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

HARVEST MANAGEMENT SUB LLC,

Petitioner,

vs.

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

Respondents,

and

AARON M. MORGAN; AND DAVID E. LUJAN,

Real Parties in Interest.

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AARON M. MORGAN

Cross-Petitioner,

vs.

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

Cross-Respondents,

and

HARVEST MANAGEMENT SUB LLC; AND DAVID E. LUJAN,

Real Parties in Interest for Cross-Petition.

Case No. 80837



**REAL PARTY IN INTEREST AARON M. MORGAN'S ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF**

**AND**

**CROSS-PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

**REAL PARTY IN INTEREST AARON M. MORGAN'S ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF**

**AND**

**CROSS-PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**


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## NRAP 26.1 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 Justices of this Court may evaluate possible disqualification or recusal.

Aaron M. Morgan is an individual.

Aaron M. Morgan was represented in the District Court by Richard Harris Law Firm, Marquis Aurbach Coffing, and Claggett & Sykes Law Firm; and

Aaron M. Morgan is represented in this Court by Richard Harris Law Firm and Claggett & Sykes Law Firm.

DATED this 20th day of July, 2020.

CLAGGETT & SYKES LAW FIRM

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## I. ROUTING STATEMENT

In its writ petition, Petitioner/Real Party in Interest for Cross-Petition, Harvest Management Sub, LLC ("Harvest"), asserts that the Supreme Court should retain this original proceeding for disposition based upon presented issues of first impression. Pet. at 4. Real Party in Interest/Cross-Petitioner, Aaron M. Morgan ("Morgan"), disagrees with Harvest's assessment of its presented issues as satisfying the standards in NRAP 17(a)(11) and (12). However, Morgan agrees that the Supreme Court should retain this original proceeding based upon his cross-petition, which asks this Court to interpret and enforce NRCP 49(a)(3), which states, "**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." The language of NRCP 49(a)(3) closely resembles the procedural posture of this case. Thus, the issues in Morgan's cross-petition satisfy the standards in NRAP 17(a)(11) and (12). Therefore, Morgan concurs in Harvest's request for the Supreme Court to retain this original proceeding.

## II. ISSUES PRESENTED FOR REVIEW

**A. WHETHER THIS COURT SHOULD REFUSE TO INTERVENE, DUE TO HARVEST'S FAILURE TO PRESERVE THE ARGUMENTS NOW PRESENTED TO THIS COURT REGARDING THE DISTRICT COURT'S NEW TRIAL ORDER.**

**B. WHETHER THIS COURT SHOULD DENY HARVEST'S WRIT PETITION AS A MATTER OF LAW SINCE:**

**(1) HARVEST DOES NOT PRESENT ANY CONTROLLING AUTHORITY REQUIRING ITS REQUESTED RELIEF TO BE GRANTED;**

**(2) THE DISTRICT COURT ALREADY MADE A FINDING THAT MORGAN'S NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS ARE BOTH UNRESOLVED;**

**(3) HARVEST CANNOT RAISE AT THIS LATE DATE ARGUMENTS REGARDING THE SUFFICIENCY OF THE EVIDENCE; AND**

**(4) THE DISTRICT COURT ALREADY IDENTIFIED FACTUAL ISSUES REGARDING LUJAN'S COURSE AND SCOPE OF EMPLOYMENT, SUCH THAT THIS WRIT PETITION IS INAPPROPRIATE.**

**C. WHETHER THE DISTRICT COURT PROPERLY ORDERED A NEW TRIAL ON THE OUTSTANDING ISSUES SINCE:**

**(1) MORGAN'S NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS ARE BOTH ADMITTEDLY UNRESOLVED;**

**(2) THERE IS NO PREJUDICE TO HARVEST TO RESOLVE MORGAN'S OUTSTANDING NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS;**

**(3) THE PLAIN LANGUAGE OF NRCP 42(b) DOES NOT PROHIBIT THE DISTRICT COURT'S NEW TRIAL ORDER; AND**

**(4) THE DISTRICT COURT REMAINS FREE TO ORDER A NEW TRIAL UNDER NRCP 59 PRIOR TO THE ENTRY OF A FINAL JUDGMENT.**

**D. ALTERNATIVELY, WHETHER THIS COURT SHOULD ORDER THE JUDGMENT ON JURY VERDICT IN FAVOR OF MORGAN TO BE EXTENDED TO HARVEST SINCE:**

**(1) HARVEST ACKNOWLEDGED THE FLAW IN THE JURY VERDICT FORM AND IS ESTOPPED FROM NOW CLAIMING OTHERWISE;**

**(2) NRCP 49(a)(3) PROVIDES THE BASIS FOR THE DISTRICT COURT TO ENTER JUDGMENT IN FAVOR OF MORGAN AND AGAINST HARVEST; AND**

**(3) UNDER THE CIRCUMSTANCES OF THIS CASE, LUJAN WAS IN THE COURSE AND SCOPE OF EMPLOYMENT, SUCH THAT THE JUDGMENT ON JURY VERDICT SHOULD BE EXTENDED TO HARVEST.**

## III. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

### A. MORGAN'S COMPLAINT.

Defendant David Lujan ("Lujan"), while working for and driving a bus owned by Harvest struck Morgan's vehicle and caused him severe injury. 1 Petitioner's Appendix ("PA") 1–6. Because of the accident, Morgan incurred significant medical bills and requires future medical care. *Id.* In this complaint, Morgan sued both Lujan and Harvest. *Id.*

### B. FROM THE BEGINNING, HARVEST'S CORPORATE REPRESENTATIVE WAS PRESENTED TO THE JURY AND THE COURT AS THE "CLIENT" BEING REPRESENTED.

Harvest and Lujan were represented by the same counsel at both the first jury trial which ended in a mistrial and the subsequent trial. Lujan attended the

first trial, while Harvest's NRCP 30(b)(6) representative, Erica Janssen, sat at counsel's table throughout the second trial. At the beginning of the second trial, Harvest's counsel introduced her to the jury venire as his client before jury selection started:

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

11 PA 1965 (emphasis added).

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

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

11 PA 1967–1968 (emphasis added).

In addition to introducing the corporate representative as a party, both sides discussed theories regarding corporate defendants during voir dire, with the members of the jury venire answering three separate questions about liability for corporate defendants, including one posed by Harvest. 11 PA 1966.

### C. DURING OPENING STATEMENTS, BOTH PARTIES ARGUE THAT LUJAN WAS ON THE JOB AT THE TIME OF THE ACCIDENT.

During his opening statement, Morgan stated that Lujan was a bus driver, driving a bus—thus in the course and scope of his employment—when the accident occurred:

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

11 PA 1974.

During the defense opening statement, Harvest admitted Lujan was "[their] driver" at the time of the accident:

> [Harvest's counsel]: Now, what was this accident all about? What happened in this accident? . . . [W]e're going to show you the actions of *our driver* were not reckless. They weren't wild. The impact did occur. We agree with that . . .

6 PA 1097 (emphasis added).

### D. HARVEST'S NRCP 30(b)(6) REPRESENTATIVE TESTIFIES ON BEHALF OF HARVEST THAT LUJAN WAS A HARVEST EMPLOYEE AT THE TIME OF THE CRASH.

Morgan called Erica Janssen, Harvest's 30(b)(6) corporate representative, on the fourth and fifth days of trial. She testified that she was employed by Harvest, that she was testifying on behalf of Harvest, and that she was listed in the interrogatories as the person authorized to respond on behalf of Harvest. She further testified that Lujan was the driver at the time of the accident:

> [Morgan's counsel]: . . . All right, Ms. Janssen, did you have an opportunity to review the sworn testimony of Mr. Lujan in this matter?
>
> [Janssen]: No.
>
> [Morgan's counsel]: Okay. Are you aware that Mr. Lujan was the driver?
>
> [Janssen]: Yes.

11 PA 1978.

Janssen testified that "[Harvest's] shuttlebus," driven by Lujan, was the vehicle involved in the crash:

> [Janssen]: Our shuttle bus is quite large and very visible, and it managed to cross three lanes of traffic and enter the fourth lane when the collision took place. Essentially, I'm saying that your client needs to look out.
>
> [Morgan's counsel]: So it was his fault for assuming that Mr. Lujan would obey the rules of the road and would stop at the stop sign? It's Aaron's fault?
>
> [Janssen]: He had the last opportunity to avoid the accident.
>
> [Morgan's counsel]: Are you aware of what actions he took to avoid the accident?

[Janssen]: I believe he braked and swerved.

[Morgan's counsel]: Okay. What could Mr. Lujan have done differently?

[Harvest's counsel]: Object. Speculation and irrelevant, frankly.

[Morgan's counsel]: It's their employee.

11 PA 1979 (emphasis added).

Additionally, Harvest's counsel confirmed that Janssen represented Harvest by eliciting the following information on cross-examination:

[Harvest's counsel]: You are here today as a representative of the Defendant, correct?

[Janssen]: Correct.

[Harvest's counsel]: And you're employed by the Defendant?

[Janssen]: Correct.

11 PA 1983.

Then, Janssen further established that she acted on behalf of a "company defendant," during the lawsuit:

[Harvest's counsel]: Did you have any -- anything to do with preparing that answer?

[Janssen]: I provided, I believe, the names of the correct Defendant.

[Harvest's counsel]: Okay.

[Janssen]: Company Defendant, I should say.

11 PA 1984.

On re-direct, Janssen confirmed that she signed the verification on behalf of Harvest for Harvest's answers to Morgan's interrogatories:

> [Morgan's counsel]: And are those the answers that were provided in response to our interrogatories?
>
> [Janssen]: Yes.
>
> [Morgan's counsel]: And, in fact, you were the one that prepared those?
>
> [Janssen]: Actually, our attorney did.
>
> [Morgan's counsel]: Okay.
>
> [Janssen]: I signed the verification.
>
> [Morgan's counsel]: So where it says, on interrogatory number 14, and you can
>
> follow along with me:
>
> > "Please provide the full name of the person answering the interrogatories on behalf of the Defendant, Harvest Management Sub, LLC, and state in what capacity you are authorized to respond on behalf of said Defendant.
> >
> > "Erica Janssen, Holiday Retirement, Risk Management."

11 PA 1985.

Finally, Janssen indicated that, following the accident, Lujan, as Harvest's driver, would have filled out an "accident information card," one of Harvest's "internal documents":

> [Morgan's counsel]: Okay. Can you tell the jurors what that document is?

[Janssen]: It's titled "Accident Information Card, Other Vehicle."

[Morgan's counsel]: Okay. And that's a document that Mr. Lujan would have filled out, true?

[Janssen]: There is no name or signature on it.

[Morgan's counsel]: Is that one of your internal documents?

[Janssen]: It is.

[Morgan's counsel]: Okay. So, obviously, if it's one of your company's internal documents, Mr. Morgan would not have filled that out, true?

[Janssen]: In terms of who completed that document?

[Morgan's counsel]: Yes.

[Janssen]: I believe it was our driver.

11 PA 1986.

### E. HARVEST READS INTO THE RECORD LUJAN'S TESTIMONY THAT HE WAS EMPLOYED BY HARVEST AT THE TIME OF THE ACCIDENT.

On the fifth day of trial, Harvest's counsel requested Lujan's testimony from the first trial be read into the record in the jury's presence. 11 PA 1987–1988. That testimony, originally elicited by Morgan's counsel, explicitly indicated that Lujan was employed by Harvest as a bus driver at the time of the accident:

[Harvest's counsel]: All right, Mr. Lujan, at the time of the accident of April 2014, were you employed with Montera Meadows?

[Lujan]: Yes.

[Harvest's counsel]: And what was your employment?

[Lujan]: I was the bus driver.

[Harvest's counsel]: Okay. And what is your understanding of the relationship of Montera Meadows to Harvest Management?

[Lujan]: Harvest Management was our corporate office.

[Harvest's counsel]: Okay.

[Lujan]: Montera Meadows is just the local.

[Harvest's counsel]: Okay, all right. And this accident happened on April 1st, 2014, correct?

[Lujan]: Yes, sir.

11 PA 1989–1990.

### F. BOTH PARTIES REFERENCE HARVEST'S RESPONSIBILITY FOR LUJAN'S ACTIONS.

One final time during his closing, Morgan indicated that Erica Janssen, Harvest's corporate representative, had taken the stand during the trial to testify about the actions of Lujan, Harvest's driver, who did not contest liability:

> [Morgan's counsel] . . . They're going to point the finger at Aaron despite the fact that when Erica Janssen, the corporate representative, took the stand, she didn't even know whether the driver had a stop sign. . . . [y]ou know, when we talked to Ms. Janssen and said, . . . "Did you know that your driver said that Aaron did nothing wrong?" "No, I didn't know that."

11 PA 1996–1997.

Likewise, Harvest indicated that Janssen testified and that Lujan did not contest liability:

> [Harvest's counsel]: . . . [S]o this is why Ms. Janssen testified that he may have had some responsibility for the accident. I'm not saying that he caused the accident. There's no question Mr. Lujan should not have pulled out in front of him. He had the right of way . . .

10 PA 1792.

### G. HARVEST WAIVES ANY OBJECTION TO MAKING CHANGES TO THE SPECIAL VERDICT FORM.

The District Court *sua sponte* created a special verdict form that inadvertently included Lujan as the only Defendant in the caption. The District Court informed the parties of this omission, and the Defendants explicitly agreed they had no objection:

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

11 PA 1994–1995.

The jury ultimately found Defendants to be negligent and 100% at fault for the accident. 10 PA 1858–1859.

### H. THE CASE IS REASSIGNED TO JUDGE GONZALEZ WHO DENIES MORGAN'S MOTION FOR ENTRY OF JUDGMENT BUT LATER REASSIGNS THE CASE BACK TO JUDGE BELL.

After the jury's verdict was entered, but prior to the entry of judgment, the case was randomly reassigned to Judge Gonzalez. Morgan had filed a motion for entry of judgment prior to the reassignment. 11 PA 1867–1922. Since Judge Bell was familiar with the case, Morgan only summarized the key facts and referred to NRCP 49(a), which allowed the District Court to enter judgment on the "issues not submitted" to jury, essentially making the District Court the trier of fact on the outstanding issues. Since Judge Gonzalez was not familiar with the history of the case, Morgan's motion for entry of judgment was denied. 11 PA 2013–2017. However, eventually Judge Gonzalez transferred the case back to Judge Bell, who then confirmed the transfer to resolve the remaining issues. 12 PA 2237–2244, 2318–2323.

### I. MORGAN FILES A NOTICE OF APPEAL BASED UPON HARVEST'S ARGUMENT THAT MORGAN HAD ABANDONED HIS CLAIMS AGAINST HARVEST.

In the District Court, Harvest argued, just as it does in this Court, that Morgan had allegedly abandoned his claims. 11 PA 1923–1948. Since Judge Gonzalez denied Morgan's motion for entry of judgment, the status of Morgan's unresolved claims against Harvest was unclear. Thus, Morgan filed a notice of appeal out of an abundance of caution since finality was uncertain. 11 PA 2018–2026.

### J. THIS COURT DISMISSES MORGAN'S APPEAL DUE TO LACK OF A FINAL, APPEALABLE ORDER.

Upon Harvest's motion, this Court confirmed that a final, appealable judgment had not been entered because "no disposition resolves the claims against Harvest." 14 PA 2598. In this Court's dismissal order, it stated, "Jurisdiction remains vested in the district court to take whatever steps it needs to reach a final judgment." 14 PA 2599. Thus, the status of Morgan's claims against Harvest are clarified through the Court's order.

### K. THE DISTRICT COURT ORDERS A NEW TRIAL ON MORGAN'S CLAIMS AGAINST HARVEST.

The District Court had earlier declined to rule on Harvest's own motion for entry of judgment due to concerns over divestiture of jurisdiction. 12 PA 2318–2323. However, now that it was clear from this Court's dismissal order that the District Court was not divested of jurisdiction, the District Court issued a decision on the merits of Harvest's motion for entry of judgment.

The District Court made the determination that upon the basis of NRCP 42(b), it would order a new trial upon Morgan's claim against Harvest for vicarious liability. 14 PA 2608–2618. Harvest now seeks extraordinary relief from this Court. Morgan answers Harvest's writ petition and files a counter-petition to have the judgment entered against Lujan extended to Harvest.

## IV. STANDARDS OF REVIEW

A writ of mandamus is available "to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Id.*

This Court will exercise its discretion to consider writ petitions, when an important issue of law needs clarification, and this Court's review would serve considerations of public policy, sound judicial economy, and administration. *See Dayside Inc. v. First Judicial Dist. Court*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008). "One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of . . . a [rule of civil procedure] that this court has never interpreted." *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000).

When reviewing a district court's interpretation of the Nevada Rules of Civil Procedure, this Court "turn[s] to the rules of statutory interpretation," *Mona v. Eighth Judicial Dist. Court*, 132 Nev. 719, 725, 380 P.3d 836, 840 (2016), which is a question of law that this Court reviews de novo, even in the context of a writ petition. *State v. Second Judicial Dist. Court (Ayden A.)*, 132 Nev. 352,

355, 373 P.3d 63, 65 (2016) (citing *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008)).

Importantly, writ petitions are not appropriate to resolve outstanding factual issues. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."). Writ relief is typically available only when there is no plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). And, generally, an appeal is an adequate legal remedy precluding writ relief. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). Even if the appellate process would be more costly and time consuming than a mandamus proceeding, it is still an adequate remedy. *See County of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602 (1961). In that regard, this Court avoids piecemeal appellate review and seeks to review possible errors only after a final judgment has been entered. *Moore v. Eighth Judicial Dist. Court*, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980). Further, it is within the complete discretion of this Court to determine if a petition will be considered. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

## V. LEGAL ARGUMENT

### A. THIS COURT SHOULD REFUSE TO INTERVENE, DUE TO HARVEST'S FAILURE TO PRESERVE THE ARGUMENTS NOW PRESENTED TO THIS COURT REGARDING THE DISTRICT COURT'S NEW TRIAL ORDER.

In its writ petition, Harvest argues that the District Court could not order a new trial based upon NRCP 42(b) or NRCP 59. Pet. at 75–82. However, Harvest never raised these issues in the District Court, challenging the District Court's authority. 11 PA 2027–2053; 12 PA 2215–2236. Instead, the District Court reached this conclusion on its own accord after this Court's order dismissing Morgan's appeal as premature directed the District Court to resolve the remaining claims. 14 PA 2598–2599, 2608–2618. In fact, in the status check hearing to set a trial date in the District Court after the decision had already been made, Harvest acknowledged, "The Court's order granting the new trial does it on a ground that wasn't—it wasn't briefed or argued by either of the parties. It's the use of Rule 42(b) post-trial to grant a new trial. I was wondering if we could get an opportunity to brief that issue." 14 PA 2621–2622. The District Court invited Harvest to file a motion for reconsideration, yet Harvest never filed such a motion and, therefore, never presented the issues to the District Court upon which Harvest now seeks relief in this Court. 14 PA 2622. Since Harvest admittedly failed to raise any of its challenges to the District Court's new trial order based upon NRCP 42(b), none of those issues are properly before this Court. *See Old*

*Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52–53, 623 P.2d 981, 983–984 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."); *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 437–438, 245 P.3d 542, 545 (2010) ("We decline to reverse summary judgment to allow Schuck to reinvent his case on new grounds."); *Archon Corp. v. Eighth Judicial Dist. Court*, 407 P.3d 702, 708 (Nev. 2017) (holding that "in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the District Court will almost never be appropriate"). Therefore, the Court should deny Harvest's writ petition out of hand for admittedly failing to first raise the issues in the District Court.

### B. THIS COURT SHOULD DENY HARVEST'S WRIT PETITION AS A MATTER OF LAW.

#### (1) HARVEST DOES NOT PRESENT ANY CONTROLLING AUTHORITY REQUIRING ITS REQUESTED RELIEF TO BE GRANTED.

"Vicarious liability" describes the burden "a supervisory party . . . bears for the actionable conduct of a subordinate . . . based on the relationship between the two parties." *McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 408 P.3d 149, 152 (Nev. 2017) (citing BLACK'S LAW DICTIONARY 1055 (10th ed. 2014)). As a result, "[t]he supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor." *Id.*

The distinction between primary liability and the employer's separate, vicarious liability is codified in NRS 41.130, which distinguishes between a primary tortfeasor's liability for damages, and "where the person causing [a personal injury] is employed by another . . . or corporation responsible for the conduct of the person causing the injury, that other . . . corporation so responsible is liable to the person injured for damages." Thus, "a person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY, § 13 (2000).

In the instant case, it is undisputed that Lujan was an employee of Harvest within the course and scope of his duties with Harvest when the accident occurred. Harvest never objected to such a theory and, throughout trial, it was understood by the parties, the jury, and the District Court, that Lujan was employed by Harvest and on the job for Harvest when he drove the Harvest-owned bus into Morgan's vehicle. As a result, Lujan's negligence, and the resulting liability, is imputed to Harvest, who is vicariously liable for the negligence of their subordinate.

Despite this straightforward case law and factual background confirming Harvest's liability for Lujan's actions, Harvest asks this Court to ignore the record, ignore the law, and believe its skewed version of the facts and law. Yet, Harvest does not point to any law that requires its requested relief of dismissal.

NRS 34.160 (providing that a writ of mandamus may issue to compel the performance of an act required by law, as a duty resulting from an office, trust or station); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Notably, Harvest relies upon a Nevada Court of Appeals unpublished order for its position, which cannot be cited according NRAP 36(c)(3). Pet. at 65 n.8. As such, it is unclear upon what legal basis this Court could actually dismiss Morgan's outstanding claims against Harvest. Therefore, the Court should deny Harvest's writ petition.

**(2) THE DISTRICT COURT ALREADY MADE A FINDING THAT MORGAN'S NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS ARE BOTH UNRESOLVED.**

An issue is tried by implied consent where a party's counsel "had raised the issue in his opening argument, [opposing counsel] specifically referred to the matter as an issue in the case, that the factual issue had been explored in discovery, that no objection had been raised at trial to the admission of evidence relevant to the issue." *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1140 (1979). When issues not raised by the pleadings are treated by express or implied consent of the parties, "they shall be treated in all respects as if they had been raised in the pleadings and that, though the pleadings may be amended to conform to the evidence, failure to amend does not affect the result of the trial of such issues." *Essex v. Guarantee Ins. Co.*, 89 Nev. 583, 585, 517 P.2d 790, 791

(1973). The District Court previously recognized Harvest's trial by consent of Morgan's claims for respondeat superior: "Mr. Morgan claimed negligence and negligence per se against David Lujan and vicarious liability/respondeat superior against Harvest. Mr. Morgan claimed that Mr. Lujan was acting in the scope of his employment with Harvest when he caused an accident to occur, injuring Mr. Morgan." 12 PA 2318–2319. Thus, Harvest improperly attempts to have this Court reweigh the facts already determined by the District Court, which this Court cannot do. *See Newman*, 97 Nev. at 604, 637 P.2d at 536 ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."); *Ryan's Express Transp. Servs. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172–173 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citing *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); *see also Anderson v. Bessemer*, 470 U.S. 564, 575, 105 S.Ct. 1504 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact)).

Moreover, to the extent Morgan "failed to amend" his pleadings to conform to a negligent entrustment theory, it "does not affect the result of the

trial of these issues." NRCP 15(b); *see also I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1204 (2013) ("NRCP 15(b) allows a court to hear an issue not raised in the pleadings when the issue is tried with the express or implied consent of the parties."). Therefore, this Court should decline Harvest's invitation to reweigh factual issues that have already been determined by the District Court.

### (3) HARVEST CANNOT RAISE AT THIS LATE DATE ARGUMENTS REGARDING THE SUFFICIENCY OF THE EVIDENCE.

Harvest's writ petition argues the oft-repeated statement that there is allegedly no evidence to support any of Morgan's claims against Harvest. Aside from the fact that the record does contain evidence to support these claims, Harvest cannot argue at this late date that the evidence was insufficient for failure to make an NRCP 50(a) motion at the close of evidence. *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969), *aff'd sub nom.*, 90 Nev. 5, 517 P.2d 1006 (1974) ("It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable."). Therefore, since Harvest failed to preserve this issue through an NRCP 50(a) motion, the Court should ignore Harvest's pleas to reweigh the evidence to reach a different outcome.

### (4) THE DISTRICT COURT ALREADY IDENTIFIED FACTUAL ISSUES REGARDING LUJAN'S COURSE AND SCOPE OF EMPLOYMENT, SUCH THAT THIS WRIT PETITION IS INAPPROPRIATE.

The District Court's new trial order recites the factual background upon which it determined that a new trial should be granted. 14 PA 2608–2618. Harvest's writ petition attempts to rebut the majority of these factual recitations, which is contrary to the purpose of a writ petition. *Newman*, 97 Nev. at 604, 637 P.2d at 536 ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."). Harvest argues at length that Morgan has not satisfied his initial burden to demonstrate that Lujan was in the course and scope of his employment with Harvest. Pet. 70–75. Aside from the evidence highlighted in this answer, the District Court also concluded in its new trial order that the burden had actually shifted to Harvest—a point which Harvest cannot deny.

- "On April 1, 2014, David Lujan a driver employed by Harvest Management, was driving a Harvest-owned shuttle bus. At lunchtime, Mr. Lujan drove the company bus to a public park to eat his lunch. After Mr. Lujan finished his lunch , Mr. Lujan was leaving the park in the company bus when Mr. Lujan crossed in front of Aaron Morgan's car at an intersection." 14 PA 2608.

- "Harvest's answer to the complaint and the evidence at trial established that Mr. Lujan was an employee and under the control of Harvest.

Harvest also admits in its answer that Harvest had control of the bus that Mr. Lujan was driving, and that Harvest had entrusted the bus to Mr. Lujan." 14 PA 2611.

- "At trial, Mr. Lujan testified that he drove Harvest's bus to the park to eat lunch, and that he was leaving the park when the accident occurred." 14 PA 2611–2612.

- "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 lunch would not necessarily be sufficient to rebut the presumption on its own." 14 PA 2613.

- "Here, there was not sufficient evidence presented at trial to determine that Mr. Lujan was not acting within the scope of his employment as a matter of law." 14 PA 2613.

- "Harvest presented nothing to suggest that Harvest was contesting vicarious liability for the accident." 14 PA 2616.

In the end, Harvest simply cannot overcome these factual issues, particularly in the context of a writ petition. *See Newman*, 97 Nev. at 604, 637 P.2d at 536 ("As we have repeatedly noted, an appellate court is not an appropriate forum in which to resolve disputed questions of fact."); *Ryan's*

*Express Transp. Servs.*, 128 Nev. at 299, 279 P.3d at 172–173 ("An appellate court is not particularly well-suited to make factual determinations in the first instance.") (citing *Zugel*, 99 Nev. at 101, 659 P.2d at 297); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); *see also Anderson*, 470 U.S. at 575, 105 S.Ct. 1504 (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact)); *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 365, 184 P.3d 378, 385 (2008) ("[I]t is not the role of this court to reweigh the evidence."); *NEC Corp. v. Benbow*, 105 Nev. 287, 290, 774 P.2d 1033, 1035 (1989) ("Neither the credibility of the witnesses nor the weight of the evidence may be considered" on appeal.). Therefore, the Court should reject Harvest's writ petition on the grounds that it attempts to have this Court reweigh facts, while ignoring the District Court's factual recitations.

### C. THE DISTRICT COURT PROPERLY ORDERED A NEW TRIAL ON THE OUTSTANDING ISSUES.

#### (1) MORGAN'S NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS ARE BOTH ADMITTEDLY UNRESOLVED.

Although Harvest argues that Morgan "abandoned" his claims against Harvest, there is no indication in the record for such a result. The District Court's new trial order specifically addressed this issue. 14 PA 2614–2616. In fact, the

District Court noted that it would be an ethical violation under RPC 1.7 for the same counsel to represent both Lujan and Harvest, while taking the position that Harvest was not vicariously liable for Lujan's actions. *Id.* Interestingly, however, it was only after Harvest retained new counsel in post-trial proceedings that this "abandonment" argument was raised. But, this Court squarely prohibits the raising of new issues after the conclusion of a proceeding. *Cf. Schuck*, 126 Nev. at 437–438, 245 P.3d at 545 ("We decline to reverse summary judgment to allow Schuck to reinvent his case on new grounds."). Additionally, Harvest is judicially estopped to now claim that Morgan abandoned his claims against Harvest because it was successful in dismissing Morgan's appeal on the basis that there were remaining claims. 14 PA 2598–2599; *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287–288, 163 P.3d 462, 469 (2007) (applying judicial estoppel when "a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage") (citation and internal quotation marks omitted). Thus, the Court should similarly reject the argument that Morgan has abandoned his claims against Harvest.

**(2) <u>THERE IS NO PREJUDICE TO HARVEST TO RESOLVE MORGAN'S OUTSTANDING NEGLIGENT ENTRUSTMENT AND RESPONDEAT SUPERIOR CLAIMS.</u>**

For the first time on appeal, Harvest argues that it will be prejudiced by having to face Morgan's remaining claims at trial. To establish prejudice,

Harvest must establish "[d]amage or detriment to one's legal rights or claims." BLACK'S LAW DICTIONARY, 1428 (11th ed. 2019). In essence, Harvest would have this Court place Morgan's claims against Harvest into a legal no-man's land—where the claims cannot be tried, but they also have not been resolved (according to the dismissal of Morgan's prior appeal). As such, Harvest's bare claims of prejudice should not be heeded because they would create a legal impossibility.

### (3) THE PLAIN LANGUAGE OF NRCP 42(b) DOES NOT PROHIBIT THE DISTRICT COURT'S NEW TRIAL ORDER.

This Court has previously "indicated that the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure." Webb v. Clark County Sch. Dist., 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009) (citations omitted). Thus, NRCP 42(b) should be read according to its plain language. *Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("When a statute's language is plain and unambiguous, we will apply the statute's plain language."). Notably, nothing within NRCP 42(b) prohibits its application to the circumstances of this case: "(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." True to the language of this rule, the District Court has maintained the

right to a jury trial. 14 PA 2623. Harvest's argument that this Court should read additional language into the language of NRCP 42(b) would violate well established rules of statutory interpretation. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391–392, 302 P.3d 1144, 1147 (2013) ("Our duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.") (citing *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 498, 915 P.2d 288, 290 (1996)).

### (4) THE DISTRICT COURT REMAINS FREE TO ORDER A NEW TRIAL UNDER NRCP 59 PRIOR TO THE ENTRY OF A FINAL JUDGMENT.

In a last ditch effort to avoid the retrial, Harvest argues that the District Court was without jurisdiction under NRCP 59 to order a new trial since it was allegedly without jurisdiction. Pet. at 82–85. But, there was admittedly no final judgment, such that the District Court never lost jurisdiction over the case. *SFPP, L.P. v. Second Judicial Dist. Court of Nev.*, 123 Nev. 608, 612, 173 P.3d 715, 717 (2007) ("[O]nce a district court enters a final judgment, that judgment cannot be reopened except under a timely motion sanctioned by the Nevada Rules of Civil Procedure. . . ."). Additionally, prior to the entry of a final judgment, the District Court is free to consider and reconsider any prior issues. *APCO Constr. v. Eighth Judicial Dist. Court (In re Manhattan W. Mechanic's Lien Litig.)*, 131 Nev. 702, 707 n.3, 359 P.3d 125, 128 n.3 (2015) ("NRCP 54(b) permits the

district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all the parties.") (citing *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009)). Regardless, the District Court did not rely upon NRCP 59 in granting a new trial limited to the claims against Harvest. 14 PA 2608–2618. Therefore, the Court should reject Harvest's jurisdictional argument.

### D. ALTERNATIVELY, THIS COURT SHOULD ORDER THE JUDGMENT ON JURY VERDICT IN FAVOR OF MORGAN TO BE EXTENDED TO HARVEST.

#### (1) HARVEST ACKNOWLEDGED THE FLAW IN THE JURY VERDICT FORM AND IS ESTOPPED FROM NOW CLAIMING OTHERWISE.

If the Court chooses to entertain Harvest's writ petition on the merits, the Court should also consider Morgan's cross-petition to extend his judgment against Lujan to Harvest. 11 PA 2054–2063. Harvest acknowledged the flaw in the verdict form at the time of trial and did not object.

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

11 PA 1994–1995.

Harvest's failure to object should have been the end of the analysis. *See Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008) ("We restate the requirement

that in our advocacy system, the parties' attorneys are required to competently and timely state their objections."); *Nevada State Bank v. Snowden*, 85 Nev. 19, 21, 449 P.2d 254, 255 (1969) ("[U]nless specifically objected to at trial, objections to a substantive error in the absence of constitutional considerations are waived and no issue remains for this court's consideration."). Therefore, in considering Morgan's requested relief in his cross-petition, the Court should first consider that Harvest acquiesced in the verdict form proposed by the District Court.

### (2) NRCP 49(a)(3) PROVIDES THE BASIS FOR THE DISTRICT COURT TO ENTER JUDGMENT IN FAVOR OF MORGAN AND AGAINST HARVEST.

NRCP 49(a)(3) provides: "**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."[1] In the District Court's new trial order, it denied Morgan's continued requests to have judgment entered in his favor and against Harvest. 14 PA 2610–2611. The District Court concluded that it was powerless to make a finding regarding

[1] Although NRCP 49 was amended effective March 1, 2019 based upon Administrative Docket No. 522, the changes in this language appear to be purely stylistic.

Morgan's vicarious liability claim against Harvest. *Id.* Yet, this is precisely what the NRCP 49(a)(3) allows a District Court to do. Instead, the further discussion in the District Court's order makes clear that it believed that the facts as presented at the jury trial did not clearly establish a prevailing party on the vicarious liability issue. If this Court agrees with Morgan's assessment of the benefit that Harvest gained by virtue of having Lujan available to pick up and drop off passengers, Morgan asks this Court to order the District Court to enter judgment in his favor and against Harvest according to NRCP 49(a)(3).

### (3) UNDER THE CIRCUMSTANCES OF THIS CASE, LUJAN WAS IN THE COURSE AND SCOPE OF EMPLOYMENT, SUCH THAT THE JUDGMENT ON JURY VERDICT SHOULD BE EXTENDED TO HARVEST.

"Ordinarily, respondeat superior liability attaches only when the employee is under the control of the employer and when the act is within the scope of employment." *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879 (1980). However, an employer is liable under respondeat superior when its vehicle is used "in furtherance of the employer's purpose" even if the use was unauthorized. *Meagher v. Garvin*, 80 Nev. 211, 216–217, 391 P.2d 507, 510 (1964) (finding that even though the employer had not allowed the driver to drive the company vehicle, the fact that it was being used in furtherance of the employer's business allowed vicarious liability). An employer can be held liable under respondeat superior when he is deriving "a benefit" from the employee's use of a company

vehicle. *Evans v. Sw. Gas Corp.*, 108 Nev. 1002, 1005–1006, 842 P.2d 719, 721–722 (1992).

The going and coming rule "frees employers from liability for the dangers employees encounter in daily life." *MGM Mirage v. Cotton*, 121 Nev. 396, 399–400, 116 P.3d 56, 58 (2005). The policy behind the going and coming rule has caused Nevada to recognize several exceptions. *Bob Allyn Masonry v. Murphy*, 124 Nev. 279, 287, 183 P.3d 126, 131 (2008). As an exception to the going and coming rule, an employer can be liable when its employee abandons a "personal objective and turn[s] to accomplish a task reasonably within the scope of his employment and of benefit to his master." *Nat'l Convenience Stores v. Fantauzzi*, 94 Nev. 655, 659, 584 P.2d 689, 692 (1978).

This legal distinction in vicarious liability exists between an employee driving to and from work, on the one hand, and an employee driving the employer's vehicle during off-work hours in furtherance of company business, on the other hand. *Evans*, 108 Nev. at 1008, 842 P.2d at 723. An employee is under the employer's control when he is driving a company vehicle during his free time for the employer's convenience. *Id.*, 108 Nev. at 1006, 842 P.2d at 722 (the employee committed a tort while driving the employer's van home for the day, but the employee was allowed to use the vehicle so he could quickly respond to the employer's needs). Even an employer who claims it receives no benefit from the employee's personal use of a company vehicle can be held liable if only

a modest benefit to the employer is shown. *Id.*, 108 Nev. at 1006–1007, 842 P.2d at 722.

"An exception [to the coming and going rule] exists whereby an employee on some special errand, although not during usual working hours, may nevertheless be considered within his scope of employment and under control of the employer." *Nat'l Convenience Stores v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 692 (1978) (citing *Boynton v. McKales*, 139 Cal. App. 2d 777, 294 P.2d 733 (1956)). In evaluating the special errand exception, "[i]t is not necessary that the servant is directly engaged in the duties which he was employed to perform, but included are also missions which incidentally or indirectly contribute to the service, incidentally or indirectly benefit the employer. *Boynton*, 139 Cal. App. 2d at 789, 294 P.2d at 740. Therefore, an employer has liability when it "furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." *Halliburton Energy Servs., Inc. v. Dep't of Transp.*, 220 Cal. App. 4th 87, 96, 162 Cal. Rptr. 3d 752, 760 (2013).

When an employee is driving the employer's vehicle for his personal use, there is often a constant benefit to the employer under which liability can be established. *Evans*, 108 Nev. at 1007–1008, 842 P.2d at 723 (citing *McClean v. Chi. G. W. R. Co.*, 3 Ill. App. 2d 235, 121 N.E.2d 337 (1954)). Unlike an employee arriving at the start of a workday, an employee driving the employer's

vehicle back to the company during off-hours is within the scope employment. *Arteaga v. Ibarra*, 109 Nev. 772, 777, 858 P.2d 387, 391 (1993) (an employee injured while returning the company vehicle was within his scope of employment even though he was not being paid and the employer did not control the time that the vehicle was returned).

As the District Court already recited, there are enough facts for this Court to make a legal determination that Lujan was, in fact, within the course and scope of his employment with Harvest. In particular,

- "On April 1, 2014, David Lujan a driver employed by Harvest Management, was driving a Harvest-owned shuttle bus. At lunchtime, Mr. Lujan drove the company bus to a public park to eat his lunch. After Mr. Lujan finished his lunch , Mr. Lujan was leaving the park in the company bus when Mr. Lujan crossed in front of Aaron Morgan's car at an intersection." 14 PA 2608.

- "Harvest's answer to the complaint and the evidence at trial established that Mr. Lujan was an employee and under the control of Harvest. Harvest also admits in its answer that Harvest had control of the bus that Mr. Lujan was driving, and that Harvest had entrusted the bus to Mr. Lujan." 14 PA 2611.

- "At trial, Mr. Lujan testified that he drove Harvest's bus to the park to eat lunch, and that he was leaving the park when the accident occurred." 14 PA 2611–2612.

- "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 lunch would not necessarily be sufficient to rebut the presumption on its own." 14 PA 2613.

- "Here, there was not sufficient evidence presented at trial to determine that Mr. Lujan was not acting within the scope of his employment as a matter of law." 14 PA 2613.

- "Harvest presented nothing to suggest that Harvest was contesting vicarious liability for the accident." 14 PA 2616.

Therefore, this Court should order the District Court to extend the judgment in favor of Morgan and against Lujan to also extend to Harvest.

## VI. CONCLUSION

In summary, this Court should deny Harvest's writ petition because (1) Harvest has failed to preserve its arguments regarding the District Court's reliance on NRCP 42(b) to order a new trial; (2) Harvest's writ petition fails as a matter of law; and (3) the District Court properly ordered a new trial on the outstanding issues. Alternatively, this Court should order the judgment on the jury verdict to be extended to Harvest since Lujan was acting within the course

and scope of his employment with Harvest when he crashed into and injured Morgan.

DATED this 20th day of July, 2020.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
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**DECLARATION OF MICAH S. ECHOLS, ESQ. IN SUPPORT OF CROSS-PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

Micah S. Echols, Esq. being first duly sworn, deposes and says:

1. I am an attorney with Claggett & Sykes Law Firm and attorney of record for Cross-Petitioner, Aaron M. Morgan ("Morgan"), in the above-captioned case. I have personal knowledge of the matters stated in this declaration, except for those stated upon information and belief. To those matters stated upon information and belief, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will do so if called upon.

2. I certify and affirm that Morgan's cross-petition for writ of mandamus or prohibition is filed in good faith and that he has no plain, speedy, and adequate remedy in the ordinary course of law that he could pursue in absence of the extraordinary relief requested.

Dated this 20th day of July, 2020.

*/s/ Micah S. Echols*
Micah S. Echols, Esq.

## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answer and cross-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 brief 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. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of July, 2020.

CLAGGETT & SYKES LAW FIRM

By /s/ Micah S. Echols
Micah S. Echols, Esq.
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4101 Meadows Lane, Suite 100
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*Attorneys for Real Party in Interest/Cross-Petitioner, Aaron M. Morgan*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REAL PARTY IN INTEREST AARON M. MORGAN'S ANSWER TO PETITION FOR EXTRAORDINARY WRIT RELIEF AND CROSS-PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was filed with the Supreme Court of Nevada on the 20th day of July, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Benjamin Cloward
Bryan Boyack
Dennis Kennedy
Andrea Champion
Sarah Harmon

I further certify that the foregoing document was mailed via U.S. Mail to the following:

Honorable Linda Marie Bell, District Court Judge
Eighth Judicial District Court, Department 7
200 Lewis Avenue
Las Vegas, Nevada 89155

David E. Lujan
651 McKnight Street, Apt. 16
Las Vegas, Nevada 89501

/s/ Anna Gresl
Anna Gresl, an employee of
Claggett & Sykes Law Firm