

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

AARON M. MORGAN

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

HARVEST MANAGEMENT SUB LLC;  
AND DAVID E. LUJAN,

Real Parties in Interest.

Case No.

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**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 October, 2020.

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## **I. ROUTING STATEMENT**

Petitioner, Aaron M. Morgan (“Morgan”), requests that the Supreme Court retain this original proceeding for disposition based upon presented issues of first impression and issues of statewide importance, as outlined in NRAP 17(a)(11) and (12). In particular, this petition 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, involving unresolved claims against Real Party in Interest Harvest Management Sub LLC (“Harvest”). 27 Petitioner’s Appendix (“PA”) 4284–4294. Thus, the issues in Morgan’s petition satisfy the standards in NRAP 17(a)(11) and (12). Therefore, Morgan requests that the Supreme Court retain this original proceeding.<sup>1</sup>

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<sup>1</sup> This petition is related to the pending Supreme Court Case No. 80837 filed by Harvest. Morgan originally filed his answer and cross-petition in the prior case. However, the Court ordered that a cross-petition could not be filed according to the Court’s procedural rules. Thus, this petition requests the relief previously presented in Morgan’s cross-petition in Case No. 80837.

## **II. ISSUES PRESENTED FOR REVIEW**

**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. OVERVIEW AND SUMMARY OF ARGUMENT**

In this original proceeding, Morgan asks this Court to order the District Court to enter judgment in favor of Morgan and against Harvest based upon NRCP 49(a)(3). Notably, Harvest acknowledged the flaw in the verdict form and is estopped from now claiming otherwise: “Yeah. That looks fine.” 18 PA 2831; *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). Therefore, the Court should first consider that Harvest acquiesced in the verdict form proposed by the District Court.

NRCP 49(a)(3) provides the basis for the District Court to enter judgment in favor of Morgan and against Harvest. *See, e.g., Hinshaw v. New England Mut. Life Ins. Co.*, 104 F.2d 45, 49 (8th Cir. 1939) (“The court made no finding, but entered judgment for the plaintiffs, and hence it will be assumed that the court made a finding in accordance with the judgment.”). Therefore, 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).

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. An employer is liable for its employee’s acts 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). Therefore, the Court should order the District Court to conclude under NRCP 49(a)(3) that the judgment in favor of Morgan and against Lujan also extends to Harvest.

In summary, this Court should grant extraordinary relief to Morgan and 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.

#### **IV. 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 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.* . . .

18 PA 2802 (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.

18 PA 2804–2805 (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. 18 PA 2803.

**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.

18 PA 2811.

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 . . .

7 PA 1095 (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.

18 PA 2815.

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.

18 PA 2816.

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.

18 PA 2820.

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.

18 PA 2821.

On re-direct, Janssen confirmed that she signed the verification on behalf of Harvest for its 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.”

18 PA 2822.

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.

18 PA 2823.

**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. 18 PA 2824–2825. 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.

18 PA 2825–2826.

**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."

18 PA 2833–2834.

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 . . .

11 PA 1790.

**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 damages, but it's just what we used in the last trial which was similar.

18 PA 2831.

The jury ultimately found Defendants to be negligent and 100% at fault for the accident. 12 PA 1872–1874.

**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. 12 PA 1865–1920. 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. 18 PA 2850–2854. However, eventually Judge Gonzalez transferred the case back to Judge Bell, who then confirmed the transfer to resolve the remaining issues. 25 PA 3916–3923.

**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, that Morgan had allegedly abandoned his claims. 12 PA 1921–17 PA 2785. 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. 18 PA 2855–2857.

**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." 27 PA 4277. 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." 27 PA 4278. 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. 26 PA 3997–4002. 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. 27 AA 4284–4294. In doing so, the District Court also rejected Morgan’s reasserted argument for the court to make a disposition of the outstanding claims against Harvest based upon NRCP 49(a). 24 PA 3752–3758. Morgan now seeks extraordinary relief in this proceeding to compel the District Court to enter judgment in favor of Morgan and against Harvest.

**V. 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)).

## **VI. LEGAL ARGUMENT**

**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.**

Harvest acknowledged the flaw in the verdict form and is estopped from now claiming otherwise.

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.

18 PA 2831.

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.").

Indeed, Harvest acquiesced in the verdict form. *See BLACK'S LAW DICTIONARY*, 29 (11th ed. 2019) (defining "acquiescence" as "[a] person's tacit or passive acceptance; implied consent to act"); *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118–1119, 197 P.3d 1032, 1043 (2008) ("[W]e conclude that the surrounding circumstances reveal that the parties acquiesced to the stipulations. We conclude that during the trial, the parties assented to the terms of the stipulations because they did not object to the district court's decision to limit the presentation of evidence based on the fact that such evidence was unnecessary in light of the stipulations."). Harvest's acquiescence

in the verdict form estops it from now arguing otherwise. *See 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). Therefore, 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 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.”<sup>2</sup> 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). *Williams v. United Parcel Servs.*, 129 Nev. 386, 391–392,

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<sup>2</sup> 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.

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)).

In the District Court’s new trial order, it denied Morgan’s continued requests to have judgment entered in his favor and against Harvest. 24 PA 3752–3758. The District Court concluded that it was powerless to make a finding regarding Morgan’s vicarious liability claim against Harvest. *Id.* Yet, this is precisely what NRCP 49(a)(3) allows a District Court to do. Other courts, including federal courts construing FRCP 49(a)(3),<sup>3</sup> have reached the same result that Morgan requests, according to the plain language of the rule.<sup>4</sup> *See, e.g., Hinshaw v. New England Mut. Life Ins. Co.*, 104 F.2d 45, 49 (8th Cir. 1939) (“The court made no finding, but entered judgment for the plaintiffs, and hence it will be assumed that the court made a finding in accordance with the judgment.”); *Ogden Food Service Corp. v. Mitchell*, 614 F.2d 1001, 1003 (5th

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<sup>3</sup> FRCP 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.”

<sup>4</sup> *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (“We have previously recognized that federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules.”).

Cir. 1980) (“Under Rule 49(a) the judge himself is deemed to have made findings of fact not covered by the jury’s answers but consistent with the judgment entered. Thus, in reducing the answers to judgment, the judge impliedly found, or is deemed to have found, that Ogden’s reason for not making the loans was Mitchell’s failure (as found by the jury) to provide satisfactory appraisals and collateral.”); *Patsy’s Italian Rest., Inc. v. Banas*, 658 F.3d 254, 265 (2d Cir. 2011) (“The jury was asked to determine whether there was abandonment but not the geographic scope of any such abandonment. Appellants requested no instruction on whether the naked licensing was limited to certain entities or certain geographical areas. While the abandonment instructions never identified as their subject the specific licenses granted to the Staten Island location or the Syosset location, those are the entities that were the subject of the naked licensing claim at trial. Therefore, the district court properly resolved the scope of abandonment issue pursuant to Fed. R. Civ. P. 49(a)(3).”). Therefore, 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.**

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).

“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).

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. *See 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. *See 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. *See 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.” 27 PA 4284.

- “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.” 27 PA 4287.

- “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.” 27 PA 4287–4288.

- “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.” 27 PA 4289.

- “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.” 27 PA 4289.

- “Harvest presented nothing to suggest that Harvest was contesting vicarious liability for the accident.” 27 PA 4292.

Based upon these facts, the Court should order the District Court to conclude under NRCP 49(a)(3) that the judgment in favor of Morgan and against Lujan also extends to Harvest.

## **VII. CONCLUSION**

In summary, this Court should grant extraordinary relief to Morgan and 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 October, 2020.

CLAGGETT & SYKES LAW FIRM

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**DECLARATION OF MICAH S. ECHOLS, ESQ. IN SUPPORT OF  
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 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 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 October, 2020.

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

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

proportionally spaced, has a typeface of 14 points or more and contains 5,582 words and a motion to exceed has been filed with the Court; or

does not exceed \_\_\_\_ pages.

3. Finally, I hereby certify that I have read this brief, 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 brief 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 October, 2020.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** and **PETITIONER'S APPENDIX (Volumes 1–27)** were filed with the Supreme Court of Nevada on the 20th day of October, 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 documents were 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