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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 RENEWED MOTION TO DISMISS APPEAL AS PREMATURE**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S RENEWED[1] MOTION TO DISMISS APPEAL AS PREMATURE

Respondent Harvest Management Sub LLC ("Harvest"), by and through its attorneys, the law firm of Bailey❖Kennedy, hereby moves to dismiss the Notice of Appeal filed by Appellant Aaron M. Morgan ("Mr. Morgan") on December 18, 2018. Mr. Morgan's Notice of Appeal is premature, as the district court has not yet entered a final judgment in the underlying action. Specifically, Mr. Morgan's claim against Harvest remains pending, subject to the district court's resolution of Harvest's Motion for Entry of Judgment, which has been pending since December 21, 2018. Moreover, Mr. Morgan did not seek Nevada Rule of Civil Procedure 54(b) certification for the order or judgment appealed from. As such, this Court lacks jurisdiction over the appeal, and Harvest respectfully requests that this Court: (1) dismiss the appeal; and (2) remand the action to the District Court ***with instructions to***

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[1] On January 23, 2019, Harvest moved to dismiss this appeal for lack of jurisdiction. On March 7, 2019, this Court denied the motion without prejudice, pending the completion of the mandatory settlement program. On August 19, 2019, a Settlement Program Status Report was filed, stating that the parties were unable to reach a settlement.

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enter judgment in favor of Harvest, as is consistent with the district court's prior order denying Mr. Morgan a judgment against Harvest.

DATED this 19th day of August, 2019.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On May 20, 2015, Mr. Morgan filed a Complaint against Harvest and Respondent David E. Lujan ("Mr. Lujan"). (Ex. 1.[2]) Mr. Morgan alleged claims for negligence and negligence per se against Mr. Lujan, and a claim for negligent entrustment against Harvest.[3] (Ex. 1, at 3:1-4:12.) In April 2018, this underlying case was tried to a jury, and the only claims presented to the

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[2] Compl. (May 20, 2015), attached hereto as Exhibit 1.

[3] The claim against Harvest is erroneously titled "vicarious liability/ respondeat superior," but it is clearly a claim for negligent entrustment.

jury for determination were the claims of negligence and negligence per se alleged against Mr. Lujan. (Ex. 2.[4])

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment seeking to have the jury's verdict against Mr. Lujan applied against Harvest — despite the fact that no claim for relief against Harvest was proven at trial or presented to the jury for determination — pursuant to NRCP 49(a). (Ex. 3[5]; Ex. 4.[6]) 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 "clerical error," that no claim against Harvest had been presented to the jury for determination, and that a judgment could not be entered against Harvest based on the jury's verdict. (Ex. 5[7]; Ex. 6,[8] at 9:8-20.) Further, when Harvest sought clarification whether the judgment against

[4] Special Verdict (Apr. 9, 2018), attached hereto as Exhibit 2.

[5] Pl.'s Mot. for Entry of J. (July 30, 2018), attached hereto as Exhibit 3. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[6] Def. Harvest Management Sub LLC's Opp'n to Pl.'s Mot. for Entry of J. (Aug. 16, 2018), attached hereto as Exhibit 4. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[7] Notice of Entry of Order on Pl.'s Mot. for Entry of J. (Nov. 28, 2018), attached hereto as Exhibit 5.

[8] Tr. of the Hr'g on Pl.'s Mot. for Entry of J. (Jan. 18, 2019), excerpts of which are attached as Exhibit 6.

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Mr. Lujan would also dismiss all claims alleged against Harvest, the district court explicitly instructed Harvest that it would have to file a motion seeking such relief. (Ex. 6, at 9:18-10:8.)

On December 17, 2018, Mr. Morgan filed a Judgment Upon the Jury Verdict against Mr. Lujan. (Ex. 7.[9]) On December 18, 2018, Mr. Morgan filed a Notice of Appeal from the November 28, 2018 Notice of Entry of Order Denying Plaintiff's Motion for Entry of Judgment and from the December 17, 2018 Judgment Upon the Jury Verdict. (Ex. 8.[10])

On December 21, 2018, Harvest filed a Motion for Entry of Judgment against Mr. Morgan as to the claim for relief that he seemingly abandoned and/or failed to prove at trial. (Ex. 9.[11]) On April 5, 2019, the District Court determined that, as a result of this appeal, it lacked jurisdiction to decide Harvest's Motion for Entry of Judgment and that it would stay proceedings pending resolution of the appeal. (Ex. 10,[12] at 1:16-19, 5:1-4.) The District

[9] Notice of Entry of J. Upon the Jury Verdict (Jan. 2, 2019), attached as Exhibit 7.

[10] Notice of Appeal (Dec. 18, 2018), attached as Exhibit 8.

[11] Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. (Dec. 21, 2018), attached as Exhibit 9. The exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

[12] Decision & Order (April 5, 2019), attached as Exhibit 10.

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Court also indicated that if this Court remands the action, it would "recall the jury [discharged and dismissed over sixteen months ago] and instruct them to consider whether their verdict applied to Harvest." (*Id.* at 1:19-21, 4:7-9, 5:4-5.) As a result, Harvest filed a Petition for Extraordinary Writ Relief from this Decision & Order, and on May 15, 2019, this Court issued an Order denying the Petition, without prejudice, should the district court take any steps to reconvene the jury. (Ex. 11,[13] at 1.)

On May 15, 2019, Mr. Morgan filed a Motion for Remand Pursuant to NRAP 12A, asserting that the action should be remanded so that the District Court could enter judgment against Harvest pursuant to NRCP 49(a). (Ex. 12.[14]) Harvest opposed the Motion for Remand: (1) stating that the district court had already denied Mr. Morgan's attempt to obtain a judgment against Harvest pursuant to NRCP 49(a); (2) pointing out that the district court never issued an indicative ruling that it would grant NRCP 49(a) relief; and (3) demonstrating that NRCP 49(a) is not an instrument for determining the

[13] Order Denying Petition for Writ of Mandamus (May 15, 2019), attached as Exhibit 11.

[14] Mot. for Remand Pursuant to NRAP 12A (May 15, 2019), attached as Exhibit 12.

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ultimate issue of liability where a party has utterly failed to present a claim for the jury's determination. (Ex. 13,[15] at 1:9-2:4.) On July 31, 2018, this Court denied the Motion for Remand, citing NRCP 49(a) and *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988) (a case raised in Harvest's Opposition brief) in support of the Court's finding that remand was not warranted. (*Id.* at 7:13-9:7; Ex. 14.[16])

II. ARGUMENT

Nevada Rule of Appellate Procedure 3A sets forth the judgments and orders from which a party may appeal. An order denying entry of judgment is not an appealable order under the Rules, and only final judgments (or interlocutory judgments in certain real property actions) are appealable. NRAP 3A(b)(1).

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,

[15] Respondent Harvest Mgmt. Sub LLC's Opp'n to Mot. for Remand Pursuant to NRAP 12A (May 17, 2019), attached as Exhibit 13.

[16] Order Denying Remand (July 31, 2019), attached as Exhibit 14.

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197 (1979); *see also Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) ("[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."). When a judgment disposes of less than all of the claims against all of the parties, a party must seek certification of the judgment as final pursuant to Nevada Rule of Civil Procedure 54(b) before it can file an appeal from the judgment. "*In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties* . . . ." NRCP 54(b) (emphasis added).

Here, neither the Order Denying Plaintiff's Motion for Entry of Judgment ("Order") nor the Judgment Upon Jury Verdict ("Judgment"), individually or considered together, constitutes a final judgment. Neither the Order nor the Judgment disposes of all of the claims in the case. Mr. Morgan's claim against Harvest remains unresolved and is the subject of a pending Motion for Entry of Judgment in the district court. Mr. Morgan failed to seek

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Rule 54(b) certification for either the Order or the Judgment prior to filing his Notice of Appeal. Therefore, Mr. Morgan's appeal is premature and this Court lacks jurisdiction to hear the appeal.

In light of the District Court's prior ruling that the jury's verdict against Mr. Lujan did not apply to Harvest, and this Court's indication in the Order Denying Remand that NRCP 49(a) is not the proper method by which to enter a judgment against Harvest, Harvest respectfully requests that upon dismissal of this appeal, this Court instruct the District Court to enter judgment in favor of Harvest, as is consistent with these prior rulings.

II. CONCLUSION

For the foregoing reasons, Mr. Morgan's appeal should be dismissed as premature. Mr. Morgan has failed to appeal from a final judgment. This action should be remanded with instructions to enter judgment in favor of

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Harvest as to the claim that Mr. Morgan failed to present to the jury for determination.

DATED this 19th day of August, 2019.

BAILEY❖KENNEDY

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

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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 19th day of August, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S RENEWED MOTION TO DISMISS APPEAL AS PREMATURE** 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:

MICAH S. ECHOLS TOM W. STEWART **MARQUIS AURBACH COFFING** 1001 Park Run Drive Las Vegas, Nevada 89145	Email: mechols@maclaw.com tstewart@maclaw.com *Attorneys for Appellant* AARON M. MORGAN
BENJAMIN P. CLOWARD BRYAN A. BOYACK **RICHARD HARRIS LAW FIRM** 801 South Fourth Street Las Vegas, Nevada 89101	Email: Bbenjamin@richardharrislaw.com bryan@richardharrislaw.com *Attorneys for Appellant* AARON M. MORGAN
DOUGLAS J. GARDNER DOUGLAS R. RANDS **RANDS, SOUTH & GARDNER** 1055 Whitney Ranch Drive, Suite 220 Henderson, Nevada 89014	Email: dgardner@rsglawfirm.com drands@rsgnvlaw.com *Attorneys for Respondent* DAVID E. LUJAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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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Attorneys for Plaintiff

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

ADAM W. WILLIAMS, ESQ.
Nevada Bar No. 13617
801 S. Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

EXHIBIT 2

EXHIBIT 2

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.

///

A-15-718679-C
SJV
Special Jury Verdict
4738215

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 3

EXHIBIT 3

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Attorneys for Plaintiff, Aaron M. Morgan

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_____
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

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]

---

[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

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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 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

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.

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By: */s/ Dennis L. Kennedy*
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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.

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[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]

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[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*
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
ANDREA M. CHAMPION

Attorneys for Defendants
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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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DAVID E. LUJAN

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and

MICAH S. ECHOLS
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Attorneys for Plaintiff
AARON M. MORGAN

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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EXHIBIT 5

EXHIBIT 5

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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

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

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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:

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Las Vegas, Nevada 89101

and

MICAH S. ECHOLS — Email: Mechols@maclaw.com
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DAVID E. LUJAN

/s/ Josephine Baltazar
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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
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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 6

EXHIBIT 6

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.

* * * * *

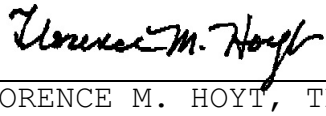
CERTIFICATION

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 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 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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Attorneys for Defendant David E. Lujan

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

[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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Attorneys for Plaintiff, Aaron M. Morgan

RICHARD HARRIS LAW FIRM

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 8

EXHIBIT 8

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Attorneys for Plaintiff, Aaron Morgan

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

By /s/ Micah S. Echols
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Attorneys for Plaintiff, Aaron Morgan

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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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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:

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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,

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Case No. A-15-718679-C
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///

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:

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EXHIBIT 9

EXHIBIT 9

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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 **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.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
DENNIS L. KENNEDY
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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.

/ / /

/ / /

[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.

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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 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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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: _____
DENNIS L. KENNEDY
SARAH E. HARMON
JOSHUA P. GILMORE
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EXHIBIT 10

EXHIBIT 10

DAO

EIGHTH JUDICIAL 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

DECISION AND ORDER

Defendant Harvest Management Sub LLC filed a Motion for Entry of Judgment because Aaron Morgan failed to properly pursue his claim of vicarious liability against them and abandoned his claim. This Motion followed a similar Motion for Entry of Judgment filed by Mr. Morgan that Judge Gonzalez denied. Mr. Morgan filed a Motion for Attorney Fees and Costs, arguing Harvest should pay attorney fees as a result of Harvest causing a mistrial. Upon review of the Motions, Oppositions, and Replies, as well as in consideration of the points made in oral argument, I find that I am without jurisdiction to render a decision on the Motion for Entry of Judgment and will stay proceedings until the appeal pending is resolved. I certify that should the Supreme Court remand the case back to me, I will recall the jury and instruct them to consider whether their verdict applied to Harvest. For the fees, I find that it would be a waste of judicial economy to rule on the fees at this point, and will defer judgment until the Supreme Court makes its decision.

I. Factual and Procedural Background

This case involves a car accident in which David Lujan, a driver for Harvest, struck Mr. Morgan. Mr. Morgan sustained injuries as a result of this accident. Mr. Morgan filed a Complaint on May 05, 2015. Mr. Morgan levied several causes of action against the Defendants. Mr. Morgan claimed negligence and negligence per se against David Lujan and vicarious liability/respondeat

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

superior against Harvest. Mr. Morgan claimed that Mr. Lujan was acting in the scope of his employment with Harvest when he caused an accident to occur, injuring Mr. Morgan.

On June 16, 2015, the Defendants filed an Answer to Mr. Morgan's Complaint. The Answer denied the allegation that Mr. Lujan was acting in the course and scope of his employment at the time of the accident. Harvest further denied that Mr. Lujan was incompetent, inexperience, or reckless in the operation of the vehicle, that Harvest knew or should have known Mr. Lujan was incompetent, inexperienced, or reckless in the operation of the vehicle, that Mr. Morgan was injured as a proximate cause of Harvest's negligent entrustment of the vehicle to Mr. Lujan, and that Mr. Morgan suffered damages as a direct and proximate result of Harvest's negligent entrustment. Defendants were represented by Douglas J. Gardner, Esq. of Rands, South, & Gardner who represented both Defendants throughout the discovery process.

On April 24, 2017, the parties appeared for a jury trial. The Defendant advised me that Mr. Lujan had been hospitalized. I continued this jury trial. On November 6, 2017, the parties conducted a second jury trial. This trial ended in a mistrial as a result of the Defendants inquiring about the pending DUI charge against Mr. Morgan. On April 2, 2018, the parties held the second trial. During this trial, the parties failed to provide a verdict form. Instead, the parties agreed to use a verdict form that had been used in a prior trial and was modified by my assistant. I did not catch, nor did any of the four attorneys, that the verdict form inadvertently omitted Harvest from the caption. The form also designated a singular "Defendant" instead of referring to multiple Defendants. Using this flawed form, the jury awarded Mr. Morgan $2,980,000.00 in damages. I did not make any legal determination regarding Harvest. I also do not recall Harvest contesting vicarious liability during any of the three trials or during the two years proceeding.

On July 30, 2018, Mr. Morgan filed a Motion for Entry of Judgment requesting the Court enter a written judgment against both Lujan and Harvest Management. The Court ruled that the inconsistencies in the jury instructions and the special verdict form were not enough to support judgment against Harvest. Mr. Morgan appealed on December 18, 2018. This matter is currently pending before the Nevada Supreme Court.

On December 21, 2019, Harvest filed a Motion for Entry of Judgment based on the decision made on Mr. Morgan's Motion for Entry of Judgment. Harvest argues that this decision warrants an immediate judgment in its favor. Mr. Morgan filed an opposition and Countermotion on January 15, 2019. Harvest filed a Reply on January 23, 2019. I heard oral arguments on March 05, 2019.

Mr. Morgan filed a Motion for Attorney's Fees and Costs on January 22, 2019. Harvest filed an Opposition on February 22, 2019. Mr. Morgan filed a Reply on March 08, 2019. I heard oral arguments on March 19, 2019.

II. Discussion

Harvest makes the following arguments in support of its Motion:

(1) Mr. Morgan voluntarily abandoned his claim against Harvest and did not present any claims against Harvest to the jury for determination.

(2) Harvest is entitled to judgment in its favor as to Mr. Morgan's claim for either negligent entrustment or vicarious liability.

Before I can address these arguments, I must first address whether I have jurisdiction to hear this case. The pending appeal by Mr. Morgan may affect my ability to adjudicate this matter.

A. The pending appeal by Mr. Morgan divests this Court of jurisdiction.

The Supreme Court of Nevada held that a "timely notice of appeal divests the district court of jurisdiction" to address issues pending before the Nevada Supreme Court. Mack-Manley v. Manley, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006). I may only adjudicate "matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." Id. at 855.

Mr. Morgan argues that the pending appeal divests this Court of jurisdiction to hear matters related to the Order Denying Mr. Morgan's Motion for Entry of Judgment, the Jury Verdict, or related substantive issues. Harvest argues that the Order denying the Motion for Entry of Judgment is not a final order because there is an issue remaining against Harvest. Harvest concludes that if the Order denying the motion for Entry of Judgment is not a final order, the Supreme Court does not have jurisdiction.

The Supreme Court could find that Mr. Morgan's appeal has merit and may reverse the Order granting 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.

Substantively, I agree with Harvest that the flawed verdict form used at trial does not support a verdict against Harvest. Pursuant to Huneycutt v. Huneycutt, I certify that if this case was remanded, I would recall the jury from the subject trial and instruct them to consider whether their verdict applied to Harvest. 94 Nev. 79, 575 P.2d 585 (1978).

B. As the pending Supreme Court decision impacts liability, I am deferring judgment until the resolution of the appeal on the Motion for attorney fees.

I have jurisdiction to resolve attorney fees. I find that it is against the interest of judicial economy to resolve the issue at this time. Mr. Morgan seeks $47,250.00 in fees and $20,371.40 in costs for the mistrial. Mr. Morgan also seeks $42,070.75 for costs incurred in the completed jury trial. While the pending Supreme Court decision does not directly consider these pending fees and costs, the decision will impact who could be responsible for some of these fees and costs. In addition, the parties seemed to indicate that, depending on the Supreme Court decision, further Motions for Attorney Fees could be warranted. Judicial economy would best be served if all requests for fees and costs were handled at the same time after all variables are accounted for.

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

III. Conclusion

The current Motion in front of me directly relates to the appeal pending before the Supreme Court. I am without jurisdiction to adjudicate this matter. I am staying proceedings until the appeal is resolved and certify that if this were remanded back to me, I would recall the jury and instruct them to consider whether Harvest is liable. I am also deferring judgment on attorney fees and costs. The parties may place this back on calendar when the Nevada Supreme Court renders its opinion.

DATED this ~~day~~ of April 2, 2019.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Micah S. Echols Marquis Aurbach Coffing Attn: Micah Echols 10001 Park Run Drive Las Vegas, NV 89145	Counsel for Plaintiff
Dennis L. Kennedy Bailey * Kennedy c/o Dennis L. Kennedy 8984 Spanish Ridge Avenue Las Vegas, NV 89148	Counsel for Harvest Management Sub LLC
Douglas J. Gardner 1055 Whitney Ranch Dr., Suite 220 Henderson, NV 89014	Counsel for David Lujan

SYLVIA PERRY
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A718679 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell
District Court Judge

Date: ~~03/12/2018~~ 4/12/19

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

EXHIBIT 11

EXHIBIT 11

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 12

EXHIBIT 12

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

MOTION FOR REMAND PURSUANT TO NRAP 12A

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I. INTRODUCTION

For over four years, Plaintiff / Appellant Aaron Morgan ("Morgan") litigated negligence-based claims against David Lujan ("Lujan") and his employer, 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 a bus in the course of his employment and Harvest Management's liability as Lujan's employer. But, because the District Court inadvertently listed only Lujan on the jury verdict form, there are now questions as to whether the jury intended to find *both* Defendants 100% at fault and liable for Morgan's injuries.

The District Court certified its intention to resolve this issue by recalling the jury.[1] Although Morgan believes NRCP 49(a) is a better option for resolving the issue with the verdict form, there is indisputably more work to be done in the District Court. Accordingly, the instant motion asks this Court for a remand pursuant to NRAP 12A.

[1] *See* Decision and Order, attached hereto as **Exhibit 1**.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

On April 1, 2014, Morgan sustained serious, life-altering injuries when a Montara Meadows[2] shuttle bus pulled in front of his moving vehicle. Morgan then filed a complaint in which he asserted three causes of action: (1) negligence against the driver of the shuttle bus, Lujan; (2) negligence per se against Lujan premised on his failure to obey traffic laws; and (3) vicarious liability / respondeat superior against Harvest Management based on its ownership of the shuttle bus and employment of Lujan. The Defendants then jointly answered the complaint and the case progressed in the ordinary course before the Honorable Judge Bell.

Following a Defense-induced mistrial in November 2017, the case proceeded to a second trial in April 2018. On the final day of trial, the District Court sua sponte created a special verdict form that listed Lujan as the only Defendant.[3] The District Court noted the error when showing a draft of the form to counsel, and 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.
>
> [Defense counsel]: Yeah. That looks fine.

[2] Montara Meadows is a senior citizen community in Las Vegas which is under the purview of Harvest Management.

[3] A copy of the special verdict form is attached hereto as **Exhibit 2**.

> 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.
>
> (Emphasis added).[4]

Unfortunately, the verdict form was not corrected before it went to the jury.[5] So, while the jury received written instructions with a complete, proper caption,[6] their finding that Defendant[s] were 100% at fault for the accident and the corresponding award of $2,980,000 was written on an improperly-captioned special verdict form.

On June 29, 2018, the District 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 in the Eighth Judicial District Court, the case was reassigned to the Honorable Judge Gonzalez as part of a mass reassignment of cases that came with the new fiscal year. *See* Eighth Judicial District Court Administrative Order 18-05.

On July 30, 2018, Morgan filed a Motion for Entry of Judgment in which he asked Judge Gonzalez to enter a written judgment against both Defendants. Given the issue with the verdict form, this motion also included an alternative request for

[4] The relevant portion of the trial transcript is attached hereto as **Exhibit 3**.

[5] *See* Exhibit 2.

[6] *See* Jury Instructions cover page, attached as **Exhibit 4**.

the Court to make an explicit finding in accordance with NRCP 49(a) that the jury's special verdict was rendered against Lujan *and* Harvest Management. In support of the motion, Morgan explained how the issue of vicarious liability / respondeat superior was tried by consent. Further, Morgan highlighted portions of the record which confirmed that Morgan pursued claims against both Defendants. Finally, because NRCP 49(a) is fact-intensive, Morgan also argued that the case should be transferred back to Judge Bell. After briefing and a hearing, Judge Gonzalez denied the motion and entered judgment as to only Lujan.

On December 18, 2018, Morgan filed the notice of appeal which led to this case. As explained in his docketing statement, the issues on appeal center on Judge Gonzalez's determination that the jury's verdict pertained to only one of the Defendants. Morgan's appeal also implicates *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 191, 772 P.2d 1284, 1286 (1989), because Judge Gonzalez rejected the argument that Judge Bell, the jurist who presided over every aspect of the case, including both trials, would be better equipped to address irregularities in the verdict form.

After Morgan filed his notice of appeal, Harvest Management filed its own Motion for Entry of Judgment. Morgan timely opposed the motion and counter-

moved to return the case to Judge Bell. Over Harvest Management's objection, the case was reassigned back to Judge Bell.

Following two hearings regarding Harvest's Motion for Entry of Judgment and other post-trial matters, Judge Bell concluded that she lacked jurisdiction to hear non-collateral matters because of Morgan's pending appeal in this Court.[7] So, while Judge Bell agreed that the flawed verdict form necessitated further action, Judge Bell certified her decision pursuant to *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978), so the parties could request a remand from this Court.[8]

Oddly, Harvest Management filed a Petition for Writ Relief instead of a motion for *Huneycutt* relief.[9] Because a *Huneycutt* / NRAP 12A remand is the correct procedure to address residual issues, Morgan now requests a remand and, hopefully, this Court's guidance.

III. LEGAL ARGUMENT

"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). To this end, this Court's decisions have repeatedly held that "a

[7] *See* Decision and Order filed April 5, 2019, attached hereto as Exhibit 1.

[8] *Id.* at pages 3-4.

[9] Harvest Management's Petition was assigned Supreme Court Case No. 78596. Harvest Management's Petition was denied on May 15, 2019.

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 (2010).[10] 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.

In this case, the District Court correctly recognized that it lacked jurisdiction to hear or adjudicate "matters related to the Order Denying Mr. Morgan's Motion for Entry of Judgment, the Jury Verdict, or related substantive issues."[11] There are at least two viable options for resolving this quandary. One, the District Court may follow through on its plan to "recall the jury from the subject trial and instruct them to consider whether their verdict applied to Harvest."[12] Two, the District Court could make an explicit finding pursuant to NRCP 49(a) that the special

[10] 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.

[11] Decision and Order, Exhibit 1, at page 3.

[12] Decision and Order, Exhibit 1, at page 4.

verdict was rendered against both Defendants. Although Morgan submits that the second separate option is better,[13] the fact remains that neither option is available without a remand from this Court.

Under NRAP 12A, remand is available after an indicative ruling in which the District Court states its intent to grant relief on a substantial issue. NRAP 12A thus codifies this Court's established *Huneycutt* procedure.

Here, a remand pursuant to NRAP 12A would allow the District Court to resolve the outstanding uncertainty as to Harvest Management. Accordingly, remand also would prevent piecemeal litigation and save judicial resources. After all, while the post-trial proceedings have been an unmitigated mess, the essential issue remains whether Harvest Management should be liable for Morgan's injuries.[14] There is thus no reason to burden this Court (or the District Court) with multiple cases which stem from the same record. And, on a related note, participation in this Court's NRAP 16 program would be more productive if all the parties knew which Defendant(s) were liable for Morgan's damages.

[13] The very purpose of NRCP 49(a) is to address unresolved issues of facts which were raised by the pleadings or the evidence. By allowing district courts to make their own findings, the Rule thus allows for an alternative to the drastic step of recalling a jury months or years after a trial.

[14] Because Lujan did not file a timely appeal, his liability is not in dispute.

IV. CONCLUSION

The problems with the jury verdict form are not going away any time soon. Rather than litigating this issue in separate proceedings, the most efficient option is a remand to the District Court, preferably with instructions encouraging the District Court to consider NRCP 49(a). Therefore, Morgan respectfully urges this Court to grant the instant Motion to Remand so the District Court may resolve Harvest Management's Motion for Entry of Judgment and other related, post-trial issues, including Morgan's own Motion for Entry of Judgment, which the District Court has reopened.

Dated this 15th day of May, 2019.

Marquis Aurbach Coffing

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Attorneys for Appellant, Aaron M. Morgan

CERTIFICATE OF SERVICE

I hereby certify that **MOTION TO REMAND PURSUANT TO NRAP 12A** was filed electronically with the Nevada Supreme Court on the 15th day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Douglas Gardner
Joshua Gilmore
Andrea Champion
Dennis Kennedy
Sarah Harmon

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

Ara H. Shirinian, Esq.
10651 Capesthorne Way
Las Vegas, NV 89135
Settlement Judge

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

EXHIBIT 13

EXHIBIT 13

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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
ANDREA M. CHAMPION

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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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/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

EXHIBIT 14

EXHIBIT 14

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.

No. 77753

FILED

JUL 31 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING MOTION

This appeal is assigned to the court's settlement program. Appellant has filed a motion for remand pursuant to NRAP 12A, which respondent Harvest Management Sub LLC opposes. The decision to grant or deny a motion for remand pursuant to NRAP 12A is discretionary with this court. *See* NRAP 12A(b). The court is not persuaded that a remand is warranted. Accordingly, the motion is denied. *See Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991); NRCP 49(a); *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988).

It is so ORDERED.

_____, C.J.

cc: Ara H. Shirinian, Settlement Judge
Richard Harris Law Firm
Marquis Aurbach Coffing
Bailey Kennedy
Rands, South & Gardner/Henderson

19-32288