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

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| AARON M. MORGAN, an individual,<br><br>Appellant,<br><br>vs.<br><br>DAVID E. LUJAN, an individual, and HARVEST MANAGEMENT SUB LLC, a foreign limited-liability company,<br><br>Respondents. | Case No.: 77753<br><br>Appeal from the Eighth Judicial District Court, the Honorable Elizabeth Gonzalez Presiding |



# REPLY IN SUPPORT OF MOTION FOR REMAND PURSUANT TO NRAP 12A

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## I. INTRODUCTION

The *Huneycutt* procedure now codified as NRAP 12A is "sound in theory and preferable in practice" because it promotes efficiency and saves resources. *Huneycutt v. Huneycutt*, 94 Nev. 79, 80, 575 P.2d 585, 586 (1978); *see also* 11 Wright & Miller, *Federal Practice and Procedure*, § 2873 (3d ed.1973, updated Apr. 2019). Indeed, while appellate courts have discretion in ruling upon motions for remand, no one benefits from allowing "motion[s] to drift in limbo," Wright and Miller, *supra*, at §2873, especially where an unresolved motion is likely to prolong and complicate litigation.

Such is the case here. Although Plaintiff / Appellant Aaron Morgan ("Morgan") litigated negligence-based claims against Respondent David Lujan ("Lujan") ***and*** his employer, Harvest Management Sub LLC ("Harvest Management"), the District Court entered judgment against only Lujan. In doing so, the Court reasoned that an inadvertent, Court-created error on the jury verdict form caused uncertainty as to whether the jury also intended to find Harvest Management liable for Morgan's injuries. But, while the District Court did not enter judgment *against* Harvest Management it also declined to enter judgment in Harvest Management's favor.

Morgan's Motion for Remand Pursuant to NRAP 12A seeks to resolve this issue. Although Harvest Management argues that a remand will "lead to more chaos and uncertainty,"[1] resolution of matters that are currently "in limbo" in the District Court will save the parties' and the Courts' resources. Accordingly, this Court should grant the requested remand so the District Court can provide much-needed clarity regarding the issues that will, inevitably, be before this Court.

## II. LEGAL ARGUMENT

NRAP 12A recognizes that remand is a viable option where district courts want to address a motion that "raises a substantial issue" but lack jurisdiction to do so because of a pending appeal.

Here, Harvest Management's unresolved Motion for Entry of Judgment raises substantial issues regarding the claims litigated at trial and the meaning of the jury's verdict.[2] Yet, while Harvest Management should be interested in having its motion decided, Harvest Management opposes the NRAP 12A remand which

[1] Opposition at page 1, lines 7-8.

[2] *See generally* Exhibit 8 to Harvest Management's Opposition.

would give the District Court jurisdiction to do so. Thus, Harvest Management seemingly would prefer to remain "in limbo."[3]

By contrast, Morgan moved this Court for an NRAP 12A remand in the interest of efficiency. In this regard, the parties' respective positions are unusual because the movant in the lower court is typically the party who requests a remand from this Court.

To be clear, Morgan does not believe that Harvest Management's pending Motion for Entry of Judgment is meritorious. But, because the issues in the motion overlap with the issues on appeal, Morgan firmly believes it is more efficient to address everything at once. To that end, remand is appropriate to ensure that all of the parties' issues are fully teed up for the Appellate Court's review.

Morgan and Harvest Management agree that reconvening the jury is not the correct way to address the irregularities in the special verdict form.[4] More

[3] "Seemingly" is the operative word because it is unclear what Harvest Management wants from this Court. Although it supports a remand on jurisdictional grounds, it argues that remand pursuant to NRAP 12A would be detrimental. *See* Opposition at page 1. At the same time, Harvest Management asks this Court to enter judgment in its favor, *see id.* at page 10 even though this Court denied Harvest Management's Motion to Dismiss and has not addressed the merits of Morgan's appeal.

[4] *See* Motion for Remand Pursuant to NRAP 12A at page 7 and Harvest Management's Opposition to the same at page 6.

importantly, this Court's Order Denying Writ Petition clearly conveys that efforts to reconvene the jury would be a serious error that could warrant intervention. *See Harvest Management Sub LLC, v. Eighth Judicial District Court*, Supreme Court case no. 78596 (May 15, 2019).

In light of this Court's guidance, the District Court should consider NRCP 49(a) on remand instead of attempting to reconvene the jury more than a year after the trial. Although Morgan acknowledges that the District Court did not mention NRCP 49(a) in its certification, the District Court conveyed its intent to address whether the jury's verdict in favor of Morgan applied to Harvest Management. Practically speaking, it is also sensible for the District Court that presided over the trial to address whether Morgan's claim(s) against Harvest Management were actually presented to the jury and whether, given the evidence presented, the jury made a factual determination as to Harvest Management on the typo-ridden verdict form. After all, in the absence of input from the jury, the presiding judge's observations are particularly valuable. *See, e.g.*, *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 919 (1996) ("[A]bsent an abuse of discretion . . . 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.").

Contrary to Harvest Management's assertions, NRCP 49(a) is designed for situations such as this where an issue of fact is raised in the pleadings and the evidence, but not specifically addressed by the jury. *See, e.g.*, *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 560 (9th Cir. 1996) (applying the federal equivalent to NRCP 49(a)); *Harmon v. Grande Tire Co.*, 821 F.2d 252, 255 (5th Cir. 1987) (same). It also bears mentioning that the applicability of NRCP 49(a) was not addressed in the written order in which Judge Gonzalez abruptly stated, "the Motion for Entry of Judgment shall be, and here is DENIED."[5]

But, even if this Court declines to give any guidance as to how the District Court should address the current procedural quagmire, it should at least allow the District Court an opportunity to do so. After all, uncertainty is likely to result piecemeal litigation and wasted resources. So, regardless of what the District Court decides, it is better for everyone to understand the Court's ruling(s) as to Harvest Management's pending Motion for Entry of Judgment, attorney fees, and

[5] *See* Exhibit 4 to Harvest Management's Opposition.

costs *before* participating in NRAP 16 settlement negotiations and appellate briefing.

Finally, it bears mentioning that Harvest Management's suggestion, "this Court should instruct the district court to enter judgment in favor of Harvest consistent with the prior rulings,"[6] is wholly inappropriate at this juncture. Neither District Court judge entered judgment in favor of Harvest Management and the parties vigorously disagree regarding the evidence and claims presented during trial. Moreover, this Court already *denied* Harvest Management's Motion to Dismiss and Petition for Extraordinary Writ Relief. But, even if the instant appeal is premature, as Harvest Management argues,[7] there is no basis for a judgment on the merits. After all, the correct approach following a premature appeal is simply a new notice of appeal when a final order issues. Thus, while NRAP 12A motion practice is not the place to argue substantive issues, Harvest Management's argument is a non-starter.

## III. CONCLUSION

Undoubtedly, the problems with the jury verdict form have created unusual and regrettable difficulties. Although this Court will eventually need to address the

[6] *See* Opposition at 10.

[7] *See id*. at page 1, lines 4-5.

parties' competing arguments as to what the jury actually decided, it is sensible for the presiding trial court judge to fully address the issues in the first instance.

This Court's guidance, be it regarding NRCP 49(a) or other viable considerations, certainly would be a tremendous asset in getting the case back on track. But, even if the Court is not inclined to offer any insights, it should grant Morgan's Motion to Remand because doing so will save resources, both for the parties and the Courts.

Dated this 7th day of July, 2019.


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## CERTIFICATE OF SERVICE

I hereby certify that **REPLY IN SUPPORT OF MOTION TO REMAND PURSUANT TO NRAP 12A** was filed electronically with the Nevada Supreme Court on the 7th day of June, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Douglas Gardner
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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:

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*Settlement Judge*

/s/ Penny Williams
Penny Williams, an employee of
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