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Electronically Filed
Aug 28 2019 02:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY TO RENEWED MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO COUNTER-MOTION RENEWING REQUEST FOR REMAND AND STAY OF CURRENT DEADLINES**

RESPONDENT HARVEST MANAGEMENT SUB LLC'S REPLY TO RENEWED MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO COUNTER-MOTION RENEWING REQUEST FOR REMAND AND STAY OF CURRENT DEADLINES

I. INTRODUCTION

Respondent Harvest Management Sub LLC ("Harvest") respectfully requests that this premature appeal be dismissed for lack of jurisdiction, with accompanying instructions for the District Court to enter judgment in favor of Harvest. Entry of judgment in favor of Harvest is the only outcome consistent with the District Court's prior rulings in the underlying action — given that the District Court has already determined that Appellant Aaron M. Morgan ("Mr. Morgan") failed to present any claim against Harvest to the jury for determination and was not entitled to a judgment against Harvest. (Ex. 1,[1] at 9:8-10:8.)

Moreover, Harvest respectfully requests that Mr. Morgan's Counter-Motion Renewing Request for Remand and Stay of Current Deadlines be denied in its entirety. Mr. Morgan's Counter-Motion is replete with factual inaccuracies and is completely unsupported by any evidence or even citations

[1] Tr. of Hr'g on Pl.'s Mot. for Entry of J. (Jan. 18, 2019), excerpts of which are attached as Exhibit 1.

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to the record. There are no grounds for remand pursuant to NRAP 12A or *Huneycutt v. Huneycutt,* 94 Nev. 79, 575 P.2d 585 (1978).

The District Court's ***only*** indicative ruling concerning Harvest's Motion for Entry of Judgment was its express intention to reconvene the jury (dismissed over sixteen (16) months ago) to decide Harvest's liability. (Ex. 2,[2] at 1:19-21.) This Court has already determined that such a course of action would be improper. (Ex. 3,[3] at 1-2.) Moreover, Mr. Morgan already sought remand of this action pursuant to NRAP 12 and *Huneycutt* based on an alleged (but ultimately non-existent) intention of the District Court to enter judgment against Harvest pursuant to NRCP 49(a). (Ex. 4,[4] at 1, 6-7.) This Court denied the requested relief because NRCP 49(a) does not permit the District Court to decide the ultimate issue of liability where there is a complete lack of pleadings or evidence to support a judgment. (Ex. 5,[5] at 1 (citing *Kinnel v. Mid-Atl. Mausoleums, Inc.*, 850 F.2d 958 (3rd Cir. 1988)).

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[2] Decision & Order (Apr. 5, 2019), attached as Exhibit 2.

[3] Order Denying Petition for Writ of Mandamus (May 15, 2019), attached as Exhibit 3.

[4] Mot. for Remand Pursuant to NRAP 12A (May 15, 2019), attached as Exhibit 4. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

[5] Order Denying Remand (July 31, 2019), attached as Exhibit 5.

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Therefore, dismissal and remand with instructions to enter judgment in favor of Harvest is the only course of action consistent with the prior orders in this action, and it will allow Mr. Morgan to finally proceed with an appeal of the final judgments in this case.

II. ARGUMENT

A. It Is Uncontested That Mr. Morgan's Appeal Is Premature; Therefore This Appeal Should Be Dismissed

Mr. Morgan admits that "more work needs to be done in the District Court before this Court addresses assignments of error and the merits of the parties' positions." (Response & Counter-Mot.[6] at 1.) Despite the admission that his appeal is premature,[7] Mr. Morgan continues to assert that his appeal was procedurally proper because the District Court's December 2018 decision[8] of his Motion for Entry of Judgment "effectively resolved all issues" in the

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[6] Mr. Morgan's Response to Harvest Management's Motion to Dismiss and Counter-Motion Renewing Request for Remand and Stay of Current Deadlines, filed on August 26, 2019, is hereinafter referred to as "Response & Counter-Motion."

[7] Mr. Morgan also acknowledges that "no formal judgment was entered against Harvest." (Response & Counter-Mot. at 2.)

[8] Based on context, Harvest assumes that Mr. Morgan's reference to the "December 2018 decision" actually refers to the District Court's November 2018 decision of his Motion for Entry of Judgment.

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action. (*Id.* at 2, 4, 5.) Mr. Morgan's argument is based on faulty factual representations.

Specifically, Mr. Morgan asserts that the District Court's December 2018 decision resolved all issues in the underlying action because: (1) Judge Gonzalez granted his motion for entry of judgment only as to Defendant David E. Lujan ("Mr. Lujan"); (2) Judge Gonzalez denied his request to transfer the action to Judge Bell for determination of his Motion for Entry of Judgment, despite the fact that she was the trial judge and most familiar with the facts of the case; and (3) Judge Gonzalez refused to enter judgment for or against Harvest. (*Id.* at 2.) However, the three factual premises for Mr. Morgan's argument are inaccurate and lack any evidentiary support.

First, Judge Gonzalez did ***not*** grant Mr. Morgan's Motion for Entry of Judgment against Mr. Lujan. Mr. Morgan never filed a Motion for Entry of Judgment against Mr. Lujan. Mr. Morgan's Motion for Entry of Judgment sought entry of judgment against *Harvest* (as the jury had already rendered a verdict against Mr. Lujan, and a motion for entry of judgment against him was

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unnecessary). (Ex. 6,[9] at 2:24-3:6.) Judge Gonzalez denied this motion in its entirety. (Ex. 7,[10] at 5.) As a result, the jury's verdict only applied to Mr. Lujan, and judgment was entered against him. (Ex. 8,[11] at 6.)

Second, Mr. Morgan never requested that his Motion for Entry of Judgment be transferred to and heard by Judge Bell, the trial judge. Rather, Mr. Morgan only requested a transfer of the case after Judge Gonzalez denied his Motion for Entry of Judgment and after Harvest filed its pending Motion for Entry of Judgment. (Ex. 6; Ex. 9,[12] at 10:11-11:17.)

Finally, Judge Gonzalez did not refuse to enter judgment in favor of Harvest — rather, she: (i) denied Mr. Morgan's request for entry of judgment against Harvest; (ii) denied Harvest's *oral* request for entry of judgment in its favor; and (iii) instructed Harvest to file a separate, *written* motion seeking

[9] Pl.'s Mot. for Entry of J. (July 30, 2018), attached hereto as Exhibit 6. The exhibits to this motion have been omitted in the interest of judicial economy and efficiency.

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

[11] Notice of Entry of J. Upon the Jury Verdict (Jan. 2, 2019), attached as Exhibit 8.

[12] 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 Exhibit 9. The exhibits to this brief have been omitted in the interest of judicial economy and efficiency.

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such relief. (Ex. 1, at 9:8-10:8.) Harvest followed the Court's instructions, and this is the motion that remains pending in the District Court. (*See generally* Ex. 10.[13])

Because Mr. Morgan admits that issues relating to Harvest remain unresolved in the underlying action, and because Mr. Morgan cannot demonstrate that the Order denying his Motion for Entry of Judgment constitutes a final judgment, Mr. Morgan's appeal is premature and should be dismissed.

B. <u>Dismissal of the Appeal Should Be Accompanied by Instructions on Remand for the District Court to Enter Judgment in Favor of Harvest.</u>

Mr. Morgan contends that remand of this action should not include instructions for the District Court to enter judgment in favor of Harvest, because "[t]here is no legal mechanism for this Court to rule upon the merits of an issue that must first be decided by the District Court, subject to this Court's further review." (Response & Counter-Mot. at 7-8 (asserting that Judge Bell is

[13] Def. Harvest Mgmt. Sub LLC's Mot. for Entry of J. (Dec. 21, 2018), attached as Exhibit 10. The exhibits to the motion have been omitted in the interest of judicial economy and efficiency.

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best suited to make factual determinations as to what occurred at the trial).) However, in this case, Harvest is not asking the Court to make any factual determinations or to rule on the merits of an issue that has yet to be decided by the District Court; rather, Harvest respectfully requests an instruction for the District Court to enter judgment ***consistent with its prior rulings in the action***.

Specifically, the District Court has already determined that Mr. Morgan failed to present any claim against Harvest to the jury for determination. (Ex. 1, at 9:8-18.) As such, the District Court has already denied Mr. Morgan's Motion for Entry of Judgment against Harvest. (Ex. 7.) Thus, where the plaintiff fails to present a claim for the jury's determination, and, as a result, the District Court determines that judgment cannot be entered against the defendant, the only course of action is to enter judgment in ***favor*** of the defendant.

Entry of judgment causes no prejudice to Mr. Morgan, as he has the right to appeal from the denial of his Motion for Entry of Judgment, the granting of Harvest's Motion for Entry of Judgment, and the final judgment in the action. However, denial of Harvest's Motion for Entry of Judgment will

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greatly prejudice Harvest, as it will only serve to promote inconsistent judgments and to deny Harvest's right to have a jury trial.

C. There Is No Basis for Remand Pursuant to NRAP 12A or *Huneycutt*.

Mr. Morgan repeatedly asserts that there is more than one motion for entry of judgment currently pending before the District Court and that Judge Bell has expressed an "intention to revisit [Mr.] Morgan's own motion for entry of judgment." (Response & Counter-Mot. at 1, 4, 6, 7-8.) Both assertions are false.

The District Court denied Mr. Morgan's Motion for Entry of Judgment on November 28, 2018. (Ex. 7.) Mr. Morgan never sought reconsideration of this motion, and no motion for entry of judgment filed by Mr. Morgan is currently pending in the District Court.[14] Judge Bell has never indicated that she intends to *sua sponte* revisit Mr. Morgan's Motion for Entry of Judgment. Thus, the only motions currently pending are Harvest's Motion for Entry of Judgment and Mr. Morgan's Motion for Attorney's Fees and Costs.

[14] Any attempt to seek reconsideration or to renew the motion for entry of judgment would be untimely, as 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.

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The only indicative ruling that could form the basis of Mr. Morgan's request for remand would be the District Court's April 5, 2019 Decision and Order on Harvest's Motion for Entry of Judgment. (Ex. 2.) The Court stated that if this action were remanded, it would "recall the jury and instruct them to consider whether their verdict applied to Harvest." (*Id.* at 1:19-21.) However, this indicative ruling cannot form the basis for remand, as this Court has already suggested that such a course of action would be improper. (Ex. 3, a1 1-2 (citing *Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991)).)

Despite the lack of any indicative ruling to revisit and grant a motion for entry of judgment pursuant to NRCP 49(a), it is assumed that Mr. Morgan intends to seek such relief upon remand. (*See* Ex. 4 (seeking remand to pursue such relief).) Any attempt to renew the request for entry of judgment pursuant to NRCP 49(a) would be procedurally improper, as suggested by this Court's denial of Mr. Morgan's prior Motion for Remand and reliance upon *Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958 (3d Cir. 1988). (Ex. 5.) In *Kinnel*, the Third Circuit declined to "enter the minds of the jurors to answer a

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question that was never posed to them," and held that it is improper to use Rule 49(a) to determine the ultimate liability of a party in the absence of a jury verdict against that party. *Id.* at 959-60, 965-67 (internal quotations and citations omitted).

Therefore, there is no valid indicative ruling by the District Court warranting remand pursuant to either NRAP 12A or *Huneycutt*, and Mr. Morgan's Counter-Motion should be denied.

III. CONCLUSION

For the foregoing reasons, Harvest respectfully requests that this Court grant Harvest's Renewed Motion to Dismiss, deny Mr. Morgan's Counter-Motion, and remand the action for lack of jurisdiction with instructions to enter judgment in favor of Harvest.

DATED this 28th day of August, 2019.

BAILEY❖KENNEDY

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

Attorneys for Respondent
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CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 28th day of August, 2019, service of the foregoing **RESPONDENT HARVEST MANAGEMENT SUB LLC'S REPLY TO RENEWED MOTION TO DISMISS APPEAL AS PREMATURE; AND RESPONSE TO COUNTER-MOTION RENEWING REQUEST FOR REMAND AND STAY OF CURRENT DEADLINES** 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

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EXHIBIT 1

EXHIBIT 1

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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.

* * * * *

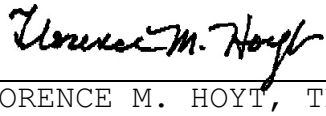
CERTIFICATION

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 2

EXHIBIT 2

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 3

EXHIBIT 3

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 4

EXHIBIT 4

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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Attorneys for Appellant, Aaron M. Morgan

MAC:15167-001 3703042_1

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 5

EXHIBIT 5

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

EXHIBIT 6

EXHIBIT 6

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

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

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

NOTICE OF MOTION

You and each of you, will please take notice that **PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** will come on regularly for hearing on the 04 day of Sept., 2018 at the hour of 9:00 A.m. or as soon thereafter as counsel may be heard, in Department 11 in the above-referenced Court.

Dated this ___ day of July, 2018.

MARQUIS AURBACH COFFING

By_____
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Nevada Bar No. 8437
Tom W. Stewart, Esq.
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Attorneys for Plaintiff, Aaron M. Morgan

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 9, 2018, a Clark County jury rendered judgment in favor of Plaintiff, Aaron Morgan ("Morgan"), and against Defendants, David Lujan ("Lujan") and Harvest Management Sub LLC ("Harvest Management"), in the amount of $2,980,980.00, plus pre- and post-judgment interest.[1] It was undisputed during trial that Lujan was acting within the course and scope of his employment with Harvest Management at the time of the traffic accident at the center of the case. All evidence and testimony indicated Morgan sought relief from, and that judgment would be entered against, both Defendants. However, the special verdict form prepared by the Court (the "special verdict form") inadvertently omitted Harvest Management from the caption, despite Harvest Management being listed on the pleadings and jury instructions upon which the jury

[1] *See* Special Verdict, attached as **Exhibit 1**.

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relied when reaching the verdict itself. The Court acknowledged this omission, and Defendants conceded they had no objection to it. Accordingly, Morgan respectfully requests this Court enter judgment against both Defendants, in accordance with the jury instructions, pleadings, testimony, and evidence, either by (a) simply entering the proposed judgment attached hereto or, (b) by making an explicit finding that the judgment was rendered against both Defendants pursuant to NRCP 49(a) and then entering judgment accordingly.[2]

II. FACTUAL BACKGROUND

On April 1, 2014, Morgan was driving his Ford Mustang north on McLeod Drive in the right lane. Morgan approached the intersection with Tompkins Avenue. At that time, Lujan, who was driving a shuttle bus owned by Harvest Management, entered the intersection driving east from the Paradise Park driveway, and attempted to cross McLeod Drive heading east on Tompkins Avenue. The front of Morgan's car struck the side of Defendants' bus in a major collision resulting in total loss of Morgan's vehicle and serious bodily injuries. Morgan was transported from the scene of the accident to Sunrise Hospital. The emergency room physicians focused on potential head trauma and injuries to the cervical spine and to Morgan's wrists. Morgan was eventually discharged with instructions to follow up with a primary care physician. A week later, Morgan sought treatment for pain in his neck, lower-back, and both wrists.

Over the next two years, Morgan underwent a series of treatments and procedures for his injuries—including bilateral medial branch block injections to his thoracic spine; injections to ease the pain from his bilateral triangular fibrocartilage tears; left wrist arthroscope and triangular fibrocartilage tendon repair with debridement, incurring approximately nearly $264,281.00 in medical expenses.

III. PROCEDURAL HISTORY

On May 5, 2015, Morgan filed a complaint for negligence and negligence per se against Lujan and vicarious liability against Harvest Management. In jointly answering the complaint, both Defendants were represented by the same counsel and both named in the caption.

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[2] *See* proposed Judgment Upon the Jury Verdict, attached as **Exhibit 2**.

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After a lengthy discovery period, the case initially proceeded to trial in early November, 2017. During the initial trial, Lujan testified that he was employed by Montara Meadows, a local entity under the purview of Harvest Management:

> [Morgan's counsel]: All right. Mr. Lujan, at the time of the accident in April of 2014, were you employed with Montara Meadows?
>
> [Lujan]: Yes.
>
> [Morgan's counsel]: And what was your employment?
>
> [Lujan]: I was the bus driver.
>
> [Morgan's counsel]: Okay. And what is your understanding of the relationship of Montara Meadows to Harvest Management?
>
> [Lujan]: Harvest Management was our corporate office.
>
> [Morgan's counsel]: Okay.
>
> [Lujan]: Montara Meadows is just the local --
>
> [Morgan's counsel]: Okay. All right. And this accident happened April 1, 2014, correct?
>
> [Lujan]: Yes, sir.[3]

However, on the third day of the initial trial, the Court declared a mistrial based on Defendants' counsel's misconduct.[4]

Following the mistrial, the case proceeded to a second trial the following April. Vicarious liability was not contested during trial. Instead, Harvest Management's NRCP 30(b)(6) representative contested primary liability—the representative claimed that either Morgan or an unknown third party was primarily responsible for the accident—but did not contest Harvest Management's own vicarious liability.[5]

---

[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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Attorneys for Defendant David E. Lujan

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

N/A

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

[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 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 ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

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

/ / /

/ / /

/ / /

A true and correct copy is attached hereto.

DATED this 28th day of November, 2018.

BAILEY❖KENNEDY

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

Attorneys for Defendants
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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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and

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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: _____
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Approved as to form and content by:

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By: _____
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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 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]

Andrea M. Champion	achampion@baileykennedy.com
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/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 _____
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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 9

EXHIBIT 9

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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

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

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

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

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

Dated this 15th day of January, 2019.

MARQUIS AURBACH COFFING

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

II. FACTS AND PROCEDURAL HISTORY

A. BRIEF STATEMENT OF FACTS.

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

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

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B. RELEVANT PROCEDURAL HISTORY.

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

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

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

---

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

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

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

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

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

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

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

---

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

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

[5] *Id.*

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

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

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

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

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

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

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

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

---

[9] *See* Exhibit 1.

[10] *Id.*

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

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

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

[14] *Id.*

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

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

III. LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[22] *See* page 3.

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

[24] *Id.* at page 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

Dated this 15th day of January, 2019.

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CERTIFICATE OF SERVICE

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

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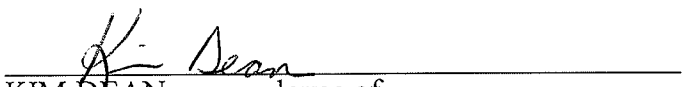

KIM DEAN, an employee of
Marquis Aurbach Coffing

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

EXHIBIT 10

EXHIBIT 10

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

/ / /

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

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

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

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

DATED this 21st day of December, 2018.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Pleadings.

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

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

(*Id.* at ¶ 9 (emphasis added).)

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

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

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

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

B. Discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

(*Id.* at 635).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

DATED this 21st day of December, 2018.

BAILEY❖KENNEDY

By: */s/ Dennis L. Kennedy*
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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

JUDG
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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: _____
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