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.

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

DATED this 20th day of March, 2020.

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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 20th day of March, 2020, service of the foregoing **NRAP 26.1 DISCLOSURE** was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

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VIA HAND DELIVERY: *Respondent*

HONORABLE LINDA MARIE BELL
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PETITION FOR EXTRAORDINARY WRIT RELIEF

Pursuant to NRS 34.160, NRS 34.330, and Nevada Rule of Appellate Procedure ("NRAP") 21, Petitioner Harvest Management Sub LLC ("Harvest") petitions this Court to issue:

(1) An extraordinary writ of prohibition preventing the Eighth Judicial District Court for the State of Nevada, in and for Clark County, the Honorable Linda Marie Bell ("District Court"), from commencing a partial re-trial on the sole issue of vicarious liability on June 22, 2020; and

(2) An extraordinary writ of mandamus directing the District Court to enter judgment in favor of Harvest.

Harvest seeks this relief because:

- The plaintiff in the underlying action, Real Party in Interest Aaron M. Morgan ("Mr. Morgan"), sued two defendants — an employer (Harvest) and an employee (Real Party in Interest David E. Lujan ("Mr. Lujan")) — for injuries suffered in an automobile accident.
- Mr. Morgan alleged claims of negligence and negligence *per se* against Mr. Lujan and negligent entrustment against Harvest.
- At the trial in April 2018, the jury returned a verdict solely against Mr. Lujan because Mr. Morgan ***chose not to pursue his claim against***

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Harvest, offered no evidence to prove the claim, and did not submit the claim to the jury for determination.

- After the trial, Mr. Morgan moved for entry of judgment against Harvest, pursuant to NRCP 49(a), on an unpled claim of vicarious liability.

- The District Court denied entry of judgment against Harvest on any claim for relief, finding that Mr. Morgan failed to submit any claim against Harvest to the jury for determination.

- Harvest then moved the District Court for entry of judgment in its favor, which the District Court also denied, finding that Harvest had failed to contest or defend an ***unpled*** claim for vicarious liability.

- The District Court determined that even though Harvest's Answer to the Complaint denied that Mr. Lujan was acting in the course and scope of his employment at the time of the accident, the District Court had ***assumed*** that Harvest was not contesting vicarious liability at trial.

- The District Court also acknowledged that Mr. Morgan failed to prove the unpled claim of vicarious liability at trial (based on the undisputed evidence that Mr. Lujan was on his lunch break at the time of the accident); however, the District Court indicated, without precedent, that it

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believed that Nevada would shift the burden of proof on such a claim to the defendant by employing a rebuttable presumption that any employee involved in an accident while driving the employer's vehicle was acting within the course and scope of his or her employment at the time of the accident.

- The District Court determined that the only viable resolution was to order a partial re-trial, pursuant to NRCP 42(b), on the sole issue of vicarious liability — essentially, the District Court ordered a "do-over" on a claim it found to be at issue in the initial trial but never submitted to the jury for determination.

The District Court's refusal to enter judgment in favor of Harvest and its decision to order a new trial based on NRCP 42(b) are manifestly incorrect, and, as fully explained herein, justify the Court's issuance of a writ of prohibition and a writ of mandamus.

DATED this 20th day of March, 2020.

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

Harvest believes that the issues raised in this Petition are presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(a)(11). Specifically, this Petition presents the following issues of first impression involving common law and the Nevada Rules of Civil Procedure:

(1) Whether the District Court can order a partial re-trial of a claim pursuant to NRCP 42(b), after the plaintiff failed to prove the claim or present it to the jury for determination in the first trial?

(2) Whether the plaintiff bears the burden of proof on a claim for vicarious liability?

(3) Whether an employee's transit to and from lunch falls within the scope of the "going and coming" rule?

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 for Harvest and was driving one of Harvest's shuttle buses at the time of the accident. However, the accident occurred while Mr. Lujan was on his lunch break.

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Mr. Morgan alleged claims of negligence and negligence *per se* against Mr. Lujan and a claim of negligent entrustment against Harvest. The case was tried to a jury in April 2018. During the trial, Mr. Morgan did not pursue or prove his claim against Harvest and even failed to present it to the jury for determination. Specifically:

- He failed to inform the jury of his claim against Harvest in his opening statement;
- He failed to offer any evidence in support of 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 his claim against Harvest in the Special Verdict form submitted to the jury.

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

Several months after the verdict was entered, Mr. Morgan filed a Motion for Entry of Judgment against Harvest on an ***unpled*** claim for vicarious liability (not his pled claim for negligent entrustment). Mr. Morgan asserted that the

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jury's failure to include Harvest in its verdict was merely a "clerical error." However, the District Court determined that there was no evidence that any claim against Harvest had been presented to the jury for determination; therefore, no judgment could be entered against Harvest.

Harvest then filed its own Motion for Entry of Judgment as to this unresolved claim. On January 3, 2020, the District Court denied Harvest's motion and ordered a partial re-trial, pursuant to NRCP 42(b), on the sole issue of Harvest's unpled claim of vicarious liability. The District Court determined that a partial re-trial was necessary because it could not enter judgment for either party as a matter of law.

The District Court's analysis is flawed and based on the following inaccurate assumptions and conclusions:

1. That Mr. Morgan pled a claim for vicarious liability (despite the fact that the Complaint only alleges a claim for negligent entrustment);

2. That a claim of vicarious liability was tried by consent (despite the fact that Harvest was never given any notice that this claim was being tried to the jury);

3. That it was ***assumed*** that Harvest was not contesting the issue of vicarious liability (despite the fact that Harvest's Answer to the Complaint

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denies all of the substantive allegations stated against it, and the District Court expressly held that Harvest had denied the allegation that Mr. Lujan was acting within the course and scope of his employment at the time of the accident);

4. That Harvest failed to present any evidence or testimony at trial that would demonstrate that it was contesting vicarious liability (despite the fact that Mr. Morgan, *not Harvest*, bears the burden of proof on this claim and he failed to satisfy his burden at the April 2018 trial);

5. That there is a rebuttable presumption that an employee driving a company vehicle at the time of an accident is acting within the course and scope of his employment (despite the fact that Nevada has never adopted such a rebuttable presumption);

6. That this presumption was not rebutted by the ***undisputed*** evidence demonstrating that Mr. Lujan was on his lunch break at the time of the accident (despite the fact that this Court has adopted the "going and coming rule" and Mr. Morgan offered no evidence to prove that Mr. Lujan was rendering services to benefit Harvest at the time of the accident);

7. That Mr. Morgan is entitled to a partial re-trial on his unpled claim of vicarious liability (despite the fact that the District Court expressly held that Mr. Morgan had failed to prove his claim or to present it to the jury for

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determination at the April 2018 trial, through no error of procedure, law, or fact); and

8. That Mr. Morgan is entitled to a partial re-trial pursuant to NRCP 42(b) (despite the fact that NRCP 42(b) is meant to apply ***before*** the commencement of a trial and is not a mechanism for granting a re-trial of claims a party has already failed to prove through no fault but his own).

Because the District Court's denial of Harvest's Motion for Entry of Judgment and order for a partial re-trial pursuant to NRCP 42(b) constitute manifest errors of law, Harvest respectfully requests that this Court issue a writ of prohibition: (i) vacating the January 3, 2020 Decision and Order granting a partial re-trial; and (ii) preventing the District Court from commencing the partial re-trial on June 22, 2020, on the issue of vicarious liability. Further, Harvest respectfully requests that this Court issue a writ of mandamus directing the District Court to enter judgment in favor of Harvest. The issuance of these writs is the only outcome consistent with due process and Nevada law.

Mr. Morgan's claim against Harvest was already the subject of a jury trial, and Mr. Morgan failed to either pursue or prove his claim. He is not entitled to a second trial, as there was no error of procedure, law, or fact committed by the Court, Harvest, or the jury which impaired Mr. Morgan's

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ability to prove his claim or present his claim to the jury for determination. Rather, he voluntarily chose to abandon the claim against Harvest.

Under these circumstances, it would be a manifest error of law to allow the partial re-trial to proceed. 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 and writs of prohibition. Nev. Const., art. 6, § 4; NRS 34.160; NRS 34.330. 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). Similarly, where there is no "plain, speedy[,] and adequate remedy [available] in the ordinary course of law," a writ of prohibition is proper to "arrest" the proceedings of a tribunal or person exercising judicial functions "when such proceedings are without or in excess of the jurisdiction" of such tribunal or person. NRS 34.320; NRS 34.330; *Daane v. Eighth Jud.*

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Dist. Ct. ex rel. Cnty. of Clark, 127 Nev. 654, 655-56, 261 P.3d 1086, 1087 (2011). Harvest has no other plain, speedy, and adequate remedy for: (1) preventing the District Court from proceeding with a partial re-trial on the claim of vicarious liability on June 22, 2020; and (2) obtaining entry of a judgment that it 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 or a writ of prohibition. *Leibowitz*, 119 Nev. at 529, 78 P.3d at 519; *Daane*, 127 Nev. at 655, 261 P.3d at 1087. Writ petitions have typically been entertained: (1) "where considerations of sound judicial economy and administration militate[] in favor of granting such petitions," *Smith v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997); (2) "where the circumstances reveal urgency and strong necessity," *Barngrover v. Fourth Jud. Dist. Ct. ex rel. Cnty. of Elko*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999); and/or (3) where "an important issue of law needs clarification," *Chur v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 136 Nev. Adv. Op. 7, __ P.3d ___, No. 78301, 2020 WL 959984, at *2 (Feb. 27, 2020).

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

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"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 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. The January 3, 2020 Decision and Order denying the Motion for Entry of Judgment and ordering a partial re-trial pursuant to NRCP 42(b), (14P.A.44[1]), is not immediately appealable. NRAP 3A(b) (identifying instances in which "[a]n appeal may be taken"). Moreover, because Mr. Morgan's claim against Harvest remains technically unresolved, there is no final judgment from which to appeal.

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[1] For citations to the 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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Second, Harvest has a direct and substantial interest in filing this Petition and seeking extraordinary writ relief. Based upon the District Court's prior ruling that Mr. Morgan failed to present his claim against Harvest to the jury for determination, (11P.A.23, at 2010:8-21; 11P.A.24), as well as the District Court's recent acknowledgement that Mr. Morgan failed to prove that Mr. Lujan was acting within the course and scope of his employment at the time of the accident, (14P.A.44, at 2613:27-28), judgment should have been entered in Harvest's favor. Instead, the District Court refuses to hold Mr. Morgan accountable for the choices he made at trial and continues to grasp at straws to find a procedural mechanism to permit him a re-trial.

Originally, the District Court planned to reconvene the jury from the April 2018 trial — two years after it had been dismissed — to decide Mr. Morgan's unpled claim of vicarious liability. (12P.A.37, at 2318:19-21.) Now, pursuant to NRCP 42(b), the District Court has scheduled a partial re-trial on vicarious liability. Harvest should not be forced to endure the costs and expense of a re-trial of a claim that Mr. Morgan voluntarily abandoned and/or failed to prove through no fault but his own.

Third, important issues of law need clarification with regard to vicarious liability: (1) which party bears the burden of proof on the issue of the course

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and scope of employment; and (2) whether the "going and coming" rule applies to an employee's transit to and from a lunch break. The majority of courts which have addressed these issues hold that Mr. Morgan should bear the burden of proof, and Harvest should be entitled to judgment as a matter of law based on the undisputed evidence that Mr. Lujan was on his lunch break at the time of the accident.

Finally, judicial efficiency, judicial economy, and sound judicial administration militate in favor of writ review in this action. *Scarbo v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009). Mr. Morgan has already received a jury trial of his claim for relief against Harvest. By no fault of the District Court, Harvest, or the jury, he failed to prove his claim or even present it to the jury for determination. As a matter of law, he is not entitled to another bite at the apple. The only proper course of action is to enter judgment in favor of Harvest on any claim that Mr. Morgan alleged, or could have alleged, in this action.

If the Court denies consideration of this Petition, Harvest will be left without any remedy until after the procedurally improper re-trial of Mr. Morgan's claim against Harvest — when a final judgment will, at last, be entered in this action. To prevent this manifest error and to avoid incurring

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unnecessary costs and fees associated with a re-trial, Harvest respectfully requests that this Court issue the requested writs of mandamus and prohibition. Issuance of the writs will not prejudice Mr. Morgan, as he can appeal the entry of judgment in favor of Harvest (a final judgment).

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

IV. RELIEF REQUESTED

Harvest seeks a writ of prohibition: (i) vacating the January 3, 2020 Decision and Order; and (ii) preventing the District Court from proceeding with a partial re-trial on Mr. Morgan's unpled claim of vicarious liability.

Harvest also seeks a writ of mandamus directing the District Court to enter judgment in favor of Harvest on any and all claims alleged, or which could have been alleged, in Mr. Morgan's Complaint.

V. TIMING OF THIS PETITION

While there is no specific time limit for the filing of a petition for extraordinary writ relief, such relief should be timely sought. *Widdis v. Second Jud. Dist. Ct. ex rel. Cnty. of Washoe*, 114 Nev. 1224, 1227-28, 968 P.2d 1165, 1167 (1998). The Decision and Order denying Harvest's Motion for Entry of

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Judgment was entered on January 3, 2020. (14P.A.44.) The District Court then scheduled a status check on January 14, 2020, to discuss the Decision and Order and set the matter for trial. (*Id.* at 2617:21-22.) The new trial is scheduled to commence on June 22, 2020. (14P.A.45.) Harvest filed this Petition on March 20, 2020 — over three months before the re-trial is to commence. Thus, this Petition is timely.

VI. ISSUES PRESENTED FOR REVIEW

This Petition presents the following issues:

1. Should the District Court 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; (ii) the complete lack of evidence offered by Mr. Morgan to prove a claim against Harvest; and (iii) the District Court's recent acknowledgement that Mr. Morgan failed to prove his (unpled) claim for vicarious liability?

2. Can the District Court order a partial re-trial of a claim pursuant to NRCP 42(b)?

3. Is a new trial warranted when no error of procedure, fact, or law by the District Court, the adverse party, or the jury has been identified as a basis for relief?

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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. (11P.A.20, at 1869:8-9.) 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 1869:9-13.) Mr. Morgan alleged that he injured his head, spine, wrists, neck, and back as a result of the accident. (*Id.* at 1869:14-17.)

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

On May 20, 2015, Mr. Morgan filed a Complaint against Mr. Lujan and Harvest. (1P.A.1.) He alleged claims for negligence and negligence *per se* against Mr. Lujan. (*Id.* at 0004:1-18.) The sole claim alleged against Harvest was captioned "Vicarious Liability/Respondeat Superior"; however, the allegations set forth in the Complaint clearly recite the elements of a claim for ***negligent entrustment*** — not vicarious liability. (*Id.* at 0004:19-0005:12.)

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Specifically, the Complaint alleges that:

- Harvest ***entrusted*** the vehicle to Mr. Lujan's control, (*id.* at 0004, at ¶ 18);
- Mr. Lujan was "***incompetent, inexperienced, or reckless*** in the operation of the Vehicle [*sic*]," (*id.* at 0005, 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 0005, 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 0005, at ¶ 21 (emphasis added)); and
- "[A]s a direct and proximate cause of the ***negligent entrustment***," Mr. Morgan had been damaged, (*id.* at 0005, at ¶ 22 (emphasis added)).

Mr. Morgan's claim for relief against Harvest does *not* allege that Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (*Id.* at 0004:19-0005:12.) In fact, the *only* reference to "course and scope of employment" in the entire Complaint is in a very

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general, conclusory, nonsensical paragraph which also refers to 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 0003, at ¶ 9 (emphasis added).)

Despite his failure to allege a claim for vicarious liability, Mr. Morgan contended, ***after the trial***, that this was the claim he tried to the jury. (11P.A.20, at 1869:24-25.)

C. Harvest Denied the Claim of Negligent Entrustment (and Any Purported Claim of 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. (1P.A.2, at 0009:7-8.) However, Harvest ***denied*** the remaining allegations of Mr. Morgan's claim for negligent entrustment. (*Id*. at 0009:9-10.) Moreover, to the extent that the general, conclusory, and nonsensical paragraph in the Complaint, with its brief and generic reference to "course and scope of employment," could, in and of itself,

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be considered notice of a claim for vicarious liability, Harvest also ***denied*** this allegation of the Complaint. (*Id.* at 0008:8-9.)

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

Mr. Morgan conducted no discovery relating to vicarious liability. Rather, the discovery propounded by Mr. Morgan focused on his claim for negligent entrustment. Specifically, on April 14, 2016, Mr. Morgan propounded interrogatories to Harvest which sought information about: (1) the background checks that Harvest performed prior to hiring Mr. Lujan, (1P.A.3, at 0019:25-0020:2); and (2) 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 0020:15-19.) ***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.***

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***

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> ***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.

(1P.A.4, at 0025:2-19 (emphasis added).) Further, in response to the interrogatory relating to disciplinary actions taken against Mr. Lujan, Harvest's response was: "***None***." (*Id.* at 0026:17-24 (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 an NRCP 30(b)(6) witness.

E. <u>The Pretrial Memorandum Provided No Notice of a Claim for Vicarious Liability.</u>

On February 27, 2017, the parties filed a Joint Pretrial Memorandum pursuant to Eighth Judicial District Court Rule 2.67. (1P.A.5.) In the section of the Memorandum concerning a list of all the plaintiff's claims for relief, Mr.

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Morgan merely stated: "Plaintiff alleges Defendants are liable in ***negligence***." (*Id.* at 0032 (emphasis added).) No mention was made of a claim for vicarious liability.

Further, in the section of the Memorandum concerning all contested issues of law and the parties' positions on these issues, Mr. Morgan merely stated that the "issues raised in Plaintiff's Complaint" and the "issues of law raised by ***Defendant*** at trial" were contested. (*Id.* at 0041 (emphasis added).) In addition to the failure to reference more than one defendant, no mention was made of vicarious liability or the course and scope of Mr. Lujan's employment.

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

This case was first tried to a jury in November 2017. (1P.A.6; 2P.A.7; 3P.A.8; 4P.A.9.) During this trial, Mr. Morgan never referenced Harvest, his claim for negligent entrustment, or even vicarious liability during voir dire or in his opening statement. (1P.A.6, at 0088:20-0164:20, 0167:13-0233:25; 2P.A.7, at 0235:1-0360:21; 3P.A.8, at 0384:4-0407:2.) In fact, *Harvest wasn't even mentioned until the third day of trial*, when 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 —

(4P.A.9, at 0612:23-0613:8.) 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 also provided the only evidence offered at the trial which was relevant to the claim of negligent entrustment:

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 0615:16-24 (emphasis added).)

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> 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 0616:8-10 (emphasis added).) Based on these facts, Mr. Morgan could not possibly prove that Harvest negligently entrusted its shuttle bus to Mr. Lujan.

To the extent that there was a valid claim for vicarious liability asserted in this action (which there was not), Mr. Lujan's testimony also provided undisputed evidence which defeated this claim. Specifically, during the jury's examination of Mr. Lujan, ***a juror*** asked:

> 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 0636:22-0637:2 (emphasis added).) In response to this testimony, Mr. Morgan failed to offer any evidence demonstrating that Mr. Lujan was providing a service to Harvest and still acting within the course and scope of his employment during his lunch break. In fact, Mr. Morgan chose not to follow-up on the juror's question at all, demonstrating that Mr. Morgan voluntarily

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abandoned any purported claim for vicarious liability that he may have had against Harvest.

The first trial ultimately ended prematurely as a result of a mistrial, when defense counsel inquired about a pending DUI charge against Mr. Morgan. (*Id.* at 0654:15-0656:14, 0670:12-18.)

G. 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 was held from April 2, 2018 to April 9, 2018. (4P.A.10; 5P.A.11; 6P.A.12; 7P.A.13; 8P.A.14; 9P.A.15; 10P.A.16.) 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 in the action 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,***

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> ***Erica***[,][2] is right back here. Let's see, I think that's it for me.

(4P.A.10, at 0690:15-18 (emphasis added).) Mr. Morgan did not object or inform the prospective jurors that the case also involved Harvest, that Erica was there on behalf of Harvest, that there was a corporate defendant, or even that the case involved Mr. Lujan's "employer." (*Id.* at 0690:19-21.)

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

> [THE COURT:] 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 0698:7-14 (emphasis added).) Again, Mr. Morgan did not object to the District Court's failure to identify Harvest as a defendant. (*Id.* at 0698:15-22.)

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[2] 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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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, director, employee, or other representative of Harvest — not even the representative, Erica Janssen, who was attending trial. (*Id.* at 0698:15-0699:3.)

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

During voir dire, Mr. Morgan failed to reference Harvest, a corporate defendant, corporate liability, negligent entrustment, or vicarious liability. (*Id.* at 0706:2-0723:25; 5P.A.11, at 0725:1-0767:22; 0771:6-0862:21, 0865:7-0942:12; 6P.A.12, at 0953:24-1011:24, 1017:16-1060:21.) 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. (6P.A.12, at 1076:7-1095:17.) 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.

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> Collision takes place. He doesn't stop at the stop sign. He doesn't look left. He doesn't look right.

(*Id*. at 1076:15-25 (emphasis added).) Mr. Morgan's opening statement made no reference to any evidence to be presented during the trial which he contended 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 trial, Mr. Morgan called Erica Janssen, the Rule 30(b)(6) representative for Harvest, as a witness during his case in chief. (8P.A.14, at 1424:13-23.) Ms. Janssen confirmed that it was Harvest's understanding that Mr. Lujan had been at a park in a shuttlebus having lunch, and 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 1428:15-20 (emphasis added).)

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Mr. Morgan never asked 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 Mr. Lujan's 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;[3] 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. (*Id.* at 1424:21-1437:17; 9P.A.15, at 1444:2-1446:1.)

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:
> "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, [*sic*] LLC, and

/ / /

[3] 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. (10P.A.16, at 1773:17 ("Aren't we lucky that there weren't other people on the bus?").)

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> state in what capacity your [*sic*] are authorized to respond on behalf of said Defendant.["]
>
> "A: Erica Janssen, Holiday Retirement, Risk Management."
>
> A: Yes.

(9P.A.15, at 1451:18-25.) This was the only reference, during the entire trial, to Harvest being a defendant in the action.

On the fifth day of trial, Mr. Morgan rested his case. (*Id.* at 1495:6-7.) Mr. Morgan's case had focused almost exclusively on proving the extent of 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 1635:7-1643:12.) As referenced in Section VII(F), *supra*, this testimony included the following facts:

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

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(*Id.* at 1635:8-17, 1635:25-1636:10, 1636:19-24, 1637:8-10.) 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 pled (or unpled) claims against 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. (10P.A.17.) In fact, Mr. Morgan never even proposed that such instructions be given to the jury. (9P.A.15, at 1541:1-1546:25.) Again, this is entirely consistent with Mr. Morgan's trial strategy — he all but ignored Harvest during the trial.

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:

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> 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.

(10P.A.16, at 1654:20-1655:1.)

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.
> 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.

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(*Id.* at 1765:11-23 (emphasis added).) The Special Verdict form approved by Mr. Morgan's counsel — after his edits were accepted and incorporated by the Court — makes no mention of Harvest (which is, again, entirely consistent with Mr. Morgan's trial strategy):

- The Special Verdict form asked the jury to determine only whether the "***Defendant***" was "***negligent***," (10P.A.18, at 1858:17 (emphasis added));
- The Special Verdict form did not ask the jury to consider whether Harvest was liable for anything, (*id.* at 1858-1859); 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 1859:1-4 (emphasis added)).

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

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

Finally, in closing arguments, Mr. Morgan never mentioned Harvest, his claim for negligent entrustment, or even an unpled claim for vicarious liability. (10P.A.16, at 1770:5-1785:19.) Further — and perhaps the clearest example of Mr. Morgan's decision to abandon his claim against Harvest — Mr. Morgan's

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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. You didn't hear from any police officer that came in to say that it was [Mr. Morgan's] fault. The only people in this case, the only people in this case that are blaming [Mr. Morgan] are the corporate folks. They're the ones that are blaming [Mr. Morgan]. So was Plaintiff negligent? That's [Mr. Morgan]. No. And then from there you fill out this other section. What percentage of fault do you assign each party? ***Defendant***, 100 percent, Plaintiff, 0 percent.

(*Id.* at 1773:20-1774:6 (emphasis added).) 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 1806:13-1810:10.)

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7. The Verdict.

On April 9, 2018, the jury rendered a verdict against the ***Defendant*** (Mr. Lujan) on a claim for ***negligence***, and awarded Mr. Morgan $2,980,980.00 in past and future medical expenses and past and future pain and suffering. (10P.A.18, at 1859:6-15.)

H. 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. (12P.A.30, at 2222:10.) Thus, on July 2, 2018, Chief Judge Bell reassigned this action to the Honorable Elizabeth Gonzalez for resolution of any and all post-trial matters. (10P.A.19, at 1863.)

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

Over two months after the verdict was rendered, Mr. Morgan filed a Motion for Entry of Judgment seeking to apply the jury's verdict against Mr. Lujan to Harvest. (11P.A.20.) Because the jury's verdict lacked an apportionment of liability between Mr. Lujan's negligence and Harvest's alleged negligent entrustment, as would be required pursuant to NRS 41.141,

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Mr. Morgan asserted, for the first time, that his claim against Harvest was actually for vicarious liability. (*Id.* at 1869:24-25.) Mr. Morgan argued that the verdict form contained a simple clerical error in its caption that could be remedied by NRCP 49(a); that Chief Judge Bell caused this error when she provided the sample verdict 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 1868:24-1869:6, 1872:7-11.)

In its Opposition to the Motion for Entry of Judgment,[4] Harvest demonstrated that its omission from the Special Verdict form was not a simple clerical error — Harvest had been, in fact, omitted from the entire trial. (11P.A.21, at 1924:13-1942:11.) Moreover, Harvest demonstrated that NRCP 49(a) was not an available remedy, as it can only be used to 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.* at 1942:12-1945:2.) Finally, Harvest established that: (1) Mr. Morgan pled a claim for negligent entrustment, not vicarious liability; (2) it had denied the allegations of

[4] 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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Mr. Morgan's claim for relief in its Answer; (3) Mr. Morgan, not Harvest, bore the burden of proof on his claim for relief; and (4) the "going and coming rule" precluded vicarious liability based on the undisputed evidence establishing that Mr. Lujan was on his lunch break at the time of the accident. (*Id.* at 1927:9-21, 1937:6-1940:14.)

In his Reply to the Motion, Mr. Morgan asserted that: (1) his claim for vicarious liability had been tried to the jury by implied consent; and (2) the issue of Harvest's vicarious liability was undisputed at trial because Harvest did not dispute that Mr. Lujan was an employee or that he was driving Harvest's shuttle bus. (11P.A.22, at 1959:8-1961:2.) Of note, Mr. Morgan ***did not***:

- Demonstrate that Harvest had notice of the alleged claim for vicarious liability and consented, expressly or impliedly, to having the claim tried to the jury;
- Identify any evidence admitted at trial that proved that Mr. Lujan was acting within the course and scope of his employment at the time of the accident;
- Demonstrate that Harvest admitted that Mr. Lujan was acting within the course and scope of his employment at the time of the accident;

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- Assert that Nevada should adopt a rebuttable presumption of vicarious liability whenever an employee is driving an employer's vehicle at the time of an accident; or
- Request a new trial due to an error by Harvest, the District Court, or the jury.

On November 28, 2018, the District Court (Judge Gonzalez) entered an Order denying Mr. Morgan's Motion for Entry of Judgment. (11P.A.24.) 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***.

(11P.A.23, at 2010:13-21 (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 2010:24-2011:1.) The District Court confirmed that the judgment pertained solely to Mr. Lujan and that

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Harvest should file a separate motion seeking relief. (*Id.* at 2011:2-6.) Judge Gonzalez stated that she wanted to "go[] one step at a time." (*Id.* at 2011:8.)

J. Mr. Morgan's Appeal.

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. (11P.A.25; *see also* 11P.A.24; 11P.A.27.) On January 23, 2019, Harvest filed a Motion to Dismiss Mr. Morgan's premature appeal from the non-final judgments. (12P.A.29.) 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. (12P.A.34.) Therefore, after the parties unsuccessfully completed the settlement program, Harvest filed a Renewed Motion to Dismiss Appeal as Premature. (14P.A.40.) Accordingly, on September 17, 2019, this Court entered an Order Dismissing Appeal, finding that no final judgment had been entered by the District Court. (14P.A.41.)

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K. Harvest's Motion for Entry of Judgment.

On December 21, 2018, just a few days after Mr. Morgan filed his premature appeal, Harvest filed a Motion for Entry of Judgment[5] in its favor on the sole remaining, unresolved claim in this case. (11P.A.26.) Harvest asserted that Mr. Morgan voluntarily abandoned his claim against Harvest, and, as Judge Gonzalez had already determined, chose not to present his claim to the jury for determination. (*Id.* at 2040:20-2041:25.) Thus, 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 2041:17-25.) Alternatively, Harvest asserted that if Mr. Morgan had not *intentionally* abandoned his claim, he still failed to prove either his pled claim of negligent entrustment or his unpled claim for vicarious liability. (*Id.* at 2042:1-2046:6.)

In response, Mr. Morgan asserted that the District Court lacked jurisdiction to decide the Motion for Entry of Judgment because of his pending appeal. (11P.A.28, at 2071:3-2073:10.) Mr. Morgan also re-raised the same arguments he had asserted to support his own Motion for Entry of Judgment — ***which had already been rejected by the District Court*** (Judge Gonzalez);

[5] 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.

specifically, that: (1) the claim for vicarious liability was tried by consent; and (2) there was substantial evidence to support a judgment against Harvest because he had proven that Mr. Lujan was responsible for the accident and that Mr. Lujan was Harvest's employee. (*Id.* at 2075:21-2079:10.) Finally, Mr. Morgan, unhappy with Judge Gonzalez's decision on his Motion for Entry of Judgment, filed a wholly ungrounded counter-motion to transfer the case back to Chief Judge Bell for determination of these post-trial issues. (*Id.* at 2073:11-2074:17.) Mr. Morgan asserted that, as the trial judge, Chief Judge Bell was allegedly in a better position to determine the "meaning (or lack thereof) behind the mistaken special verdict form." (*Id.* at 2074:14-17.)

Of note, Mr. Morgan's Opposition to Harvest's Motion did not:

- Demonstrate that Harvest had notice of the alleged claim for vicarious liability and consented, expressly or impliedly, to having the claim tried to the jury;
- Identify any evidence admitted at trial that proved that Mr. Lujan was acting within the course and scope of his employment at the time of the accident;
- Demonstrate that Harvest admitted that Mr. Lujan was acting within the course and scope of his employment at the time of the accident;

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- Assert that Nevada should adopt a rebuttable presumption of vicarious liability whenever an employee is driving an employer's car at the time of an accident; or
- Request a new trial due to an error by Harvest, the District Court, or the jury.

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. (12P.A.30.) Harvest demonstrated that the District Court did not lack jurisdiction to decide the Motion for Entry of Judgment, as no final judgment has been entered in the action. (*Id.* at 2218:21-2220:10.) 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 2223:5-13.) Harvest further demonstrated that a claim for vicarious liability was not tried by consent — either express or implied. (*Id.* at 2223:14-2224:18.) Moreover, Harvest established, in pain-staking detail, the complete lack of evidence identified by Mr. Morgan to support his contention that "substantial evidence" justified entry of judgment against Harvest on a claim for vicarious liability. (*Id.* at 2224:19-2229:26.)

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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 2220:11-2222:17.) Because Harvest's Motion was based on a complete *lack of evidence* offered at trial and an abandonment of the claim, Judge Gonzalez was fully capable and qualified to decide Harvest's Motion. (*Id.* at 2222:3-9.)

On February 7, 2019, Judge Gonzalez transferred Harvest's Motion for Entry of Judgment back to Chief Judge Bell for determination while retaining jurisdiction over the remainder of the case. (12P.A.31, at 2243:26-2244:5.) However, on March 14, 2019, Chief Judge Bell issued an order transferring the entire action back to her department. (12P.A.33, at 2282:14-2283:5; 12P.A.35.)[6]

The first hearing on Harvest's Motion for Entry of Judgment was held on March 5, 2019, and it became clear during oral arguments that Chief Judge Bell

/ / /

[6] 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 both inexplicable and 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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had 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 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.

(12P.A.33, at 2292:21-2293:11 (emphasis added).)

During the same hearing, Chief Judge Bell requested transcripts of the settling of the jury instructions from the April 2018 trial. (*Id.* at 2283:20-2284:20, 2296:5-17.) Therefore, immediately after the hearing, Harvest submitted the trial transcripts regarding the settling of the jury instructions and

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the creation of and revisions to the Special Verdict form, demonstrating that there were "no proposed instructions as to either negligent entrustment or vicarious liability." (12P.A.32, at 2246:19-21, 2246:25-2247:1.) The transcripts also demonstrated that the only revision that Mr. Morgan's counsel 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 2247:13-17.)

On March 19, 2019, the District Court held a status check on the pending Motion for Entry of Judgment. (12P.A.36.) At this hearing, Chief Judge Bell announced that she did not believe she had jurisdiction over the action (due to Mr. Morgan's appeal, which was still pending at the time), and she intended "to certify under *Honeycutt* [*sic*], that if the case [wa]s returned to [the District Court], [she] would ***recall the jury*** to see if we c[ould] correct the error with respect to the verdict form." (*Id.* at 2301:15-18 (emphasis added).)

On April 5, 2019, Chief Judge Bell issued a Decision and Order memorializing her decision from the March 19, 2019 status check on Harvest's Motion for Entry of Judgment. (12P.A.37.) Of note, Chief Judge Bell stated in the Decision and Order that she "***agree[d] with Harvest that the flawed verdict form used at trial does not support a verdict against Harvest***." (*Id.* at 2321:6-7

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(emphasis added).) Moreover, while she erroneously stated, without supporting facts, that Mr. Morgan had alleged a claim for vicarious liability against Harvest, she did acknowledge that 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 2318:26-2319:5 (emphasis added).) Despite this acknowledgement, Chief Judge Bell contradictorily asserted that she "d[id] not recall ***Harvest contesting*** vicarious liability during any of the three trials or during the two years proceeding [*sic*]," (*id.* at 2319:21-22 (emphasis added)) — apparently overlooking the fact that Harvest bears no burden to contest an unpled claim or a claim for which the plaintiff chose not to offer any evidence at trial.

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L. Harvest's First Petition for Extraordinary Writ Relief.

On April 18, 2019, in response to the District Court's expressed intent to reconvene the jury from the second trial to determine Harvest's liability for a claim of respondeat superior, Harvest filed a Petition for Extraordinary Relief.[7] (13P.A.38.) Harvest sought a writ of mandamus: (i) directing the District Court

[7] The Petitioner's Appendix to Harvest's first Petition for Extraordinary Writ Relief has been omitted from the current Petitioner's Appendix in the interest of judicial efficiency and economy, as all of the documents included in the original Petitioner's Appendix are included in the current Petitioner's Appendix.

to vacate the April 5, 2019 Decision and Order which set forth the court's intent to reconvene the jury; and (ii) granting Harvest's Motion for Entry of Judgment. (*Id.* at 2348:8-11.)

On May 15, 2019, this Court denied the Petition. (13P.A.39.) However, the dismissal was without prejudice and expressly provided that Harvest retained the ability to seek writ relief again should the District Court take steps to reconvene the jury, as the District Court is "'without authority or jurisdiction to reconvene a jury once it has been dismissed.'" (*Id.* at 2446-2447 (quoting *Sierra Foods v. Williams*, 107 Nev. 574, 576, 816 P.2d 466, 467 (1991)).

M. <u>The District Court Denied Harvest's Motion for Entry of Judgment.</u>

As set forth in Section VII(J), supra, on September 17, 2019, this Court dismissed Mr. Morgan's premature appeal from the Order denying his Motion for Entry of Judgment and his Judgment against Mr. Lujan. (14P.A.41.) On that same day, Harvest filed, in the District Court, a Notice of Readiness and Request for Setting for its Motion for Entry of Judgment. (14P.A.42.)

On October 29, 2019, the District Court held another oral argument on Harvest's Motion for Entry of Judgment. (14P.A.43.) In response to Harvest's request for entry of judgment, Chief Judge Bell stated:

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> Yeah. I mean, Mr. Kennedy [counsel for Harvest], I'm having a hard time with that since I was there and — I mean, I understand, I understand what happened. At the same time, this was just not an issue — ***it was never an issue raised at trial. There was an assumption that there was vicarious liability***, which I think this is how this ended up getting overlooked frankly, but — so it's a little bit of a struggle for me because it's not — it's not how this happened.

(*Id.* at 2604:19-24 (emphasis added).) The District Court then reiterated that it still felt the best course of action was to "reconvene the jury, if that's possible, and have them make a determination." (*Id.* at 2605:5-6.) In response, both parties informed the District Court that this Court had already indicated that it would be improper to reconvene a jury after it has been dismissed and released. (*Id.* at 2605:7-24.) Mr. Morgan then renewed his request for entry of judgment in his favor pursuant to NRCP 49(a) — the very relief that Judge Gonzalez had already denied. (*Id.* at 2605:24-2606:10.)

Chief Judge Bell took the matter under advisement for several months, and on January 3, 2020, the District Court issued a Decision and Order regarding Harvest's Motion for Entry of Judgment. (*Id.* at 2606:22-23; 14P.A.44.) The District Court denied Harvest's Motion for Entry of Judgment, and, pursuant to NRCP 42(b), ordered a "separate trial on the issue of Harvest's vicarious liability." (14P.A.44, at 2608:18-20.)

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In setting forth the factual and procedural background of the action, the District Court correctly acknowledged that: (1) the accident occurred when Mr. Morgan was exiting a public park where he had been eating his lunch during his lunch break, (*id.* at 2608:24-28); (2) Harvest's Answer denied that "Mr. Lujan had been acting in the course and scope of employment when the accident occurred," (*id.* at 2609:9-10); and (3) the Special Verdict form did not just omit Harvest from the caption but also from the substance of the verdict itself, (*id.* at 2609:24-2610:4). However, the District Court incorrectly stated that Mr. Morgan's Complaint alleged a claim of vicarious liability against Harvest. (*Id.* at 2609:3-4.)

The Decision and Order then set forth the basis for the District Court's determination. First, the District Court acknowledged that it lacked the authority to reconvene the jury from the April 2018 trial. (*Id.* at 2611:4-15.) However, the District Court also found that it could not enter a judgment on the unpled claim for vicarious liability because this issue had not been addressed at the April 2018 trial. (*Id.* at 2611:16-17.)

Despite the fact that Chief Judge Bell did not examine whether or not Mr. Morgan had pled a claim for vicarious liability, whether Harvest had notice that Mr. Morgan intended to plead and try such a claim, or whether such a claim had

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been tried to the jury by consent, she still found Mr. Morgan's position to be "understandable" — claiming Harvest never argued against vicarious liability during the pre-trial litigation or during the trials themselves." (*Id.* at 2614:19-22.) Thus, the District Court determined that "Mr. Lujan [*sic*] did not abandon his claim of vicarious liability against Harvest, but instead proceeded to trial on the ***assumption*** that Harvest was not contesting the issue." (*Id.* at 2616:11-12 (emphasis added).)

If the District Court determined that Harvest had failed to contest the claim of vicarious liability, then, presumably, a judgment should be entered against Harvest as a matter of law. Here, however, the District Court decided to re-examine the burden of proof on a claim for vicarious liability.

Specifically, the District Court claimed that the undisputed evidence that Mr. Lujan was on his lunch break at the time of the accident was not sufficient to warrant entry of judgment in favor of Harvest. (*Id.* at 2611:27-2613:26.) While Nevada has adopted the "going and coming" rule, which excludes employers from liability for their employee's tortious conduct committed while in transit to or from work, the District Court was not convinced that Nevada would follow other states, like California, and apply the "going and coming" rule to employees who commit tortious conduct while on a lunch break. (*Id.* at

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2611:27-2612:25.) Rather, the District Court believed that Nevada would apply a presumption that the employee was acting within the course and scope of his employment while driving his employer's vehicle, and the employer must rebut this presumption with clear and convincing evidence. (*Id.* at 2612:26-2613:11.) Thus, the District Court held that Harvest bore the burden of proving that Mr. Lujan was not acting for its benefit at the time of the accident, and evidence that he was returning from lunch was "not necessarily . . . sufficient to rebut the presumption on its own." (*Id.* at 2613:14-17.)

After determining that Harvest's evidence had failed to rebut the presumption that Mr. Lujan was acting in the course and scope of his employment at the time of the accident, the District Court then held that:

> the same evidence ***also fails to establish*** that Mr. Lujan was acting ***within the scope of his employment*** at the time of the accident. ***There was insufficient evidence at trial as to whether or not Mr. Lujan was conducting a special errand or job responsibility when the accident occurred***.

(*Id.* at 2613:27-2614:1 (emphasis added).) Typically, when a plaintiff fails to prove that an employee was acting within the course and scope of his employment at the time of the tortious conduct, judgment should be entered in favor of the defendant as a matter of law. Similarly, if Nevada employs a

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rebuttable presumption regarding the course and scope of employment (as Chief Judge Bell contends), and the defendant cannot demonstrate that the employee was acting outside the course and scope of his employment at the time of the accident, judgment should be entered in favor of the plaintiff as a matter of law. However, in this case, Chief Judge Bell determined that she could not enter judgment in favor of ***either*** Harvest or Morgan.

Instead, the District Court determined that the only resolution was to order a "separate trial" on the issue of vicarious liability pursuant to NRCP 42(b). (*Id.* at 2616:15-2617:12.) The District Court held that a partial re-trial was warranted because:

> ***At trial, Mr. Morgan did not present evidence on the issue of vicarious liability***, but Harvest also did not present any evidence to contest the issue. The issue was therefore never addressed at trial, and the Court cannot enter judgment on vicarious liability on the ***limited evidence presented at trial*** without prejudicing either parties' ***opportunity to address the evidence***.

(*Id.* at 2617:2-6 (emphasis added).) Of note, no party ever raised NRCP 42(b) as a means of resolving the issues in this action, and Mr. Morgan has never sought a new trial of his claims.

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On January 14, 2020, the District Court held a status check to schedule this action for a partial re-trial on the issue of vicarious liability. (*Id.* at 2617:21-22.) During the status check, Chief Judge Bell again acknowledged that "there [was]n't enough information for [her] to make a decision. There [was]n't any information at all, really." (14P.A.46, at 2621:12-14.) However, rather than enter judgment in favor of Harvest based on a lack of evidence to prove Mr. Morgan's claim, the District Court reiterated that the only course of action was to proceed with a partial re-trial on vicarious liability. (*Id.* at 2621:14-15.) Thus, the District Court scheduled the re-trial to commence on June 22, 2020. (14P.A.45.)

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VIII. REASONS WHY A WRIT SHOULD ISSUE

A. The District Court Has the Authority to Enter Judgment in Favor of Harvest as a Matter of Law.

The District Court possesses the authority to grant Harvest's Motion for Entry of Judgment. Mr. Morgan only pled one claim against Harvest in this case — negligent entrustment. Mr. Morgan never disputed that he failed to prove this claim; therefore, judgment should be entered in favor of Harvest as a matter of law.

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Mr. Morgan never alleged a claim for vicarious liability. He conducted no discovery relating to a claim for vicarious liability. The joint pre-trial memorandum fails to provide any notice that a claim for vicarious liability was at issue. Harvest never consented to trying this claim to a jury at trial. Therefore, vicarious liability is not a valid claim in this action, and judgment should be entered in favor of Harvest as a matter of law.

Even if it were to be determined that Mr. Morgan properly pled a claim for vicarious liability, or that the claim was tried by consent, Mr. Morgan failed to meet his burden of proof as to this claim. Therefore, judgment should be entered in favor of Harvest.

1. Mr. Morgan Only Pled a Claim for Negligent Entrustment.

Mr. Morgan's Complaint clearly sets forth a claim for negligent entrustment — not vicarious liability. While the claim may have been titled "vicarious liability/respondeat superior," the allegations only set forth the necessary elements of a claim for negligent entrustment. (1P.A.1, at 0004:19-0005:12.) Mr. Morgan's third claim for relief does not make any reference to Mr. Lujan acting within the course and scope of his employment at the time of the accident.

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It is well-settled in Nevada that courts "analyze[] a claim according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 129 Nev. 799, 809, 312 P.3d 491, 498-99 (2013) (determining that claims for breach of contract, breach of the covenant of good faith and fair dealing, professional negligence, and punitive damages were actually claims for contribution and equitable indemnity); *see also Nev. Power Co. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 120 Nev. 948, 960, 102 P.3d 578, 586 (2004) (holding that when making the determination as to whether the claims alleged were within the Public Utilities Commission's original jurisdiction or the district court's original jurisdiction, the court "must look at the substance of the claims, ***not just the labels used in the amended complaint***") (emphasis added); *Alsenz v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1066, 864 P.2d 285, 287-88 (1993) (holding that a decedent's personal injury claim preserved for the estate under the survival statute was actually a claim for wrongful death improperly brought by the decedent's personal representative). Thus, the fact that Mr. Morgan titled his claim "vicarious liability/respondeat superior" is irrelevant; the allegations of his claim clearly set forth the elements of a claim for negligent entrustment.

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While Nevada is a notice-pleading state, a complaint must still "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v.Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). "[A] party must be given reasonable advance notice of an issue to be raised and an opportunity to respond." *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653 (1996).

A claim of vicarious liability has two elements: (1) the "actor at issue" must be an employee of the defendant; and (2) the "action complained of" must occur "within the scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Mr. Morgan's third claim for relief fails to allege that Mr. Lujan was acting within the course and scope of his employment at the time of accident or to set forth any facts in support of this element. Therefore, the Complaint fails to provide Harvest with adequate notice of an intended claim for vicarious liability.

In fact, the only reference to the phrase "course and scope of employment" in the entire Complaint is in a general, conclusory, and nonsensical paragraph that also alleges that the defendants are "family members" acting for a "family purpose" who were entrusted with a vehicle that

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was driven in a negligent and careless manner that caused a collision with Mr. Morgan's vehicle. (1P.A.1, at 0003:21-25.) It is unreasonable to believe that the inclusion of the phrase "course and scope of employment" in this nonsensical paragraph referring to family members acting for a family purpose and negligent entrustment of a vehicle was sufficient to place Harvest on notice of a claim for vicarious liability when Mr. Morgan's claim for relief clearly sets forth each and every element of a claim for negligent entrustment. The lack of notice is particularly true where Mr. Morgan failed to conduct any discovery relating to the course and scope of employment and failed to describe a claim for vicarious liability in the parties' joint pre-trial memorandum. (1P.A.3; 1P.A.5, at 0032.) This is likely why Mr. Morgan has not disputed Harvest's contention that he failed to plead a claim for negligent entrustment and has, instead, repeatedly asserted that vicarious liability was tried by consent. (11P.A.22, at 1959:8-1961:2; 11P.A.28, at 2077:17-2079:10.)

2. Harvest Did Not Consent to the Trial of an Unpled Claim for Vicarious Liability.

Pursuant to NRCP 15(b)(2), an unpled claim can be "tried by the parties' express or implied consent." However, in order for Harvest to expressly or impliedly consent to trial of an unpled claim for vicarious liability, it must have

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been clear that Mr. Morgan was attempting to prove such a claim at trial. *Sprouse v. Wentz*, 105 Nev. 597, 602-03, 781 P.2d 1136, 1139 (1989) (holding that an unpled issue cannot be tried by consent unless a party has taken some action to inform the other parties that he is seeking such relief, and the district court has notified the parties that it intends to consider the unpled issue). Mr. Morgan never provided Harvest with notice of an intent to try a claim for vicarious liability; therefore, Harvest could not and did not ever expressly or impliedly consent to the trial of such a claim.

Specifically, Mr. Morgan conducted no discovery regarding the course and scope of Mr. Lujan's employment; rather all of his discovery was related to Mr. Lujan's driving record and Harvest's investigation and knowledge of such driving record. (1P.A.3, at 0019:25-0020:2, 0020:15-19.) He also never deposed Mr. Lujan or a single employee, officer, or other representative of Harvest. Thus, Mr. Morgan's discovery failed to place Harvest on notice of an intent to try an unpled claim for vicarious liability.

Moreover, the Parties' Joint Pre-Trial Memorandum failed to alert Harvest of Mr. Morgan's intent to try an unpled claim for relief. Rather, Mr. Morgan described his claims for relief merely as claims of "negligence." (1P.A.5, at 0032.) More importantly, he identified the "contested issues of law"

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as being limited to those raised in his Complaint. (*Id.* at 0041.) Therefore, as the parties prepared for trial, Harvest was not given any notice of an intent to try an unpled claim for vicarious liability.

Finally, Mr. Morgan failed to take any action at trial which would constitute notice of his intent to pursue a claim for vicarious liability. 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 Mr. Lujan was acting within the course and scope of his employment with Harvest at the time of the accident. (6P.A.12, at 1076:7-1095:17.) He never offered any evidence at trial regarding the course and scope of Mr. Lujan's employment. (8P.A.14, at 1424:21-1437:17; 9P.A.15, at 1444:2-1446:1, 1449:23-1452:6, 1453:16-1455:6.) His closing argument failed to include any references to vicarious liability or the course and scope of employment. (10P.A.16, at 1770:5-1785:19, 1806:13-1810:10.) There were no jury instructions proposed or offered regarding the elements of a claim for vicarious liability or pertaining to the course and scope of employment. (10P.A.17.) Finally, the Special Verdict form also failed to include any reference to a claim for vicarious liability against Harvest. (10P.A.18.)

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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 for vicarious liability. *See Poe v. La Metropolitana Compania Nacional de Seguros, S.A., Havana, Cuba*, 76 Nev. 306, 353 P.2d 454 (1960) (finding defense of fraud in the application for an insurance policy had been tried by implied consent where the defendant raised the issue in his opening statement, the plaintiff referred to the matter as an issue in the case, the issue had been explored in discovery, and no objection was raised at trial to admission of evidence relevant to the claim); *Schwartz v. Schwartz*, 95 Nev. 202, 205-06, 591 P.2d 1137, 1140 (1979) (finding no implied consent to an unpled defense of res judicata where there was no discovery regarding this issue, no remarks about the defense in opening statement and when finally raised during the cross-examination of a witness at trial, an objection was raised).

Therefore, the only claim expressly or impliedly pled by Mr. Morgan and tried to the jury was for negligent entrustment.

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3. Mr. Morgan Failed to Prove a Claim for Negligent Entrustment.

In Nevada, "a person who knowingly entrusts a vehicle to an inexperienced or incompetent person" may be found liable for damages resulting therefrom. *Zugel by Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). To establish negligent entrustment, a plaintiff must demonstrate: (1) that an entrustment actually occurred; and (2) that the entrustment was negligent. *Id.* at 528, 688 P.2d at 313; *see also Willis v. Manning*, 850 So. 2d 983, 987 (La. Ct. App. 2003) (recognizing that the plaintiff bears the burden of proof on a claim for negligent entrustment); *Dukes v. McGimsey*, 500 S.W.2d 448, 451 (Tenn. Ct. App. 1973) ("The plaintiff has the burden of proving negligent entrustment of an automobile.").

In its Answer to the Complaint, Harvest admitted that Mr. Lujan was its employee and that it entrusted him with a vehicle. (1P.A.1, at 0004:23-28; 1P.A.2, at 0009:7-8.) Thus, the first element of a negligent entrustment claim was satisfied. However, the second element of the claim was contested by Harvest, (1P.A.1, at 0005:1-12; 1P.A.2, at 0009:9-10), and was never proven to the jury. Mr. Morgan offered no evidence that Mr. Lujan was an incompetent, inexperienced, careless, and/or reckless driver. In fact, the only evidence

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offered at trial relating to Mr. Lujan's driving history demonstrated that he ***had never been in an accident before***. (9P.A.15 at 1636:19-24, 1637:8-10.)

Mr. Morgan also failed to prove Harvest knew or should have known that Mr. Lujan was an incompetent, inexperienced, careless, and/or reckless driver. This is likely because Harvest's responses to Mr. Morgan's written discovery requests demonstrated early in the case that it had thoroughly checked Mr. Lujan's background prior to hiring him and that continued annual checks of Mr. Lujan's motor vehicle record "always came back clear." (1P.A.4, at 0025:2-19.)

Mr. Morgan has never contended that he offered any evidence to support his claim of negligent entrustment or that he proved this claim to the jury. Mr. Morgan has also never sought entry of judgment in his favor on this claim. Based on the utter lack of evidence to support his claim of negligent entrustment, coupled with the undisputed testimony by Mr. Lujan regarding his lack of prior vehicle accidents, judgment should be entered in favor of Harvest as a matter of law.

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4. If a Claim for Vicarious Liability Was Pled by Mr. Morgan, It Was Denied and Contested by Harvest.

To the extent this Court determines that Mr. Morgan's Complaint sufficiently stated a claim for vicarious liability — by either mislabeling his claim for negligent entrustment and/or by including the phrase "course and scope of employment" in a nonsensical and conclusory paragraph which also references family members and negligent entrustment — such a claim was ***denied by Harvest***. Harvest's Answer denied the substantive allegations in Mr. Morgan's third cause of action labeled "vicarious liability/respondeat superior," and he denied the nonsensical paragraph referencing family members and the "course and scope of employment." (1P.A.1, at 0003:21-25, 0005:1-12; 1P.A.2, at 0008:8-9, 0009:9-10.)

Chief Judge Bell acknowledged that Harvest's Answer denied that Mr. Lujan was acting within the course and scope of his employment at the time of the accident, (14P.A.44, at 2609:9-10, 2614:20-21.) Despite this admission, Chief Judge Bell repeatedly — and erroneously — asserted that vicarious liability was *undisputed* in this action and/or that vicarious liability was "*assumed*." (12P.A.33, at 2292:21-25 (stating that "there was really never any dispute that this was an employee in the course and scope of employment. It

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was never an issue in the case"); *Id*. at 2293:8-9 (stating that Harvest did not contest vicarious liability because it did not raise it as an affirmative defense in the answer); 12P.A.37, at 2319:21-22 (stating that she "d[id] not recall Harvest contesting vicarious liability during any of the three trials or during the two years proceeding [*sic*]"); 14P.A.43, at 2604:19-24 (stating that "it was never an issue raised at trial" and "[t]here was an assumption that there was vicarious liability"); 14P.A.44, at 2614:19-22 (stating that "Harvest never argued against vicarious liability during the pre-trial litigation or during the trial themselves"); *Id.* at 2616:11-12 (stating that "Mr. Lujan [*sic*] did not abandon his claim of vicarious liability against Harvest, but instead proceeded to trial on the assumption that Harvest was not contesting the issue").)

The District Court's "assumption" is puzzling on many grounds. If the issue of vicarious liability was never raised or addressed at trial, how could the District Court determine that the claim was tried by consent? If the District Court actually assumed that Harvest was not contesting the claim of vicarious liability, why would the District Court be reluctant to enter judgment in favor of Mr. Morgan on the claim?

Moreover, why would the District Court assume that Harvest was not contesting vicarious liability when the District Court acknowledged that

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Harvest denied that Mr. Lujan acted within the course and scope of his employment at the time of the accident? To the extent that the District Court's assumption is based on Harvest's purported failure to allege as an affirmative defense the fact that Mr. Lujan was acting outside the course and scope of his employment at the time of the accident, such an assumption would be in error. It is well settled that denials of essential elements of a claim — like an employee acting outside the course and scope of his employment at the time of the tortious conduct — are not affirmative defenses and do not have to be raised in an answer to a complaint. *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395-96, 168 P.3d 87, 96 (2007).

Regardless of the District Court's latent attempts to remedy Mr. Morgan's errors and/or failures with inaccurate "assumptions," one thing is clear: To the extent that Mr. Morgan alleged a claim for vicarious liability, Harvest denied the essential element of this claim (*i.e.,* that Mr. Lujan was acting within the course and scope of his employment at the time of the accident). Because Harvest contested the claim, Mr. Morgan bore the burden of proving the claim (as discussed in Section VIII(A)(5), *infra*), and he failed to do so — as demonstrated by the District Court's acknowledgement that the issue

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of vicarious liability was never addressed at trial. Therefore, judgment should be entered in favor of Harvest as a matter of law.

5. If a Claim for Vicarious Liability Was Pled in the Complaint or Tried by Consent, Mr. Morgan Failed to Satisfy His Burden of Proof.

Of the jurisdictions addressing this issue, the majority have held that the plaintiff bears the burden of proving the elements of a claim for vicarious liability.[8] *See, e.g., Justice v. Lombardo*, 208 A.3d 1057, 1067-68 (Pa. 2019) (recognizing that in cases where sovereign or local government immunity does not apply, "the plaintiff carries the burden of proving that an employee acted within the scope of employment"; whereas, in cases where sovereign immunity is applicable and can be raised as an affirmative defense, "the defendant carries the burden at trial of proving that his conduct was within the scope of his employment"); *Montague v. AMN Healthcare, Inc.*, 168 Cal. Rptr. 3d 123, 126 (Cal. Ct. App. 2014) ("The plaintiff bears the burden of proving that the employee's tortious act was committed within the scope of his or her

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[8] The Nevada Supreme Court has not addressed this issue. However, the Nevada Court of Appeals recently held, in an unpublished disposition: "To prevail on a theory of respondeat superior, the ***plaintiff*** must establish both that (1) the employee who caused the injury was under the employer's control, and (2) the act occurred within the scope of the employment." *Kaye v. JRJ Invs., Inc., d/b/a BMW of Las Vegas*, No. 74324-COA, 2018 WL 6133883, at *1 (Nev. Ct. App. Nov. 20, 2018) (emphasis added).

employment."); *Sutton v. Byer Excavating, Inc.*, 271 P.3d 169, 171-72 (Utah Ct. App. 2012) (holding that the party asserting vicarious liability bears the burden of proving its elements); *Colo. Compensation Ins. Auth. v. Jones*, 131 P.3d 1074, 1079-1080 (Colo. Ct. App. 2005) ("To establish a defendant's liability under the doctrine [of respondeat superior], the plaintiff must show that an employer-employee relationship existed and that the act occurred in the course and scope of employment."); *Baker v. Saint Francis Hosp.*, 126 P.3d 602, 607 (Okla. 2005) ("Of course, it is a plaintiff's burden to show that the employee was acting within the scope of employment."); *Doe v. Forrest*, 853 A.2d 48, 54 (Vt. 2004) (holding that the plaintiff bears the burden of showing a "servant's conduct falls within the scope of his or her employment"); *Carter v. Reynolds*, 815 A.2d 460, 463-64 (N.J. 2003) ("To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment."); *Hudson v. Muller*, 653 So.2d 942, 944 (Ala. 1995) ("To recover against a defendant under the theory of respondeat superior, the plaintiff must establish the status of employer and employee and must show that the act was done within the line and scope of the employee's employment."); *Wong-Leong v. Hawaiian Indep. Refinery, Inc.*, 879 P.2d 538, 543 (Haw. 1994)

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("[T]o recover under the respondeat superior theory, a plaintiff must establish: 1) a negligent act of the employee, in other words, breach of a duty that is the legal cause of plaintiff's injury; and 2) that the negligent act was within the employee's scope of employment."); *Kelly v. Middlesex Corp.*, 616 N.E.2d 473, 474 (Mass. App. Ct. 1993) (holding that it is the plaintiff's burden to prove that the employee was acting within the scope of his employment at the time of the accident); *Pyne v. Witmer*, 543 N.E.2d 1304, 1309 (Ill. 1989) ("The burden is on the plaintiff to show the contemporaneous relationship between tortious act and scope of employment."); *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333, 338 (N.M. Ct. App. 1984) ("In order to recover under a *respondeat superior* theory, the plaintiff must demonstrate that the employee was acting within the scope of his employment."); *Wilken v. Van Sickle*, 507 P.2d 1150, 1151 (Or. 1973) ("[U]nder the doctrine of respondeat superior, the plaintiff must show 'the harm-producing activity was in furtherance of the employer's business and that the employer had the right to exercise some degree of control over the workman in the conduct of such activity.") (internal quotations omitted); *Lane v. Modern Music, Inc.*, 136 S.E.2d 713, 716 (S.C. 1964) ("A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then

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about his master's business and acting within the scope of his employment."); *Vencill v. Cornwell*, 145 N.E.2d 136, 138 (Ohio Ct. App. 1956) ("Under the doctrine of *respondeat superior*, the burden is on the plaintiff to adduce evidence tending to show that the servant was acting within the scope of his employment and that the right to control the servant's conduct was in the master.")

Despite the fact that Mr. Morgan has *never* maintained that Nevada has adopted (or should adopt) a rebuttable presumption regarding the course and scope of employment — and in contradiction of the majority view on the burden of proof — the District Court's January 3, 2020 Decision denying Harvest's Motion for Entry of Judgment suggests that a rebuttable presumption should be applied to Mr. Morgan's unpled claim for vicarious liability. Specifically, the District Court held that:

> [M]any jurisdictions presume that an employee is acting within the course and scope of their employment when an accident occurs while driving the employer's vehicle and the employer must rebut that presumption with clear and convincing evidence. . . . Under this burden shifting framework, Harvest's admissions that it owned the bus and that Mr. Lujan was Harvest's employee would have made Harvest responsible for providing evidence that Mr. Lujan was not acting for Harvest's benefit at the time of the accident. Evidence that Mr. Lujan was returning from

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> lunch would not necessarily be sufficient to rebut the presumption on its own.

(14P.A.44, at 2612:26-2613:17.)

If Nevada truly has adopted (or is likely to adopt) a rebuttable presumption regarding the course and scope of employment for vicarious liability claims, and the District Court has determined that the evidence Harvest offered at trial was insufficient to rebut this presumption, then why has the District Court refused to enter judgment in favor of Mr. Morgan as a matter of law? It is likely because the District Court knows that Nevada has never adopted such a presumption and is unlikely to do so.

NRS 47.250, which delineates Nevada's rebuttable presumptions, does not include any presumption regarding vicarious liability or the course and scope of employment. Moreover, there is no such rebuttable presumption expressed in Title 43 of the Nevada Revised Statutes governing public safety for vehicles and watercraft. Furthermore, this Court has never held that a rebuttable presumption should be employed as to the course and scope of employment in a vicarious liability claim. Finally, no justification has been advanced for following the minority view and adopting such a rebuttable presumption. Therefore, the District Court erred in determining that it could be

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presumed that Mr. Lujan was acting within the course and scope of his employment at the time of the accident.

Mr. Morgan was required to offer evidence at trial to prove this element of a claim for vicarious liability, and he failed to do so. (*See* Section VIII(A)(6), *infra.*) Thus, Harvest is entitled to judgment as a matter of law.

6. The Undisputed Evidence Proves That Mr. Lujan Was Not Acting Within the Course and Scope of His Employment at the Time of the Accident.

Regardless of whether Nevada follows the majority rule and requires the plaintiff to bear the burden of proof on a claim for vicarious liability, or whether Nevada employs a rebuttable presumption regarding the course and scope of employment, the outcome is the same in this action. The only evidence offered at trial regarding the nature of Mr. Lujan's activities at the time of the accident established that Mr. Lujan was returning from his lunch break. Based on this fact, Harvest is entitled to a judgment in its favor as a matter of law.

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

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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 language and policy of the "going and coming rule" suggests that no vicarious liability applies, as an employee is not acting within the course and scope of his or her employment when commuting to and from lunch. In fact, other jurisdictions addressing this issue have confirmed that the "going and coming rule" precludes any finding of vicarious liability for tortious conduct occurring during a lunch break. *See, e.g., Halliburton Energy Servs., Inc. v. Dep't of Transp.*, 162 Cal. Rptr. 3d 752, 759 (Cal. Ct. App. 2013) (recognizing that "when the employee leaves the employer's premises on a lunch break, to get lunch or run a personal errand, and the employee is not engaged in any errand or task for the employer, the employee is not acting within the scope of his or her employment"); *Richardson v. Glass*, 835 P.2d 835, 838 (N.M. 1992) (finding the employer was not vicariously liable for the employee's accident

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during his lunch break because there was no evidence of the employer's control over the employee at the time of the accident);

Even in jurisdictions employing a rebuttable presumption regarding the course and scope of employment, the "going and coming rule" is sufficient to shift the burden of proof *back to the plaintiff* to prove vicarious liability. For instance, in *Gant v. Dumas Glass & Mirror, Inc.*, 935 S.W.2d 202 (Tex. App. 1996), a vehicle owned by Dumas Glass was being driven by its employee, Mr. Banks, when an accident occurred with Mr. Gant. *Id.* at 204-05. Mr. Gant sued Mr. Banks for negligence and Dumas Glass for vicarious liability. *Id.* at 205. The court analyzed the issue of vicarious liability as follows:

> The evidence that Dumas Glass employed Banks and furnished for use in his employment the truck involved in the collision gave rise to the presumption that Banks was acting within the course and scope of his employment when the collision occurred; yet, ***the presumption vanished*** when Banks testified that[,] at the time [of the accident,] he was ***returning from attending his personal business of eating lunch en route to work***, and the rebutted presumption could ***not*** then be treated as evidence by the jury in reaching its verdict. Consequently, if Dumas Glass was to be held liable, ***Gant had the burden of producing <u>other evidence</u> that Banks was acting within the course and scope of his employment***.
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>
> [W]hen the evidence revealed that Banks was on his personal business at the time of the accident, the facts

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> that he was working for Dumas Glass and driving its truck ***did not create a reasonable inference*** that he was in the course and scope of his employment. Nor does the fact that Banks was ***returning*** from his personal undertaking and was going to the shop to ***possibly*** engage in work for Dumas Glass serve to show that he had returned to the zone of his employment, for [t]he test of liability is whether [Banks] was engaged in [Dumas Glass's] business and ***not whether he purposed to resume it***.

Id. at 211-12 (emphasis added) (internal quotations omitted).

Similarly in *Matheson v. Braden*, 713 S.E.2d 723 (Ga. Ct. App. 2011), the court held that when an employer overcomes the presumption regarding the course and scope of employment, "[t]he employer is thereafter entitled to summary judgment unless 'other facts' are proffered — that is, ***additional evidence other than the fact that the vehicle was owned by the employer*** — from which a jury could reasonably infer that the employee was acting within the course and scope of his employment when the accident occurred." *Id*. at 726 (emphasis added). In *Matheson*, the court held that "[a]ny presumption raised by the fact that the employee was driving his employer's vehicle at the time of the collision was overcome as a matter of law through the employer's ***positive and uncontradicted testimony*** that the employee was in fact driving to his own residence for the ***purely personal purpose of having lunch***." *Id.* at 727

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(emphasis added); *see also Ewing-Cage v. Quality Prods., Inc.*, 18 S.W.3d 147, 150 (Mo. Ct. App. 2000) (despite employing a rebuttable presumption regarding the scope of employment, the court was also "mindful of the general rule that the master-servant relationship is suspended while the servant is going to and from meals, even though he is driving the master's car, unless the master receives some direct benefit from the servant's use of the master's car").

The defense demonstrated at trial that Mr. Lujan was on his lunch break when the accident with Mr. Morgan occurred. (8P.A.14, at 1428:15-20.) Under the "going and coming" rule, Harvest is not liable for Mr. Lujan's actions during his lunch break. Mr. Morgan failed to refute the "going and coming" rule by demonstrating that Mr. Lujan was still acting within the course and scope of his employment during his lunch break. Specifically, Mr. Morgan failed to prove 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 or had no requirement to "clock in" and "clock out" as part of his employment with Harvest; that Harvest knew that Mr. Lujan was using the company shuttle bus

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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 was insufficient to prove vicarious liability. Therefore, Harvest is entitled to a judgment in its favor as a matter of law.

B. Mr. Morgan Is Not Entitled to a Partial Re- Trial on the Alleged Claim of Vicarious Liability.

Despite the fact that Mr. Morgan has never requested a new trial on his claim against Harvest, the District Court has determined that it cannot enter judgment in favor of either party and has concluded — *sua sponte* — that a partial re-trial is warranted pursuant to NRCP 42(b). (14P.A.44, at 2616:15-2617:12.) However, the District Court has also held that at the April 2018 trial, Mr. Morgan failed to prove his claim against Harvest and failed to present the claim to the jury for determination. Whether these failures were intentional, strategic decisions on his part (due to a lack of evidence), or unintentional as a result of a "mistaken" belief that Harvest was not contesting liability, the outcome is the same. His failure to obtain a judgment against Harvest was not due to any error of procedure, law, or fact, committed by the court, Harvest, or

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the jury, but rather, a result of his own actions and/or decisions. Under such circumstances, Mr. Morgan is not entitled to a partial re-trial. In fact, there is no procedural mechanism which allows Mr. Morgan to have a second bite at the apple simply because he would prefer to have a judgment entered against Harvest instead of Mr. Lujan.

1. A Separate Trial on Vicarious Liability Is Not Convenient, Expeditious, or Economical, and It Will Not Assist the Parties in Avoiding Prejudice.

NRCP 42(b) states that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counter-claims, or third-party claims." There are no circumstances under which it would be convenient, expeditious, or economical to have a partial re-trial on a claim that Mr. Morgan, through no fault ***but his own***, already failed to prove or present to the jury. Therefore, the District Court, in ordering a partial re-trial, ignored these factors and focused on alleged prejudice instead:

> [A] separate trial on the issue of vicarious liability is appropriate to avoid prejudice and because the issue of vicarious liability is separate and distinct from the issue of damages. At trial, Mr. Morgan did not present evidence on the issue of vicarious liability, but Harvest also did not present any evidence to contest the issue. The issue was therefore never addressed at

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> trial, and the Court cannot enter judgment on vicarious liability on the limited evidence presented at trial without prejudicing either parties' ***opportunity to address the evidence***.

(14P.A.44, at 2617:1-6 (emphasis added).) The District Court further explained that "[p]rejudice occurs when a party is denied a ***meaningful opportunity to rebut evidence at trial***." (*Id.* at 2616:20-22 (emphasis added) (citing *ATC/Vancom of Nev. Ltd. P'ship v. MacDonald*, 281 P.3d 1151 (2009)).

However, *MacDonald* is an unpublished opinion in which a court bifurcated issues during the middle of an ongoing trial. *MacDonald*, No. 49579, 2009 WL 1491650 at *1 (Nev. Feb. 5, 2009). The defendant wanted to present evidence pertaining to the plaintiff's immigration status, arguing that it was relevant to her credibility and the amount of her future medical damages. *Id.* The plaintiff argued that the evidence should be excluded as highly prejudicial and irrelevant to the issues of liability and past medical damages. *Id.* Therefore, in the middle of trial, the court bifurcated the issues of liability and past medical damages from the issue of future medical damages and determined that the plaintiff's immigration status would only be admissible in the second phase of the trial on future medical damages. *Id.* However, evidence regarding the plaintiff's future medical damages had already been

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presented in the first phase of the trial, and the bifurcation order prejudiced the defendant by denying it a "meaningful opportunity to rebut the future damages evidence which was presented during the liability and past damages phase of the trial." *Id.* at 2. Thus, this Court ordered a new trial with bifurcation of the issues. *Id.*

MacDonald provides no basis for the District Court's grant of a new trial in this case. The District Court did not order bifurcation of issues or claims before or during the trial in April 2018. There are no prejudicial facts or evidence that require bifurcation of issues or claims in this case. Rather, the District Court contends that a partial re-trial on vicarious liability is warranted because neither Harvest nor Mr. Morgan presented any evidence on the issue of vicarious liability at the April 2018 trial, and it would prejudice the parties if the court were to enter judgment on the claim without allowing the parties the "opportunity to address the evidence." (14P.A.44, at 2617:4-6.)

The District Court has failed to explain how Mr. Morgan was denied an opportunity to address the evidence of Mr. Lujan's lunch break. The District Court has also failed to identify any other evidence that exists which the parties had not been given the opportunity to address. There are no allegations of limitations placed on the scope of discovery or evidentiary rulings which

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prevented the parties from offering relevant evidence on vicarious liability at trial. Mr. Morgan has never alleged that he was not permitted to offer evidence or examine a witness regarding the issue of the course and scope of Mr. Lujan's employment. Thus, there is no legitimate basis for a partial re-trial on the issue of vicarious liability.

If, as the District Court acknowledged, no evidence was presented at trial on the issue of vicarious liability, then Mr. Morgan failed to satisfy his burden of proof on this claim. The proper course of action is not to order a re-trial, but to enter judgment in favor of Harvest as a matter of law.[9]

2. NRCP 42(b) Is Not a Mechanism for Ordering a Partial Re-Trial of a Claim a Party Has Already Failed to Prove or Present to the Jury.

NRCP 42(b) is meant to be utilized prior to the commencement of a trial, not as a mechanism for ordering a re-trial of a claim. This is demonstrated by NRCP 16(c)(2), which governs matters for consideration at a pre-trial conference. NRCP 16(c)(2)(L) states that one of the topics the parties and the court must discuss at the pretrial conference is: "***ordering a separate trial***

[9] The District Court's Order granting a partial re-trial flies in the face of traditional notions of fairness, finality, and the pronouncement in NRCP 1 that the Rules of Civil Procedure should be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

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under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue." (Emphasis added).

Other jurisdictions with a similar rule of procedure have also held that an order of a separate trial should be made *before* a trial commences. Specifically, in *Davis v. Realty Exch., Inc.*, 488 S.W.2d 913 (Mo. 1973), the court was presented with quiet title claims brought by three separate plaintiffs for three separate parcels of property. *Id.* at 913. On appeal, the defendants asserted that there was a misjoinder and that a new trial was warranted. *Id*. at 914. The court denied the appeal because the defendants never moved for separate trials in the action. *Id.* at 914-15. However, the court also stated: "Had the defendants desired that the court sever the claims and order separate trials of the three counts[,] they should have so moved the court ***before the trial began***." *Id.* at 915 (emphasis added).

Similarly, in *Allstate Ins. Co. v. Schick*, 746 A.2d 546 (N.J. Super. Ct. Law Div. 1999), the plaintiff had sued multiple defendants for insurance fraud in filing claims for personal injury protection benefits. *Id.* at 548. Some of the defendants claimed that they had been misjoined and/or that the claims against them should be severed because they would be prejudiced if they were forced to go to trial with other defendants accused of involvement with sham accidents.

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Id. at 556-57. The court denied the defendants' request for separate trials, finding sufficient connections and relations between the groups of defendants in the action. *Id.* However, the court also held: "Under these circumstances, it would be inefficient and inappropriate at this time to sever Allstate's claims against the Gross defendants from those involving the other defendants before discovery has even begun, particularly inasmuch as the court can always sever Allstate's claims against these defendants ***after discovery, but before the trial begins***." *Id.* at 557 (emphasis added).

Finally, in *Hawes v. Cleveland Clinic Foundation*, No. 48403, 1985 WL 7458 (Ohio Ct. App. Jan. 24, 1985), the court examined Ohio's pre-trial conference rule. *Id*. at **5-6. Under Ohio's rule, like NRCP 16, the parties and the court must discuss consolidation and severing of claims at the pre-trial conference. *Id*. at ** 6-7. However, the rule also provides that "[t]he court . . . on its own motion, may consolidate or sever cases ***at any time before the taking of testimony begins***." *Id.* at *7 (emphasis added); *see also Martin v. Lott*, No. 3:07-3782-JFA, 2009 WL 5195960, at *3 (D. S.C. Dec. 21, 2009) (holding that "[p]rinciples of judicial economy militate against separate trials at this late date, three months before trial"); *Tempkin v. Lewis-Gale Clinic, Inc.*, Nos. 89-209, 91-154, 1992 WL 12034035, at *3 (Va. Cir. Ct. Mar. 16, 1992) (taking motions

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to sever and/or for separate trials under advisement until discovery is completed, and noting that "[o]bviously, any decision on separate trials will have to be made ***before trial dates can be finalized***") (emphasis added); *Purcell v. Zimbelman*, 500 P.2d 335, 345 (Ariz. Ct. App. 1972) (holding that trial court did not err in denying the defendant's motion to sever and order separate trials where the defendant waited until the first day of trial to seek separate trials); *Moseley v. Lamirato*, 370 P.2d 450, 455 (Colo. 1962) (holding that it was not an abuse of discretion to deny a motion for separate trials made moments before trial was scheduled to commence).

No court -- in Nevada or any other jurisdiction — has ever ordered a re-trial on a claim or issue pursuant to NRCP 42(b), or its equivalent, after the plaintiff has already been given an opportunity to present the claim or issue to the jury for determination. Once a plaintiff's claim has been the subject of a trial, only NRCP 59 can provide a mechanism for a new trial of such claim.

3. Mr. Morgan Is Not Entitled to a Partial Re-Trial Pursuant to NRCP 59.

When a party seeks a new trial pursuant to NRCP 59, it must file the motion for such relief within twenty-eight (28) days of service of the written notice of entry of judgment. NRCP 59(b). The district court may also, *sua*

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sponte, issue an order to show cause why a new trial should not be granted, based on any reason that would justify granting a new trial based on a party's motion; however, this order to show cause must also be issued within twenty-eight (28) days after service of the written notice of entry of judgment. NRCP 59(d). Neither of these deadlines can be extended for any reason. NRCP 59(f).

Mr. Morgan never moved for a new trial pursuant to NRCP 59. Moreover, the District Court's grant of a partial re-trial on the issue of vicarious liability was made absent the issuance of an order to show cause why a new trial should not be granted, and it was made over one year after the written notice of entry of judgment was filed in this action. Therefore, the District Court's grant of a new trial was untimely and should be vacated.

Even if the timing of the grant of a new trial was ignored (which it cannot be), none of the grounds for the grant of a new trial pursuant to NRCP 59 have been met. A new trial may be granted for any of the following reasons:

- An irregularity in the proceeding or an abuse of discretion that prevents a fair trial;
- Misconduct of the jury or prevailing party;
- Accident or surprise;
- Newly discovered evidence;

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- Manifest disregard of the jury instructions;
- Excessive damages awarded as a result of passion or prejudice; and
- Error in the law.

NRCP 59(a)(1), (d). The District Court did not identify any of these grounds as the basis for its order of a partial re-trial. Rather, the District Court found that the parties failed to present any evidence on an alleged claim for relief. To the extent that the District Court's order is based on its, and Mr. Morgan's, "mistaken" belief that Harvest was not contesting vicarious liability, the order for a re-trial would be in error. There can be no accident or mistake where Harvest denied liability in its Answer and presented evidence of the fact that Mr. Lujan was on a lunch break at the time of the accident. Both of these facts are a direct and unequivocal statement to both the District Court and Mr. Morgan that vicarious liability has been contested and that Mr. Morgan bears the burden of proving his alleged claim for relief. *See* NRCP 59(a)(1)(C) (requiring the accident or surprise necessitating a new trial be something that "ordinary prudence could not have guarded against").

Because no legitimate ground for a new trial exists, the District Court exceeded its authority and jurisdiction in ordering a partial re-trial on the claim

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of vicarious liability. Thus, the January 3, 2020 Order granting a partial re-trial should be vacated.

IX. CONCLUSION

For the foregoing reasons, Harvest respectfully requests that this Court issue a writ of prohibition: (i) vacating the January 3, 2020 Decision and Order granting a partial re-trial; and (ii) preventing the District Court from proceeding with a partial re-trial of Mr. Morgan's claim for vicarious liability, pursuant to NRCP 42(b), on June 22, 2020. Harvest also respectfully requests that this Court issue a writ of mandamus directing the District Court to enter judgment in favor of Harvest because Mr. Morgan failed to prove either his pled claim for negligent entrustment or his unpled claim for vicarious liability.

DATED this 20th day of March, 2020.

BAILEY❖KENNEDY

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

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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 19th day of March, 2020.

MICHELE STONE

BAILEY ❖ KENNEDY
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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 20th day of March, 2020.

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

I certify that I am an employee of BAILEY❖KENNEDY and that on the 20th day of March, 2020, 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 U.S. MAIL: *Real Party in Interest*

DAVID E. LUJAN
651 McKnight Street, Apt. 16
Las Vegas, Nevada 89501

VIA HAND DELIVERY: *Respondent*

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

/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
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

Approved and ratified 1864. Amended 1920, 1976, 1978, 2014.

Notes of Decisions (184)

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (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 (444)

N. R. S. 34.160, NV ST 34.160
Current through the end of the 80th Regular Session (2019)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (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 (178)

N. R. S. 34.170, NV ST 34.170
Current through the end of the 80th Regular Session (2019)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (Refs & Annos)
Prohibition (Refs & Annos)

N.R.S. 34.320

34.320. Writ of prohibition defined

Currentness

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

Credits

Added by CPA (1911), § 766.

Notes of Decisions (184)

N. R. S. 34.320, NV ST 34.320
Current through the end of the 80th Regular Session (2019)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 34. Writs; Petition to Establish Factual Innocence (Refs & Annos)
Prohibition (Refs & Annos)

N.R.S. 34.330

34.330. Writ may be issued by appellate or district court when no plain, speedy and adequate remedy in law

Effective: January 1, 2015

Currentness

The writ may be issued only by the Supreme Court, the Court of Appeals or a district court to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Credits

Added by CPA (1911), § 767. NRS amended by Laws 2003, c. 272, § 1, eff. May 28, 2003; Laws 2013, c. 343, § 78, eff. Jan. 1, 2015.

Notes of Decisions (122)

N. R. S. 34.330, NV ST 34.330
Current through the end of the 80th Regular Session (2019)

End of Document

West's Nevada Revised Statutes Annotated
Title 3. Remedies; Special Actions and Proceedings (Chapters 28-43)
Chapter 41. Actions and Proceedings in Particular Cases Concerning Persons (Refs & Annos)
Comparative Negligence

N.R.S. 41.141

41.141. When comparative negligence not bar to recovery; jury instructions; liability of multiple defendants

Currentness

1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.

2. In those cases, the judge shall instruct the jury that:

(a) The plaintiff may not recover if the plaintiff's comparative negligence or that of the plaintiff's decedent is greater than the negligence of the defendant or the combined negligence of multiple defendants.

(b) If the jury determines the plaintiff is entitled to recover, it shall return:

(1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to the plaintiff's comparative negligence; and

(2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.

3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise

recoverable by the plaintiff pursuant to the general and special verdicts.

4. Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to that defendant.

5. This section does not affect the joint and several liability, if any, of the defendants in an action based upon:

(a) Strict liability;

(b) An intentional tort;

(c) The emission, disposal or spillage of a toxic or hazardous substance;

(d) The concerted acts of the defendants; or

(e) An injury to any person or property resulting from a product which is manufactured, distributed, sold or used in this State.

6. As used in this section:

(a) "Concerted acts of the defendants" does not include negligent acts committed by providers of health care while working together to provide treatment to a patient.

(b) "Provider of health care" has the meaning ascribed to it in NRS 629.031.

Credits

Added by Laws 1973, p. 1722. Amended by Laws 1979, p. 1356; Laws 1987, p. 1697; Laws 1989, p. 72.

West's Nevada Revised Statutes Annotated
Title 4. Witnesses and Evidence (Chapters 47-56) (Refs & Annos)
Chapter 47. General Provisions; Judicial Notice; Presumptions (Refs & Annos)
Presumptions

N.R.S. 47.250

47.250. Disputable presumptions

Currentness

All other presumptions are disputable. The following are of that kind:

1. That an unlawful act was done with an unlawful intent.

2. That a person intends the ordinary consequences of that person's voluntary act.

3. That evidence willfully suppressed would be adverse if produced.

4. That higher evidence would be adverse from inferior being produced.

5. That money paid by one to another was due to the latter.

6. That a thing delivered by one to another belonged to the latter.

7. That things which a person possesses are owned by that person.

8. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of that ownership.

9. That official duty has been regularly performed.

10. That a court or judge, acting as such, whether in this State or any other state or country, was acting in the lawful exercise of the court's or judge's jurisdiction.

11. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

12. That a writing is truly dated.

13. That a letter duly directed and mailed was received in the regular course of the mail.

14. That a person not heard from in 3 years is dead.

15. That a child born in lawful wedlock is legitimate.

16. That the law has been obeyed.

17. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest.

18. In situations not governed by the Uniform Commercial Code:

(a) That an obligation delivered up to the debtor has been paid.

(b) That private transactions have been fair and regular.

(c) That the ordinary course of business has been followed.

(d) That there was good and sufficient consideration for a written contract.

Credits

Added by Laws 1971, p. 779. Amended by Laws 1993, p. 2761.

Editors' Notes

SUBCOMMITTEE'S COMMENT

Transfers list of disputable presumptions from present NRS 52.070 to its proper place in the new codification. The omitted "presumption of innocence" found in subsection 1 is really a rule of public policy and is separately established by NRS 175.191 and 175.201. The presumptions stated in subsections 4, 9, 12, 16, 19, 21, 22, 23, 24 and 26 were omitted because the subcommittee did not believe them to be valid as general propositions, but this omission is not meant to preclude a trier of fact from drawing the same inference if warranted by the particular situation. The subject matter of subsections 28, 29 and 30 is covered in sections 148 and 152 respectively of this draft bill (now NRS 52.095 and 52.135). The subject matter of subsections 31 and 32 is transferred to chapters 452 and 111 of NRS, respectively, where it more logically belongs.

Notes of Decisions (54)

N. R. S. 47.250, NV ST 47.250
Current through the end of the 80th Regular Session (2019)

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

Effective: January 1, 2019

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 (203)

Rules App. Proc., Rule 3A, NV ST RAP Rule 3A
Current with amendments received through February 1, 2020.

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

Effective: January 1, 2019

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, 2020.

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

Effective: January 1, 2019

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)

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
I. Scope of Rules; Form of Action (Refs & Annos)

Rules of Civil Procedure, Rule 1

Rule 1. Scope of Rules

Effective: January 1, 2019

Currentness

These rules govern the procedure in the district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Credits

As amended, effective January 1, 2005; March 1, 2019.

Notes of Decisions (5)

Civ. Proc. Rules, Rule 1, NV ST RCP Rule 1
Current with amendments received through February 1, 2020.

End of Document

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
III. Pleadings and Motions (Refs & Annos)

Rules of Civil Procedure, Rule 15

Rule 15. Amended and Supplemental Pleadings

Effective: January 1, 2019

Currentness

(a) Amendments Before Trial.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) Amendments During and After Trial.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the

pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an impleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) Relation Back of Amendments. An amendment to a pleading relates back to the date of the original pleading when:

(1) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out--or attempted to be set out--in the original pleading; or

(2) the amendment changes a party or the naming of a party against whom a claim is asserted, if Rule 15(c)(1) is satisfied and if, within the period provided by Rule 4(e) for serving the summons and complaint, the party to be brought in by amendment:

(A) received such notice of the action that it will not be prejudiced in defending on the merits; and

(B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(d) Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Credits

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

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

Rule 15(a)(1) tracks FRCP 15(a)(1) and permits a plaintiff to amend as a matter of course later than former NRCP 15(a) allowed. Rule 15(c)(2) incorporates text from FRCP 15(c)(1)(C). Rule 15(c) governs relation-back of amendments generally, while Rule 10(d) governs replacing a named party for a fictitiously named party. The express provision Rule 10(d) makes for pleading fictitious defendants, which the FRCP does not have, avoids the problem that has arisen in federal cases attempting to apply FRCP 15(c)(1)(C) to fictitious defendants. While Rule 15(c) and Rule 10(d) are distinct tests, if a fictitious-party replacement does not meet the Rule 10(d) test, it may be treated as an amendment to add a party under Rule 15 if the standards in Rule 15 are met.

Notes of Decisions (120)

Civ. Proc. Rules, Rule 15, NV ST RCP Rule 15
Current with amendments received through February 1, 2020.

West's Nevada Revised Statutes Annotated
Nevada Rules of Court
Rules of Civil Procedure (Refs & Annos)
III. Pleadings and Motions (Refs & Annos)

Rules of Civil Procedure, Rule 16

Rule 16. Pretrial Conferences; Scheduling; Management

Effective: January 1, 2019

Currentness

(a) Pretrial Conferences; Objectives. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling and Planning.

(1) *Scheduling Order.* Except in categories of actions exempted by local rule, the court must, after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, case conference, telephone conference, or other suitable means, enter a scheduling order.

(2) *Time to Issue.* The court must issue the scheduling order as soon as practicable, but unless the court finds good cause for delay, the court must issue it within 60 days after:

(A) a Rule 16.1 case conference report has been filed; or

(B) the court waives the requirement of a case conference report under Rule 16.1(f).

(3) *Contents of the Order.*

(A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) Permitted Contents. The scheduling order may:

(i) provide for disclosure, discovery, or preservation of electronically stored information;

(ii) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(iii) set dates for pretrial conferences, a final pretrial conference, and for trial; and

(iv) include any other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified by the court for good cause.

(c) Attendance and Subjects to Be Discussed at Pretrial Conferences.

(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under NRS 47.060 and NRS 50.275;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(G) referring matters to a discovery commissioner or a master;

(H) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(I) determining the form and content of the pretrial order;

(J) disposing of pending motions;

(K) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(L) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(M) establishing a reasonable limit on the time allowed to present evidence; and

(N) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(1), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Credits

Amended effective January 1, 1988; January 1, 2005; March 1, 2019.

Editors' Notes

ADVISORY COMMITTEE NOTES

2019 Amendment

Rule 16 parallels FRCP 16, with some Nevada-specific variations. Except as noted, the amendments are stylistic, not substantive.

Subsection (b). Rule 16(b)(1) continues to omit the reference in FRCP 16(b)(1)(A) to FRCP 26(f). The deadline for entry of the scheduling order in Rule 16(b)(2) differs from the federal rule and is calculated from the filing of the case conference report required by Rule 16.1 rather than from the filing of the complaint. As amended, Rule 16(b) requires the district court judge to enter the scheduling order. Rule 16(b)(3)(B) omits sections (i), (ii), and (iv) from its federal counterpart and renumbers the remaining sections.

Subsection (c). Rule 16(c) conforms to the federal rule, except that Nevada has not adopted FRCP 16(c)(2)(F) and (N). The remaining sections of the rule have been renumbered.

Notes of Decisions (34)

Civ. Proc. Rules, Rule 16, NV ST RCP Rule 16
Current with amendments received through February 1, 2020.

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

Effective: January 1, 2019

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, 2020.

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 42

Rule 42. Consolidation; Separate Trials

Effective: January 1, 2019

Currentness

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any right to a jury trial.

Credits

Amended effective September 27, 1971; January 1, 2005; March 1, 2019.

Notes of Decisions (15)

Civ. Proc. Rules, Rule 42, NV ST RCP Rule 42

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

Effective: January 1, 2019

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.

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

Effective: January 1, 2019

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 (183)

Civ. Proc. Rules, Rule 59, NV ST RCP Rule 59
Current with amendments received through February 1, 2020.

End of Document

2018 WL 6133883
Only the Westlaw citation is currently available.

Court of Appeals of Nevada.

Warren H. KAYE, an Individual, Appellant,
v.
JRJ INVESTMENTS, INC., d/b/a BMW of Las Vegas, Respondents.

No. 74324-COA
|
FILED NOVEMBER 20, 2018

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ORDER OF AFFIRMANCE

***1** Warren H. Kaye appeals from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Kaye was riding his bicycle in front of BMW of Las Vegas when Ahmed Bencheikh, a dealership employee, drove out of the dealership's driveway and allegedly struck Kaye. Kaye sued Bencheikh, Auto Nation, Inc., and JRJ Investments, Inc., d/b/a BMW of Las Vegas ("BMW") for negligence, negligent entrustment, and respondeat superior, asserting Bencheikh was driving a company car and negligently hit Kaye. After the parties settled the claims against Bencheikh and Auto Nation, as well as the negligent entrustment claim against BMW, BMW moved for summary judgment on the remaining respondeat superior claim, arguing Bencheikh was not under its control or working in the course and scope of his employment at the time of the accident. The district court granted summary judgment in BMW's favor.[1]

[1] We do not recount the facts except as necessary to our disposition

On appeal, Kaye contends the district court erred in granting summary judgment, arguing that whether Bencheikh was under the defendant's control or acting in the scope of his employment at the time of the accident was a question of fact for the jury. We disagree that summary judgment was improper under the particular facts of this case.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

To prevail on a theory of respondeat superior, the plaintiff must establish both that (1) the employee who caused the injury was under the employer's control, and (2) the act occurred within the scope of the employment. *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Generally, this presents a question of fact for the jury. *See Kornton v. Conrad, Inc.*, 119 Nev. 123, 125, 67 P.3d 316, 317 (2003) (addressing the scope of employment); *Molino v. Asher*, 96 Nev. 814, 816-18, 618 P.2d 878, 879-80 (1980) (addressing factual questions regarding the control and the scope of employment). Summary judgment may nevertheless be appropriate where undisputed

evidence establishes the employee's status at the time of the incident. *See* *Molino*, 96 Nev. at 817-18, 618 P.2d at 879-80 (concluding summary judgment was proper where the undisputed evidence established that, as to the scope and course of employment, the employer could not be liable under the respondeat superior doctrine).

Critically here, Nevada courts have long recognized the "going and coming rule," which provides that "[t]he tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving." *Kornton*, 119 Nev. at 125, 67 P.3d at 317 (quoting *Molino*, 96 Nev. at 817, 618 P.2d at 879-80); *see also* *Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691-92 (1978) (addressing the going and coming rule and the "special errand" exception). Our supreme court has held that this rule encompasses accidents that occur when an employee is entering or leaving the employer's parking lot. *See* *Molino*, 96 Nev. at 817, 618 P.2d at 880 ("Many courts have held, in accordance with our holding, that parking lot accidents under the 'coming and going' rule are not sufficiently within the scope of employment to warrant respondeat superior liability."). Thus, an off-duty employee's car accident will not give rise to liability under respondeat superior where no evidence suggests that the employee was on a special errand that would further the employer's interests or otherwise give the employer control over the employee. *See Kornton*, 119 Nev. at 125, 67 P.3d at 317.

***2** Here, the undisputed evidence established that at the time of the accident, Bencheikh was on a break, in his personal vehicle, and leaving the premises to purchase a cup of coffee for himself. Critically, nothing in the record suggests that Bencheikh was engaged in a special, job-related errand that required driving or furthered BMW's business interests. *Cf.* *Nat'l Convenience Stores*, 94 Nev. at 659, 584 P.2d at 692 (affirming a jury verdict finding the employer liable under respondeat superior where the employee was involved in a car accident while traveling between the employer's business locations to measure shelves for a business project). Moreover, the evidence does not suggest that BMW had control over Bencheikh while he was physically out on this break, as Bencheikh was not a salaried employee and was not paid during his break, he did not receive reimbursement for travel, and BMW did not direct him to get the coffee. *Cf. Kornton,* 119 Nev. at 125-26, 67 P.3d at 317 (concluding summary judgment in favor of the employer was proper where the subject employee was an hourly employee who worked on a field crew and was involved in the accident while driving his personal vehicle from home to a job site). Under the particular facts of this case, therefore, we conclude BMW is not liable under a theory of respondeat superior. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

All Citations

Not Reported in Pac. Rptr., 2018 WL 6133883

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