr. Morgan asks this Court to find that Harvest is jointly and severally liable for Mr. Lujan's conduct, (*see* Mot. at 6:7-11), despite the fact that Nevada abolished joint and several liability in cases against multiple, negligent tortfeasors over thirty years ago. *See Warmbrodt v. Blanchard*, 100 Nev. 703, 707-08, 692 P.2d 1282, 1285-86 (1984) (explaining that NRS 41.141 "eliminat[ed]" and "abolished" two common-law doctrines: (1) a plaintiff's contributory negligence as a complete bar to recovery; and (2) joint and several liability against negligent defendants), *superseded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener*, 124 Nev. 725, 740-43 & n.39, 192 P.3d 243, 253-55 & n.39 (2008).

The law requires that "[i]n any action to recover damages for death or injury . . . in which comparative negligence is asserted as a defense [and] the jury determines the plaintiff is entitled to recover [damages], [the jury] shall return . . . [a] special verdict indicating the percentage of negligence attributable to each party remaining in the action."[23] NRS 41.141(1), (2)(b)(2). If a plaintiff is entitled to recover against more than one defendant, then "***each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant***."[24] NRS 41.141(4) (emphasis added). By way of

[23] The jury does not need to find that the plaintiff was comparatively negligent to trigger the application of NRS 41.141; it is enough that a comparative negligence defense is asserted. *See Piroozi v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 131 Nev. Adv. Op. 100, 363 P.3d 1168, 1171 (2015). In this case, Mr. Lujan and Harvest collectively asserted a comparative negligence defense. (Ex. 2, at 3:16-21.)

[24] "[B]y abandoning joint and several liability against negligent defendants, the Legislature sought to ensure that a negligent defendant's liability would be limited to an amount proportionate with his or her fault." *Café Moda, LLC v. Palma*, 128 Nev. 78, 82, 272 P.3d 137, 140 (2012) (citing 1973 Nev. Stat., ch. 787, at 1722; Hearing on S.B. 524 Before the Senate Judiciary Comm., 57th Leg. (Nev. April 6, 1973)).

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example, if a jury determines that Defendant A is 80 percent negligent and Defendant B is 20 percent negligent, then Defendant B is only liable for 20 percent of the judgment awarded to the plaintiff. *See Café Moda, LLC v. Palma*, 128 Nev. 78, 84, 272 P.3d 137, 141 (2012).

Here, Harvest and Mr. Lujan jointly asserted an affirmative defense of comparative negligence. (Ex. 2, at 3:16-21.) Despite the fact that Mr. Morgan had alleged negligence-based claims against two defendants, he failed to ask the jury to apportion damages between Mr. Lujan and Harvest as required by NRS 41.141. (*See generally* Mot. at Ex. 1.) Mr. Morgan has not (and cannot) cite to any authority that allows the Court to now determine how to apportion liability between the defendants (assuming there was a factual basis for entry of judgment against Harvest). Indeed, it would be completely contrary to N.R.C.P. 49(a) and *Kinnel* for the Court to find that any portion of the jury's $3 million verdict could be applied to Harvest because that would be a determination of ultimate liability —not a factual finding.

IV. CONCLUSION[25]

Now, dissatisfied with his trial strategy, Mr. Morgan asks this Court to do what it cannot: to enter liability against Harvest despite the complete lack of evidence to prove his claim for either vicarious liability or negligent entrustment. Mr. Morgan's request is not only contrary to the record

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[25] Given the brevity of Mr. Morgan's Motion, his lack of citations to the record, and his failure to truly analyze the evidence and procedure of this case, Harvest is concerned that Mr. Morgan may intend to file a lengthy reply that raises new arguments for the first time. Any attempt to do so would be entirely improper. But, out of an abundance of caution, should Mr. Morgan do so, Harvest reserves the right to request a surreply to address any arguments or evidence not advanced in his Motion.

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in this action, but also to the purpose of Rule 49(a). Thus, it must be denied. Mr. Morgan chose to proceed against only Mr. Lujan at trial and he must now bear the burden of that choice.

DATED this 16th day of August, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 16th day of August, 2018, service of the foregoing **DEFENDANT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was made by mandatory electronic service through the Eighth Judicial District Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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EXHIBIT 2

EXHIBIT 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually, Plaintiff, vs. DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally, Defendants.	Case No.: A-15-718679-C Dept. No.: XI

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Plaintiff, Aaron M. Morgan, in this matter, by and through his attorneys of record, Benjamin P. Cloward, Esq. and Bryan A. Boyack, Esq., of the Richard Harris Law Firm, and Micah S. Echols, Esq. and Tom W. Stewart, Esq., of Marquis Aurbach Coffing, hereby files Plaintiff's Motion for Entry of Judgment. This motion is made and based on the papers and

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pleadings on file herein, the attached memorandum of points and authorities, and the oral argument before the Court.

NOTICE OF MOTION

You and each of you, will please take notice that **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** will come on regularly for hearing on the 04 day of Sept., 2018 at the hour of 9:00 A.m. or as soon thereafter as counsel may be heard, in Department 11 in the above-referenced Court.

Dated this ___ day of July, 2018.

MARQUIS AURBACH COFFING

By_____
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Attorneys for Plaintiff, Aaron M. Morgan

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 9, 2018, a Clark County jury rendered judgment in favor of Plaintiff, Aaron Morgan ("Morgan"), and against Defendants, David Lujan ("Lujan") and Harvest Management Sub LLC ("Harvest Management"), in the amount of $2,980,980.00, plus pre- and post-judgment interest.[1] It was undisputed during trial that Lujan was acting within the course and scope of his employment with Harvest Management at the time of the traffic accident at the center of the case. All evidence and testimony indicated Morgan sought relief from, and that judgment would be entered against, both Defendants. However, the special verdict form prepared by the Court (the "special verdict form") inadvertently omitted Harvest Management from the caption, despite Harvest Management being listed on the pleadings and jury instructions upon which the jury

[1] *See* Special Verdict, attached as **Exhibit 1**.

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relied when reaching the verdict itself. The Court acknowledged this omission, and Defendants conceded they had no objection to it. Accordingly, Morgan respectfully requests this Court enter judgment against both Defendants, in accordance with the jury instructions, pleadings, testimony, and evidence, either by (a) simply entering the proposed judgment attached hereto or, (b) by making an explicit finding that the judgment was rendered against both Defendants pursuant to NRCP 49(a) and then entering judgment accordingly.[2]

II. FACTUAL BACKGROUND

On April 1, 2014, Morgan was driving his Ford Mustang north on McLeod Drive in the right lane. Morgan approached the intersection with Tompkins Avenue. At that time, Lujan, who was driving a shuttle bus owned by Harvest Management, entered the intersection driving east from the Paradise Park driveway, and attempted to cross McLeod Drive heading east on Tompkins Avenue. The front of Morgan's car struck the side of Defendants' bus in a major collision resulting in total loss of Morgan's vehicle and serious bodily injuries. Morgan was transported from the scene of the accident to Sunrise Hospital. The emergency room physicians focused on potential head trauma and injuries to the cervical spine and to Morgan's wrists. Morgan was eventually discharged with instructions to follow up with a primary care physician. A week later, Morgan sought treatment for pain in his neck, lower-back, and both wrists.

Over the next two years, Morgan underwent a series of treatments and procedures for his injuries—including bilateral medial branch block injections to his thoracic spine; injections to ease the pain from his bilateral triangular fibrocartilage tears; left wrist arthroscope and triangular fibrocartilage tendon repair with debridement, incurring approximately nearly $264,281.00 in medical expenses.

III. PROCEDURAL HISTORY

On May 5, 2015, Morgan filed a complaint for negligence and negligence per se against Lujan and vicarious liability against Harvest Management. In jointly answering the complaint, both Defendants were represented by the same counsel and both named in the caption.

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[2] *See* proposed Judgment Upon the Jury Verdict, attached as **Exhibit 2**.

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After a lengthy discovery period, the case initially proceeded to trial in early November, 2017. During the initial trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[3]

However, on the third day of the initial trial, the Court declared a mistrial based on Defendants' counsel's misconduct.[4]

Following the mistrial, the case proceeded to a second trial the following April. Vicarious liability was not contested during trial. Instead, Harvest Management's NRCP 30(b)(6) representative contested primary liability—the representative claimed that either Morgan or an unknown third party was primarily responsible for the accident—but did not contest Harvest Management's own vicarious liability.[5]

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[3] Transcript of Jury Trial, November 8, 2017, attached as **Exhibit 3**, at 109 (direct examination of Lujan).

[4] *See* **Exhibit 3** at 166 (the Court granting Plaintiff's motion for mistrial); *see also* Court Minutes, November 8, 2017, attached as **Exhibit 4**.

[5] *See* Transcript of Jury Trial, April 5, 2018, attached as **Exhibit 5**, at 165–78 (testimony of Erica Janssen, NRCP 30(b)(6) witness for Harvest Management); Transcript of Jury Trial, April 6, 2018, attached as **Exhibit 6**, at 4–15 (same).

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On the final day of trial, the Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption. The Court informed the parties of this omission, and the Defendants explicitly agreed they had no objection:

> THE COURT: Take a look and see if -- will you guys look at that verdict form? I know it doesn't have the right caption. I know it's just the one we used the last trial. See if that looks sort of okay.
>
> [Defendants' counsel]: Yeah. That looks fine.
>
> THE COURT: I don't know if it's right with what you're asking for for damages, but it's just what we used in the last trial which was similar sort of.

At the end of the six-day jury trial, jury instructions were provided to the jury with the proper caption.[6] The jury used those instructions to fill-out the improperly-captioned special verdict form and render judgment in favor of Plaintiff—the jury found Defendants to be negligent and 100% at fault for the accident.[7] As a result, the jury awarded Plaintiff $2,980,000.[8]

IV. LEGAL ARGUMENT

This Court should enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**—it provides that judgment was rendered against both Lujan and Harvest Management because such a result conforms to the pleadings, evidence, and jury instructions upon which the jury relied in reaching the special verdict.

In the alternative, the Court should make an explicit finding pursuant to NRCP 49(a) that the special verdict was rendered against both Defendants and then enter judgment accordingly. NRCP 49(a) provides, in certain circumstances, the Court may make a finding on an issue not raised before a special verdict was rendered. Indeed, when a special verdict is used, "the court may submit to the jury written questions susceptible of categorical or other brief answer . . . which might properly be made under the pleadings and evidence." NRCP 49(a). Further, "[t]he court shall give to the jury such explanation and instruction concerning the matter

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[6] *See* Jury Instructions cover page, attached as **Exhibit 7**, at 1.

[7] *See* **Exhibit 1**.

[8] *Id.*

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thus submitted as may be necessary to enable the jury to make its findings upon each issue." *Id.* However, "[i]f in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. *As to an issue omitted without such demand the court may make a finding*; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Id.* (emphasis added).

Here, the record plainly supports judgment being rendered against both Defendants. However, should the Court wish to clarify the issue for the record, the Court should make an explicit finding that the omission of Harvest Management from the special verdict was inadvertent and, as a result, that judgment was rendered in favor of Morgan and both against Defendants, jointly and severally.

V. CONCLUSION

For the foregoing reasons, Plaintiff Aaron Morgan respectfully requests this Court enter the proposed Judgment on the Jury Verdict attached as **Exhibit 2**. In the alternative, Plaintiff requests this Court to make an explicit finding that judgment in this matter was rendered against both Defendants and then enter judgment accordingly.

Dated this 30th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 30th day of July, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[9]

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

/s/ Leah Dell
Leah Dell, an employee of
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[9] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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EXHIBIT 1

EXHIBIT 1

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CLERK OF THE COURT

COMP
ADAM W. WILLIAMS, ESQ.
Nevada Bar No. 13617
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DISTRICT COURT

CLARK COUNTY, NEVADA

AARON M. MORGAN, individually

Plaintiff,

vs.

DAVID E. LUJAN, individually; HARVEST MANAGEMENT SUB LLC; a Foreign Limited-Liability Company; DOES 1 through 20; ROE BUSINESS ENTITIES 1 through 20, inclusive jointly and severally,

Defendants.

CASE NO.: A-15-718679-C
DEPT. NO.: VII

COMPLAINT

RICHARD HARRIS LAW FIRM

COMES NOW, Plaintiff AARON M. MORGAN, individually, by and through his attorney of record ADAM W. WILLIAMS, ESQ. of the RICHARD HARRIS LAW FIRM, and complains and alleges as follows:

JURISDICTION

1. That at all times relevant herein, Plaintiff AARON M. MORGAN (hereinafter referred to as "Plaintiff") is, a resident of Clark County, Nevada.
2. That at all times relevant herein, Defendant, DAVID E. LUJAN was, and is, a resident of Clark County, Nevada.

3. That at all times relevant herein, Defendant, HARVEST MANAGEMENT SUB LLC, was, and is, a foreign limited-liability Company licensed and actively conducting business in Clark County, Nevada

4. All the facts and circumstances that gave rise to the subject lawsuit occurred in Clark County, Nevada.

5. The identities of Defendant DOES 1 through 20, and ROE BUSINESS ENTITIES 1 through 20, are unknown at this time and are individuals, corporations, associations, partnerships, subsidiaries, holding companies, owners, predecessor or successor entities, joint venturers, parent corporations or related business entities of Defendants, inclusive, who were acting on behalf of or in concert with, or at the direction of Defendants and are responsible for the injurious activities of the other Defendants.

6. Plaintiff alleges that each named and Doe and Roe Defendant negligently, willfully, intentionally, recklessly, vicariously, or otherwise, caused, directed, allowed or set in motion the injurious events set forth herein.

7. Each named and Doe and Roe Defendant is legally responsible for the events and happenings stated in this Complaint, and thus proximately caused injury and damages to Plaintiff.

8. Plaintiff requests leave of the Court to amend this Complaint to specify the Doe and Roe Defendants when their identities become known.

9. On or about April 1, 2014, Defendants, were the owners, employers, family members and/or operators of a motor vehicle, while in the course and scope of employment and/or family purpose and/or other purpose, which was entrusted and/or driven in such a negligent and careless manner so as to cause a collision with the vehicle occupied by Plaintiff.

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FIRST CAUSE OF ACTION
Negligence Against Employee Defendant, DAVID E. LUJAN

10. Plaintiff incorporates paragraphs 1 through 9 of the Complaint as though said paragraphs were fully set forth herein.

11. Defendant DAVID E. LUJAN owed Plaintiff a duty of care. Defendant DAVID E. LUJAN breached that duty of care.

12. As a direct and proximate result of the negligence of Defendant, Plaintiff was seriously injured and caused to suffer great pain of body and mind, some of which conditions are permanent and disabling all to her general damage in an amount in excess of $10,000.00.

SECOND CAUSE OF ACTION
Negligence Per Se Against Employee Defendant, DAVID E. LUJAN

13. Plaintiff incorporates paragraphs 1 through 12 of the Complaint as though said paragraphs were fully set forth herein.

14. The acts of Defendant DAVID E. LUJAN as described herein violated the traffic laws of the State of Nevada and Clark County, constituting negligence per se, and Plaintiff has been damaged as a direct and proximate result thereof in an amount in excess of $10,000.00.

THIRD CAUSE OF ACTION
Vicarious Liability/Respondeat Superior Against Defendant
HARVEST MANAGEMENT SUB LLC.

15. Plaintiff incorporates paragraphs 1 through 14 of the Complaint as though said paragraphs were fully set forth herein.

16. Plaintiff is informed and believes that DAVID E. LUJAN was employed as a driver for Defendant HARVEST MANAGEMENT SUB LLC.

17. At all times mentioned herein, Defendant HARVEST MANAGEMENT SUB LLC. was the owner of, or had custody and control of, the Vehicle.

18. That Defendant HARVEST MANAGEMENT SUB LLC. did entrust the Vehicle to the control of Defendant DAVID E. LUJAN.

19. That Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of the Vehicle.

20. That Defendant HARVEST MANAGEMENT SUB LLC. actually knew, or by the exercise of reasonable care should have known, that Defendant DAVID E. LUJAN was incompetent, inexperienced, or reckless in the operation of motor vehicles.

21. That Plaintiff was injured as a proximate consequence of the negligence and incompetence of Defendant DAVID E. LUJAN, concurring with the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC..

22. That as a direct and proximate cause of the negligent entrustment of the Vehicle by Defendant HARVEST MANAGEMENT SUB LLC. to Defendant DAVID E. LUJAN, Plaintiff has been damaged in an amount in excess of $10,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment against Defendants as follows:

1. General damages in an amount in excess of $10,000.00;
2. Special damages for medical and incidental expenses incurred and to be incurred;
3. Special damages for lost earnings and earning capacity;
4. Attorney's fees and costs off suit incurred herein; and
5. For such other and further relief as the Court may deem just and proper.

DATED this 20 day of May, 2015.

RICHARD HARRIS LAW FIRM

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HARVEST MANAGEMENT SUB LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON M. MORGAN, individually, Appellant, vs. DAVID E. LUJAN, individually; and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company, Respondents.	Supreme Court No. 77753 District Court No. A-15-718679-C **RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A

I. INTRODUCTION

Respondent Harvest Management Sub LLC ("Harvest") agrees that this appeal should be remanded (because this Court lacks jurisdiction over Appellant Aaron M. Morgan's ("Mr. Morgan") premature appeal); however, Harvest opposes Mr. Morgan's Motion to Remand Pursuant to NRAP 12A because it is procedurally improper and will only lead to more chaos and uncertainty in this case.

Mr. Morgan seeks remand on two grounds: (1) the district court's indicative ruling that it would reconvene jurors dismissed in April 2018, in order to determine Harvest's liability; or (2) Mr. Morgan's misplaced belief that NRCP 49(a) could be utilized to enter judgment against Harvest. Neither ground warrants remand. First, this Court has already issued an order strongly suggesting that a jury cannot be reconvened once it has been dismissed. Second, the district court has not even hinted, let alone issued an indicative ruling, that it would enter judgment against Harvest pursuant to NRCP 49(a). In fact, the district court has already ***denied*** such a motion by Mr. Morgan

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because Rule 49 is not an instrument for determining the ultimate issue of liability where a party has utterly failed to present a claim for the jury's determination. Mr. Morgan did not seek timely reconsideration of this decision; therefore, Mr. Morgan's Motion for Remand should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Respondent David E. Lujan ("Mr. Lujan"). (Ex. 1.[1]) Mr. Morgan alleged claims for negligence and negligence per se against Mr. Lujan, and a claim for negligent entrustment[2] against Harvest. (*Id.* at 3:1-4:12.) In April 2018, the case was tried to a jury, and the only claim presented to the jury for decision was the claim for negligence against Mr. Lujan. (Mot. for Remand, at Ex. 2.)

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to have the district court apply the jury's verdict against Mr. Lujan to Harvest, despite the fact that no claim for relief against Harvest was proven at

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[1] Compl. (May 20, 2015), attached as Exhibit 1.

[2] The claim against Harvest was erroneously titled "vicarious liability/ respondeat superior," but its allegations clearly state a claim for negligent entrustment.

trial or presented to the jury for determination. (Ex. 2,[3] at 3:2-4; Ex. 3,[4] at 14:15-20:11.) In the alternative, Mr. Morgan moved for entry of judgment against Harvest pursuant to NRCP 49(a). (Ex. 3, at 5:18-6:11.) On November 28, 2018, the district court denied Mr. Morgan's motion, holding that the failure to include the claim against Harvest in the Special Verdict form was not a mere "clerical error," that no claim against Harvest had been presented to the jury for determination, and that no judgment could be entered against Harvest based on the jury's verdict. (Ex. 4[5]; Ex. 5,[6] at 9:8-21.) Therefore, on January 2, 2019, a Judgment Upon the Jury Verdict was entered solely against Mr. Lujan. (Ex. 6.[7])

On December 18, 2018, Mr. Morgan filed a Notice of Appeal from the Order denying his Motion for Entry of Judgment and from the Judgment. (Ex.

[3] Pl.'s Mot. for Entry of J. (July 30, 2018), attached as Exhibit 2. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[4] Def. Harvest Mgmt. Sub LLC's Opp'n to Pl.'s Mot. for Entry of J. (Aug. 16, 2018), attached as Exhibit 3. The Appendix of Exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[5] Notice of Entry of Order on Pl.'s Mot. for Entry of J. (Nov. 28, 2018), attached as Exhibit 4.

[6] Excerpts of Tr. of Hr'g on Pl.'s Mot. for Entry of J. (Jan. 18, 2019), attached as Exhibit 5.

[7] Notice of Entry of J. (Jan. 2, 2019), attached as Exhibit 6.

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7.[8]) On December 21, 2018, Harvest filed a Motion for Entry of Judgment against Mr. Morgan as to his claim for relief against Harvest that he seemingly abandoned and/or failed to prove at trial. (Ex. 8.[9]) On April 5, 2019, the district court determined that it lacked jurisdiction to decide Harvest's Motion for Entry of Judgment and that it would stay proceedings pending resolution of Mr. Morgan's appeal. (Mot. for Remand, at Ex. 1, at 1:16-19, 5:1-4). The district court also rendered an indicative ruling, pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), that if this Court remanded the case, it would "recall the jury and instruct them to consider whether their verdict applied to Harvest." (*Id*. at 1:19-21, 4:7-9, 5:4-5.) The indicative ruling does not mention NRCP 49.

On April 18, 2019, Harvest filed a Petition for Extraordinary Writ Relief, seeking a writ of mandamus ordering the district court to refrain from reconvening the jurors dismissed over a year ago, and ordering the district

[8] Notice of Appeal (Dec. 18, 2018), attached as Exhibit 7. The exhibits to the notice have been omitted in the interest of judicial economy and efficiency.

[9] Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. (Dec. 21, 2018), attached as Exhibit 8. The Appendix of Exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

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court to enter judgment in favor of Harvest given the prior determination that the jury's verdict could not be entered against Harvest. (Ex. 9,[10] at 7:16-8:7.) On May 15, 2019, this Court denied the Writ Petition "without prejudice to petitioner's ability to seek writ relief again if subsequent steps are taken to reconvene the jury." (Ex. 10,[11] at 1.)

III. ARGUMENT

NRAP 12A provides that this Court has the discretion to remand an action to the district court where "a ***timely motion is made in the district court*** for relief that it lacks authority to grant because of an appeal . . ., if the district court states either that ***it would grant the motion*** or that the ***motion raises a substantial issue***." (Emphasis added). Here, Mr. Morgan's Motion for Entry of Judgment pursuant to NRCP 49(a) was ***denied*** by the district court[12] on

[10] Petition for Extraordinary Writ Relief (Apr. 18, 2019), attached as Exhibit 9. The Addendum and the Appendix to the Petition have been omitted in the interest of judicial economy and efficiency.

[11] Order Denying Petition for Writ of Mandamus (May 15, 2019), attached as Exhibit 10.

[12] Mr. Morgan asserts that his motion was denied because it was not heard by the trial judge, despite his request that the case be transferred back to the trial judge for determination. (Mot. for Remand, at 4.) This argument is patently false. ***Neither Mr. Morgan's Motion for Entry of Judgment nor the Reply brief in support of the same included a request for a transfer of the case to the trial judge.*** (*See* Ex. 2; Pl.'s Reply in Support of Mot. for Entry of J. (Sept. 7, 2018), attached as Exhibit 11 (the exhibits to the Reply have been

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November 28, 2018. (Ex. 2, Ex. 4.) Mr. Morgan never filed a motion for reconsideration (and certainly cannot do so at this late date[13]). Because the district court has not issued any indicative ruling regarding a renewed motion for entry of judgment pursuant to Rule 49(a), remand pursuant to NRAP 12A is improper.

The only indicative ruling rendered by the district court was its decision to reconvene the jury to determine if Harvest was vicariously liable for Mr. Morgan's injuries. (Mot. for Remand, at Ex. 1.) This Court has already indicated that such a course of conduct would likely be improper, (Ex. 10); therefore, there is no basis for remand pursuant to NRAP 12A.

If this Court is inclined to remand in the absence of an indicative ruling, the remand should not be accompanied by instructions or "encouragement" to

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omitted in the interest of judicial economy and efficiency).) In fact, Mr. Morgan did not make a request for transfer of the action until he ***opposed Harvest's Motion for Entry of Judgment*** in January 2019. (Opp'n to Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. & Counter-Mot. to Transfer Case Back to Chief Judge Bell for Resolution of Post-Verdict Issues (Jan. 15, 2019), attached as Ex. 12, at 10:11-11:17 (the exhibits to the motion have been omitted in the interest of judicial economy and efficiency).)

[13] EDCR 2.24(b) provides that motions for reconsideration must be filed within ten (10) days of service of the notice of entry of order resolving the original motion.

utilize Rule 49, as Mr. Morgan requests. NRCP 49 is not applicable where a claim for relief was never presented to a jury for determination.

NRCP 49(a), which is now NRCP 49(a)(3), provides that if an issue of fact raised by the pleadings or evidence is omitted from a special verdict form, the district court has the discretion to make a finding on the issue. Thus, NRCP 49(a)(3) allows a court to make findings on omitted factual issues in order to avoid "the hazard of the verdict remaining incomplete and indecisive where the jury did not decide ***every element*** of recovery or defense." 33 Fed. Proc., L. Ed. § 44:326, Omitted Issue — Substitute Finding By Court (June 2018).[14] However, NRCP 49(a)(3) does not permit the Court to decide the ***ultimate issue*** of liability or to enter judgment where there is a complete lack of pleadings or evidence to support a judgment.

Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3rd Cir. 1988) is instructive on this point. In *Kinnel*, the plaintiff brought claims against a corporate defendant and an individual defendant for breach of contract and

[14] As the Nevada Rules of Civil Procedure are closely based on the Federal Rules of Civil Procedure, this Court considers cases and authorities interpreting the federal rules as strong persuasive authority. *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.2d 872, 876 (2002); *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

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fraudulent misrepresentation. *Id.* at 959. The written interrogatories submitted to the jury during trial failed to include any questions regarding the individual defendant's liability; therefore, the jury rendered a verdict solely against the corporate defendant. *Id.* When the district court subsequently entered judgment against both defendants pursuant to Rule 49(a), and the Third Circuit reversed:

> Rule 49(a) as we understand it, was designed to have the court supply ***an omitted subsidiary finding*** which would complete the jury's determination or verdict. For example, although we recognize that in this case no individual elements of a misrepresentation cause of action were specifically framed for the jury to answer, nevertheless, the district court could "fill in" those subsidiary elements when the ***jury returned a verdict*** finding [the corporate defendant] had misrepresented commission rates to [the plaintiff]. ***Subsumed within that ultimate jury finding*** were the five elements of misrepresentation, i.e., materiality, deception, intent, reasonable reliance and damages, each of which ***could be deemed to have been supplied by the court in accordance with the jury's judgment once the jury's ultimate verdict was known***.
>
> That procedure of supplying a finding to the ultimate verdict is a ***far cry, however, from a procedure whereby the court in the absence of a jury verdict determines the ultimate liability of a party***, as it did here. ***We have been directed to no authority which would permit the district***

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> ***court to act as it did here in depriving [the individual defendant] of his right to a jury verdict***.

Id. at 959-60, 965-66 (emphasis added). In refusing to make a finding as to the ultimate liability of the individual defendant in *Kinnel*, the Third Circuit stated that it declined to "'enter the minds of the jurors to ***answer a question that was never posed to them***.'" *Id.* at 967 (emphasis added) (quoting *Stradley v. Cortez*, 518 F.2d 488, 490 (3rd Cir. 1975).

Here, Mr. Morgan is not seeking for the district court to render specific findings as to an element of its unpled claim for vicarious liability. Rather, Mr. Morgan failed to plead a claim for vicarious liability, failed to offer any evidence at trial to prove this claim, and ***failed to present this claim to the jury for determination***. These are issues that Rule 49 cannot correct. The district court has no authority to supplant the role of the jury and render a decision as to Harvest's liability on this claim. Therefore, Mr. Morgan's Motion for Remand should be denied.

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IV. CONCLUSION

Mr. Morgan's Motion for Remand pursuant to NRAP 12A should be denied because: (1) the district court has not issued any indicative ruling that it would be willing to grant the relief sought by Mr. Morgan; and (2) the relief sought upon remand is procedurally improper and/or inapplicable. The district court cannot reconvene a dismissed jury to determine a claim that was omitted from its consideration at trial, and the district court cannot rely upon NRCP 49(a)(3) to render a verdict on a claim for relief that was never presented to the jury for determination. Remand should only be granted because this Court lacks jurisdiction over Mr. Morgan's premature appeal from a non-final judgment, and, under such circumstances, this Court should instruct the district court to enter judgment in favor of Harvest consistent with the prior rulings.

DATED this 17th day of May, 2019.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
SARAH E. HARMON
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 17th day of May, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S OPPOSITION TO MOTION FOR REMAND PURSUANT TO NRAP 12A** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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