Case No. _____

IN THE SUPREME COURT OF NEVADA

HARVEST MANAGEMENT SUB LLC,
Petitioner,

vs.

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

- and -

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

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

PETITION FOR EXTRAORDINARY WRIT RELIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

NRAP 26.1 DISCLOSURE

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

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

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

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

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

DATED this 18th day of April, 2019.

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

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

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VIA HAND DELIVERY:

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PETITION FOR EXTRAORDINARY WRIT RELIEF

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

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

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

DATED this 18th day of April, 2019.

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

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

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

II. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. SUMMARY OF REASONS WHY EXTRAORDINARY WRIT RELIEF IS PROPER

A. Standard of Decision for Seeking Writ Relief.

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

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

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

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

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

B. Writ Relief Is Appropriate Here.

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

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

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

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

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

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

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

IV. RELIEF REQUESTED

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

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

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

V. TIMING OF THIS PETITION

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

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

VI. ISSUES PRESENTED FOR REVIEW

This Petition presents the following issues:

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

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

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VII. STATEMENT OF FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Accident.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/ / /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. The Verdict.

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

G. The Action Was Reassigned to Department XI.

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

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

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

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

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

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

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

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

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

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

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

I. Mr. Morgan's Appeal.

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

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

Mr. Morgan has identified three issues on appeal:

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

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

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

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

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J. Harvest's Motion for Entry of Judgment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. REASONS WHY A WRIT SHOULD ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Judgment Should Be Entered in Favor of Harvest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. CONCLUSION

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

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

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

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

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

DATED this 18th day of April, 2019.

BAILEY❖KENNEDY

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

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

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VERIFICATION

STATE OF OREGON)

COUNTY OF Multnomah

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

EXECUTED on this 17th day of April, 2019.

Michele Stone

MICHELE STONE

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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

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

2. I further certify that I have read this Petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 18th day of April, 2019.

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

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HARVEST MANAGEMENT SUB LLC

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CERTIFICATE OF SERVICE

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

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VIA HAND DELIVERY: *Respondent*

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Settlement Program Mediator

/s/ Josephine Baltazar
Employee of BAILEY❖KENNEDY

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ADDENDUM

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West's Nevada Revised Statutes Annotated
The Constitution of the State of Nevada (Refs & Annos)
Article 6. Judicial Department

N.R.S. Const. Art. 6, § 4

§ 4. Jurisdiction of Supreme Court and court of appeals; appointment of judge to sit for disabled or disqualified justice or judge

Currentness

1. The Supreme Court and the court of appeals have appellate jurisdiction in all civil cases arising in district courts, and also on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts. The Supreme Court shall fix by rule the jurisdiction of the court of appeals and shall provide for the review, where appropriate, of appeals decided by the court of appeals. The Supreme Court and the court of appeals have power to issue writs of *mandamus, certiorari,* prohibition, *quo warranto* and *habeas corpus* and also all writs necessary or proper to the complete exercise of their jurisdiction. Each justice of the Supreme Court and judge of the court of appeals may issue writs of *habeas corpus* to any part of the State, upon petition by, or on behalf of, any person held in actual custody in this State and may make such writs returnable before the issuing justice or judge or the court of which the justice or judge is a member, or before any district court in the State or any judge of a district court.

2. In case of the disability or disqualification, for any cause, of a justice of the Supreme Court, the Governor may designate a judge of the court of appeals or a district judge to sit in the place of the disqualified or disabled justice. The judge designated by the Governor is entitled to receive his actual expense of travel and otherwise while sitting in the supreme court.

3. In the case of the disability or disqualification, for any cause, of a judge of the court of appeals, the Governor may designate a district judge to sit in the place of the disabled or disqualified judge. The judge whom the Governor designates is entitled to receive his actual expense of travel and otherwise while sitting in the court of appeals.

Credits

Amended in 1920, 1976, 1978 and 2014. The 1920 amendment was proposed and passed by the 1917 legislature; agreed to and passed by the 1919 legislature; and approved and ratified by the people at the 1920 general election. See: Laws 1917, p. 491; Laws 1919, p. 485. The 1976 amendment was proposed and passed by the 1973 legislature; agreed to and passed by the 1975 legislature; and approved and ratified by the people at the 1976 general election. See: Laws 1973, p. 1953; Laws 1975, p. 1981. The 1978 amendment was proposed and passed by the 1975 legislature; agreed to and passed by the 1977 legislature; and approved and ratified by the people at the 1978 general election. See: Laws 1975, p. 1951; Laws 1977, p. 1690. The 2014 amendment was proposed and passed by the 2011 legislature; agreed to and passed by the 2013 legislature; and approved and ratified by the people at the 2014 general election. See: Laws 2011 and Laws 2013, Senate Joint Resolution

No. 14.

Notes of Decisions (184)

N. R. S. Const. Art. 6, § 4, NV CONST Art. 6, § 4
Current through Ch. 2 of the 80th Regular Session (2019) of the Nevada Legislature subject to change from the reviser of the Legislative Bureau.

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs: Certiorari; Mandamus; Prohibition; Habeas Corpus (Refs & Annos)
Mandamus (Refs & Annos)

N.R.S. 34.160

34.160. Writ may be issued by appellate and district courts; when writ may issue

Effective: January 1, 2015

Currentness

The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

Credits

Added by CPA (1911), § 753. NRS amended by Laws 2013, c. 343, § 77, eff. Jan. 1, 2015.

Notes of Decisions (438)

N. R. S. 34.160, NV ST 34.160
Current through Ch. 2 of the 80th Regular Session (2019) of the Nevada Legislature subject to change from the reviser of the Legislative Bureau.

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs: Certiorari; Mandamus; Prohibition; Habeas Corpus (Refs & Annos)
Mandamus (Refs & Annos)

N.R.S. 34.170

34.170. Writ to issue when no plain, speedy and adequate remedy in law

Currentness

This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

Credits

Added by CPA (1911), § 754.

Notes of Decisions (175)

N. R. S. 34.170, NV ST 34.170
Current through Ch. 2 of the 80th Regular Session (2019) of the Nevada Legislature subject to change from the reviser of the Legislative Bureau.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
II. Appeals from Judgments and Orders of District Courts

Nevada Rules of Appellate Procedure, Rule 3A

Rule 3A. Civil Actions: Standing to Appeal; Appealable Determinations

Currentness

(a) Standing to Appeal. A party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial.

(b) Appealable Determinations. An appeal may be taken from the following judgments and orders of a district court in a civil action:

(1) A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

(2) An order granting or denying a motion for a new trial.

(3) An order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction.

(4) An order appointing or refusing to appoint a receiver or vacating or refusing to vacate an order appointing a receiver.

(5) An order dissolving or refusing to dissolve an attachment.

(6) An order changing or refusing to change the place of trial only when a notice of appeal from the order is filed within 30 days.

(A) Such an order may only be reviewed upon a timely direct appeal from the order and may not be reviewed on appeal from the judgment in the action or proceeding or otherwise. On motion of any party, the court granting or refusing to grant a motion to change the place of trial of an action or proceeding shall enter an order staying the trial of the action or proceeding until the time to appeal from the order granting or refusing to grant the motion to change the place of trial has expired or, if an appeal has been taken, until the appeal has been resolved.

(B) Whenever an appeal is taken from such an order, the clerk of the district court shall forthwith certify and transmit to the clerk of the Supreme Court, as the record on appeal, the original papers on which the motion was heard in the district court and, if the appellant or respondent demands it, a transcript of any proceedings had in the district court. The district court shall require its court reporter to expedite the preparation of the transcript in preference to any other request for a transcript in a civil matter. When the appeal is docketed in the court, it stands submitted without further briefs or oral argument unless the court otherwise orders.

(7) An order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children.

(8) A special order entered after final judgment, excluding an order granting a motion to set aside a default judgment under NRCP 60(b)(1) when the motion was filed and served within 60 days after entry of the default judgment.

(9) An interlocutory judgment, order or decree in an action to redeem real or personal property from a mortgage or lien that determines the right to redeem and directs an accounting.

(10) An interlocutory judgment in an action for partition that determines the rights and interests of the respective parties and directs a partition, sale or division.

Credits

Amended effective July 18, 1983; July 1, 2009; January 20, 2015.

Editors' Notes

ADVISORY COMMITTEE NOTES

This rule was added by the committee. It restates N.R.C.P. 72, which differs materially from former F.R.C.P. 72.

The committee added paragraph (5) to subdivision (b) to include in the appellate rules the rule of law announced in Dzack v. Marshall, 80 Nev. 345, 393 P.2d 610 (1964), and reaffirmed in Holloway v. Barrett, 87 Nev. 385, 487 P.2d 501 (1971).

Notes of Decisions (202)

Rules App. Proc., Rule 3A, NV ST RAP Rule 3A
Current with amendments received through February 1, 2019.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
II. Appeals from Judgments and Orders of District Courts

Nevada Rules of Appellate Procedure, Rule 17

Rule 17. Division of Cases between the Supreme Court and the Court of Appeals

Currentness

(a) Cases Retained by the Supreme Court. The Supreme Court shall hear and decide the following:

(1) All death penalty cases;

(2) Cases involving ballot or election questions;

(3) Cases involving judicial discipline;

(4) Cases involving attorney admission, suspension, discipline, disability, reinstatement, and resignation;

(5) Cases involving the approval of prepaid legal service plans;

(6) Questions of law certified by a federal court;

(7) Disputes between branches of government or local governments;

(8) Administrative agency cases involving tax, water, or public utilities commission determinations;

(9) Cases originating in business court;

(10) Cases involving the termination of parental rights or NRS Chapter 432B;

(11) Matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law; and

(12) Matters raising as a principal issue a question of statewide public importance, or an issue upon which there is an inconsistency in the published decisions of the Court of Appeals or of the Supreme Court or a conflict between published decisions of the two courts.

(b) Cases Assigned to Court of Appeals. The Court of Appeals shall hear and decide only those matters assigned to it by the Supreme Court and those matters within its original jurisdiction. Except as provided in Rule 17(a), the Supreme Court may assign to the Court of Appeals any case filed in the Supreme Court. The following case categories are presumptively assigned to the Court of Appeals:

(1) Appeals from a judgment of conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere (Alford);

(2) Appeals from a judgment of conviction based on a jury verdict that

(A) do not involve a conviction for any offenses that are category A or B felonies; or

(B) challenge only the sentence imposed and/or the sufficiency of the evidence;

(3) Postconviction appeals that involve a challenge to a judgment of conviction or sentence for offenses that are not category A felonies;

(4) Postconviction appeals that involve a challenge to the computation of time served under a judgment of conviction, a motion to correct an illegal sentence, or a motion to modify a sentence;

(5) Appeals from a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case;

(6) Cases involving a contract dispute where the amount in controversy is less than $75,000;

(7) Appeals from postjudgment orders in civil cases;

(8) Cases involving statutory lien matters under NRS Chapter 108;

(9) Administrative agency cases except those involving tax, water, or public utilities commission determinations;

(10) Cases involving family law matters other than termination of parental rights or NRS Chapter 432B proceedings;

(11) Appeals challenging venue;

(12) Cases challenging the grant or denial of injunctive relief;

(13) Pretrial writ proceedings challenging discovery orders or orders resolving motions in limine;

(14) Cases involving trust and estate matters in which the corpus has a value of less than $5,430,000; and

(15) Cases arising from the foreclosure mediation program.

(c) Consideration of Workload. In assigning cases to the Court of Appeals, due regard will be given to the workload of each court.

(d) Routing Statements; Finality. A party who believes that a matter presumptively assigned to the Court of Appeals should

be retained by the Supreme Court may state the reasons as enumerated in (a) of this Rule in the routing statement of the briefs as provided in Rules 3C, 3E, and 28 or a writ petition as provided in Rule 21. A party may not file a motion or other pleading seeking reassignment of a case that the Supreme Court has assigned to the Court of Appeals.

(e) Transfer and Notice. Upon the transfer of a case to the Court of Appeals, the clerk shall issue a notice to the parties. With the exception of a petition for Supreme Court review under Rule 40B, any pleadings in a case after it has been transferred to the Court of Appeals shall be entitled "In the Court of Appeals of the State of Nevada."

Credits

Adopted effective January 20, 2015. Amended effective January 1, 2017; October 21, 2018.

Editors' Notes

COMMENTS

Nothing in Rule 17(b)(8) should be interpreted to deviate from current jurisprudence regarding challenges to discovery orders and orders resolving motions in limine.

Rules App. Proc., Rule 17, NV ST RAP Rule 17
Current with amendments received through February 1, 2019.

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Appellate Procedure (Refs & Annos)
III. Extraordinary Writs

Nevada Rules of Appellate Procedure, Rule 21

Rule 21. Writs of Mandamus and Prohibition and Other Extraordinary Writs

Currentness

(a) Mandamus or Prohibition: Petition for Writ; Service and Filing.

(1) *Filing and Service.* A party petitioning for a writ of mandamus or prohibition must file a petition with the clerk of the Supreme Court with proof of service on the respondent judge, corporation, commission, board or officer and on each real party in interest. A petition directed to a court shall also be accompanied by a notice of the filing of the petition, which shall be served on all parties to the proceeding in that court.

(2) *Caption.* The petition shall include in the caption: the name of each petitioner; the name of the appropriate judicial officer, public tribunal, corporation, commission, board or person to whom the writ is directed as the respondent; and the name of each real party in interest, if any.

(3) *Contents of Petition.* The petition must state:

(A) whether the matter falls in one of the categories of cases retained by the Supreme Court pursuant to NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b);

(B) the relief sought;

(C) the issues presented;

(D) the facts necessary to understand the issues presented by the petition; and

(E) the reasons why the writ should issue, including points and legal authorities.

(4) *Appendix.* The petitioner shall submit with the petition an appendix that complies with Rule 30. Rule 30(i), which prohibits pro se parties from filing an appendix, shall not apply to a petition for relief filed under this Rule and thus pro se writ petitions shall be accompanied by an appendix as required by this Rule. The appendix shall include a copy of any order or opinion, parts of the record before the respondent judge, corporation, commission, board or officer, or any other original document that may be essential to understand the matters set forth in the petition.

(5) *Verification.* A petition for an extraordinary writ shall be verified by the affidavit of the petitioner or, if the petitioner is unable to verify the petition or the facts stated therein are within the knowledge of the petitioner's attorney, by the affidavit of the attorney. The affidavit shall be filed with the petition.

(6) *Emergency Petitions.* A petition that requests the court to grant relief in less than 14 days shall also comply with the requirements of Rule 27(e).

(b) Denial; Order Directing Answer.

(1) The court may deny the petition without an answer. Otherwise, it may order the respondent or real party in interest to answer within a fixed time.

(2) Two or more respondents or real parties in interest may answer jointly.

(3) The court may invite an amicus curiae to address the petition.

(4) In extraordinary circumstances, the court may invite the trial court judge to address the petition.

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) shall be made by filing a petition with the clerk of the Supreme Court with proof of service on the parties named as respondents and any real party in interest. Proceedings on the application shall conform, so far as is practicable, to the procedure prescribed in Rule 21(a) and (b).

(d) Form of Papers; Number of Copies. All papers must conform to Rule 32(c)(2). An original and 2 copies shall be filed unless the court requires the filing of a different number by order in a particular case.

(e) Payment of Fees. The court shall not consider any application for an extraordinary writ until the petition has been filed; and the clerk shall receive no petition for filing until the $250 fee has been paid, unless the applicant is exempt from payment of fees, or the court or a justice or judge thereof orders waiver of the fee for good cause shown.

Credits

Amended effective July 1, 2009; January 20, 2015; October 1, 2015; January 1, 2017.

Editors' Notes

ADVISORY COMMITTEE NOTES

The federal rule is revised to substitute "Supreme Court" for "court of appeals" and "filing fee" for "docket fee."

Subdivision (b) is modified to substitute "may" for "shall" in the first sentence; and amending the second sentence to require the appellate court to enter an order fixing the time within which an answer, directed solely to the issue of arguable cause against issuance of an alternative or peremptory writ may be filed. The third sentence is modified to relieve the clerk of responsibility for service of the order, to broaden the scope of "respondent" to include tribunals and boards other than "judges," and to require service on all persons, other than parties, directly affected. The fifth sentence of the federal rule is deleted as unnecessary under Nevada practice. The sixth sentence is amended to require the court, rather than the clerk, by order, to advise the parties of the date on which briefs are to be filed, if briefs are required, and the date of oral argument. The final sentence of the federal rule, giving applications for writs preferences over ordinary civil cases is deleted, as an undue intrusion on the court's discretion.

Subdivision (d) is revised to require filing of the original and six copies of all papers with the court, to conform with existing rules.

Subdivision (e) is added to require filing of applications for writs and payment of filing fees before the court considers the application, unless the applicant is exempt or the court waives fees.

Notes of Decisions (37)

Rules App. Proc., Rule 21, NV ST RAP Rule 21
Current with amendments received through February 1, 2019.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
V. Disclosures and Discovery (Refs & Annos)

Rules of Civil Procedure, Rule 30

Rule 30. Depositions by Oral Examination

Currentness

(a) When a Deposition May Be Taken.

(1) *Without Leave.* A party may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2). The deponent's attendance may be compelled by subpoena under Rule 45.

(2) *With Leave.* A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants, not counting any deposition that is solely a custodian-of-records deposition;

(ii) the deponent has already been deposed in the case; or

(iii) the party seeks to take the deposition before the time specified in Rule 26(a), unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave Nevada and be unavailable for examination in the state after that time; or

(B) if the deponent is confined in prison.

(b) Notice of the Deposition; Other Formal Requirements.

(1) *Notice in General.* A party who wants to depose a person by oral questions must give not less than 14 days' written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing Documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition.

(3) *Method of Recording.*

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) *By Remote Means.* The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means. For the purpose of this rule and Rules 28(a), 37(a)(2), and 37(b), the deposition takes place where the deponent answers the questions.

(5) *Officer's Duties.*

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under Rule 28. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under Nevada law of evidence, except NRS 47.040-47.080 and NRS 50.155. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition--must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

(3) *Participating Through Written Questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Duration; Sanction; Motion to Terminate or Limit.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours of testimony. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction--including the reasonable expenses and attorney fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or, if the deposition is being conducted under an out-of-state subpoena, where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37(a)(5) applies to the award of expenses.

(e) Review by the Witness; Changes.

(1) *Review; Statement of Changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) *Certification and Delivery*. The officer must certify in writing that the witness was duly sworn and that the deposition accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and Tangible Things.*

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked--in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the Transcript or Recording.* Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(4) *Notice of Filing.* A party who files the deposition must promptly notify all other parties of the filing.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

(h) Expert Witness Fees.

(1) *In General.*

(A) A party desiring to depose any expert who is to be asked to express an opinion must pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by the party noticing the deposition.

(B) If any other attending party desires to question the witness, that party is responsible for the expert's fee for the actual time consumed in that party's examination.

(2) *Advance Request; Balance Due.*

(A) If requested by the expert before the date of the deposition, the party taking the deposition of an expert must tender the

expert's fee based on the anticipated length of that party's examination of the witness.

(B) If the deposition of the expert takes longer than anticipated, any party responsible for any additional fee must pay the balance of that expert's fee within 30 days of receipt of an invoice from the expert.

(3) *Preparation; Review of Transcript.* Any party identifying an expert whom the party expects to call at trial is responsible for any fee charged by the expert for preparing for the deposition and reviewing the deposition transcript.

(4) *Objections.*

(A) Motion; Contents; Notice. If a party deems that an expert's hourly or daily fee for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. This motion must be accompanied by an affidavit stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. Notice of this motion must be given to the expert.

(B) Court Determination of Expert Fee. If the court determines that the fee demanded by the expert is unreasonable, the court must set the fee of the expert for providing deposition testimony.

(C) Sanctions. The court may impose a sanction under Rule 37 against any party who does not prevail, and in favor of any party who does prevail, on a motion to set expert witness fee, provided the prevailing party has engaged in a reasonable and good faith attempt at an informal resolution of any issues presented by the motion.

Credits

Amended effective January 1, 2005; March 1, 2014; May 1, 2014; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

The amendments generally conform Rule 30 to FRCP 30, but retain NRCP 30(h), which governs fees associated with expert depositions. Consistent with the federal rule, Rule 30(a)(2)(A)(i) now limits the parties to 10 depositions per side absent stipulation or court order. The Nevada rule, however, does not count depositions of custodians of records toward the 10-deposition limit per side.

The "7 hours of testimony" specified in Rule 30(d)(1) means 7 hours on the record. The time taken for convenience breaks, recess for a meal, or an adjournment under Rule 30(d)(3) does not count as deposition time.

Discussion between the deponent and counsel during a convenience break is not privileged unless counsel called the break to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3). After a privilege-assessment break, counsel for the deponent must place on the record: (1) that a conference took place; (2) the subject of the conference; and (3) the result of the conference, i.e., whether to assert privilege or not. *Coyote Springs Inv., LLC v. Eighth Judicial Dist. Court*, 131 Nev. 140, 149, 347 P.3d 267, 273 (2015).

If a deposition is recorded by audio or audiovisual means and is later transcribed, any dispute regarding the accuracy of the transcription or of multiple competing transcriptions should be resolved by the court or discovery commissioner.

Notes of Decisions (18)

Civ. Proc. Rules, Rule 30, NV ST RCP Rule 30
Current with amendments received through February 1, 2019.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VI. Trials

Rules of Civil Procedure, Rule 49

Rule 49. Special Verdict; General Verdict and Questions

Currentness

(a) Special Verdict.

(1) *In General.* The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact. The court may do so by:

(A) submitting written questions susceptible of a categorical or other brief answer;

(B) submitting written forms of the special findings that might properly be made under the pleadings and evidence; or

(C) using any other method that the court considers appropriate.

(2) *Instructions.* The court must give the instructions and explanations necessary to enable the jury to make its findings on each submitted issue.

(3) *Issues Not Submitted.* A party waives the right to a jury trial on any issue of fact raised by the pleadings or evidence but not submitted to the jury unless, before the jury retires, the party demands its submission to the jury. If the party does not demand submission, the court may make a finding on the issue. If the court makes no finding, it is considered to have made a finding consistent with its judgment on the special verdict.

(b) General Verdict With Answers to Written Questions.

(1) *In General.* The court may submit to the jury forms for a general verdict, together with written questions on one or more issues of fact that the jury must decide. The court must give the instructions and explanations necessary to enable the jury to render a general verdict and answer the questions in writing, and must direct the jury to do both.

(2) *Verdict and Answers Consistent.* When the general verdict and the answers are consistent, the court must approve, for entry under Rule 58, an appropriate judgment on the verdict and answers.

(3) *Answers Inconsistent With the Verdict.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may:

(A) approve, for entry under Rule 58, an appropriate judgment according to the answers, notwithstanding the general verdict;

(B) direct the jury to further consider its answers and verdict; or

(C) order a new trial.

(4) *Answers Inconsistent With Each Other and the Verdict.* When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court may:

(A) direct the jury to further consider its answers and verdict; or

(B) order a new trial.

Credits

Amended effective January 1, 2005; March 1, 2019.

Notes of Decisions (17)

Rule 49. Special Verdict; General Verdict and Questions, NV ST RCP Rule 49

Civ. Proc. Rules, Rule 49, NV ST RCP Rule 49
Current with amendments received through February 1, 2019.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VII. Judgment

Rules of Civil Procedure, Rule 54

Rule 54. Judgments; Attorney Fees

Currentness

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings, except that if the prayer is for unspecified damages under Rule 8(a)(4), the court must determine the amount of the judgment. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings.

(d) Attorney Fees.

(1) *Reserved.*

(2) *Attorney Fees.*

(A) Claim to Be by Motion. A claim for attorney fees must be made by motion. The court may decide a postjudgment motion for attorney fees despite the existence of a pending appeal from the underlying final judgment.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 21 days after written notice of entry of judgment is served;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it;

(iv) disclose, if the court so orders, the nonprivileged financial terms of any agreement about fees for the services for which the claim is made; and

(v) be supported by:

(a) counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable;

(b) documentation concerning the amount of fees claimed; and

(c) points and authorities addressing the appropriate factors to be considered by the court in deciding the motion.

(C) Extensions of Time. The court may not extend the time for filing the motion after the time has expired.

(D) Exceptions. Rules 54(d)(2)(A) and (B) do not apply to claims for attorney fees as sanctions or when the applicable substantive law requires attorney fees to be proved at trial as an element of damages.

Credits

Amended effective January 1, 2005; August 7, 2008; May 1, 2009; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

Subsection (b). From 2004 to 2019, NRCP 54(b) departed from FRCP 54(b), only permitting certification of a judgment to allow an interlocutory appeal if it eliminated one or more parties, not one or more claims. The 2019 amendments add the reference to claims back into the rule, restoring the district court's authority to direct entry of final judgment when one or more, but fewer than all, claims are resolved. The court has discretion in deciding whether to grant Rule 54(b) certification; given the strong policy against piecemeal review, an order granting Rule 54(b) certification should detail the facts and reasoning that make interlocutory review appropriate. An appellate court may review whether a judgment was properly certified under this rule.

Subsection (d). Rule 54(d)(2)(B)(iv) is new. While drawn from the federal rule, it limits the required disclosure about the agreement for services to nonprivileged financial terms.

Notes of Decisions (117)

Civ. Proc. Rules, Rule 54, NV ST RCP Rule 54
Current with amendments received through February 1, 2019.

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VII. Judgment

Rules of Civil Procedure, Rule 59

Rule 59. New Trials; Amendment of Judgments

Currentness

(a) In General.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues--and to any party--for any of the following causes or grounds materially affecting the substantial rights of the moving party:

(A) irregularity in the proceedings of the court, jury, master, or adverse party or in any order of the court or master, or any abuse of discretion by which either party was prevented from having a fair trial;

(B) misconduct of the jury or prevailing party;

(C) accident or surprise that ordinary prudence could not have guarded against;

(D) newly discovered evidence material for the party making the motion that the party could not, with reasonable diligence, have discovered and produced at the trial;

(E) manifest disregard by the jury of the instructions of the court;

(F) excessive damages appearing to have been given under the influence of passion or prejudice; or

(G) error in law occurring at the trial and objected to by the party making the motion.

(2) *Further Action After a Nonjury Trial.* On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after service of written notice of entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after service of written notice of entry of judgment, the court, on its own, may issue an order to show cause why a new trial should not be granted for any reason that would justify granting one on a party's motion. After giving the parties notice and the opportunity to be heard, the court may grant a party's timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after service of written notice of entry of judgment.

(f) No Extensions of Time. The 28-day time periods specified in this rule cannot be extended under Rule 6(b).

Credits

Amended effective March 16, 1964; January 1, 2005; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

Subsection (a). Rule 59(a) is restyled but retains the Nevada-specific provisions respecting bases for granting a new trial.

Subsection (b), (d), (e). The amendments adopt the federal 28- day deadlines in Rules 59(b) and (e) and incorporate the provisions respecting court-initiated new trials from FRCP 59(d) into NRCP 59(d).

Notes of Decisions (182)

Civ. Proc. Rules, Rule 59, NV ST RCP Rule 59
Current with amendments received through February 1, 2019.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
VII. Judgment

Rules of Civil Procedure, Rule 60

Rule 60. Relief from a Judgment or Order

Currentness

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later. The time for filing the motion cannot be extended under Rule 6(b).

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) upon motion filed within 6 months after written notice of entry of a default judgment is served, set aside the default judgment against a defendant who was not personally served with a summons and complaint and who has not appeared in the action, admitted service, signed a waiver of service, or otherwise waived service; or

(3) set aside a judgment for fraud upon the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

Credits

Amended effective January 1, 2005; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

The amendments generally conform Rule 60 to FRCP 60, including incorporating FRCP 60(b)(6) as Rule 60(b)(6). The Rule 60(c) time limit for filing a Rule 60(b)(l)-(3) motion, however, remains at 6 months consistent with the former Nevada rule. Rule 60(d)(2) preserves the first sentence of former NRCP 60(c) respecting default judgments. The amendments eliminate the remaining portion of former NRCP 60(c) and former NRCP 60(d) as superfluous.

Notes of Decisions (323)

Civ. Proc. Rules, Rule 60, NV ST RCP Rule 60
Current with amendments received through February 1, 2019.