Case No. 80837

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

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF

DENNIS L. KENNEDY, Nevada Bar No. 1462
SARAH E. HARMON, Nevada Bar No. 8106
ANDREA M. CHAMPION, Nevada Bar No. 13461
BAILEY❖KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: 702.562.8820
Facsimile: 702.562.8821
DKennedy@BaileyKennedy.com
SHarmon@BaileyKennedy.com
AChampion@BaileyKennedy.com

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

September 24, 2020

TABLE OF CONTENTS

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

TABLE OF AUTHORITIES

Cases

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Rules

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF

I. INTRODUCTION

The record is clear and undisputed. Mr. Morgan pled one claim against Harvest — negligent entrustment — but he failed to prove this claim at trial or submit it to the jury for determination. There is no procedural mechanism by which Harvest can — two and a half years later — be held liable for any damages assessed to a different party, and Harvest is entitled to a judgment in its favor as a matter of law.

Whether voluntarily or through negligence, Mr. Morgan abandoned his single claim against Harvest and focused his case solely on the amount of his damages and the negligence of the individual defendant, Mr. Lujan. Mr. Morgan obtained a large judgment against Mr. Lujan, but he has no realistic hope of collecting it. Therefore, over four months after the jury rendered its verdict, Mr. Morgan changed strategies and began arguing, without support, that it was "understood" and "undisputed" that Harvest was vicariously liable, and that the jury's verdict should be applied against both Mr. Lujan and Harvest.

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Mr. Morgan did not plead a claim of vicarious liability, and he has failed to prove that the claim was tried by implied consent. Furthermore, Mr. Morgan failed to prove this claim at trial, and this claim was also never presented to the jury for determination.

The District Court abused its discretion and committed plain error in denying Harvest's Motion for Entry of Judgment and *sua sponte* ordering a partial re-trial of the claim of vicarious liability pursuant to NRCP 42(b). The District Court based its decision on findings of fact that were completely unsupported by the record and in contravention of well-established law.

Therefore, Harvest respectfully requests that this Court: (1) issue a writ of prohibition: (a) vacating the January 3, 2020 Decision and Order denying Harvest's Motion for Entry of Judgment and granting a partial re-trial pursuant to NRCP 42(b); and (b) preventing the District Court from proceeding with a new trial or partial re-trial of the claim of vicarious liability; and (2) issue a writ of mandamus directing the District Court to enter judgment in favor of Harvest on any claim Mr. Morgan pled (or could have pled) in this action.

/ / /

/ / /

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

II. ARGUMENT

A. This Court Can Properly Review the District Court's Clearly Erroneous and Completely Unsupported Factual Findings.

Mr. Morgan repeatedly contends that this Court cannot resolve "disputed questions of fact," "reweigh the facts," "make factual determinations in the first instance," or "make determinations of credibility." (Answer[1] at 5:6-10, 5:16-6:2, 27:20-28:11, 28:17-19, 29:21-31:5.) No one is asking this Court to do any of these things. Instead, Harvest asks this Court to determine if the District Court's factual findings are clearly erroneous or unsupported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009); *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996); *Beverly Enters. v. Globe Land Corp.*, 90 Nev. 363, 364-65, 526 P.2d 1179, 1179-80 (1974).

Here, the District Court attempts to justify its refusal to enter judgment in favor of Harvest, and its decision to order a partial re-trial pursuant to NRCP 42(b), on several erroneous factual findings that are unsupported by the undisputed evidence in the record:

[1] Although Mr. Morgan's Answer is not on line-numbered pleading paper, Harvest has attempted to cite herein to specific pages and lines in the Answer for ease of reference.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Factual Finding:	Reason Finding is Erroneous and Unsupported:
Mr. Morgan alleged a claim for vicarious liability against Harvest in his Complaint. (14P.A.44, at 2609:1-4.)	The Complaint does not state a claim for vicarious liability. (1P.A.1.) While the claim against Harvest may have been titled "vicarious liability/respondeat superior," this is irrelevant. *Otak Nev., LLC v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 129 Nev. 799, 809, 312 P.3d 491, 498-99 (2013) (holding that claims are "analyzed . . . according to [their] substance, rather than [their] label[s]"). The only claim pled in Mr. Morgan's Complaint was negligent entrustment. (Pet. at 53:11-56:14; 1P.A.1, 0004:19-0005:12.) Moreover, in both the District Court and in this Court, Mr. Morgan has failed to assert that he actually pled a claim for vicarious liability. Rather, he contends that the claim was tried by implied consent. (11P.A.22, at 1959:8-1961:2, 11P.A.28, at 2077:17-2079:10; Answer at 27:5-20.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Factual Finding:	Reason Finding is Erroneous and Unsupported:
Harvest failed to contest vicarious liability, despite the fact that "Harvest denied [in its Answer] that Mr. Lujan had been acting in the course and scope of employment when the accident occurred." (14P.A.44, at 2609:9-10, 2614:15-22.)	If the District Court believed an element of the claim had been denied in the Answer, then, by definition, the claim is contested. However, it is unknown on what basis the District Court erroneously determined that Harvest's Answer denied the element of course and scope of employment. Mr. Morgan never actually pled a claim for vicarious liability; therefore, Harvest could not specifically deny, in its Answer, that Mr. Lujan was acting in the course and scope of his employment at the time of the accident. Rather, Harvest denied the substantive allegations of Mr. Morgan's pled claim of negligent entrustment, along with the nonsensical allegation concerning the liability of family members which contains the phrase "course and scope of employment." (Pet. at 62:1-65:2; 1P.A.1, at 0003:21-25, 0005:1-12; 1P.A.2, at 0008:8-9, 0009:9-10.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Factual Finding:	Reason Finding is Erroneous and Unsupported:
Despite finding that Harvest's Answer denied the element of course and scope of employment, the District Court determined that Harvest did not contest the claim of vicarious liability because: (1) "Harvest never argued against vicarious liability during the pre-trial litigation" or during the trial, (14P.A.44, at 2614:20-22); and (2) Harvest did not plead as an affirmative defense that Mr. Lujan was acting outside the course and scope of his employment at the time of the accident, (12P.A.33, at 2293:1-9).	It is unclear how a defendant should demonstrate in pre-trial litigation or trial that it contests a claim for relief when that claim has not been pled or tried by consent, and the defendant has no notice that the claim is at issue in the case. (*See* Section F, *infra*, regarding Mr. Morgan's failure to prove that vicarious liability was tried by consent.) Even if Mr. Morgan had pled a claim for vicarious liability or tried the claim by consent, Harvest need not allege as an affirmative defense the denial of an essential element of the claim. (Pet. at 64:2-10 (citing *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395-96, 168 P.3d 87, 96 (2007).)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Factual Finding:	Reason Finding is Erroneous and Unsupported:
Harvest was "barred" from contesting vicarious liability because both Harvest and Mr. Lujan were represented by the same counsel at trial, and it would have been an "impermissible conflict of interest" for Harvest to contest that Mr. Lujan was acting in the course and scope of his employment. (14P.A.44, at 2614:22-2615:5.)	Because Mr. Morgan failed to plead a claim of vicarious liability, failed to demonstrate that the claim was tried by implied consent, and failed to provide any notice that it was at issue in the case, (*see* Section F, *infra*), Harvest had no reason to contest that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. Both Mr. Lujan and Harvest believed they were contesting negligence-based claims; therefore, there was no conflict of interest between them. Moreover, if the District Court actually believed that Mr. Morgan had pled a claim for vicarious liability, and that Harvest's Answer denied that Mr. Lujan was acting within the course and scope of his employment, then the District Court (or Mr. Morgan) had an obligation to raise the issue of a conflict of interest during the pleading stage of this action. It failed to do so because ***there was no claim for vicarious liability*** in this case.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Factual Finding:	Reason Finding is Erroneous and Unsupported:
The District Court ***assumed*** that Harvest was not contesting vicarious liability because, during the trial, Harvest and Mr. Lujan pursued the same defense to Mr. Morgan's claims, contending that Mr. Lujan was not negligent and/or that Mr. Morgan was more negligent than Mr. Lujan. (14P.A.44, at 2615:6-2616:9.)	Because Mr. Morgan failed to plead a claim of vicarious liability, failed to demonstrate that the claim was tried by implied consent, and failed to provide any notice that it was at issue in the case, (*see* Section F, *infra*), Harvest had no reason to contest that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. Therefore, Harvest and Mr. Lujan jointly contested the negligence-based claims pled in the Complaint. Moreover, even if vicarious liability had been pled in the Complaint or tried by consent, Mr. Morgan had the burden to prove this claim *prima facie* before Harvest had any obligation to offer evidence in defense of the claim. (*See* Section G, *infra*; *see also* Pet. at 65:3-70:5) Mr. Morgan failed to meet this burden of proof. (*See* Section G, *infra*; *see also* Pet. at 70:6-75:6.)

Based on these erroneous factual findings, the District Court abused its discretion in denying Harvest's Motion for Entry of Judgment and ordering a partial re-trial pursuant to NRCP 42(b).

B. The Petition Is Not Barred by the Doctrines of Invited Error or Waiver.

Mr. Morgan contends that this Court should "reject" Harvest's Petition because Harvest invited the errors complained of and/or waived the right to

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

object to the District Court's errors. (Answer at 3:19-22.) Specifically, Mr. Morgan asserts that the issues raised in Harvest's Petition are waived and/or are barred by invited error because Harvest's counsel approved of the "flawed" Special Verdict Form. (*Id.* at 3:12-22.) This argument is patently absurd.

Neither of these doctrines applies to any of the issues raised in Harvest's Petition. It is *Mr. Morgan*, not Harvest, who believes there is an error in the Special Verdict Form. (11P.A.20, at 1868:24-1869:6, 1872:7-11.) It is *Mr. Morgan*, not Harvest, who contends that his unpled, untried claim for vicarious liability should have been included in the Special Verdict Form. (*Id.* at 1869:24-25; 12P.A.22, at 1961:6-11.) As the Plaintiff, it is *Mr. Morgan*, not Harvest, who bore the burden of ensuring that whatever claim he intended to prove against Harvest was included in the Special Verdict Form. As the Plaintiff, it is *Mr. Morgan*, not Harvest, who also had the obligation to object to the Special Verdict Form if he believed it did not accurately reflect his claims in this case.

Harvest does not claim that the Special Verdict Form contained any errors. Rather, Harvest believes that Mr. Morgan, either voluntarily or through negligence, abandoned his claims against Harvest. (Pet. at 24:6-33:19 (demonstrating that Mr. Morgan never references a claim against Harvest

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

during the entirety of the trial).) Moreover, given that Mr. Morgan does not contest that he failed to plead a claim for vicarious liability (*see* Section A, *supra*), and the fact that the claim of vicarious liability was not tried by consent (*see* Section F, *infra*), Harvest had absolutely no notice during the trial that Mr. Morgan (allegedly) intended for a claim of vicarious liability to be included in the Special Verdict Form.

The doctrines of invited error and waiver would only be applicable in this action if *Mr. Morgan* should choose, after entry of final judgment, to appeal the jury's verdict or the entry of judgment in favor of Harvest. Specifically, when the District Court proposed a draft of the Special Verdict Form, Mr. Morgan failed to object to the omission of Harvest or the claim for vicarious liability. (10P.A.16, at 1654:20-1655:1.) Moreover, Mr. Morgan later revised the draft Special Verdict by requesting changes to the categories of damages included therein; however, he never requested that Harvest be named as a Defendant or that any claims be included against Harvest, (*Id.* at 1765:11-23.) Furthermore, during closing arguments, Mr. Morgan specifically instructed the jury on how to complete the Special Verdict Form, and again, failed to object that it omitted a purported claim of vicarious liability against Harvest. (*Id.* at 1773:20-1774:6.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

C. Harvest Was Not Required to Seek a Directed Verdict.

Mr. Morgan contends that this Court should not consider the sufficiency of the evidence offered at trial because Harvest failed to move for a directed verdict. (Answer at 5:11-6:2, 29:4-16.) Again, Mr. Morgan's argument is non-sensical. First, this Court may properly review the sufficiency of the evidence in this case in order to determine whether the District Court committed plain error or abused its discretion in denying Harvest's Motion for Entry of Judgment. (*See* Section A, *supra*.)

Second, with respect to the claim of negligent entrustment, Mr. Morgan has not refuted Harvest's contention that he failed to prove his claim at trial. (*See* Section E, *infra*.) Therefore, for this claim, the Court need not consider the sufficiency of the evidence — it is undisputed that Harvest is entitled to judgment as a matter of law on the claim for negligent entrustment.

Third, as set forth in Section A, *supra*, and Section F, *infra*, Mr. Morgan does not contend that he pled a claim for vicarious liability, and he has failed to prove that he tried this claim by implied consent. Thus, Harvest had no notice that a claim for vicarious liability was at issue in this case and had no reason to seek a directed verdict for such an unpled claim.

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Finally, the legal authorities upon which Mr. Morgan relies are inapposite to the facts of this case. Mr. Morgan contends that "'[i]t 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.'" (Answer at 5:13-16 (citing *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969)), 29:8-12 (same) (emphasis added).) However, Harvest is not challenging the jury's verdict or the sufficiency of the evidence to support the verdict — there is no verdict against Harvest on any claim for relief. (10P.A.18.) Rather, the Petition addresses the undisputed facts and the absence of evidence in support of Mr. Morgan's claim in order to demonstrate that the District Court abused its discretion and committed plain error in denying Harvest's Motion for Summary Judgment and ordering a partial retrial pursuant to Rule 42(b). (*See* Section A, *supra*; Pet. at 60:1-61:16, 70:6-75:6.)

D. Harvest Is Not Judicially Estopped From Claiming That Mr. Morgan Abandoned His Claim Against Harvest.

Mr. Morgan contends that Harvest is judicially estopped from claiming that he abandoned his claim against Harvest, and, thus, is not entitled to entry of judgment in his favor. (Answer at 6:3-13, 31:11-32:6.) Mr. Morgan's contention has no basis in law or fact.

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

First, Mr. Morgan erroneously asserts that "there is no indication in the record" that he abandoned his claim against Harvest. (*Id.* at 31:11-12.) However, he has failed to demonstrate that he ever mentioned Harvest, a corporate defendant, or any claim alleged against Harvest during voir dire, in his opening statement, in any jury instructions, during closing arguments, or in the Special Verdict Form. (Pet. at 24:6-27:7, 30:6-33:19.) Similarly, he has also failed to demonstrate that he proved any claim for relief against Harvest at trial or submitted any claim against Harvest to the jury for determination. (*Id.* at 27:8-30:5, 60:1-61:16, 70:6-75:6; 10P.A.18.) Rather, Mr. Morgan attempts to support his argument by relying solely on the District Court's clearly erroneous and completely unsupported findings in its January 3, 2020 Decision and Order. (Answer at 31:12-16; *see also* Section A, *supra*.) Therefore, there is no other possible conclusion: Mr. Morgan either voluntarily, or through negligence, abandoned his claim against Harvest.

Alternatively, Mr. Morgan contends that "Harvest is judicially estopped to now claim that [he] abandoned his claims against Harvest because it was successful in dismissing [his] appeal on the basis that there were remaining claims." (Answer at 31:21-32:1.) These two facts are not mutually exclusive. Morgan alleged a claim against Harvest, failed to prove the claim or present it

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

to the jury for determination, and the District Court refused to dismiss the claim or enter judgment in favor of Mr. Morgan. (1P.A.1, at 0004:19-0005:12; 10P.A.18; 11P.A.24.) As such, the claim remained pending and defeated this Court's jurisdiction on Mr. Morgan's premature appeal. (14P.A.41.) Remand does not preclude Harvest from seeking entry of judgment in its favor — the proper means for obtaining final resolution on an abandoned claim.

E. It Is Uncontested That Judgment Should Be Entered Against Mr. Morgan on the Only Claim He Pled Against Harvest.

In its Petition, Harvest contended that Mr. Morgan only pled one claim against Harvest in this case—negligent entrustment. (Pet. at 16:10-18:10, 52:15-16, 53:11-56:14.) Harvest further contended that Mr. Morgan failed to prove his claim for negligent entrustment at trial. (*Id.* at 52:16-17, 60:1-61:16.) Finally, Harvest contended that judgment should be entered in Harvest's favor on the claim because Mr. Morgan never asserted that he had offered any evidence at trial to prove the claim, never presented the claim to the jury for determination, and never sought entry of judgment in his favor on the claim. (*Id.* at 32:1-13, 52:15-18, 56:11-14, 61:10-16.)

Mr. Morgan has failed to challenge any of these contentions. Thus, it is undisputed that Mr. Morgan failed to prove his sole claim against Harvest in the

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

underlying action, and judgment must be entered in favor of Harvest as a matter of law.

F. There Is No Evidence That Vicarious Liability Was Tried by Implied Consent.

Because Mr. Morgan cannot prove that he pled a claim for vicarious liability, he has attempted to justify a "re-trial" of this unpled claim by asserting that it was tried by implied consent in the underlying action. (Answer at 27:5-28:19.) However, there is no evidence supporting Mr. Morgan's assertion.

Both Parties agree that a claim can only be tried by implied consent where the plaintiff raises the issue in his opening statement, the defendant specifically refers to the matter as an issue in the case, the parties explore the issue in discovery, and the defendant fails to raise any objection at trial to the admission of evidence relevant to the issue. (*Id.* at 27:5-10 (citing *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1139-40 (1979)); Pet. at 59:11-15 (citing same).) Here, Mr. Morgan has failed to cite to any reference to vicarious liability in his opening statement; rather, the opening statement focused on Mr. Lujan's negligence and Mr. Morgan's damages. (Pet. at 26:10-27:7; 6P.A.12, at 1076:7-1095:17.) Similarly, he has failed to demonstrate that he conducted any discovery relating to vicarious liability or course and scope of employment;

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

rather, all discovery was focused on the claim of negligent entrustment. (Pet. at 19:5-15, 20:11-14; 1P.A.3, at 0019:25-0020:2, 0020:15-19.)

Further, Mr. Morgan failed to demonstrate that Harvest ever referenced the claim of vicarious liability or the issue of course and scope of employment during the trial, or that Harvest failed to object to evidence offered at trial that related to the issue of course and scope of employment.[2] This is because Mr. Morgan only proved two undisputed facts that Harvest had already admitted in its Answer to the Complaint: (1) that there was an employment relationship between Harvest and Mr. Lujan; and (2) that Harvest owned the shuttle bus that Mr. Lujan was driving at the time of the accident. (1P.A.1, at 004, at ¶¶ 16-17; 1P.A.2, at 009:7-8; Answer at 11:5-20, 13:7-22, 14:4-18.) However, Mr. Morgan pled these undisputed facts in support of his claim for ***negligent entrustment*** (1P.A.1, at 0004, at ¶¶ 16-17); therefore, these facts, by

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

[2] Mr. Morgan contends that both Parties "discussed theories regarding corporate defendants during voir dire," and that Harvest asked one of the three questions that the Parties posed to the jury venire about liability for corporate defendants. (Answer at 9:13-16 (citing 11P.A.22, at 1966).) However, Mr. Morgan completely misrepresents the record. The page of the trial transcript cited by Mr. Morgan contains no questions posed by either party relating to corporate liability. Moreover, at no time during jury selection did either party ask any questions relating to corporate defendants or corporate liability. (4P.A.10, 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.) In fact, the only reference to corporate defendants during jury selection came from the jury venire's spontaneous responses to questions unrelated to corporate defendants or corporate liability. (5P.A.11 at 0886:25-0890:9, 0905:24-0907:3.)

themselves, do not serve as notice of an intent to try an unpled claim of vicarious liability.

In *Yount v. Criswell Radovan, LLC*, 136 Nev. Adv. Op. 47, 469 P.3d 167 (Nev. July 30, 2020), this Court recently held that "[i]f evidence relevant to the implied claim is also relevant to another issue in the case, and nothing at trial indicates that the party who introduced the evidence did so to raise the implied claim, courts will generally not find that the parties tried the issue by consent." *Id.* at *12, 469 P.3d at 172. Given that the phrases "vicarious liability," "respondeat superior," or "course and scope of employment" were never uttered at trial — and that Mr. Morgan's Complaint alleged Mr. Lujan's employment relationship with Harvest and Harvest's ownership of the shuttle bus as facts in support of his pled claim for negligent entrustment — Harvest had no notice that evidence relating to these two facts was offered in order to raise an unpled claim of vicarious liability as opposed to proving the pled claim of negligent entrustment.

G. <u>An Employment Relationship and Ownership of the Vehicle Involved in the Accident Are Insufficient to Prove Vicarious Liability.</u>

Mr. Morgan does not contend that he pled a claim for vicarious liability. (*See* Section A, *supra.*) Mr. Morgan also has failed to demonstrate that this

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

unpled claim was tried by implied consent. (*See* Section F, *supra*.) Despite these two, key, undisputed matters, Mr. Morgan contends that Harvest is not entitled to either dismissal or entry of judgment on this unpled, untried cause of action. (Answer, at 26:9.) Specifically, Mr. Morgan claims that Mr. Lujan's liability for Mr. Morgan's damages should be imputed to Harvest merely because Mr. Lujan was employed as a bus driver by Harvest and driving Harvest's bus at the time of the accident. (*Id.* at 21:21-22:4 (contending, without citation to the record, that it was "undisputed that [Mr.] Lujan was an employee of Harvest within the course and scope of his duties with Harvest when the accident occurred," and that it was universally "understood by the [P]arties, the jury, and the District Court, that [Mr.] Lujan was employed by Harvest and on the job for Harvest when he drove the Harvest-owned bus into Morgan's vehicle"). Mr. Morgan's argument is contrary to well-settled law.

An employer is only vicariously liable for tortious conduct when "(1) the actor at issue was an employee[;] and (2) the action complained of occurred within the [course and] scope of the actor's employment." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 1225, 925 P.2d 1175, 1179, 1180 (1996) (holding that an employer is not liable if an employee's tort is an "'independent venture of his own'" and was "'not committed in the course of

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

the very task assigned to him'") (quoting *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 391, 469 P.2d 399, 400 (1970)). An employment relationship, in and of itself, is insufficient to prove vicarious liability.

Moreover, a plaintiff, a court, and/or a jury cannot just "assume" that an employee is acting within the course and scope of his employment at the time the tortious conduct occurs. A plaintiff must prove this element of the claim. In its Petition, Harvest asserted that while this Court has not yet addressed which party bears the burden of proof on a claim for vicarious liability: (i) the Nevada Court of Appeals, recently held, in an unpublished disposition, that ***the plaintiff*** must prove both elements of the claim, *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); and (2) that this is consistent with the majority of other jurisdictions which have addressed this issue, (*see* Pet. at 65:3-68:6 (citing twenty jurisdictions which have held that the plaintiff bears the burden of proving both elements of a claim for vicarious liability).) Mr. Morgan fails to refute, or even address, this issue (other than to state that the unpublished disposition in the Nevada Court of Appeals is not binding authority). (Answer at 21:6-26:17.)

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Here, Mr. Morgan could not prove that Mr. Lujan was acting in the course and scope of his employment at the time of the accident because of the undisputed fact that Mr. Lujan was exiting a park, where he had just eaten lunch, when the accident occurred. (8P.A.14, at 1428:15-20; 9P.A.15, at 1635:25-1636:10.) As set forth in detail in the Petition, Nevada has adopted 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." (Pet. at 70:15-75:6 (citing *Molino v. Asher*, 96 Nev. 814, 817, 618 P.2d 878, 879-80 (1980)).) Mr. Morgan contends that there are several exceptions to the going and coming rule; for instance, where: (1) an employee was using the employer's vehicle "in furtherance of the employer's purpose"; (2) the employer "derived a 'benefit' from the employee's use of a company vehicle"; (3) the employee was driving a company vehicle during non-work hours for the employer's "convenience" or "constant benefit" (i.e., so that the employee could be "on-call" at all times); and (4) the employee is on a "special errand" which "incidentally or indirectly" contributes to or benefits the employer. (Answer at 22:8-24:19.) However, Mr. Morgan fails to cite to any evidence which proves: (i) that Mr. Lujan drove Harvest's shuttle bus to the park for his lunch break because he was "on call"; or (ii) that Mr. Lujan's use of

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Harvest's shuttle bus during his lunch break served any purpose for or provided any benefit to Harvest — and that failure is due to the fact that there is no such evidence.

Therefore, to the extent that this Court finds that Mr. Morgan pled a claim for vicarious liability or tried this claim by implied consent, it is indisputable that Mr. Morgan failed to refute the going and coming rule and failed to prove that Mr. Lujan was acting within the course and scope of his employment at the time of the accident. As such, judgment should be entered in Harvest's favor on this claim.

H. The District Court Abused Its Discretion in Denying Harvest's Motion for Entry of Judgment Based on a Rebuttable Presumption It Created *Sua* Sponte After the Trial.

As set forth in Section G, *supra*, this Court has not yet addressed which party bears the burden of proof on a claim for vicarious liability. However, nearly two years after the trial ended, the District Court ignored the persuasive authority from the majority of the jurisdictions that have addressed this issue and *sua sponte* created a new, rebuttable presumption regarding the course and scope of employment. (14P.A.44, at 2612:26-2613:11.) The District Court then used its newly-created presumption to justify the denial of Harvest's Motion for Entry of Judgment. (*Id.* at 2613:14-17.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Specifically, the District Court held that there was a rebuttable presumption that an employee was acting within the course and scope of his employment if the employee is driving his employer's vehicle at the time of the accident. (*Id.* at 2612:26-2613:17.) The District Court also held that the evidence that Mr. Lujan was on his lunch break in a park at the time of the accident failed to rebut this presumption; rather, the District Court's newly created presumption required Harvest to show, by clear and convincing evidence, that Mr. Lujan was not acting for Harvest's benefit at the time of the accident. (*Id.* at 2613:14-17.) In short, the District Court held that in order to rebut its newly created presumption, evidence invoking the going and coming rule is insufficient — the defendant must go further and preemptively prove that none of the exceptions to the going and coming rule apply.

This is an unwarranted application of the rebuttable presumption concerning course and scope of employment. As set forth in Harvest's Petition, even the few jurisdictions that employ a similar rebuttable presumption have found that the presumption is rebutted by evidence invoking the going and coming rule. (Pet. at 72:3-74:6.)

Therefore, Harvest respectfully requests that if this Court determines that the claim of vicarious liability was pled in Mr. Morgan's Complaint or tried by

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

implied consent (which it should not), that it vacate the District Court's January 3, 2020 Decision and Order and provide guidance on which party should bear the burden of proof on a claim of vicarious liability. Moreover, if this Court determines that a rebuttable presumption should be employed, Harvest respectfully requests guidance as to whether evidence invoking the going and coming rule is sufficient to shift the burden of proof back to the plaintiff to prove that the employee was acting within the course and scope of his employment at the time of the accident. Finally, if this Court determines that the plaintiff alone bears the burden of proof on the claim, or, alternatively, that the rebuttable presumption is rebutted by evidence invoking the going and coming rule, then Harvest respectfully requests that this Court grant the relief set forth in its Petition. (Pet. at 85:4-11.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

I. A Motion for Reconsideration Is Not a Prerequisite to Seeking Extraordinary Writ Relief From a *Sua Sponte* Order.

Mr. Morgan asserts that this Court should refuse to entertain the issue of the propriety of the District Court's January 3, 2020 Decision and Order granting a partial re-trial pursuant to NRCP 42(b), because Harvest did not first raise the issue of the propriety of this Order in the District Court. (Answer at 4:1-12, 19:8-20:17.) Specifically, Mr. Morgan contends that Harvest was

required to file a motion for reconsideration of the January 3, 2020 Decision and Order before it was permitted to seek this Court's review. (*Id.* at 20:1-6.)

However, any attempt to seek reconsideration of the District Court's *sua sponte* order would have been futile. After this action was transferred from Judge Gonzalez back to Chief Judge Bell for resolution, the District Court insisted that it was going to reconvene the jurors from the April 2018 trial to decide Mr. Morgan's alleged claim for vicarious liability. (12P.A.33, at 2282:14-2283:5; 12P.A.35; 12P.A.36, at 2301:15-18; 12P.A.37, at 2318:19-21; 14P.A.43, at 2605:5-6.) It was only after this Court's Order denying Harvest's first Writ Petition, which advised that the District Court was "without authority or jurisdiction to reconvene a jury once it has been dismissed," that the District Court chose to order another form of relief which no party ever requested on completely unsupported procedural grounds — a partial re-trial pursuant to NRCP 42(b). (13P.A.39, at 2446-2447; 14P.A.44, at 2608:18-20.)

Moreover, while Mr. Morgan has failed to cite to any statute, procedural rule, or case which requires a party to seek reconsideration of a *sua sponte* order as a precondition to seeking extraordinary writ relief, the Ninth Circuit Court of

/ / /

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Appeals[3] has held that there are three exceptions to the general rule that it will not consider issues raised for the first time on appeal[4]: "(1) in an 'exceptional' case when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new issue arises while [the] appeal is pending because of a change in [the] law, or (3) when the issue is purely one of law and the necessary facts are fully developed." *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986).

To the extent that the Court finds that Harvest should have moved for reconsideration of the District Court's *sua sponte* order granting re-trial, Harvest asserts that two of the above-stated exceptions warrant the Court's consideration of the issues raised in its Petition. First, this is an exceptional case where the Court's review is necessary to prevent a miscarriage of justice and to preserve the integrity of the judicial process. Mr. Morgan has already

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

---

[3] This Court has often recognized that "[w]here a Nevada rule is similar to an analogous federal rule, the cases interpreting the federal rule provide persuasive authority as to the meaning of the Nevada rule." *Yount v. Criswell Radovan*, LLC, 136 Nev. Adv. Op. 47, at *10, 469 P.3d 167, 172 (Nev. Jul. 30, 2020); *Vanguard Piping Sys., Inc. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 129 Nev. 602, 608, 309 P.3d 1017, 1020 (2013). In fact, in *Archon Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 133 Nev. 816, 407 P.3d 702 (2017), this Court explicitly cited to the Ninth Circuit's general rule to exclude points not urged in the trial court from consideration on appeal in support of Nevada's virtually identical rule. *Id.* at 822, 407 P.3d at 708 (citing *United States v. U.S. Dist. Ct. ex rel. S. Dist. of Cal.*, 384 F.3d 1202, 1205 (9th Cir. 2004)).

[4] The Ninth Circuit also applies these exceptions to proceedings for writ relief. *See, e.g., U.S. Dist. Ct. ex rel. S. Dist. of Cal.*, 384 F.3d at 1205.

had his day in Court against Harvest and, either voluntarily or through negligence, chose not to pursue such claims. (Pet. at 24:6-34:5.) However, the District Court refuses to enter judgment in favor of Harvest and to enter final judgment in this matter. (14P.A.44, at 2608:18-19.) Rather, despite the lack of any factual errors, legal errors, abuse of discretion, or other misconduct which would justify a new trial, the District Court has granted Mr. Morgan a partial re-trial on an unpled claim for relief. (*Id.* at 2608:19-20.) This Court's intervention is necessary to protect the integrity of the judicial process, as a defendant should not be required to face a new trial every time a plaintiff has failed to prevail and would like a "do-over" in order to litigate a different claim for relief that it failed to allege in the first trial.

Similarly, the issues presented concerning the District Court's *sua sponte* order granting a partial re-trial — namely: (1) whether a District Court may grant a partial re-trial pursuant to NRCP 42(b) or whether the District Court's discretion to sever claims and order separate trials may only be invoked prior to the commencement of a trial; and (2) whether re-trial should be granted pursuant to NRCP 59 — are issues of law. The issue concerning NRCP 42(b) is one of statutory interpretation, and the issue concerning NRCP 59 concerns the analysis and application of undisputed facts. (*See* Sections J & L, *infra*.)

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

Thus, all of the issues presented in the Petition are proper for this Court's consideration.

J. The Rules of Statutory Interpretation Demonstrate That NRCP 42(b) Is Not a Mechanism for Ordering a Partial Re-Trial.

NRCP 42(b) is silent as to whether it can be utilized as a means of ordering a partial re-trial of a claim. Mr. Morgan asserts that the rules of statutory interpretation apply to the Rules of Civil Procedure, and that NRCP 42(b) should be interpreted accordingly. (Answer, at 33:11-16.) Harvest agrees.

The plain language of NRCP 42(b) authorizes district courts to order "*separate trials*" of one or more issues or claims — it does not authorize district courts to grant partial *re-trials* or *new trials* after a jury has already rendered a verdict in an action. Moreover, if NRCP 42(b) were interpreted to allow district courts to order re-trials and new trials, then NRCP 42(b) would be in conflict with NRCP 59, which sets forth very specific requirements for ordering a new trial. Generally, this Court endeavors to interpret rules harmoniously so as not to render any words, phrases, or rules superfluous. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263

/ / /

BAILEY ❖ KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

(2009); *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999).

Mr. Morgan further contends that Harvest's interpretation of NRCP 42(b), which limits application of the Rule to the period *before* a trial commences in an action, attempts to improperly expand upon or modify the Rule's plain language. (Answer at 34:1-8.) However, this Court routinely looks to analogous federal rules as persuasive authority for interpreting the meaning of Nevada's rules. *Yount v. Criswell Radovan,* LLC, 136 Nev. Adv. Op. 47, at *10, 469 P.3d 167, 172 (Nev. Jul. 30, 2020). Therefore, it is also proper for this Court to consider the interpretation of analogous rules in other jurisdictions, as set forth in detail in the Petition, as persuasive authority for limiting a court's ability to sever claims and order separate trials to the time period before a trial first commences in an action. (Pet. at 79:12-82:14.)

K. The Doctrine of the Law of the Case Does Not Support the District Court's Order of a Partial Re-Trial.

Mr. Morgan contends that when this Court dismissed his premature appeal and remanded the case to the District Court with the instruction to "take whatever steps it needs to reach a final judgment," this established the "law of the case" and "required the District Court to exercise its discretion to order a

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

new trial limited to the outstanding issues involving Harvest." (Answer at 34:9-35:3.) This argument is completely without any legal or factual support.

Previously, this Court properly determined that no final judgment had been entered in this action because a claim had been pled against Harvest and no judgment or order of dismissal had been rendered in relation to this claim. (14P.A.41.) This Court did *not* order the District Court to resolve the remaining claim by ordering a partial re-trial utilizing a Rule of Civil Procedure that does not apply to new trials. Nothing in this Court's Order Dismissing Appeal prevented the District Court from entering judgment in favor of Harvest or even dismissing Mr. Morgan's claim as an abandoned claim for failure to present it to the jury for determination. Thus, a partial re-trial was not the only option for obtaining a final judgment.

L. Mr. Morgan Failed to Demonstrate That a New Trial Is Warranted Pursuant to NRCP 59.

Mr. Morgan contends that even if the District Court cannot grant a partial re-trial pursuant to NRCP 42(b), the District Court has the discretion to order a new trial pursuant to NRCP 59, since a final judgment has not yet been entered in the action. (Answer, at 35:7-36:2.) A district court only has 28 days from entry of the judgment being challenged — not the entry of a final judgment in

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

the action — to order a new trial. (Pet. at 82:15-83:11.) Here, the judgment being challenged by the District Court is the judgment entered solely against Mr. Lujan. This judgment was entered over a year before the District Court *sua sponte* ordered a partial re-trial. Therefore, the grant of a new trial is untimely and should be vacated.

However, even if Mr. Morgan's interpretation of NRCP 59 was persuasive, both Mr. Morgan and the District Court have failed to demonstrate any ground for granting a new trial pursuant to NRCP 59. (Pet. at 83:12-85:2.) Therefore, the January 3, 2020 Decision and Order granting partial re-trial is an abuse of discretion and should be vacated.

M. Mr. Morgan Wrongly Contends That Harvest Would Not Be Prejudiced by a Partial Re-Trial.

Unfathomably, Mr. Morgan contends that Harvest will not suffer any prejudice by a partial re-trial of the claim for vicarious liability because such a re-trial will not damage or be detrimental to its legal rights. (Pet. at 32:11-33:7.) It is absurd to suggest that Harvest will not suffer any prejudice, and its legal rights will not be damaged, by forcing it to stand trial for a second time on a claim that was never pled in this action in the first place. Mr. Morgan had his day in court and failed to prove any claim against Harvest. Now, Mr. Morgan

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

contends that he is entitled to a new trial despite the fact that there was no error of fact or law, no abuse of discretion, and no misconduct that prevented him from proving his claim against Harvest or presenting the claim to the jury for determination. A plaintiff is not entitled to a re-trial every time he comes up with a new strategy he wishes he had pursued the first time; nor is a plaintiff entitled to a new trial merely because his counsel may have erred. There are other mechanisms for a plaintiff to obtain relief in such instances.

Mr. Morgan contends that he will suffer prejudice if a partial retrial is not granted, because his claim against Harvest would be placed in a "legal no-man's land" where it would never be resolved. (Answer, at 33:3-7.) This is false. Mr. Morgan has had a trial and an opportunity to prove his claim. He failed to do so, and that claim is now resolved. Therefore, judgment must be entered in favor of Harvest as a matter of law.

III. CONCLUSION

Harvest respectfully requests that this Court: (1) issue a writ of prohibition: (a) vacating the January 3, 2020 Decision and Order denying Harvest's Motion for Entry of Judgment and granting a partial re-trial pursuant to NRCP 42(b); and (b) preventing the District Court from proceeding with a new trial or partial re-trial of the claim of vicarious liability; and (2) issue a writ

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

of mandamus directing the District Court to enter judgment in favor of Harvest on any claim Mr. Morgan pled (or could have pled) in this action.

DATED this 24th day of September, 2020.

BAILEY❖KENNEDY

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

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

VERIFICATION

STATE OF NEVADA)

COUNTY OF CLARK)

I, Dennis L. Kennedy, am a partner of the law firm of Bailey❖Kennedy, counsel of record for Harvest, and the attorney primarily responsible for handling this matter for and on behalf of Harvest. I make this verification pursuant to NRS 34.170, NRS 34.330, NRS 53.045 and NRAP 21(a)(5).

I hereby declare under penalty of perjury under the laws of the State of Nevada, that the facts relevant to this Reply in Support of Petition for Extraordinary Writ Relief are within my knowledge as attorney for Harvest and are based on the proceedings, documents, and papers filed in the underlying action, *Aaron M. Morgan v. David E. Lujan*, No. A-15-718679-C, pending in Department VII of the Eighth Judicial District Court, Clark County, Nevada.

I know the contents of the foregoing Reply, and the facts stated therein are true of my own knowledge except as to those matters stated on information and belief. As to any matters identified as being stated on information and belief, I believe them to be true.

/ / /

/ / /

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

True and correct copies of the orders and papers served and filed by the parties in the underlying action that may be essential to an understanding of the matters set forth in the Petition and this Reply are contained in the Appendix to the Petition.

EXECUTED on this 24th day of September, 2020.

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

NRAP 21(e) CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply in Supply of Petition for Extraordinary Writ Relief 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 Reply in Support of Petition for Extraordinary Writ Relief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 21(d) because it contains 6,971 words.

2. I further certify that I have read this Reply in Support of Petition for Extraordinary Writ Relief, 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 Reply in Support of Petition for Extraordinary Writ Relief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Reply in Support of Petition for Extraordinary Writ Relief regarding matters in the record to be

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

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 Reply in Support of Petition for Extraordinary Writ Relief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 24th day of September, 2020.

BAILEY❖KENNEDY

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

Attorneys for Petitioner
HARVEST MANAGEMENT SUB LLC

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

CERTIFICATE OF SERVICE

I certify that I am an employee of BAILEY❖KENNEDY and that on the 24th day of September, 2020, service of the foregoing **REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF** 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:

MICAH S. ECHOLS **CLAGGETT & SYKES LAW FIRM** 4101 Meadows Lane, Suite 100 Las Vegas, Nevada 89107	Email: micah@claggettlaw.com *Attorneys for Real Party in Interest* AARON M. MORGAN
BENJAMIN P. CLOWARD BRYAN A. BOYACK **RICHARD HARRIS LAW FIRM** 801 South Fourth Street Las Vegas, Nevada 89101	Email: Benjamin@richardharrislaw.com bryan@richardharrislaw.com *Attorneys for Real Party in Interest* AARON M. MORGAN
VIA U.S. MAIL: DAVID E. LUJAN 651 McKnight Street, Apt. 16 Las Vegas, Nevada 89501	*Real Party in Interest*

VIA E-MAIL

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

Email:
DC7Inbox@ClarkCountyCourts.us
Dept7LC@ClarkCountyCourts.us
Dept7JEA@ClarkCountyCourts.us

Respondent

/s/ Angelique Mattox
Employee of BAILEY❖KENNEDY

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

ADDENDUM

BAILEY❖KENNEDY
8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
702.562.8820

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)
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

Attorneys and Law Firms

Law Offices of Eric R. Blank

William B. Palmer, II

Howard & Howard Attorneys PLLC

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